



MEMORANDUM

From: AMC Staff[†]
To: Commissioners
Date: May 19, 2006
Re: Enforcement Institutions-Federal Discussion Memorandum

The Commission adopted for study three issues regarding federal antitrust enforcement institutions. First, the Commission agreed to study whether merger enforcement should continue to be administered by both the Federal Trade Commission (“FTC”) and Department of Justice Antitrust Division (“DOJ”). Second, assuming continued dual enforcement, should merger enforcement authority be reallocated between the FTC and DOJ (*e.g.*, by statute or agreement between the two agencies based on industry or area of commerce)? Third, assuming continued dual enforcement, should steps be taken to eliminate procedural differences between the FTC and DOJ in prosecuting merger challenges?¹

The Commission sought comment on the following specific questions.

A. *Dual Federal Merger Enforcement*

1. Should merger enforcement continue to be administered by two different federal agencies? What are the advantages and disadvantages resulting from having two

[†] This memorandum is a brief summary prepared by staff of the comments and testimony received by the AMC to assist Commissioners in preparing for deliberations. All Commissioners have been provided with copies of comments and hearing transcripts, which provide the full and complete positions and statements of witnesses and commenters.

¹ See Memorandum Re: Mergers Issues Recommended for Study, at 2 (Dec. 21, 2004); January 13, 2005, Meeting Trans. at 50-56, 76.

different federal antitrust enforcement agencies reviewing mergers? For example, does it result in bureaucratic duplication, inconsistency in treatment, more thorough enforcement, beneficial diversity in enforcement perspectives, or competition between antitrust enforcement agencies?

2. Should merger enforcement authority be reallocated between the FTC and DOJ? If so, how should it be reallocated? Please provide specific reasons for proposed reallocations.
3. Commenters have advised that disagreements between the FTC and DOJ concerning the clearance of mergers for review by one or the other agency have unreasonably delayed regulatory review in some cases. Should the FTC-DOJ merger review clearance process be revised to make it more efficient? If so, how?

B. *Differential Merger Enforcement Standards*

1. Does the standard the DOJ must meet to obtain a preliminary injunction to block a merger differ, as a practical matter, from that the FTC must meet? Has any such difference affected the outcome of a decision, or might it reasonably be expected to affect the outcome?
2. To the extent there is a difference in legal standards, should the different standards be harmonized? If so, how?
3. Should there continue to be a difference in the procedural aspects of federal agency challenges to mergers, specifically that the FTC can commence an administrative proceeding in addition to seeking a court order to block a transaction? If the procedural aspects of agency challenges to mergers should be harmonized, how should that be done?
4. What practical burdens are imposed on private parties by the FTC's policy of pursuing permanent relief through an administrative proceeding (in some instances) after failing to obtain a preliminary injunction?²

The Commission held two hearings on these topics on November 3, 2005. The first panel addressed issues involving the harmonization of FTC and DOJ merger enforcement procedures.

The witnesses were: Joe Sims, partner at Jones Day; Michael N. Sohn, partner at Arnold & Porter; William Blumenthal, General Counsel, Federal Trade Commission; and Craig Conrath, Trial Attorney, Antitrust Division, Department of Justice. The second panel addressed the FTC-DOJ clearance process. The witnesses were: Timothy J. Muris, of counsel at O'Melveny & Myers; John M. Nannes, partner at Skadden, Arps, Slate, Meagher & Flom; Joe Sims; and

² 70 Fed. Reg. 28,902, 28,904 (May 19, 2005).

Michael N. Sohn. In addition, FTC Chairman Deborah Platt Majoras and Assistant Attorney General Thomas O. Barnett addressed the issues of dual enforcement, clearance, and preliminary injunction standards when they testified before the AMC on March 21, 2006.³ The Commission received comments from five entities relevant to these issues.⁴

This memorandum will first address the question of dual federal merger enforcement, specifically whether federal merger authority should be reallocated between the FTC and DOJ. Second, it will address the issue of clearance of transactions notified under the Hart-Scott-Rodino Act (“HSR”) between the FTC and DOJ, and whether (and how) the process should be reformed, *e.g.*, through an arrangement similar to the clearance arrangement briefly adopted by the FTC and DOJ in 2002. Lastly, it will address the issue of conforming merger enforcement procedures, specifically the standards applicable to the FTC and DOJ for obtaining a preliminary injunction and the FTC’s use of administrative litigation in merger investigations.

I. Dual Federal Merger Enforcement

A. Should merger enforcement continue to be administered by two different federal agencies?

Should merger enforcement authority be reallocated between the FTC and DOJ? If so, how should it be reallocated?

1. Background

The FTC and DOJ have shared responsibility for enforcing federal antitrust law ever since the FTC was created in 1914. However, there are substantial differences between the

³ Unless otherwise noted, all citations to “Trans.” are to the transcript of the November 3, 2005, Federal Enforcement Institutions hearing.

⁴ The American Antitrust Institute, the American Bar Association, the International Chamber of Commerce, the Business Roundtable, and the Chamber of Commerce of the United States of America.

agencies. While DOJ is an executive branch agency and enforcement decisions are largely made by the Assistant Attorney General in charge of the Antitrust Division,⁵ the FTC is a bipartisan independent agency headed by five Commissioners; decisions are made by a majority of Commissioners, who may be unified or divided at any given time.⁶ Historically, the FTC has supplemented DOJ's role of prosecutor with broader, industry-wide market investigations, research, and policy development.⁷

The existence of two agencies enforcing substantially the same laws has continued to raise questions about the need for both the FTC and DOJ.⁸ As discussed below, it also leads to differing procedural approaches and systems that at least theoretically may result in differing treatment depending on which agency is investigating a particular matter.

Commission witnesses, commenters, and other commentators identified the following benefits and criticisms of dual enforcement in general.

⁵ The Antitrust Division had its beginnings in 1903, but did not become a separate division until some 30 years later. *See* Ernest Gellhorn, Charles A. James, Richard Pogue, & Joe Sims, *Has Antitrust Outgrown Dual Enforcement? A Proposal for Rationalization*, 35 *Antitrust Bull.* 695, 717 (1990) (“Gellhorn, *Outgrown*”).

⁶ *Id.* at 719-20.

⁷ *See* Guide to the Federal Trade Commission, <http://www.ftc.gov/bcp/conline/pubs/general/guidetoftc.htm#bc> (stating that “Congress created the FTC as a source of expertise and information on the economy” and providing as examples of the FTC’s research and policy work public workshops on issues such as the development of electronic marketplaces); *see also* David Balto, *Returning to the Elman Vision of the Federal Trade Commission: Reassessing the Approach to FTC Remedies*, 72 *Antitrust L.J.* 1113, 1113-14 (2005) (Whereas the DOJ uses its role as “prosecutor” to promote antitrust enforcement on a case-by-case basis in the courts, the FTC may use its information-gathering powers to “enhance the development of antitrust law”), *citing* Philip Elman, *Antitrust Enforcement: Retrospect and Prospect*, Remarks at the First New England Antitrust Conference (Mar. 31, 1967).

⁸ These issues were examined at length by an ABA committee in the *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 *Antitrust L.J.* 43, 113-19 (1989), which stated that “[a] majority of us conclude that the case for proposing abolition of dual enforcement has not been made.”

Benefits

- Dual enforcement enhances flexibility in enforcement by facilitating the more efficient allocation of scarce enforcement resources and allowing the agencies to focus on certain priorities.⁹
- Dual enforcement enables each agency to specialize in certain industries or areas of the economy, enhancing the efficiency of enforcement efforts.¹⁰
- Dual enforcement provides balance in the federal enforcement regime by sharing responsibility between an executive branch agency and an independent administrative agency.¹¹
- Dual enforcement provides an opportunity to develop and evaluate different approaches to enforcement policy, priorities, and mechanisms.¹²
- Each agency has comparative advantages in enforcement that are valuable to preserve. For example, the FTC's Part III authority provides a unique vehicle for advancing the development of antitrust law in complex settings in which the FTC's expertise may have a measurable impact. DOJ, on the other hand, is particularly well suited to investigating and prosecuting cartel activity and may be able to reach decisions more efficiently given its pyramidal structure.¹³

⁹ See American Bar Association, Antitrust Section re: Dual Federal Merger Enforcement, at 5 (Oct. 28, 2005) (“ABA Comments re: Dual Enforcement”).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*; see also The American Antitrust Institute (Comments of the American Antitrust Institute Working Group on Enforcement Institutions, at 1 (July 15, 2005) (“AAI Comments”) (“somewhat different approaches of the two federal agencies allows us to see both benefits and disadvantages of each approach and the rivalry for budget, good cases, and professional reputation may help both agencies improve”); AAI Comments, at 2 (providing a “diversity of viewpoints and policy competition over what merger enforcement policy and cases are best”).

¹³ See, e.g., Trans. at 49-50 (Sohn); Observations on Federal Antitrust Enforcement Institutions, Comments of William Blumenthal, General Counsel, Federal Trade Commission, at 2 n.3 (Nov. 3, 2005) (“Blumenthal Statement”) (noting that even critics of dual enforcement have acknowledged that the FTC has “managed to amass in recent years a number of genuine accomplishments”) (quoting Richard A. Posner, *The Federal Trade Commission: A Retrospective*, 72 Antitrust L.J. 761, 765 (2005)); D. Bruce Hoffman & M. Sean Royall, *Administrative Litigation at the FTC: Past, Present, and Future*, 71 Antitrust L.J. 319, 319-20 (2003); see also Report of the American Bar Association, Section on Antitrust Law, Special Committee to Study the Role of the Federal Trade Commission, 58 Antitrust L.J. 43 (1989).

Criticisms

- Dual enforcement creates the potential for actual (or perceived) inconsistent treatment, depending on which agency reviews a transaction.
- Dual enforcement results in the duplication of government functions and the unnecessary expenditure of additional resources.
- Diversification in agency enforcement, such as differing enforcement policies, does not necessarily promote better enforcement.¹⁴ Likewise, any benefits of “competition” between agencies may be quite limited and offset by the costs.¹⁵
- FTC Part III administrative proceedings do not appear to be more efficient than litigation in federal court, nor is the FTC more capable or efficient than DOJ.¹⁶

2. *Discussion*

No witnesses recommended eliminating one agency or changing the jurisdiction of the FTC or DOJ to review mergers, although several of them acknowledged the potential for inefficiency and inconsistency resulting from dual enforcement.¹⁷ In particular, FTC Chairman

¹⁴ William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 *Antitrust Bull.* 505, 510-15 (1996) (“Kovacic, *Downsizing*”); *see also* Trans. at 86 (Sims) (stating that it is “ludicrous” to think there is some value in competition between the agencies).

¹⁵ Kovacic, *Downsizing*, at 510-15.

¹⁶ *See* Statement of Joe Sims before the Antitrust Modernization Commission, at 6-7 (Nov. 3, 2005) (“Sims Statement”) (“there is no straight-faced argument that the FTC is more expert than [DOJ] . . . , and given the more diverse backgrounds that some past FTC commissioners have come from, you could argue that on occasions its decision-makers, at least, have collectively been less expert than those at [DOJ]”); Kovacic, *Downsizing*, at 540 (“FTC’s administrative resolution of antitrust complaints has displayed no advantage in terms of greater speed or reduced cost over adjudication of DOJ cases in federal court.”).

¹⁷ *See, e.g.*, Trans. at 5-6 (Blumenthal); Trans. at 49-50, 87 (Sohn) (stating that there are benefits that an expert agency can offer and that “there are strong arguments for having both an FTC and a Justice Department”); ABA Comments re: Dual Enforcement, at 7-9 (stating that the drawbacks of dual enforcement are “not so large as to compel any change in the status quo of dual agency enforcement, particularly because vesting merger enforcement within a single agency would have its own set of drawbacks”); *see also* *Nomination of Robert Pitofsky to be Chairman of the Federal Trade Commission: Hearing Before the Senate Comm. on Commerce, Science, and Transportation*, 104th Cong. 13 (1995) (statement of Robert Pitofsky) (although one might not have to set up the antitrust agencies this way in the first place, “the fact of the

Majoras testified that changing the current system would “come at a cost that would not be offset by its benefits.”¹⁸ Witnesses acknowledged that creating agencies with multiple, independent, overlapping sources of the same regulatory power is not a sensible government structure.¹⁹

No witnesses proposed any type of statutory allocation of merger enforcement authority between DOJ and FTC, such as one based on industry. (As discussed below, commenters and witnesses supported the 2002 clearance agreement, which contained a mutually agreed-upon allocation of industries between DOJ and FTC.)

B. Should the FTC-DOJ merger review clearance process be revised to make it more efficient? If so, how?

1. *Background*

One consequence of dual enforcement of the antitrust laws is that both DOJ and the FTC have concurrent authority to investigate potential antitrust violations. The agencies have established a clearance procedure to allocate responsibility to investigate a transaction (or potential violation) when they both have indicated an interest in pursuing a formal investigation

matter is it works rather well.”); Gellhorn, *Outgrown*, at 736, 743 (“dual enforcement is at best inefficient, and at worst inconsistent with sound economic policy”); *cf.* AAI Comments, at 2 (in the event that AMC believes reallocation of merger authority is appropriate, there are “distinct benefits to a FTC-centralized merger enforcement program.”).

¹⁸ Statement of Deborah Platt Majoras, Chairman, Federal Trade Commission, Before the Antitrust Modernization Commission, at 13-15 (Mar. 21, 2006) (“Majoras Statement”) (stating that combining all the strengths and talents into one bigger agency would not necessarily be better and more efficient, and that there is no public harm from having two agencies); *see also* ABA Comments re: Dual Enforcement, at 1 (arguing that “there does not appear to be a compelling rationale for altering the existing two-agency framework”); Trans. at 52 (Blumenthal) (arguing that the system generally works well and that the transition costs would likely outweigh any inefficiencies of the current system).

¹⁹ Sims Statement, at 2 (stating that although it would be interesting to redesign the federal government’s antitrust agencies, it is “not going to happen”).

of the matter.²⁰ Clearance has been a particular concern in investigations under the HSR Act, largely due to the time constraints for review under the HSR process and the potential for delaying the consummation of transactions that will not cause anticompetitive harm.²¹ Clearance decisions in HSR matters traditionally have been based on which agency has more expertise or more recent experience investigating conduct or transactions involving one or more relevant companies, products, or industries.²²

Clearance disputes arise when one agency refuses to clear a matter to the other agency. In recent years, the question of which agency has superior expertise in specific industries has become less easily resolved.²³ For example, between 1982 and 1989, the agencies averaged 10 clearance disputes per year; but between 1990 and 2001, the annual average had risen to 83 disputes.²⁴

The current clearance process has led to the following criticisms.

²⁰ See ABA Section of Antitrust Law, *The Merger Review Process: A Step-By-Step Guide to Federal Merger Review* 134-36 (3d ed. 2006).

²¹ See pp. 8-10, below.

²² See, e.g., Testimony of Michael N. Sohn, Arnold & Porter, LLP Before the Antitrust Modernization Commission, at 2 (Oct. 24, 2005) (“Sohn Statement”); Comments on the FTC-DOJ Clearance Process Before the Antitrust Modernization Commission by Timothy J. Muris, at 4-5 (Nov. 3, 2005) (“Muris Statement”); Statement by John M. Nannes, Antitrust Modernization Commission Hearings on the FTC-DOJ Clearance Process, at 1-2 (Nov. 3, 2005) (“Nannes Statement”). While the standard is fairly straight-forward, its application as been difficult on occasion, e.g., because of ambiguities in defining especially evolving markets or industries or a desire by one agency not to “cede” an area to the other. Various methods have been used to resolve disagreement in the past, including use of a “possession arrow” and referral to an “arbitrator.”

²³ Muris Statement, at 3-4.

²⁴ *Id.* at 6.

Problems with existing system

- The current clearance process causes unjustified delay for at least some transactions.²⁵
- Clearance delay can reduce the time available during the initial 30-day review period during which the agencies must decide conduct an initial investigation, decide whether a second request is needed, and, if so, issue it.²⁶ The delay in conducting the initial review is sometimes so long that the agency is unable to conduct an initial competitive assessment and must issue a second request that is costly to the parties.²⁷ To avoid this, parties often are obliged to withdraw and re-file in order to restart the 30-day clock to give the agency time to assess the transaction.²⁸
- HSR waiting period extensions overall can lead to billions of dollars in additional costs for merging parties.²⁹
- The clearance process lacks transparency, such that parties lack information on the status of the pending clearance disputes.³⁰ The lack of transparency and predictability as to which agency will review a merger prevents parties from

²⁵ See, e.g., Comments of the Chamber of Commerce of the United States of America, at 15 (Nov. 8, 2005) (“Chamber of Commerce Comments”); ABA Comments re: Dual Enforcement, at 10; Prepared Remarks of William J. Baer Before the Antitrust Modernization Commission, at 13 (Nov. 17, 2005) (“Baer Statement”).

²⁶ Muris Statement, at 6 (“a delay of even a week in assigning a transaction can impose significant costs on the agencies and the merging parties”). Muris also maintains that “the 2002 Clearance Agreement would have reduced the costs for businesses to comply with antitrust laws.” *Id.* at 12-13.

²⁷ ABA Comments re: Dual Enforcement, at 10 (stating that “[a]ll too often clearance is substantially delayed during the initial HSR Act waiting period”); *id.* at 11-12 (delay and issuance of second request “imposes substantial costs and burden on the merging parties and delays consummation of the transaction for weeks, or even months.”); see also Muris Statement, at 6; Sohn Statement, at 4; Sims Statement, at 3; Comments of the Business Roundtable Regarding the Issues Selected for Study by the Antitrust Modernization Commission, at 21 (November 4, 2005) (“Business Roundtable Comments”).

²⁸ Chamber of Commerce Comments, at 15; ABA Comments re: Dual Enforcement, at 10; Muris Statement, at 6; Sohn Statement, at 4; Business Roundtable Comments, at 21.

²⁹ Trans. at 128-29 (Sims) (based on research ten years ago before the advent of electronic discovery).

³⁰ Muris Statement, at 7; Nannes Statement, at 1.

“approaching an agency before filing a premerger notice to begin identifying and addressing competitive concerns.”³¹

- The competition to have matters cleared to their respective agency creates perverse incentives for the agencies as well as tensions between them.³² Since clearance depends largely on expertise, the agencies have incentives to conduct substantial investigations into transactions that are not competitively problematic in order to claim more expertise in that industry during the next clearance disputes.³³ Both agencies have from time to time believed that the other agency has been acting in bad faith in clearance battles.³⁴
- The agencies do not provide the public with data regarding how long it has taken the agencies to resolve these clearance fights, reducing public awareness of the problem.³⁵
- Clearance disputes negatively affect the perceptions of antitrust enforcement.³⁶

Some commentators, however, have said that the criticisms are overstated.³⁷ According to former FTC Commissioner Mozelle W. Thompson, the percentage of investigation requests that cleared within six business days increased from 21 percent in 1999 to 41 percent in 2001.³⁸

³¹ Muris Statement, at 7.

³² Nannes Statement, at 2; Muris Statement, at 6; Trans. at 108-09 (Sims).

³³ Nannes Statement, at 2-3; *see also* Muris Statement, at 6 (stating that “agencies waste precious enforcement resources contesting the right to examine specific matters and in conducting investigations in marginal matters for the purpose of using the experience gained to assert claims to other cases in the future).

³⁴ Trans. at 109 (Muris); Trans. at 97 (Sims).

³⁵ *See* Trans. at 94-95 (Sohn); Trans. at 97 (Muris); *see* Nannes Statement, at 1 (the absence of transparency “makes it difficult to assess how the clearance process is working at any one time”); Trans. at 95 (Sims); Nov. 17, 2005, Merger Enforcement Hearing Trans. at 98 (Baer) (the lack of transparency prevents the clearance timeframes adopted by the agencies from being observed); *see also* ABA Comments re: Dual Enforcement, at 12.

³⁶ Nannes Statement, at 3.

³⁷ *See* Statement of Commissioner Mozelle W. Thompson, Concurring in Part in, and Dissenting in Part from, the Federal Trade Commission’s March 19, 2002 Testimony Before the Senate Commerce, Justice, State and the Judiciary Subcommittee of the Appropriations Committee (“Thompson Testimony Dissent”).

³⁸ Thompson Testimony Dissent.

One witness noted that merging companies are free to discuss their transactions with both agencies while clearance is pending.³⁹

2. The 2002 Clearance Agreement

The FTC and DOJ have made efforts over the past decade or more to improve the clearance process.⁴⁰ In August 2001, FTC Chairman Timothy Muris and Assistant Attorney General Charles James launched an internal review and sought recommendations from four former antitrust officials.⁴¹ The four former officials were given broad access to records and personnel, and after several months submitted a unanimous recommendation that was supported by eleven former antitrust agency heads and the Antitrust Section of the American Bar Association.⁴² After receiving the recommendation, Muris and James reached agreement on a new clearance framework in early 2002.⁴³

The 2002 clearance agreement had four key features:

- Assignment of primary areas of antitrust responsibility among the two agencies by industry, based on expertise.⁴⁴ The allocation was intended to provide a well-

³⁹ Trans. at 134-35 (Sohn).

⁴⁰ Muris Statement, at 3-5.

⁴¹ *Id.* at 7-8. The practitioners were: Kevin Arquit, William Baer, Joe Sims, and Steven Sunshine. *Id.* See Sims Statement for more information on the work and proposals of the four practitioners selected by Muris and James.

⁴² Sims Statement, at 4; see <http://www.ftc.gov/opa/2002/03/clearance.htm> (providing links to the four practitioners' memorandum to Muris and James, in addition to a letter from 11 former agency heads endorsing the clearance agreement). *But see* Statement of Commissioner Mozelle W. Thompson, Concerning the March 5, 2002 Clearance Agreement Between the Department of Justice and the Federal Trade Commission (discounting the letter from former agency heads cited as supporting the agreement as simply reflecting support for the general principle of a clearance agreement, not the particular industry allocations) ("Thompson Clearance Statement").

⁴³ Muris Statement, at 8-9; Sims Statement, at 4.

⁴⁴ Federal Trade Commission & Antitrust Division of the United States Department of Justice, *Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the United States Department of Justice Concerning Clearance Procedures for*

specified assignment of sectors to each agency, minimizing room for dispute and maximizing transparency.

- Creation of a dispute resolution mechanism. The agreement contained specified time within which a clearance decision was to be made. Clearance disputes would proceed to increasing levels of seniority within each agency after brief periods for resolution. Any clearance dispute was to be referred to the Chairman of the FTC and the Assistant Attorney General for Antitrust within 6 days, and a decision made by them within 8 days. If the agency heads were unable to agree upon which agency should receive clearance, they would submit the clearance question for neutral evaluation by a pre-established, mutually agreeable expert, for decision within 48 hours.⁴⁵ As a result, all clearance disputes would be resolved within ten days.
- Establishment of a “Convergence Committee,” which would recommend further refinements to the allocation of information technologies matters contained in the agreement.⁴⁶
- A mandatory review of the agreement four years after the date of adoption.⁴⁷

The clearance agreement was in effect from March 5, 2002, to May 19, 2002. At that time, the Antitrust Division withdrew at the direction of the Justice Department, largely in response to objections from Senator Ernest Hollings, who was then Chairman of the Senate Commerce Committee.⁴⁸ The agencies have not entered into a new agreement since.

Investigations, at ¶ 18 (Mar. 5, 2002) (“Clearance Agreement”). The agreement did not transfer “jurisdiction” over mergers.

⁴⁵ *Id.* at ¶ 24-29.

⁴⁶ *Id.* at ¶ 17.

⁴⁷ *Id.* at ¶ 31.

⁴⁸ Muris Statement, at 8-9; see Matt Andrejczak, *Federal Trustbusters Abandon Pact: Justice, FTC Succumb to Budget Threats*, MarketWatch (May 21, 2002). Senator Hollings was also the Chairman of the Senate appropriations subcommittee responsible for both FTC and DOJ appropriations.

In conjunction with the adoption of the 2002 Clearance Agreement, the FTC released data regarding clearance.⁴⁹ They showed that:

- From October 1999 to February 2002, there were 300 matters where clearance to one agency was delayed. On average, these matters were delayed approximately 15 business days.⁵⁰ By comparison, during the 11 weeks the agreement was in effect, it took an average of less than two business days to clear a matter to an agency, after the agency submitted a request for clearance.⁵¹
- Prior to the agreement and in the several months after the agreement was terminated, approximately 15 percent of HSR clearance requests were contested; but while the agreement was in place, there were no clearance disputes over HSR filings.⁵²

3. *Discussion*

Most commenters have argued that the “there is a pressing need to fix the [clearance] system by which merger matters are cleared between the agencies.”⁵³ Several witnesses suggested that the AMC could perform an important service by underscoring the extent of the clearance problems and making a strong recommendation in support of a resolution.⁵⁴ The current heads of both agencies stated that they would welcome support from the AMC regarding

⁴⁹ The AMC has requested additional data regarding clearance disputes and clearance delays from FTC and DOJ. Both FTC and DOJ are compiling responsive information, but have not yet provided any data in response to the AMC’s requests.

⁵⁰ Sohn Statement, at 2-3 (citing Federal Trade Commission Press Release, Clearance Delays (Feb. 27, 2002)); *see also* Muris Statement, at 12.

⁵¹ Muris Statement, at 12 (stating that while the agreement was in place, the time needed to resolve all clearance requests fell from over five days to about 1.4 days, and the average time required to resolve clearance requests for mergers also fell); Sims Statement, at 4; *see also* Sohn Statement, at 6 (stating that the average time for a clearance decision was reduced to only 1.5 days).

⁵² Muris Statement, at 12.

⁵³ ABA Comments re: Dual Enforcement, at 10; *see also* Business Roundtable Comments, at 21 (the “clearance process requires an immediate solution”).

⁵⁴ Muris Statement, at 20; Trans. at 122-23 (Sims); *see also* Sohn Statement, at 7 (stating that AMC should recommend that Congress leave resolving the clearance problem to the discretion of the agencies).

the clearance issue.⁵⁵ This section will first consider the desirability of recommending that the agencies readopt the 2002 clearance agreement or some other form of agreement to resolve clearance disputes. It will then consider whether legislative action is needed to implement a solution.

a. Potential Reforms to Clearance Process

AMC witnesses and commenters were generally supportive of the 2002 clearance agreement, and called for the agencies to readopt it.⁵⁶ There was no public comment opposing resolution of the problems arising from the clearance process through readoption of the 2002 agreement.⁵⁷

⁵⁵ Mar. 21, 2006, Hearing Trans. at 15 (Majoras); *id.* at 37 (Barnett); *see also id.* at 54 (Majoras) (stating that as a practical and political matter, implementing something like the 2002 agreement would require help from the AMC); Baer Statement, at 13.

⁵⁶ Sohn Statement, at 6 (AMC “should urge the enforcement agencies to re-endorse the 2002 agreement in consultation with the relevant congressional committees.”); Trans. at 123 (Sohn); Nannes Statement, at 3-4 (stating that “although their efforts were not successful, such an approach made sense then and would make sense now”); Trans. at 148 (Sims); Nov. 17, 2005, Merger Enforcement Hearing Trans. at 97-98 (Rill and Baer); *see also* Muris Statement, at 20 (stating that AMC should make a strong recommendation in support of a resolution to the clearance problem); Statement of Thomas B. Leary Before the Antitrust Modernization Commission, at 7 (Dec. 1, 2005) (Leary Statement) (stating that AMC should encourage renewed efforts by the agencies to revive the idea of a global agreement on clearance matters); Nov. 17, 2005, Trans. at 107-08 (Rill); Chamber of Commerce Comments, at 15 (11/8/05) (“urg[ing] the AMC to recommend that the agencies work together to develop another agreement dividing responsibility between them for the review of notified transactions.”).

⁵⁷ Then-FTC Commissioner Mozelle Thompson published several statements criticizing the 2002 clearance agreement. *See, e.g.*, Thompson Clearance Statement. Thompson questioned whether the clearance delay problem was either serious or worsening. *See* Thompson Testimony Dissent (pointing out that delays improved from 1999 to 2001, and that only one percent of clearance requests were not resolved within 20 business days from 1995 to 2001). He also questioned the manner in which the agreement was reached. *See* Thompson Clearance Statement (arguing that “non-public consultation with private attorneys is not a substitute for meaningful consultation with FTC Commissioners who are appointed by the President and confirmed by the Senate to work on behalf of the public interest”).

Witnesses highlighted the industry allocation approach as central to the 2002 agreement,⁵⁸ and testified that any other approach would be a “distinct second best.”⁵⁹ They noted the following benefits with the allocation approach:

- It generally provides a quick resolution.⁶⁰
- It enhances agency expertise in an efficient manner.⁶¹
- It provides advance notice to the business community as to which agency will handle particular transactions.⁶²
- The specific allocation itself is relatively unimportant—“[w]hat matters most is not which agency receives clearance but rather that a clearance decision is reached promptly.”⁶³
- A different mechanism of resolving disputes, such as a “possession arrow,” are second-best because they are not predictable and can be gamed.⁶⁴

One commenter proposed consideration of a statutory “stick” to force prompt resolution of clearance disputes. The waiting period would terminate if clearance were not resolved within

⁵⁸ Trans. at 88 (Muris) (stating that having industry allocation was “the heart of the agreement”); Trans. at 89-90 (Sims); Trans. at 91 (Sohn) (stating that the allocation agreement was “all the difference”).

⁵⁹ *See, e.g.*, Trans. at 94-95 (Sohn).

⁶⁰ *See* Trans. at 89 (Sims).

⁶¹ *See* Trans. at 94-95 (Sohn); Business Roundtable Comments, at 22.

⁶² *See* Trans. at 107-08 (Muris); Business Roundtable Comments, at 22; Trans. at 94-95 (Sohn).

⁶³ Sohn Statement, at 6-7; *see also* Trans. at 96 (Sims) (“it doesn’t make much difference in the long run who does it, but it does make a lot of difference that they get started on it”); Sims Statement, at 3. Several panelists suggested that the allocations could be changed slightly if necessary to secure support. Trans. at 104 (Sims) (stating that the benefits of solving the political problem and thereby allowing for a clearance agreement to go forward is more important than which agency looks at media mergers.); Trans. at 132-33 (Muris). Former FTC Commissioner Mozelle Thompson expressed concern at the time the Clearance Agreement was adopted that “certain key industries, such as media, entertainment, and high technology” would no longer benefit from FTC oversight since they were allocated to DOJ. *See* Thompson Clearance Statement.

⁶⁴ Trans. at 94-95 (Sohn); Trans. at 113 (Sims) (discussing the tie-breaker under the 2002 clearance agreement); *see* ABA Comments re: Dual Enforcement, at 14 (identifying possibility of using a coin-flip or possession arrow to resolve disputes within reasonable period).

a specified number of days.⁶⁵ The drawbacks to such an approach acknowledged by its proponent are:

- It may not give an adequate incentive to resolve disputes quickly, because protecting turf may be elevated above issuing a second request to extend the waiting period.
- The costs of failures to resolve clearance will be borne principally by consumers, who would suffer any harm from anticompetitive transactions.
- The merging parties may not find it desirable to close a transaction in the face of a potential post-closing challenge.⁶⁶

b. Methods of implementing clearance agreement

Most commenters believe that implementing a resolution to the clearance problem will require the involvement of Congress in some manner.⁶⁷ There was a substantial division over whether the Commission should recommend specific legislation authorizing a clearance agreement, or merely seek informal Congressional approval for agency adoption of such an agreement.

Informal action. Several witnesses suggested that the AMC “ask the congressional committees to ask the agencies to improve the clearance process.”⁶⁸ Several witnesses opined that the Commission could attempt to secure agency and/or Congressional action by providing a “fairly succinct statement” of the advantages of an allocation system.⁶⁹

⁶⁵ ABA Comments re: Dual Enforcement, at 14 (nine days); *see also* Trans. at 126-27 (Sims) (discussing idea).

⁶⁶ ABA Comments re: Dual Enforcement, at 14.

⁶⁷ *See* Muris Statement, at 19 (both agencies will feel it necessary to consult Congress before any future clearance agreement).

⁶⁸ *See, e.g.*, Trans. at 101, 107, 120-21 (Muris) (recommending that AMC “ask the congressional committees to ask the agencies to improve the clearance process”); Trans. at 112 (Sohn) (same).

⁶⁹ Trans at 121 (Nannes); Trans. at 120 (Muris) (suggesting that the AMC develop “some precise recommendations” and that Commissioners discuss recommendation with Congress and

Legislative approaches. Some participants suggested Congress could create a statutory time limit for resolving clearance disputes (*e.g.*, nine days), and direct the agencies to adopt a process for meeting the deadline.⁷⁰ Agency compliance could be ensured by including a “stick,” such as a limitation on authority to issue a second request under HSR.⁷¹

II. Differential Merger Enforcement Standards

Dual merger enforcement also raises the possibility that the outcome of a merger review can turn on which agency reviews the merger. Two differences in the agencies’ merger enforcement processes were adopted for review by the Commission: (1) the standard the agency must meet in seeking to preliminarily enjoin a merger, and (2) the availability of administrative litigation in FTC merger investigations (but not in DOJ investigations), if the FTC fails to obtain a preliminary injunction.

develop support with consumer and business groups); Trans. at 102 (Sims); *see* Muris Statement, at 19 (in light of the demise of the 2002 clearance agreement, both agencies will feel it necessary to consult Congress before any future clearance agreement could be made between the agencies).

⁷⁰ Trans. at 124, 127 (Muris and Sims) (agreeing with suggestion by Commissioner Cannon). Others have suggested longer time limits than three days. *See, e.g.*, ABA Comments re: Dual Enforcement, at 12 (endorsing a nine-day limit to resolving clearance disputes); Chamber of Commerce Comments, at 15 (Nov. 8, 2005) (endorsing a ten-day limit); *see also* ABA Comments re: Dual Enforcement, at 13 (proposing that legislation also call for definitive allocation of industries between the agencies).

⁷¹ Trans. at 127 (Sims); ABA Comments re: Dual Enforcement, at 14 (discussing the pros and cons of another solution, namely that agencies could lose their ability to issue Second Requests, if they fail to resolve clearance disputes within nine business days). Most commenters agreed that Congress should not be involved in the details of deciding how merger authority is allocated between agencies, but rather should allow antitrust agencies to make such decisions. *See, e.g.*, Trans. at 96 (Nannes) (factors other than expertise may be significant in legislative environment); Nov. 17, 2005, Merger Enforcement Hearing Trans. at 97 (Rill) (stating that “some kind of congressional delineation of authority would be something close to a disaster”). If Congress wanted to have a voice in specific industry allocations, Nannes suggested a “base closing” approach, under which the agencies would develop a legislative proposal that would be subject to a straight up-or-down vote. Trans. at 109-10 (Nannes).

- A. Does the standard the DOJ must meet to obtain a preliminary injunction to block a merger differ, as a practical matter, from that the FTC must meet? Has any such difference affected the outcome of a decision, or might it reasonably be expected to affect the outcome?

To the extent there is a difference in legal standards, should the different standards be harmonized? If so, how?

1. *Background*

After reviewing mergers under the HSR Act, each agency is authorized to seek a preliminary injunction to block the merger until a trial on the merits is conducted. The standard governing the grant of a preliminary injunction may have considerable impact on the likelihood that the merger is blocked, since the preliminary injunction decision usually determines whether the merger will be consummated—generally “the deal is dead once it’s preliminarily enjoined.”⁷²

There are two reasons why the effective standards the agencies face in preliminary injunction proceedings may differ. First, the agencies are authorized to seek preliminary injunctions under different statutes with different legal standards—DOJ under Section 15 of the Clayton Act⁷³ and the FTC under Section 13(b) of the FTC Act.⁷⁴ Second, DOJ in recent years has frequently agreed to consolidate the preliminary injunction hearing with the trial on the merits.⁷⁵ In such cases, DOJ must establish a violation of Section 7 by a preponderance of the

⁷² Trans. at 15 (Sohn) (“no firm as a seller can stand the destabilizing effect of a year’s worth of administrative or judicial litigation and survive.”); Sohn Statement, at 12 (“For all practical purposes to merging parties after losing a preliminary injunction proceeding brought by the FTC, preliminary relief means *final*.”); Sims Statement, at 7 (stating that “the entry of a preliminary injunction is fatal to the deal”); *cf.* March 21, 2006, Hearing Trans. at 49 (Majoras) (stating that courts look at the issuance of a PI practically and know that if the PI is granted, it is likely that the deal will go away).

⁷³ 15 U.S.C. § 25.

⁷⁴ 15 U.S.C. § 53(b).

⁷⁵ Sohn Statement, at 13-14; Conrath Statement, at 3.

evidence, which is a standard more burdensome than either preliminary injunction standard.⁷⁶ In contrast, the FTC has never consolidated preliminary injunction hearings with hearings for permanent injunctions.⁷⁷

The legal standard DOJ faces in seeking a preliminary injunction has been described as a traditional equity test.⁷⁸ In comparison, the FTC may obtain 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.”⁷⁹ There is considerable dispute over whether, in practice, there is a substantial difference between the preliminary injunction standards as they are actually implemented by the courts.

There are no Practical Differences

- Courts actually apply a public interest standard when either agency seeks a preliminary injunction.⁸⁰ In particular, DOJ (in contrast to private parties) is generally not required to make the usual showing of irreparable harm under the equitable standard if it demonstrates a reasonable likelihood that it will prevail on the merits.⁸¹

⁷⁶ *Id.*; *United States v. Oracle*, 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004).

⁷⁷ Sohn Statement, at 14.

⁷⁸ This test is typically described as consisting of four elements: (1) the likelihood of the plaintiff’s success on the merits; (2) the threat of irreparable injury to the plaintiff in the absence of an injunction; (3) the possibility of substantial harm to other interested parties from a grant of injunctive relief; and (4) the interests of the public. *See, e.g., United States v. Gillette Co.*, 828 F. Supp. 78, 80 (D.D.C. 1993); Conrath Statement at 5-6.

⁷⁹ 15 U.S.C. § 53(b); *see FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109, 115-16 (D.D.C. 2004). *See also* Sohn Statement, at 7-8.

⁸⁰ Trans. at 7 (Blumenthal); Trans. at 15-17 (Sohn).

⁸¹ Trans. at 9-10 (Conrath); Trans. at 14-17 (Sohn); Sohn Statement, at 9-10; *see, e.g., United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980) (holding that “once the Government demonstrates a reasonable probability that [Section] 7 has been violated, irreparable harm to the public should be presumed”); *see also* Trans. at 18 (Sims) (admitting that DOJ traditional equity standard is different from a private party traditional equity standard and should remain that way).

- Any difference does not matter since the courts generally focus on the merits of the case.⁸²
- No one has identified a specific merger investigation where the outcome was affected by a difference in the preliminary injunction standards.⁸³
- Any practical differences result from the agencies' practices regarding consolidation of proceedings for preliminary and permanent relief, not the actual standards for preliminary injunctions.⁸⁴

There are Practical Differences

- There is a “measurable” difference between how courts have applied the two standards in recent years.⁸⁵ For example, the district court in *Libbey* held that the FTC merely had to show that its concerns about anticompetitive effects of the merger were “plausible” in order to show reasonable likelihood of success on the merits.⁸⁶
- Some courts in applying Section 13(b) fail to take into account public equities such as merger-specific efficiencies, cost savings, and synergies.⁸⁷
- The FTC faces a “lesser burden” with its standard, and the very perception that the FTC’s burden is easier affects its practical ability of the FTC to challenge a merger and may also “effect the relief agreed to in consent decrees.”⁸⁸

⁸² March 21, 2006, Trans. at 49 (Majoras) (courts “are treating the PI hearing [for both agencies] more like a trial on the merits.”); Trans. at 33 (Conrath) (courts focus on merits considerations rather than the legal standard).

⁸³ Sims speculated as to whether Oracle/Peoplesoft could have come out differently if challenged by the FTC, but there the DOJ consolidated proceedings for preliminary and permanent relief, and so had to prove a Section 7 violation on the merits. Sims Statement, at 6; *see United States v. Oracle*, 331 F. Supp. 2d 1098, 1109 (N.D. Cal. 2004).

⁸⁴ *See* Trans. at 14-16 (Sohn).

⁸⁵ Trans. at 21 (Sims); ABA Section of Antitrust Law, Comments Regarding Differential Merger Enforcement Standards, at 3 (Oct. 28, 2005) (“ABA Comments re: Merger Standards”) (stating that the Section 13(b) standard is “more lenient” than the DOJ standard).

⁸⁶ *FTC v. Libbey*, 211 F. Supp. 2d 34, 50 (D.D.C. 2002); Sohn Statement at 10-11.

⁸⁷ Trans. at 25-26 (Sohn); *see also* Trans. at 27 (Sims) (agreeing with Sohn’s comment).

⁸⁸ Sims Statement at 6 (stating that “most private practitioners today advise their clients that the FTC may have greater legal ability to block a merger” than does DOJ); ABA Comments re: Merger Standards at 4. *But see* Trans. at 65-66 (Blumenthal) (stating that the perception continually changes, and that it is not invariably the case that people would rather be before DOJ)

- Regardless of practical similarities, there should be one uniform standard for obtaining a preliminary injunction in merger cases.⁸⁹

2. *Possible Reforms*

Two reforms were proposed to address actual or perceived differences between the standards: (a) statutory change to make the standards the same, and (b) mandatory consolidation of the hearing on a preliminary injunction with a hearing on a permanent injunction.

a. Statutory change to Section 13(b) or the Clayton Act

Assuming a difference currently exists between the preliminary injunction standards, that difference should be eliminated through the adoption of a single standard. Witnesses and commenters disagreed as to which standard is preferable for HSR merger litigation. One witness argued that this is a question best left to courts, and should not be addressed by legislation.⁹⁰

Adopt Standard of Section 13(b)

- The FTC’s 13(b) standard is more appropriate because the agencies are responsible for protecting the public interest, which can best be accomplished under a public interest standard that does not require a showing of irreparable harm.⁹¹
- However, any changes to Section 13(b)’s preliminary injunction standard should be limited to HSR cases.⁹²

⁸⁹ See, e.g., Trans. at 21 (Sohn) (stating “I can’t imagine a defense of the proposition that the PI standards should be different”); Trans. at 22-23 (Sims) (stating that different standards are unjustifiable); Trans. at 23-25 (Blumenthal) (stating that “it’s appropriate that the standard be the same”); see also ABA Comments re: Merger Standards, at 5 (stating that AMC should “recommend that when the agencies seek a PI against a merger they be subjected to the same standard”).

⁹⁰ Trans. at 8 (Blumenthal).

⁹¹ Trans. at 23-24 (Sohn) (“an irreparable harm test is not the right test”); see also Trans. at 25 (Blumenthal) (stating that 13(b) is the appropriate standard).

⁹² See Trans. at 25-27 (Sohn, Sims); ABA Comments re: Merger Standards, at 5; see also Trans. at 26-27 (Blumenthal) (even if the change is limited to mergers, there could be “ripple

Adopt General Preliminary Injunction Standard

- Section 13(b) is too weak and should be adjusted to conform with the DOJ standard.⁹³
- Section 13(b) ought to emphasize the weight of the showing required and to encourage weighing of “real world” factors in assessing equities.⁹⁴

b. Mandatory consolidation of hearings on preliminary injunction and permanent injunction

Adopting a uniform preliminary injunction standard will not address differences resulting from the fact that DOJ often consolidates hearings and the FTC does not.⁹⁵ This concern could be addressed by mandating that the FTC and DOJ both consolidate motions for preliminary and permanent relief, so that both agencies would face the ultimate burden of establishing a Section 7 violation on the merits. Such a reform would also affect the availability of an FTC administrative proceeding, and therefore is discussed in the next section.

effects” affecting how courts apply Section 13(b) to consumer protection or non-merger competition cases).

⁹³ Trans. at 13, 24 (Sims) (“a pretty damn weak standard”); ABA Comments re: Merger Standards, at 5 (advocating “amending Section 13(b) such that it does not apply to mergers and acquisitions challenged under Section 7 of the Clayton Act but leave[] the [FTC] to proceed under common law principles of equity”).

⁹⁴ See, e.g., Sohn Statement at 14-15; ABA Comments re: Merger Standards, at 9-10.

⁹⁵ See, e.g., Trans. at 13-16 (Sohn).

- B. Should there continue to be a difference in the procedural aspects of federal agency challenges to mergers, specifically that the FTC can commence an administrative proceeding in addition to seeking a court order to block a transaction? If the procedural aspects of agency challenges to mergers should be harmonized, how should that be done?

What practical burdens are imposed on private parties by the FTC's policy of pursuing permanent relief through an administrative proceeding (in some instances) after failing to obtain a preliminary injunction?

1. *Background*

A second difference between the merger enforcement processes used by the FTC and DOJ relates to their options after a preliminary injunction decision. DOJ can continue to challenge the transaction in district court, while the FTC can continue its challenge in an administrative proceeding. As a practical matter, if the agencies win a preliminary injunction, generally the deal is dead. Moreover, in the usual case in which DOJ consolidates, a loss will end the challenge.

The FTC can choose to initiate administrative litigation even if it fails to obtain a preliminary injunction. The parties are free to consummate the merger, but they face prolonged administrative proceedings and the possibility of an adverse final determination. The FTC adopted a policy on this issue in 1995 that calls for case-by-case determination of whether to bring administrative litigation after the denial of a preliminary injunction.⁹⁶ The FTC makes the case-by-case determination after considering the following:

- (1) The factual findings and conclusions of law of the district court or any appellate court;
- (2) Any new evidence developed during the course of the preliminary injunction proceeding;
- (3) Whether the transaction raises important issues of fact, law, or merger injunction policy that need resolution in administrative litigation;

⁹⁶ Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741, 39,743 (1995).

- (4) An overall assessment of the costs and benefits of further proceedings; and
- (5) Any other matter that bears on whether it would be in the public interest to proceed with the merger challenge.⁹⁷

Since issuing its policy in 1995, the FTC has not authorized administrative litigation after losing a preliminary injunction.⁹⁸ Indeed, the FTC could identify only one instance of such action in “modern history.”⁹⁹

2. Discussion

Two main proposals were put forth to reduce or eliminate the potential differences between the agencies’ practice arising from the fact that the FTC may pursue injunctive relief after it loses a preliminary injunction. First, some observers have proposed mandating that both agencies consolidate preliminary and permanent relief in HSR matters. Others have proposed that the FTC be prohibited from invoking administrative litigation after losing a preliminary injunction (put alternatively, the FTC would be required to choose between pursuing administrative litigation and seeking a preliminary injunction).

Some witnesses argued that no change was appropriate:

- Administrative litigation plays an important role in effective antitrust policy.¹⁰⁰ The FTC should decide whether it is in the public interest to pursue administrative litigation if it loses a preliminary motion.¹⁰¹

⁹⁷ *Id.*; see Statement of the Commission, *In the Matter of Arch Coal, Inc.*, at 1 (applying factors), available at: <http://www.ftc.gov/os/adjpro/d9316/050613commstatement.pdf>.

⁹⁸ See James Mongoven, *Updated Information on Preliminary Injunctions and Administrative Litigation brought by the Federal Trade Commission in Merger Cases (1996-2005)* (Oct. 19, 2005) (draft) (on file at AMC).

⁹⁹ March 21, 2006, Hearing Trans. at 50-51 (Majoras) (identifying the *R.R. Donnelley* case); see also FTC Press Release, Federal Trade Commission Dismisses Case Against R.R. Donnelley over Acquisition of Meredith/Burda (Aug. 4, 1995) (stating that the FTC failed to obtain a preliminary injunction, issued a Part III Complaint, but ultimately overturned the ALJ’s decision requiring divestitures), available at: <http://www.ftc.gov/opa/1995/08/donnelly.htm>.

- Mandatory consolidation is appropriate only if the preliminary injunction standards are not harmonized.¹⁰²

Others argued for specified changes, as described below.

- a. Universal consolidation of proceedings for preliminary and permanent relief after premerger investigations pursuant to HSR

Several witnesses testified that it would be reasonable to require the FTC and DOJ to consolidate preliminary and permanent injunction proceedings.¹⁰³ Mandatory consolidation would eliminate differences in treatment and would also ensure that the agencies face the same effective standard when challenging a merger in a (consolidated) proceeding in district court. Both agencies likely could adopt this approach as a matter of practice,¹⁰⁴ although there is some possibility that legislation would be necessary in order to enable the FTC to consolidate proceedings for preliminary and permanent relief.¹⁰⁵

¹⁰⁰ Trans. at 9 (Blumenthal) (suggesting that it would be “dubious policy” to develop merger law solely through what are effectively preliminary injunction motions); AAI Comments, at 2 (emphasizing the importance of administrative litigation to the development of sound merger law.)

¹⁰¹ See Blumenthal Statement, at 8.

¹⁰² See ABA Comments re: Merger Standards, at 6.

¹⁰³ Trans. at 53-54 (Conrath) (stating that such a proposal is “not crazy”); Trans. at 53 (Sohn) (stating that this would be a “plausible” approach); Trans. at 30-31 (Sims); see also Trans. at 55 (Blumenthal) (stating that he is not opposed to the idea in principle, but would have to see what the “institutional view” would be).

¹⁰⁴ Trans. at 28-29 (Sohn) (FTC could adopt as a matter of practice); Trans. at 48 (Sohn) (there should be a “strong presumption” that preconsummation horizontal merger cases should be consolidated). The FTC has never consolidated proceedings for preliminary and permanent relief in merger cases under Section 13(b).

¹⁰⁵ Section 13(b) specifies that “in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction.” 15 U.S.C. § 53(b). However, in *Arch Coal* the court held that Section 13(b) “allows for preliminary injunctive relief only and places the resolution of the FTC’s antitrust case on the merits outside the scope of this Court’s jurisdiction.” Order, *FTC v. Arch Coal, Inc.*, Case Number 1:04CV00534 (JDB), at 2 (May 6, 2004) (rejecting defendants’ request to consolidate preliminary injunction with permanent injunction); see Pl.

Pros

- In light of the time needed for the HSR process and preliminary injunction proceeding, there is sufficient time to prepare for trial on the merits. In particular, in light of the discovery that the HSR process provides, the government should be able to go to a full trial on the merits in “a couple months.”¹⁰⁶
- DOJ is generally ready to begin a consolidated trial starting six months after the HSR process ends.¹⁰⁷

Cons

- It would eliminate any opportunity for the FTC to use administrative litigation in merger matters, other than those arising outside the HSR process.
- Mandatory consolidation might interfere with the ability of the agencies to negotiate a reasonable schedule for consolidated proceedings, with sufficient time to prepare for trial on the merits, when they no longer have the leverage to refuse to consolidate.¹⁰⁸ DOJ, for example, allows for consolidation only upon reaching a scheduling agreement with the parties.¹⁰⁹
 - b. Bar the FTC from pursuing administrative litigation after an HSR investigation either (a) if it loses a preliminary injunction proceeding or (b) if it seeks a preliminary injunction

A number of commenters argued that administrative litigation should not be available in merger investigations if the FTC fails to obtain a preliminary injunction.¹¹⁰ Alternatively, the

FTC’s Mem. in Opp’n to Defs.’ Mot. Seeking Consolidation of Prelim. & Permanent Injs., *FTC v. Arch Coal, Inc.*, Case Number 1:04CV00534 (JDB), at 3, 4 (Apr. 22, 2004) (arguing against consolidation).

¹⁰⁶ See Trans. at 29-31 (Sohn); Trans. at 30-31 (Sims).

¹⁰⁷ Trans. at 53-54 (Conrath) (proposal is “not that different from where we end up today,” but would want a judge to be authorized to grant more time for good cause); see also Trans. at 54 (Blumenthal) (would “want to take that back to the office”).

¹⁰⁸ Trans. at 30-31 (Conrath) (pointing out that the government has a heavy burden and that key elements like expert reports require time).

¹⁰⁹ See Trans. at 53 (Conrath).

¹¹⁰ ABA Comments re: Merger Standards, at 9-10; see also Leary Statement re: Federal Civil Remedies, at 6 (Dec. 1, 2005) (“Leary Statement”) (supporting the ABA proposal); see also John E. Lopatka & James F. Mongoven, *After Preliminary Relief in Merger Cases is Denied, What Then?*, 17 Research in L. & Econ. 149 (1995) (concluding that agencies’

FTC should be required to elect up front whether to seek a preliminary injunction in district court or challenge the transaction through administrative litigation (permitting the parties to close the transaction while administrative litigation is pending).¹¹¹ Commenters argue that administrative litigation should not be available after the denial of a preliminary injunction for two reasons. First, the burden on the parties of administrative litigation outweighs its benefits.¹¹² Second, the burden of proof in administrative litigation is higher than that in preliminary injunction proceedings, making the subsequent proceeding “futile.”¹¹³

Commenters noted that this approach does not require legislative change, but rather could be accomplished through a commitment by the FTC to elect whether to pursue preliminary relief or administrative litigation.¹¹⁴

One witness questioned the value of the FTC’s ability to pursue administrative merger litigation after winning a preliminary injunction, rather than simply treating the matter as moot.

continuing to challenge cases after losing a preliminary injunction does not serve the public interest).

¹¹¹ Leary Statement, at 5-6. He argues that some cases, such as *Arch Coal*, are “well-suited for administrative litigation,” because the usual concerns regarding scrambling of the assets were not present and the complex coordinated effects analysis could benefit from a more deliberate administrative process. *Id.*; see also Statement of Commissioner Thomas B. Leary, *In the Matter of Arch Coal, Inc.*, File No. 0310191 (Apr. 6. 2004) (stating that “the administrative arena is the best place to address the challenging issues presented by [the *Arch Coal*] case”), available at: <http://www.ftc.gov/os/caselist/0310191/040407learystatement0310191.pdf>.

¹¹² ABA Comments re: Merger Standards, at 9-10 (“the value of administrative litigation . . . is outweighed by the burden on the parties”).

¹¹³ *Id.* at 9.

¹¹⁴ ABA Comments re: Merger Standards, at 9 (FTC should adopt strong presumption against pursuing administrative litigation, absent “extraordinary circumstances”); Leary Statement, at 5 (referring to “a commitment to elect”).

He argued that this option is rarely used and provides the agency only “a little extra tactical leverage.”¹¹⁵

Advocates of limits on the FTC’s pursuit of administrative litigation would not preclude the FTC from pursuing administrative litigation post-closing, after the development of new evidence.¹¹⁶

¹¹⁵ Trans. at 46-47 (Sims); *see also In re The Coca Cola Company*, 117 F.T.C. 795, 903-05 (1994) (Opinion of the Commission) (even though merger was abandoned by the parties, FTC pursued administrative litigation and ultimately imposed ten-year prior approval requirement for future acquisitions of interests in Dr Pepper brand soft drinks).

¹¹⁶ ABA Comments re: Merger Standards, at 10 (the FTC still should be permitted to pursue a post-acquisition challenge, but only after a “not insignificant period of time post-closing,” and if new evidence of anticompetitive effects of the merger appears); *see also* Leary Statement, at 6 (supporting the ABA proposal).