

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**Working Party No. 3 on Co-operation and Enforcement**

**INSTITUTIONAL AND PROCEDURAL ASPECTS OF THE RELATIONSHIP BETWEEN  
COMPETITION AUTHORITIES AND COURTS, AND UPDATE ON DEVELOPMENTS IN  
PROCEDURAL FAIRNESS AND TRANSPARENCY**

-- United States --

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*The attached document is submitted to Working Party No.3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 18 October 2011.*

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1. This paper responds to the Working Party No. 3 Chair's letter of 19 July 2011, inviting submissions for the Working Party's upcoming roundtable on institutional and procedural aspects of the relationship between competition authorities and courts, and update on developments in procedural fairness and transparency. The U.S. Federal Trade Commission ("FTC") and Antitrust Division of the U.S. Department of Justice ("Department") (collectively, "the Agencies") are pleased to provide below our perspectives on these issues.

## **1. The relationship between the courts and competition agencies in the United States**

2. The primary role of courts in the United States is to resolve legal disputes and vindicate rights, which inherently requires interpreting the law.<sup>1</sup> There are separate court systems at the federal level and in each of the states. The Federal courts handle both civil and criminal matters under federal law, as well as some civil matters under state law (mainly matters between citizens of different states with a significant monetary value at stake).<sup>2</sup>

### **1.1. Overview of the Federal Courts**

3. The highest federal court is the Supreme Court of the United States, composed of nine justices.<sup>3</sup> Beneath the Supreme Court are 13 Circuit Courts of Appeals, twelve of which are assigned regions into which the country is divided.<sup>4</sup> Within each of the twelve regions, there are the lowest level courts, known as District Courts, in addition to the intermediate Circuit Courts of Appeals.<sup>5</sup> Supreme Court Justices, judges in the Courts of Appeals, and District Court judges are appointed for life terms by the President, subject to confirmation by the United States Senate. Federal court judges are generalists; District Courts are not specialized by subject matter, and, with rare exceptions, neither are the higher courts.<sup>6</sup>

### **1.2. Overview of State Courts**

4. Each of the 50 states and territories<sup>7</sup> has its own court system. These systems vary in structure. All states have a single highest court, most often called the Supreme Court of that state. Decisions of a state's highest court may be appealed to the (federal) Supreme Court only if they raise questions of federal law. Most states have intermediate courts of appeals; all have lower level or trial courts. Many states have specialized courts to handle special classes of matters; examples include probate court, juvenile court, and family court. Some state court judges are appointed to their position, while others are often elected.

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<sup>1</sup> Administrative Office of the United States Courts, *Understanding Federal and State Courts*, available at <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/UnderstandingFederalAndStateCourts.aspx>.

<sup>2</sup> *Id.*

<sup>3</sup> U.S. Const. Art. III.

<sup>4</sup> Administrative Office of the United States Courts, *Structure of Federal Courts*, available at <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/StructureOfFederalCourts.aspx>.

<sup>5</sup> *Id.*

<sup>6</sup> Administrative Office of the United States Courts, *Comparing Federal and State Courts*, available at <http://www.uscourts.gov/EducationalResources/FederalCourtBasics/CourtStructure/ComparingFederalAndStateCourts.aspx>.

<sup>7</sup> Territories include the District of Columbia, Guam, etc.

Generally, state court judges do not receive lifetime appointments and are instead installed for fixed terms (though there are some lifetime appointments).<sup>8</sup>

### 1.3. *Common Law System*

5. Almost all court systems in the United States are common law systems.<sup>9</sup> Judges are guided in their decisions by precedent, “the articulation of legal principles in a historical succession of judicial decisions.” “Common law principles can be changed by legislation.”<sup>10</sup>

### 1.4. *Public Enforcement of the Antitrust Laws in the United States*

6. The three primary federal antitrust statutes in the United States are: the Sherman Act,<sup>11</sup> which became law in 1890; the Clayton Act,<sup>12</sup> which was enacted in 1914; and the Federal Trade Commission Act,<sup>13</sup> which also became law in 1914. Almost every state in the United States also has its own antitrust law statute, under which the state itself and/or private parties may sue.

7. The United States Supreme Court has explained that: “Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it clear that it expected the courts to give shape to the statute’s broad mandate by drawing on common law tradition.”<sup>14</sup>

8. Two government bodies, the Department, which is a part of the executive branch of government, and the FTC, which is an independent agency, are responsible for enforcing the federal antitrust laws. Enforcement also occurs through private litigation. The individual states may also bring court cases under the Sherman Act and the Clayton Act. Due to their underlying structure, the Agencies have different relationships to courts (this is discussed further below).

9. To enforce the Sherman Act or the Clayton Act, the Department must initiate an action in federal district court as the Plaintiff, where procedure is governed by the Federal Rules of Civil or Criminal Procedure.<sup>15</sup> The federal district court will then determine whether the law has been violated and, if so, order appropriate remedies.

10. In contrast, the FTC typically enforces antitrust law by initiating an administrative proceeding, which begins with issuance of a complaint approved by the five-member Commission upon reason to believe that the respondent violated the Federal Trade Commission Act or the Clayton Act and that a proceeding by it would be in the public interest. Complaint issuance is followed by hearings before an Administrative Law Judge (ALJ) within the agency, not a court, and subject to the agency’s rules of

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<sup>8</sup> *Id.*

<sup>9</sup> The state of Louisiana has a civil law system.

<sup>10</sup> Administrative Office of the United States Courts, *Glossary of Key Terms*, available at <http://www.uscourts.gov/Common/Glossary.aspx>.

<sup>11</sup> 15 U.S.C. §1 *et seq.* The Sherman Act is enforced by the Department.

<sup>12</sup> 15 U.S.C. §12 *et seq.* The Clayton Act is enforced by both the Department and the FTC.

<sup>13</sup> 15 U.S.C. §45 *et seq.* The FTC Act is enforced by the FTC. Substantively, violations of the Sherman Act are also violations of Section 5 of the FTC Act.

<sup>14</sup> *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 688 (1978).

<sup>15</sup> Fed. R. Civ. P.; Fed. R. Crim. P.

practice,<sup>16</sup> not to the Federal Rules. The ALJ's determination may be appealed to the five member Commission, which conducts a *de novo* review of the ALJ's decision. Any final Commission determination may be appealed by the respondent to any regional Circuit Court of Appeals in which the respondent does business. The losing party in the court of appeals may seek review by the Supreme Court. In addition to proceeding administratively, the FTC may also seek a preliminary injunction in a federal district court in aid of its administrative proceeding. Thus, like the Department, in appropriate cases, the Commission may also initiate an action in federal district court as plaintiff. In those cases, the procedures are governed by the Federal Rules.

11. As described above, the FTC has adjudicative functions in addition to investigative and prosecutorial ones. Unlike the Department, the FTC has the authority to investigate, prosecute, and adjudicate enforcement matters, subject to appeal in the federal courts. This system comports with constitutional principles of due process and administrative law.<sup>17</sup> Once the Commission issues its complaint, the Commissioners are considered to be in an adjudicative role and they are no longer involved in the investigation and prosecution of the matter. FTC staff who conduct the investigation or the prosecution of the case are prohibited from participating in the Commission's decision or review of the matter. In addition, *ex parte* contacts about the matter between FTC staff and the ALJ or the Commissioners are strictly prohibited.<sup>18</sup>

## **2. A summary of the procedures applicable to public and private competition cases before United States courts**

### **2.1. *The Adversarial System***

12. Whether a matter originates with the Department, the FTC, a State Attorney General, or a private party, once in federal court or an administrative hearing, all proceedings – public or private – employ an adversarial system: the parties submit their evidence and arguments regarding the relevant facts to a neutral fact-finder—a judge or jury.<sup>19</sup> U.S. judges do not independently investigate the facts or assist the parties in presenting their cases; they may however ask questions and request briefing. Juries do not generally ask questions and they may not request information. Based on the parties' submissions, the court determines the ultimate facts and decides the case in accordance with the controlling law and precedent. Thus the process is highly transparent, since all, or nearly all, the evidence on which the decision is based is available for all to see, and the result (unless fully determined by a jury) is accompanied by a written explanation.

### **2.2. *Discovery in Antitrust Suits***

13. Before the trial is held, the parties in all types of proceedings may discover information from each other and from third parties that may be relevant to the claims or defenses in the case. This ensures that all parties understand the nature and scope of the claims and ensures transparency. The rules applicable to this discovery process in antitrust cases are the same rules of discovery applied in other cases. The parties in civil cases gather information through mandatory disclosures under the Federal Rules, written interrogatories, document requests, requests for admissions, and depositions. This process of

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<sup>16</sup> FTC Rules of Practice, 16 C.F.R. Part 3 (2011).

<sup>17</sup> *Withrow v. Larkin*, 421 U.S. 35 (1975); Administrative Procedure Act, 5 U.S.C. §§ 551-706.

<sup>18</sup> 16 C.F.R. § 4.7.

<sup>19</sup> In civil cases in federal court seeking only injunctive relief, the fact finder is the judge. Private litigants may seek damages and then they have a right to a jury as fact finder, but they may choose to rely on a judge instead. There is a right to a jury in criminal cases, but that right may generally be waived.

discovery lays the foundation for the facts the parties will present to the court; discovery is generally more limited in criminal cases. The pre-trial submission of facts in judicial proceedings is governed by the Federal Rules of Civil or Criminal Procedure and the Federal Rules of Evidence. Similar discovery rules apply in FTC administrative proceedings. The FTC's rules of practice require counsel for the agency and respondent to identify individuals likely to have information relevant to the proceeding, and to produce documents (or certain information about documents) relevant to the proceeding, subject to limited exceptions, such as privilege; they also authorize the parties to obtain other discovery from one another through a variety of means.<sup>20</sup> The parties must also identify their experts and produce reports prepared by, and permit pre-trial discovery of, these experts.<sup>21</sup>

### 2.3. *Early Proceedings in Antitrust Suits*

14. Defendants may move to dismiss the charges against them at an early stage in the proceedings. On a motion to dismiss a civil case "for failure to state a claim," the court is required to assume that the facts alleged by the plaintiff (whether an agency or private party) are true; if those alleged facts do not permissibly lead to the conclusion that the law has been violated, the case is dismissed.<sup>22</sup> (Analogous procedures exist in criminal proceedings.) At later stages in civil proceedings, either party may seek summary determination of certain matters or disposition of the case before trial. A motion for summary judgment will be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."<sup>23</sup> Likewise, in administrative proceedings before the FTC, respondents may file motions to dismiss and motions for summary decision. In order to expedite the proceeding, such motions in FTC cases are directly referred to the Commission, which must rule on the motion or, in its discretion, refer it to the ALJ.<sup>24</sup>

### 2.4. *Trial Protections and Processes*

15. In all non-criminal court cases, the defendant is afforded a number of procedural protections, including the right to call witnesses on its own behalf and to put on its own case. Defendants in U.S. judicial proceedings also have the opportunity to challenge the opposing party's factual presentations via cross-examination of witnesses. Similarly, under the FTC's rules of practice, respondents "have the right of due notice, cross-examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing."<sup>25</sup>

16. In federal criminal cases,<sup>26</sup> defendants have additional procedural rights, such as the right to trial by jury<sup>27</sup> and the right against self-incrimination,<sup>28</sup> as well as pre-trial discovery rights to obtain certain

<sup>20</sup> See generally 16 C.F.R. § 3.31. As under the Federal Rules of Civil Procedure, parties to an administrative proceeding may, under the FTC's procedural rules, discover information from each other through mandatory disclosures, depositions, written interrogatories, production of documents, and requests for admission. *Id.* See also 16 C.F.R. §§ 3.32 (admissions), 3.33 (depositions), 3.35 (interrogatories), 3.37 (production of documents). Parties may also obtain discovery from third parties. See, e.g., 16 C.F.R. § 3.34.

<sup>21</sup> 16 C.F.R. § 3.31A.

<sup>22</sup> *Iqbal v. Ashcroft*, 129 S.Ct. 1937, 1950-51 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 556 (2007).

<sup>23</sup> Fed. R. Civ. P. 56(a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

<sup>24</sup> 16 C.F.R. § 3.22(a).

<sup>25</sup> 16 C.F.R. § 3.41(c).

<sup>26</sup> Only the Department may prosecute federal criminal matters.

documents that are in the Department's possession,<sup>29</sup> statements of government witnesses, and exculpatory information.

17. In the U.S. judicial system, the burden of proof lies with the plaintiff (i.e., the agency, a State Attorney General, or private plaintiff). To prevail in a civil judicial proceeding, the agency must show by a "preponderance of the evidence" (meaning that it is more likely than not) that the defendant is legally responsible for the alleged harm. This is also the applicable standard in FTC administrative proceedings. In criminal cases, the Department must prove its case "beyond a reasonable doubt."

18. At the end of a civil trial without a jury, the judge makes findings of facts and conclusions of law, orally on the record or written in an opinion or memorandum of decision.<sup>30</sup> In practice all, or nearly all competition cases that are not settled, conclude in a reasoned written opinion.

19. In federal court, the losing party in a civil action (and the losing defendant in a criminal action) has a right to appeal.<sup>31</sup> In federal proceedings, the district court decision will be appealed to the court of appeals for the circuit in which the district court is located.<sup>32</sup> Litigants may seek Supreme Court review of decisions of courts of appeals, but there is no right to such review and the Supreme Court in most cases does not grant review. Many detailed and specific procedures govern appellate practice.<sup>33</sup>

20. Proceedings and appeals in state court follow similar – though not identical – procedures as the federal system. Each state, however, has its own set of procedures and requirements.

### **3. Factors Encouraging Transparency and Fairness in United States Litigation**

21. Litigation in the federal courts is governed by a complex system of rules and procedures, some of which are discussed above. A number of these rules are designed to ensure transparency and fairness in decision-making. Some of these rules are explained below.

#### **3.1. Duties of Disclosure**

22. In civil litigation, parties have a general duty of disclosure. Federal Rule of Civil Procedure 26 (a)(1) imposes an affirmative duty of disclosure on parties to a civil lawsuit to disclose to the other parties considerable information even before the other parties have sought the information through discovery. This information includes information about individuals likely to have discoverable information, copies of all documents or electronic information that may support the party's claims or defenses, computation of each category of damages claimed. The parties are also required to supplement and correct these responses when necessary. Certain initial disclosures are also required in FTC administrative proceedings. Specifically, within five days of receipt of the respondent's answer to the complaint, and without awaiting a discovery request, the parties must identify each individual likely to have information relevant to the

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<sup>27</sup> U.S. Const. amend. VI.

<sup>28</sup> U.S. Const. amend. V.

<sup>29</sup> U.S. Department of Justice Antitrust Division Manual, Fourth Edition (Dec. 2008), Ch. IV(F), *available at* <http://www.justice.gov/atr/public/divisionmanual/atrdivman.pdf>.

<sup>30</sup> Fed. R. Civ. P. 52(a)(1).

<sup>31</sup> Fed. R. App. P. 3 and 4.

<sup>32</sup> A few types of cases are appealed to the one court of appeals that is not regional.

<sup>33</sup> *See, generally*, Federal Rules of Appellate Procedure.

proceeding, and produce copies (or a description by category and location) of all documents and electronically stored information relevant to the proceeding.<sup>34</sup>

### 3.2. *Protective Orders*

23. To protect from disclosure information that is obtained in discovery, a party or a person from whom discovery is sought may seek a protective order from the appropriate judge, who can issue an order “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense,” including orders limiting the type, manner, or extent of discovery, or to protect a trade secret or other confidential material.”<sup>35</sup> Protective orders are routinely issued in FTC proceedings. However, evidence admitted during the trial in any type of proceeding is presumptively public unless a party can show that it will be harmed by the public disclosure of such information. In that case, the court may seal part of the court record. Similarly in FTC proceedings, upon motion, the ALJ may determine that the evidence should be held “in camera” pursuant to the Commission’s rules of practice.

### 3.3. *Sanctions for Failure to Follow Procedures*

24. Federal Rule of Civil Procedure 37 addresses failure to make disclosure or cooperate in discovery and provides for sanctions. A party may apply to a court for an order compelling disclosure or discovery where the person from whom the disclosure or discovery is sought refuses to comply or provides an evasive or incomplete answer. Where a motion to compel is granted, the court may require the party or deponent whose conduct necessitated the motion to pay the moving party’s reasonable expenses, including attorney’s fees; if the motion is denied, the court may enter a protective order and require the moving party to pay reasonable expenses. Failure by a deponent to be sworn or to answer a question after being directed to do so by a court may be considered contempt of that court and punished accordingly. Where a party fails to obey an order of the court regarding discovery, the court may issue:

- an order that certain facts be taken as established in accordance with the claim of the party obtaining the order;
- an order refusing to allow the disobedient party to support or oppose designated claims or evidence, or prohibiting that party from introducing designated matters in evidence;
- an order striking pleadings, or staying further proceedings until the order is obeyed, or dismissing the action or rendering a default judgment against the disobedient party;

25. In addition the court may treat the failure to obey as contempt of court. Similar penalties may be imposed for failure to disclose or to amend prior responses to discovery.

26. Analogous procedures exist in FTC administrative adjudications, where a party may seek an order compelling disclosure or discovery, including a determination of the sufficiency of the opposing party’s answers or objections to discovery requests or required disclosures.<sup>36</sup> If a party fails to comply with any discovery obligation under the FTC’s rules of practice, the ALJ or the Commission (or both) may – upon motion by the aggrieved party – take such action “as is just,” including but not limited to the following:

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<sup>34</sup> 16 C.F.R. § 3.31(b).

<sup>35</sup> Fed.R.Civ. P. 26(c).

<sup>36</sup> 16 C.F.R. § 3.38.

- Order that any answer be amended to comply with the request, subpoena, or order;
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- Order that the matter be admitted or that the admission, testimony, documents, or other evidence would have been adverse to the party;
- Rule that for the purposes of the proceeding the matter or matters concerning which the order or subpoena was issued be taken as established adversely to the party;
- Rule that the party may not introduce into evidence or otherwise rely, in support of any claim or defense, upon testimony by such party, officer, agent, expert, or fact witness, or the documents or other evidence, or upon any other improperly withheld or undisclosed materials, information, witnesses, or other discovery;
- Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld admission, testimony, documents, or other evidence would have shown; or
- Rule that a pleading, or part of a pleading, or a motion or other submission by the party, concerning which the order or subpoena was issued, be stricken, or that a decision of the proceeding be rendered against the party, or both.

27. Court enforcement may be sought where the ALJ determines that such relief would not be sufficient, or in instances where a nonparty fails to comply with a subpoena or order.

### **3.4. *Rules of Attorney Client Privilege***

28. Certain information is protected from discovery under well-established U.S. rules of privilege, which apply in both court proceedings and administrative adjudications before the FTC.<sup>37</sup> Rule 501 of the Federal Rules of Evidence provides that a privilege “shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.” While a number of different privileges exist, those most commonly invoked in antitrust cases are the attorney-client privilege, which, under U.S. law, generally protects a person’s request for legal advice from his or her attorney, and covers both outside counsel and in-house counsel, and the work product rule, which protects materials prepared in anticipation of litigation. Both of these privileges are subject to an exception for communications with attorneys that were made in furtherance of an ongoing or future criminal or fraudulent act. The privilege against self-incrimination can be invoked in any sort of proceeding in which a witness is asked a question that he believes will require him to implicate himself criminally.

### **3.5. *Expert Witnesses***

29. Expert witnesses are frequently used in civil antitrust litigation and FTC administrative adjudications. Experts may be appointed by the court, or separately hired by each party to explain complex economic issues, accounting subtleties, or substantive areas (e.g., software, technology, science). Prior to

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<sup>37</sup> See, e.g., 16 C.F.R. § 3.31(c)(4) (providing that “[d]iscovery [in FTC administrative proceedings] shall be denied or limited in order to preserve the privilege of a witness, person, or governmental agency as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in the light of reason and experience”).



trial or administrative hearing, a party must disclose to other parties the identity of any person who may be called as an expert witness, along with a signed written report indicating his opinion, facts and data considered, exhibits to be used, qualifications, previous testimony, and compensation.<sup>38</sup> A party may depose any person who has been identified as an expert whose opinions may be presented at trial or administrative hearing.<sup>39</sup> At trial, or during an administrative hearing before the FTC, expert witnesses are subject to cross-examination regarding their qualifications, bias, and opinions. Purely conclusory expert testimony may be accorded little or no weight.<sup>40</sup> Consequently, expert reports are often quite extensive and even more detailed than the eventual testimony. Expert reports have to include the opinions to be offered by the expert and the basis for each opinion, and the party offering the expert will have to make out a prima facie case for admissibility, establishing that the witness is indeed an expert on the relevant subject matter and that a basis exists in both fact and the discipline of the expert for every opinion.<sup>41</sup>

### 3.6. *Closing Statements*

30. Although there are no formal rules requiring the Department to make a public announcement upon closing an antitrust investigation, it has a policy of doing so in significant civil matters.<sup>42</sup> Similarly, as part of its efforts to provide further transparency to its decision-making process, the FTC sometimes publishes public statements explaining the reasons for closing second-stage merger investigations.<sup>43</sup>

### 3.7. *Settlements*

31. When the Department concludes a civil antitrust investigation by settlement or consent decree, the Tunney Act requires a complaint, proposed settlement, and a competitive impact statement to be filed in federal district court.<sup>44</sup> The Act provides for wide publication of the details of any proposed settlement, and for a period of public comment on the proposal. The statute requires the Department to consider those comments, and the court must ultimately determine that the settlement is in the public interest before it can take effect. The FTC's acceptance of a proposed consent agreement also initiates a public process, whether before or after an enforcement action has been initiated. Every consent agreement proposed must contain certain provisions, largely designed to ensure that the decree is enforceable and legally sustainable in case compliance problems arise later.<sup>45</sup> If the FTC accepts a proposed consent agreement, the entire proposed agreement and complaint are usually available for public comment. To facilitate input by the public, the Commission simultaneously publishes an analysis to aid public comment, which explains in lay terms the violations alleged and proposed remedies. It is intended to disclose information sufficient to educate the public about the facts and underlying rationale of the proposed consent agreement, and describe the competitive harm addressed, the nature and extent of the evidence involved, the nature of the proposed remedy vis-à-vis the harm identified, and the consumer impact of the competitive harm. After

<sup>38</sup> Fed. R. Civ. P. 26(a)(2)(B), 16 C.F.R. § 3.31A(a)—(c).

<sup>39</sup> Fed. R. Civ. P. 26(b)(4)(A), 16 C.F.R. § 3.31A(d).

<sup>40</sup> See *SMS Sys. Maint. Servs., Inc. v. Digital Equip. Corp.*, 188 F.3d 11, 25 (1st Cir. 1999) (“Expert testimony that offers only a bare conclusion is insufficient to prove the expert’s point.”).

<sup>41</sup> See also Fed. R. Evid. 702.

<sup>42</sup> See Issuance of Public Statements Upon Closing of Investigations (2003), available at <http://www.justice.gov/atr/public/guidelines/201888.pdf>.

<sup>43</sup> See, e.g., *Statement of the Commission Concerning Google/AdMob* (May 21, 2010), available at <http://www.ftc.gov/os/closings/100521google-admobstmt.pdf>.

<sup>44</sup> 15 U.S.C. § 16.

<sup>45</sup> 16 C.F.R. § 2.32.

the comment period closes, the Commission evaluates the record and determines whether to accept, change, or reject the settlement.<sup>46</sup>

#### **4. Update on recent United States developments relating to procedural fairness and transparency**

32. The Agencies have made ensuring procedural fairness and increasing transparency a priority. Three examples of this are described below.

##### **4.1. *United States Department of Justice Antitrust Division Remedies Guide***

33. Announced in June 2011 and addressed at the June WP3 Roundtable, the policy guide is a tool for Department staff to use in analyzing proposed remedies in its merger matters.<sup>47</sup> It also provides transparency into the Department's approach to merger remedies for the business community, the antitrust bar and the broader public. The goal of the Department remains the same – to provide an effective remedy to eliminate the anticompetitive effects of a proposed transaction. The policy guide states that effective merger remedies typically include structural or conduct provisions, or a combination. In horizontal merger matters, the Department continues to rely predominantly on structural remedies, sometimes in combination with conduct remedies. However, the Department has found that in many vertical transactions tailored conduct relief can prevent competitive harm while allowing the merger's efficiencies to be realized.

##### **4.2. *Horizontal Merger Guidelines***

34. Approximately one year ago, the Agencies announced revisions to the Horizontal Merger Guidelines, which had not been updated since 1992.<sup>48</sup> These Guidelines outline the principal analytical techniques, practices, and the enforcement policy of the Agencies with respect to mergers and acquisitions involving actual or potential competitors under the federal antitrust laws. The Guidelines also describe the main types of evidence on which the Agencies usually rely to predict whether a horizontal merger may substantially lessen competition. They are designed in part to assist the courts in developing an appropriate framework for interpreting and applying the antitrust laws in the horizontal merger context, based on the Agencies' long-standing expertise and experience with antitrust law cases. The Guidelines are also intended to assist the business community and antitrust practitioners by increasing the transparency of the analytical process underlying the Agencies' enforcement decisions.

##### **4.3. *Revisions to FTC Rules of Practice***

35. In 2009, as part of the FTC's periodic internal review of its adjudicative proceeding process, the FTC finalized rules to expedite the prehearing, hearing, and appeal phases of its adjudications; streamline discovery and motion practice; and ensure that the agency can apply its substantive expertise, as appropriate, earlier in the process.<sup>49</sup> The changes are intended in part to provide greater clarity, transparency, and fairness, including by establishing a more rigorous timetable for administrative litigation so that respondents are not harmed by unnecessary delay in the determination of their rights and

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<sup>46</sup> 16 C.F.R. § 2.34.

<sup>47</sup> *Antitrust Division Policy Guide to Merger Remedies*, United States Department of Justice, Antitrust Division (June 2011), available at <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

<sup>48</sup> *Horizontal Merger Guidelines*, United States Department of Justice and Federal Trade Commission (Aug. 19, 2010), available at <http://www.ftc.gov/os/2010/08/100819hmg.pdf>.

<sup>49</sup> See <http://www.ftc.gov/opa/2009/04/part3.shtm>.

responsibilities. Earlier this year, the FTC made further modifications to its rules of practice relating to discovery, the labeling and admissibility of certain evidence, and deadlines for oral arguments.<sup>50</sup>

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<sup>50</sup> See <http://www.ftc.gov/opa/2011/08/part3.shtm>.