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Editor's Note: When the Process Is the Punishment

BY JAMES J. O'CONNELL

THIS ISSUE OF ANTITRUST INCLUDES a number of articles that examine various aspects of antitrust enforcement by the government. One of the great strengths of the U.S. antitrust enforcement system has always been the role played by the judiciary, warts and all, as a check on the decisions of the enforcement agencies. Agree or disagree with specific judicial decisions, praise or bemoan the role played by "private attorneys general," chuckle or gnash your teeth at the usually wasteful discovery process—to paraphrase Winston Churchill, trying cases before the federal courts is the worst way to determine outcomes in antitrust enforcement matters, except for all the other ways that have been tried. In jurisdictions where the enforcer is effectively judge, jury, and executioner, for example, what guarantees do parties have that the enforcer's decision won't be influenced, at least in part, by the reality that it will likely never be challenged? And in jurisdictions in which the judiciary is not sufficiently independent to challenge the enforcer, whatever "day in court" that parties may eventually get likely won't be worth the candle.

That day in court is especially important, in my view, in the context of merger enforcement. But here and there one sees signs that the ability of merging parties to put the government to its proof before a federal judge is at risk of being undermined by administrative processes, whether as a result of the FTC's ongoing project to bring more merger enforcement "in house" or because of the circumstances in which parties may find themselves when faced with concurrent merger review by the DOJ and the FCC. Time being money, the prospect of a prolonged administrative review before a body whose decision to initiate the proceedings has already signaled its suspicions has even, on occasion, prompted parties to abandon their transactions.

Parties often abandon their deals when they don't like their litigation odds against the government, of course. But if an enforcer knows that parties may not have their day in court until after the damage has been done—or, to put it differently, if an enforcer knows that it may not be put to its proof in the crucible of a federal courtroom—that knowledge will inevitably affect outcomes. And even when transactions are able to close, the time pressures imposed by the market are such that any perceived enforcer advantage, even if only a procedural one, could be used by those enforcers as leverage to extract concessions that the merits of a case may not justify. The government may get the results it wants and count those outcomes as "wins." But we risk the public and the market losing confidence in the merits of those outcomes and in the overall fairness of the system if merging parties are not able to have their day in court.

The point here is not that courts always get it right—they don't. Nor is it that enforcers routinely take a harder line in situations where the merits of the case are less likely to be tested—they don't, or at least they don't today. The point, rather, is that process matters, particularly when it comes to merger review, and that processes should be calibrated so they do not determine outcomes.

For the most part, those calibrations have been properly made. But while government enforcers should be expected to use whatever tools they have to accomplish their mission of protecting competition, if that leads to the perception that deals are suffering "death by process," those tools should be reexamined, so that the process does not become the punishment.

Counterfactual History

Two thought experiments illustrate this concern.

Prior to and for some time after the enactment of the Airline Deregulation Act of 1978, the Antitrust Division had no enforcement jurisdiction over airline mergers. Such transactions were within the purview of the Civil Aeronautics Board and then, after the CAB was abolished in 1985, of the Department of Transportation until 1988 when the Division assumed sole jurisdiction to review mergers in the airline industry. Throughout, however, the Division and the CAB/DOT never had separate and independent authority to review and seek to block airline mergers—in contrast, for example, with the authority that the Division and the Federal Communications Commission share today with respect to mergers in the telecommunications sector.

But if we may engage in a bit of counterfactual historical fiction and pretend for a moment that the Division and the DOT could each independently block an airline merger, consider whether Assistant Attorney General Bill Baer would have settled the Division's challenge of the merger between American Airlines and US Airways, after filing the complaint that he did, if the parties had had to go before the Department of Transportation or some other regulatory agency for a prolonged review of their merger?

Baer was presented with evidence sufficient to convince him that the transaction would violate the Clayton Act.

Jim O'Connell, Editorial Chair of ANTITRUST, is a partner at Covington & Burling LLP. All opinions expressed herein are his alone and do not necessarily reflect those of his firm or any of its clients.

Although the complaint he authorized sent a strong signal that the usual remedy of divesting gates at congested airports would be insufficient to address those concerns, he has since explained that the remedy package the Division ultimately accepted as the trial approached—making gates at congested airports available to low cost carriers—"improve[d] on a problematic status quo" and "provide[d] more competition than exists today" in the airline industry.[1] Leaving aside the question of whether merger enforcement is supposed to improve the pre-merger competitive landscape rather than preserve it, the impression many had when the case was settled, was that the Division—as litigators often must—had opted to take the best deal it could get rather than go through the costly and inherently risky process of a litigated challenge. That in itself was unremarkable because the Division's policy has long been that if a settlement achieves what the Division expected to achieve at trial, it is better to settle than risk getting nothing for American consumers. Such a policy makes good sense. Why waste limited resources on a challenge that you might lose if you can get all or most of what you want by agreeing to a settlement?

But if the DOT had also been reviewing the transaction, if behind the scenes the Division had been encouraging the DOT to view the deal as harmful to competition, if a lengthy DOT review would have prevented the parties from forcing the Division to bring its Clayton Act challenge before a federal court, etc., would the Division have settled? Or would it have made its bold enforcement statement with its broad complaint and then sat back, confident that the DOT's processes would operate to kill the merger before the Division was put to its proof in court?

All I know about the American Airlines case is what I've read in the press, so before I leave the impression that I only engage in thought experiments regarding cases about which I know little that were led by AAGs for whom I've never worked, I will offer a second thought experiment involving a case I happen know a great deal about, thanks to the fact that the AAG at the time hired me into the Division to be one of his counsel. What might have happened to Oracle's hostile takeover bid for rival PeopleSoft if AAG R. Hewitt Pate's decision to challenge the transaction in 2003 had been put down for review by . . . R. Hewitt Pate? Oracle risked going before Judge Vaughan Walker—a bet which, in light of what Judge Walker's decision revealed about his views regarding unilateral effects, market definition, and the utility of customer testimony paid off. But would Oracle have been as willing to contest the Division's challenge before the very enforcer who had already concluded that its transaction violated the Clayton Act? If they had been, would the markets and shareholders have supported their gamble?

SMARTER Enforcement?

Moving from fiction to poetry—or poetic license, to be precise—Professor Gary Lawson used humor and some exaggeration to illustrate the perceptions of unfair treatment that can be engendered when parties are unable effectively to have their day in court:

> Consider the typical enforcement activities of a typical federal agency—for example, of the Federal Trade Commission. The Commission promulgates substantive rules of conduct. The Commission then considers whether to authorize investigations into whether the Commission's rules have been violated. If the Commission authorizes an investigation, the investigation is conducted by the Commission, which reports its findings to the Commission. If the Commission thinks that the Commission's findings warrant an enforcement action, the Commission issues a complaint. The Commission's complaint that a Commission rule has been violated is then prosecuted by the Commission and adjudicated by the Commission. This Commission adjudication can either take place before the full Commission or before a semi-autonomous Commission administrative law judge. If the Commission chooses to adjudicate before an administrative law judge rather than before the Commission and the decision is adverse to the Commission, the Commission can appeal to the Commission. If the Commission ultimately finds a violation, then, and only then, the affected private party can appeal to an Article III court. But the agency decision, even before the bona fide Article III tribunal, possesses a very strong presumption of correctness on matters both of fact and of law.[2]

Poetic license notwithstanding, one could dispute some of the details of Professor Lawson's description of what happens at the FTC. It does not, for example, "promulgate[] substantive rules of conduct," at least not with respect to competition (although its efforts to expand its "stand alone" Section 5 authority effectively come close). Professor Lawson's summary also leaves out the efforts to provide due process checks and balances through the Administrative Procedure Act.[3] And, *contra* Professor Lawson, the separation of powers, although arguably even more under attack today than it was in 1994, thankfully still has a pulse. But anyone who has ever had to explain to a client how the FTC's administrative processes work will recognize some truth in Lawson's wry polemic.

The FTC's ability to review mergers through its internal administrative processes has come under fire recently on Capitol Hill, where legislators are considering the "Standard Merger and Acquisition Reviews Through Equal Rules," or "SMARTER," Act. The proposal is a response to concerns about the unequal treatment—actual or perceived—of parties whose transactions are reviewed by the FTC, which faces an easier preliminary injunction standard than the Division. The legislation would bring the FTC's PI standard into alignment with the Division's and would also remove the FTC's authority to use its administrative proceedings authority to challenge a transaction under the Clayton Act, leaving the FTC to do what the DOJ essentially has to do: convince a federal judge that a merger violates the antitrust laws in order to enjoin it.

The second prong of the bill is driven in part by a recent shift in the FTC's approach to merger challenges. Until only a few years ago, when the FTC lost at the PI stage it did not

routinely exercise its right to pursue administrative litigation. This started to change around the time of the FTC's challenge of the Whole Foods/Wild Oats merger. In June 2007, the FTC sought a preliminary injunction to stop the transaction, pending the outcome of its administrative proceedings. The district court refused to issue an injunction, and the FTC stayed its own proceedings pending the outcome of its appeal to the D.C. Circuit. When, a year later, the D.C. Circuit agreed that the district court had not properly applied the more lenient PI standard of the FTC Act, the FTC restarted its administrative process, eventually proving that life truly does imitate art—or at least law review articles—by appointing Commissioner J. Thomas Rosch, who had voted to seek an injunction to prevent the transaction from closing, as the Administrative Law Judge for the case. The matter was eventually—and perhaps not altogether unsurprisingly—settled by the parties.[4] Nearly the same thing happened in the FTC's 2008 challenge of the proposed acquisition by Inova Health Systems Foundation of Prince William Health System—except, in that case, the parties abandoned the transaction.[5]

During this same period the FTC, perhaps appreciating that its bid to bring more merger enforcement "in house" would lack credibility if those proceedings were seen as inefficient or less likely to result in timely decisions, made great strides towards streamlining those processes.[6] But despite those efforts, for which the FTC should be applauded, concerns have persisted that the procedural differences between Division and FTC merger enforcement produce, or are being perceived as producing, different outcomes. And although parties may be able to close their transactions pending administrative review by the FTC in cases where the agency's efforts to obtain a preliminary injunction are unsuccessful, they do so at risk. This means that the FTC's processes—regardless of the eventual outcome—can themselves have a market-distorting effect. "Heads we win, tails you lose."

Which raises the question: is a merger's chance of being cleared, or at least of getting to a result within a reasonable period of time, dependent on which agency wins the merger clearance "coin toss," rather than strictly on the merits of the case? The proposed SMARTER Act is a response to those concerns. And in what may have been a partial response to the SMARTER Act, the FTC announced changes to its procedural rules on March 13, 2015. One of the changes is a return to the FTC's pre-2009 practice of granting an automatic stay of administrative litigation, pending its decision on whether continuing the litigation would serve the public interest, if parties file a timely request following denial by a district court of the FTC's request for a preliminary injunction.[7] This relatively minor change does not appear likely to affect the debate over the SMARTER Act, however.[8]

Chairwoman Edith Ramirez, testifying recently before the House Judiciary Committee in opposition to the legislation, argued that removing the FTC's ability to hear and decide merger cases would "undermine one of the central strengths of the Federal Trade Commission and one of the reasons the FTC was created in the first instance, which was to have an expert body of bipartisan commissioners rule on and develop antitrust doctrine."[9] One would expect the Chairwoman of the FTC to be vigorous in her defense of her agency's processes and mission, and one should expect an agency to utilize all the tools in its toolbox when seeking to accomplish that mission. But one need not choose sides in the debate over which agency's processes and PI standards are superior to see that the fact that they are different is a problem.

The response to these concerns is often that most deals that are notified to the agencies are never investigated, that very few investigations result in contested challenges, and that this is what President Woodrow Wilson and Congress intended when they established the FTC just over a century ago. That last is not much of a response to proposals like the SMARTER Act, because Congress has done and intended to do all sort of things since the founding of the republic that it has later seen fit to change. But as to the former response—one might as easily say that if these processes are rarely needed, why fight to retain them, given the perceptions of unequal treatment that they engender? Beyond that, the death of even one transaction, not because the enforcer successfully proved its case in court, but because the enforcer's processes killed it, is too many, not just because of that one result, but because of the message it sends to the market. And that message will reverberate forward to subsequent investigations if the agency uses parties' fear of being mired in administrative processes as leverage to extract remedies and other concessions that the agency might not be able to get otherwise if it had to prove its case before a federal judge. Although enforcers may ask companies and the bar to trust them—and regardless of how diligently they may work to prevent their processes from becoming the punishment—reliance on the good faith of enforcers, when there may be little meaningful opportunity to challenge them, is insufficient for a government that is supposed to be one of laws rather than of men.

When Truth Is Stranger than Fiction

The thought experiment about the American Airlines case discussed above was a bit of counterfactual historical fiction, but what happened to the AT&T/T-Mobile merger in 2011, although dramatic, was decidedly non-fiction.

The Federal Communications Commission has long had authority to review mergers and other transactions that occur within the industries that it regulates. It does so under a broad "public interest" standard, which, it has long maintained, includes concerns about a transaction's effects on competition. Therein may be found the seeds of conflict between the FCC and the Division—two very different agencies whose views regarding what is and what is not good competition policy have not always aligned. The degree to which the two agencies and their staffs coordinate their investigations and consult regarding their findings has also varied from AAG to AAG and from FCC Chair to FCC Chair.

In recent years, the agencies have cooperated very closely, and the FCC has also brought on board experienced and well-respected antitrust attorneys and economists to assist in its reviews of mergers. To the extent that these practices result in an FCC review that tracks more closely with generally accepted antitrust principles—an emphasis on evidence of economic effects, the evaluation of expected synergies, the idea that merger review is about protecting competition rather than specific competitors, etc.—this will be a good thing. But it will not be a good thing if it results in parties finding themselves caught between the processes of the two agencies, which is what happened to AT&T and T-Mobile.

In August 2011, the Division filed a complaint challenging the proposed merger of the two cellular service competitors. For those who had followed the Division's previous investigations in the space, this was not necessarily a surprise. The Division had been moving towards the view that the market for such services was becoming national, and in a relevant market so defined it was only a matter of time before the Division chose a "this far and no further" approach to continued consolidation. I was not involved in the case and so don't know whether a "fix" may have been available or whether the parties' efficiency arguments might have been sufficient to overcome the Division's competition concerns, but the Division's decision to challenge the deal seemed unremarkable.

The Division's complaint was filed as the FCC's staff was still conducting its separate investigation, which continued to move forward as the parties and the Division prepared for trial, which was set for February 2012. But a funny thing happened on the way to the court. In late November 2011, FCC Chairman Julius Genachowski proposed a vote of the full commission on whether to hold an administrative hearing regarding whether to block the transaction. Before that vote was held, on November 24 the parties asked to withdraw their application, telling the commission that they were not calling off their transaction but were instead postponing further FCC review until after the Division's Clayton Act challenge in U.S. District Court had been decided. That request was granted on November 29, but later that day, in an apparently unprecedented move, the internal draft staff report that had recommended that the commission block the deal was released. Most press accounts describe this last move as one taken by "the FCC," but the commission never voted to release the report.

The parties reacted strongly to the decision to release the staff report.[10] The FCC attempted a "no harm, no foul" argument, saying that "the staff report had already been prepared for public release and would have been published anyway if the FCC had gone forward with the hearing designation order," and that "it was unfair to withhold the [staff's] findings after completing an exhaustive review of hundreds of thousands of pages of documents over the past six months."[11] But those were unserious arguments, the first because the FCC Chair released the staff's report *after* the parties had asked to withdraw their petition and that request was in the process of being granted, the second because, with all due respect to the staff and its work, the issue is not what is fair to the agency that has the power to regulate the parties, but what is fair to the parties that come before the agency.

One is left to assume that the staff's report was released to influence the outcome—in the eyes of the public, in the halls of power in Washington, and before Judge Huvelle—of a case that would not be back before the commission for at least several months, if ever. There may also have been concerns at the FCC that if the parties went on to win their day in court against the Division, that victory would have been used to pressure the FCC to act favorably on their renewed petition.

In the end, any such concerns proved unwarranted. The following week, the Division told Judge Huvelle that because the parties had withdrawn their FCC petition, there was in effect no merger on the table and therefore no need for an expedited trial on its Clayton Act complaint.[12] The Division filed a motion to stay further proceedings on December 12, and faced with a hostile FCC and the evaporation of their ability to contest the Division's case on the merits, AT&T abandoned the deal a week later.[13]

The two agencies claimed victory.[14] And to the extent that their objections to the transaction were well-founded, they were right to claim that their actions had helped to preserve competition for the benefit of American consumers. But they achieved this result not on the merits of their arguments and the strength of their evidence—in the FCC's case, no vote was ever held on the substance of the matter, and the Division's case was never heard—but because the parties were caught between a procedural rock and a hard place. As noted, parties abandon deals all the time in the face of agency opposition or a Division complaint, rather than risk losing at trial. In this case, though, the parties were apparently willing to take on that risk, but Judge Huvelle and the Division prevented that from happening. So although the parties literally had a day in court, they didn't get the opportunity to put the Division to its proof.

"A win is a win," litigants often say. And we should expect agencies to take advantage of the tools available to them in seeking to achieve their objectives—which include saving resources wherever possible by avoiding litigation in federal court. But when agencies achieve their results through process rather than on the merits, even in cases where the merging parties would prefer to test those merits before a judge, those tools should be reconsidered. After all, what ultimately prevents the filing of a complaint that may push the envelope too far—one that articulates a novel theory of harm that leaves the bar scratching its head, unsure of how to advise its clients, for example—by an enforcer that is confident that it will never have to carry its day in court because the transaction might be susceptible to death-by-process? We trust that this will never happen and that enforcement agencies will only seek to block transactions when they are confident (or at

least hopeful) that, if necessary, they could satisfy their burden of proof. But hope and trust and good will are not the same as checks and balances. ■

[1] *See* Assistant Attorney General Bill Baer Delivers Remarks at the Conference Call Regarding the Justice Department's Proposed Settlement with US Airways and American Airlines (Nov. 12, 2013), *available at* http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-conference-call-regarding-justice.

[2] Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231 (1994).

[3] *See, e.g.*, 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 3–4 (Sept. 19, 2009), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/thoughts-ftcs-relationship-constitutional-and-otherwise-legislative-executive-and-judicial-branches/090919roschberlinspeech.pdf.

[4] *See id.* at 6.

[5] My partner and former DOJ colleague Deborah Garza summarized that case last year in testimony regarding the SMARTER Act. See Prepared Statement of Deborah A. Garza Before the United States House of Representatives Committee on the Judiciary Subcommittee on Regulatory Reform, Commercial and Antitrust Law Hearing on the "Standard Merger And Acquisition Reviews Through Equal Rules (SMARTER) Act of 2014 at 5–6 (Apr. 3, 2015), *available at* http://judiciary.house.gov/_cache/files/bf34dcb6-2e4c-46bc-be24-3332f381daf9/d-garza-smarter-act-testimony-4-3-14.pdf.

[6] *See* Rosch, *supra* note 3, at 23–28.

[7] Revisions to Rules of Practice for Adjudicative Proceedings (Part 3), 80 Fed. Reg. 15,157, 15,158 (Mar. 23, 2015); Press Release, Fed. Trade Comm'n, Commission Approves Revisions to Its Rules of Practice (Mar. 13, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/03/commission-approves-revisions-its-rules-practice.

[8] *See, e.g.*, Melissa Lipman, *FTC to Face Continued Merger Rule Fight Despite Tweak*, Law360 (Mar. 16, 2015).

[9] Melissa Lipman, *FTC Chair Defends Watchdog's Merger Challenge Process*, Law360 (May 15, 2015).

[10] *See* Brendan Sasso, *FCC to Allow AT&T to Drop Application for T-Mobile Deal*, The Hill (Nov. 29, 2011) (quoting Jim Cicconi, AT&T's vice president of legislative affairs: "This report is not an order of the FCC and has never been voted on," said Jim Cicconi, AT&T's head of external affairs, in an e-mailed statement. "It is simply a staff draft that raises questions of fact that were to be addressed in an administrative hearing, a hearing which will not now take place. It has no force or effect under law, which raises questions as to why the FCC would choose to release it."), http://thehill.com/policy/technology/196005-fcc-to-allow-atat-to-drop-t-mobile-application.

[11] Kim Hart, *FCC Releases Damning Report on AT&T-T-Mobile Deal*, Politico (Nov. 29, 2011), http://www.politico.com/news/stories/1111/69360.html

[12] *See* Brent Kendall, *US Justice Dept Seeks to Delay AT&T Antitrust Case*, MarketWatch (Dec. 9, 2011), http://www.marketwatch.com/story/us-justice-dept-seeks-to-delay-att-antitrust-case-2011-12-09; *see also* Kevin Fitchard, "DOJ to AT&T: No FCC petition, no merger," GigaOm (Dec. 9, 2011), https://gigaom.com/2011/12/09/doj-to-att-no-fcc-petition-no-merger/.

[13] *See* Michael J. de la Merced, *AT&T Ends $39 Billion Bid for T-Mobile*, N.Y. Times, Dec. 19, 2011, *available at* http://dealbook.nytimes.com/2011/12/19/att-withdraws-39-bid-for-t-mobile/?_r=0.

[14] *See* Press Release, U.S. Dep't of Justice, Justice Department Issues Statements Regarding AT&T Inc.'s Abandonment of Its Proposed Acquisition of T-Mobile USA Inc. (Dec. 19, 2011); Press Release, Fed. Commc'ns Comm'n, Statement From FCC Chairman Julius Genachowski Regarding AT&T Inc.'s Abandonment of its Proposed Acquisition of T-Mobile USA Inc. (Dec. 19, 2011).