Doutrina

[1] A BRIEF OVERVIEW OF THE FEDERAL TRADE COMMISSION'S ORGANIZATION AND OPERATION [2]

Nota:

1 Disclaimer: this piece of work represents the personal views of the author and shall not be interpreted or construed as the official understanding of either CADE or the FTC.

2 This article has been properly submitted to the Federal Trade Commission for clearance purposes.

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Nota:

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O presente texto é resultado do primeiro *International Fellows Program* da agência concorrencial norte-americana *Federal Trade Commission* (FTC), cujo compartilhamento de informações sigilosas foi amparado pelo US Safe Web Act de 2006. Designado por três meses (setembro-dezembro/2007) na condição de funcionário especial do governo norte-americano para seu Escritório da Concorrência (*Bureau of Competition*), o trabalho tem como epicentro elucidar o aspecto procedimental da análise prévia dos atos de concentração por esse órgão. Nesse sentido, a rotina e os instrumentais apresentados podem ser úteis na análise do projeto de reestruturação do modelo concorrencial brasileiro, que muito se espelha no homólogo estadunidense.

Palavras-chave: Premerger; second request; early termination; waiting period; thresholds; consent agreements; quick look; preliminary injunction; divestiture.

This piece of work was developed as a result of the US Federal Trade Commission International Fellows Program developed under the US Safe Web Act of 2006, which has entitled participants to access sensitive information. This report gives an overview of the premerger analysis after working for three months (Sept-Dec/2007) at the Bureau of Competition as a US special federal employee. Hopefully the routine and procedures reported hereby may become a useful tool in the study of the proposed new antitrust system, which has the American pattern as a cornerstone.

Keywords: premerger; Second Request; early termination; waiting period; thresholds; consent agreements; quick look; preliminary injunction; divestiture

FOREWORD [4]

Nota:

4 Acknowledgement: This piece of work would not have been possible without the efforts of Chairwoman Majoras, the Commissioners and BCstaff. For such an enriching opportunity, I also thank Commissioner Luiz Carlos T. Delorme Prado and Chairwoman Elizabeth M. M. Querido Farina from CADE, who have appointed me after a fair and impartial bid amongst the CADE staff. For her unconditional support, my special thanks to my beloved wife Ana Luiza de Oliveira Lima Taufick.

The Brazilian competition system is quite recent and comes in the wake of Law 8884/94 – traditionally, although improperly, called antitrust law.

There has been no real trust in Brazil – whose main corporations have been historically steered by the state. The Brazilian bourgeoisie comes from the professional services, especially the legal and bureaucratic ones – meaning that the entrepreneurial spirit, although inevitably present in Brazilians like Mauá, has not received financial and political support until very recently. The term antitrust comes then from the American concern that inspired the enactment of the Sherman Antitrust

Act still in the 19 th century.

Dating back 1962, Brazil 's first "antitrust" law tackled only anticompetitive practices. Merger analyses were simply ignored. Enacted in our very brief parliamentary experience, Law 4137/62 creates the Administrative Council for Economic Defense ("CADE") and sets forth that the five Commissioners should be nominated by the President of the Council of Ministers and appointed by the President of the Republic – giving absolute political control over the activities of the Commission.

Two years later, resuming the presidential regime, CADE becomes a stretch of the presidential arms. For a myriad of reasons – from the lack of quorum and competition expertise through the ongoing rampant inflationary process and political interference – CADE cannot develop the culture of competition and is incorporated by the main political concern of tackling inflation, situation which would endure until the mid-1990's.

In 1991, when Brazil is on the brink of neo-liberalism and trying to attract foreign investors, a new law is enacted to re-launch the antitrust policy. Although (a) creating a new investigative agency (the National Secretariat for Economic Law, the "SNDE"), (b) assigning CADE the single role of trying the defendants and also (c) allocating both of them to the Ministry of Justice, the relevance of inflation, the remaining political influence over the agencies and lack of antitrust culture have led Law 8158/91 to absolute failure. Both the SNDE and CADE are once again incorporated as anti-inflationary agencies.

Once the Real Plan is launched in 1994, Brazil 's antitrust is remodeled by Law 8884/94, regarded as a turning point for finally bringing merger analysis under the umbrella of CADE. Also, said statute brings a third bureau to the competition analyses: the Secretariat for Economic Monitoring ("SEAE"). The three agencies are not new though. SEAE itself was part of SUNAB [5] , one of Brazil 's most important anti-inflationary watchdogs then. Hence, the most relevant concern in the wake of Law 8884/94 was whether CADE, the SDE and SEAE would be able to leave behind their price monitoring roots.

Nota:

5 Brazilian National Supply Bureau.

Unlike the three Brazilian bureaus, the Federal Trade Commission ("FTC") was created in 1914, when Woodrow Wilson was President, and eleven years after President Theodore Roosevelt supported the creation of its predecessor, the Commerce Department's Bureau of Corporations. The creation of the FTC followed the debates over antitrust that dominated the 1912 election – in the aftermath of the Supreme Court's rule of reason analysis in the Standard Oil matter one year earlier.

Both former Presidents shared the view that the role of the gove-rnment should not be to interfere in the economy, but rather to assist the private parties to understand which practices were lawful or not. The original purpose of the Bureau of Corporations was to conduct industry and policy researches for the Congress and the President. In the words of President Wilson, the FTC would rather replace the Department of Justice's strictly repressive role with an educative approach [6] . Unlike its predecessor, the FTC could also bring administrative cases.

Nota:

6 WINERMAN, Mark Op. cit.

The task at the FTC is divided between its three bureaus: the Bureau of Competition ("BC"), the Bureau of Economics ("BE") and the Bureau of Consumer Protection ("BCP"). The BE is assigned with the task to provide economic analyses for both the BC and the BCP. The bureaus are arranged in different areas (the "shops") provided with experts (mainly lawyers and economists) who must deal with area-specific matters.

As we have depicted, one must not take the Brazilian competition system (the SBDC) for the FTC three-folded. Rather, we could compare, to some extent: (a) the BE and its divisions to SEAE and its divisions; (b) the BC and its shops to the SDE antitrust department (the DPDE) and its division; (c) the FTC's Commission to CADE. The mere existence of three distinct bureaus does not allow construing that in Brazil there are three ultimate decision-making entities – which shall be deemed an unfortunate *imbroglio* . Both SEAE and the SDE/DPDE are only entitled to conduct investigations and give recommendations to CADE.

Regarding the BCP, it finds no match within the Brazilian federal administration. However playing an important role in major consumer protection matters, the consumer protection department of the SDE (the DPDC) is usually assigned a much broader role of political coordination of the state and local Procons, which are the ultimate consumer protection agencies in Brazil .

UNVEILING THE FTC

Personnel

Working in the American law firm fashion, the FTC selects mostof its employees -- currently there are approximately 1,100 – in a curricu-lum-based process and grants them, mainly lawyers and economists, a career plan. The five commissioners, on the other hand, are appointed by the President for terms of seven years, by and with the advice and consent of the Senate. According to the Federal Trade Commission Act ("FTCA", defined as 15 U.S.C. §§41-58, as amended), "[e]ach commissioner shall receive a sa-lary, payable in the same manner as the salaries of the judges of the courts of the United States ".

In the Bureau of Competition ("BC"), Law graduates usually join "the firm" even before they are admitted to the bar – having more than a year to pursue their lawyer certificate, which is roughly equivalent to three attempts to succeed in the

American Bar Association's entrance exams. More experienced attorneys are welcome as well and presumably join the career in higher ranks.

Vacancy announcements are used to notify the FTC employees and the public of the vacant position and are available on the Office of Personnel Management ("OPM") site and on the FTC's Intranet. Most candidates are evaluated on the basis of experience, education, training, awards and supervisory appraisals.

The staff can be labeled according to four main categories: the (a) permanent, (b) term, (c) temporary and (d) non-career appointees. Permanent employees, comprising of career, career-conditional, excepted and excepted-conditional appointments, are expected to last more than one year and differ from term public servants to the extent that the latter are hired under a 4-year limit. Term assignments are usually appointed for a 14-month period that can be extended to four entire years.

Opposite to permanent and still unlike term, temporary appointments are not expected to last more than one year, even though they can be extended to a 2-year ceiling. Temporary appointments can also be terminated anytime prior to the end of the appointment.

Non-career appointment in the excepted service is usually identified with the senior executive service (SES) and is filled in by influential individuals who may not be part of the internal career but tend to stay longer than one year and consistently do not have their assignments subject to a precise final term. The SES consists of an elite corps of managers charged with running the federal government. It is a separate system consisting of executive or management positions that exceed the GS-15 grade level. Pur-suant to the basis for grading positions set forth in 5 U.S.C. § 5104:

> "(15) Grade GS–15 includes those classes of positions the duties of which are:
>
> (A) to perform, under general administrative direction, with very wide latitude for the exercise of independent judgment, work of outstanding difficulty and responsibility along special technical, supervisory, or administrative lines which has demonstrated leadership and exceptional attainments;
>
> (B) to serve as head of a major organization within a bureau involving work of comparable level;
>
> (C) to plan and direct or to plan and execute specialized programs of marked difficulty, responsibility, and national significance, along professional, scientific, technical, administrative, fiscal, or other lines, requiring extended training and experience which has demonstrated leadership and unusual attainments in professional, scientific, or technical research, practice, or administration, or in administrative, fiscal, or other specialized activities; or
>
> (D) to perform consulting or other professional, scientific, technical, administrative, fiscal, or other specialized work of equal importance, difficulty, and responsibility, and requiring comparable qualifications."

The civil service consists of competitive, excepted and senior executive services. The primary differences lie in appointment procedures and job protections. The competitive service, including most positions in the executive branch, is regulated by law or by the OPM and is biding upon all agencies. In the excepted, only basic requirements are prescribed by law and each agency develops specific rules for their own personnel.

Career and career-conditional are the most common competitive service appointments. The usual entrance method to the competitive service is to be selected for an appointment after competing in an examination with other applicants. However rare, legal provisions allow for competitive service appointments without examination though.

The excepted service (or positions excepted from the competitive service) is divided into three main categories: schedules A, B and C. Schedule A applies to positions to which it is not practical to use the qualification standards of the competitive service; schedule B involves positions to which it is not practical to hold open competitive examinations, even though OPM standards must be met by the appointees; schedule C are key policy determining positions or involve close personal contact between the incumbent and key officials. No examinations are required and the agency appoints who they assess as being qualified.

Unlike the economists, FTC lawyers are in the excepted and not in the competitive civil service. Nevertheless, just like the competitive civil service FTC attorneys serve trial periods and have career ladders. Probationary or trial period is the 1-year period in which the suitability for and competence in the job are assessed so as to define if the employee must be retained or returned to his previous position or a comparable one. Even SES employees are subject to the trial period.

It should be remarked that even though the lawyers are usually assigned a leading role in the BC – and this is especially true if one takes into account the fact that they head the investigations –, the analyses following the Second Request are increasingly more economic or, moreover, econometric, which means that the task of the economist is becoming rather specific so as to make it unviable for a lawyer to perform. On the other hand, since the Second Request is so rare and antitrust attorneys are quite familiar with the basic economic concepts applicable to the ordinary matters, the structure of the agency is still fully justifiable. Attorneys also have preeminence in court proceedings and in the composition of the Commission – in the latter, for its decision-making role.

The FTC maintains specific personnel appointed to contact the states where the operation is about to take place. The staff are in charge of informing their counterparts in that (those) specific state(s) – more specifically the state's attorney general – and achieve their cooperation that may be helpful to understand a specific market. Such help may come by means of joint undertakings, like cross-border conference calls, but also by means of separate projects, like local surveys.

Besides that, the FTC counts on regional offices covering seven geographic areas which account for the country as a whole, including Alaska , Hawaii and Puerto Rico . For competition purposes there are three specific offices serving as regional centers: the Western, Northwest and Northeast Regional Offices. Such measures are particularly important for the US not only for its vast territory, but also due to jurisdiction conflicts that are well-expressed in the "state action" [7] and "preemption" [8] doctrines. The discussions surrounding both doctrines also solidify the political immunity behind the regulatory exemption [9] . Quoting Areeda and Hovenkamp:

Nota:

7 Please refer to Parker v. Brown.

8 Please refer to Justice Rehnquist's dissent in Community Communications Co. v. City of Bolder , as well as to the following Rice v. Norman Williams Co., Fisher v. City of Berkeley and Liquor Co. v. Duffy.

9 Contrasting, Section 15 of the Brazilian Antitrust Law expressly allows for the use of the competition enforcement to public entities.

> "In sum, antitrust's intervention into the political process is inappropriate once it is determined that the government itself rather than a private actor is the relevant decision maker. Even if the resulting decisions are anticompetitive or seem contrary to the general values of our free market system, it is not antitrust's job to correct failures in the democratic process. To be sure, if Congress wished it could have designed such legislation and perhaps even permitted private lawsuits to enforce it, other legislation has been designed for that purpose. But the Sherman Act, Clayton Act, and other antitrust laws from their inception were directed at 'private' restraints. Their language contains no mechanism for identifying the appropriate limits of regulatory power of any level of government.
>
> To be sure, one can find in the background history of antitrust much evidence that the Sherman Act was addressed to governmentally imposed as well as privately imposed restraints. Section 2 of the Sherman Act condemns those who 'monopolize', and historically a monopoly was a government grant of an exclusive right to engage in a particular enterprise. The common law, particularly during the regime of Lord Coke, was especially hostile toward monopolies given by letters patent from the Crown, mainly as a political reward. Indeed, the great British Statute of Monopolies of 1624 was directed first at monopolies created by the government, not at those created by private parties. The first section of that statute condemned all monopolies and all commissions, grants, licenses, charters, and letter patents heretofore made or granted, or hereafter to be made or granted to any person or persons, bodies politic or corporate whatsoever, or of for the sole buying, selling, making, working, or using of anything, or of any other monopolies.
>
> Could not one infer from this that the granting of a statutory or franchise monopoly to a telephone company, a taxicab company, or a towing service picking up illegally parked cars was also intended by the framers of the Sherman Act to be a § 2 violation?
>
> The answer is generally no, for several reasons. First, when the members of Congress debating the Sherman Act defined 'monopolizing' conduct, they almost always spoke of it in terms of 'engrossing' to oneself all of a trade or business. Second, under the then-prevailing concept of Commerce Clause power, a state had the constitutional power to create a monopoly only within its sovereign territory. By contrast, federal power extended only to activities that were unambiguously 'in interstate commerce'. Even application of the Sherman Act to a manufacturing trust composed of firms in numerous states but that involved no actual interstate movement, was in doubt; and these doubts were realized when the Supreme Court refused to apply the Sherman Act to just such an arrangement in the E.C. Knight case. In sum, any monopoly within the regulatory jurisdiction of a state, and certainly of a local government, would have been outside the regulatory jurisdiction of the federal government. No member of Congress suggested that the Sherman Act would reach a completely intrastate monopoly grant --such as an exclusive grant from a city to a waste hauler, draying service, or street repair company. Indeed, very likely not a single speaking member of Congress who knew anything about the matter believed federal commerce power would extend thatfar. [According to the authors ('231b2. Arguments for gi-ving the FTC Act the same limitations as the Sherman Act'), not even the FTCA: In 1975 the FTC Act was amended to reach all matters 'affecting' commerce as well, but the legislative history of the amendments gives no indication that they were designed to enable the FTC to reach restraints imposed by state or local governments].
>
> Third, even disregarding the second point, no statement by any congressmen of the evils at which the Sherman Act was to be directed included government-created exclusive franchises. This point is particularly important given the constitutional history of such franchises. In the Slaughter-House Cases, decided 15 years before the Sherman Act was debated, a bitterly divided Supreme Court had upheld a state grant of an exclusive slaughterhouse franchise in New Orleans . During the ensuing era of 'substantive due process', both state and local government grants of franchise monopolies were frequently made subject to constitutional challenge. Most were generally upheld, notwithstanding severe criticism by contemporary scholars. The government creation of such monopolies was thus politically controversial, and some members of Congress might certainly have presumed that legislation was necessary to strike down more state-created monopolies than the courts had seen fit to condemn on Fourteenth Amendment or state Due Process grounds. Nevertheless, such state-created monopolies are not the topic of discussion in the legislative history of the Sherman Act.
>
> Fourth, after the Sherman Act was passed, private parties went right on challenging state and local government monopoly franchises under the Fourteenth Amendment of the Constitution or equivalent provisions in state constitutions. But the Sherman Act did not become an instrument in such challenges. If any significant group of lawyers had believed that the Sherman Act addressed state-created monopolies that legislation would undoubtedly have been brought to bear.
>
> In sum, while the 'monopoly problem' in 1890 was regarded as severe and while many thought that state-created monopolies were odious and ought to be abolished, the Sherman Act was not regarded as an instrument for such purposes. Its job was to pursue private restraints and monopolies and to leave publicly imposed restraints to other forms of government intervention."

So far the FTC has been very successful in replacing conflicts of jurisdiction with clearance and close cooperation.

REPORTING

The parties to a merger contract are invited to file their operations as early as possible with both the FTC and the Department of Justice (DOJ) by means of the "Notification and Report Form". Generally all the parties are required to file. In the case of a cash tender offer such burden lies with the acquiring person only, though. Although online filings are available, seldom do the parties replace traditional paper-based filings.

At the FTC the Notification and Report Form is handled by the Premerger Notification Office ("PNO"). The PNO has developed preliminary analyses skills, looking for overlapping products and evidence of significant competitive issues. Also, the PNO even goes through non compete clauses and evidence of significant 4C document information in the filed materials. The 4C documents are named after section 4C of the "Antitrust Improvements Act Notification and Report Form for Certain Mergers and Acquisitions" and refer to a list of corporate papers holding sensitive *interna corporis* information on the parties individual assessment of the acquisition. *In verbis* :

> "Item 4: Furnish one copy of each of the following documents. For each entity included within the person filing notification which has prepared its own such documents different from those prepared by the person filing notification,

furnish, in addition, one copy of each document from each such other entity. Furnish copies of:

Item 4(c)-all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets, and indicate (if not contained in the document itself) the date of preparation, and the name and title of each individual who prepared each such document.

Persons filing notification may provide an optional index of documents called for by Item 4 of the Answer Sheets.

NOTE: If the person filing notification withholds any documents called for by Item 4(c) based on a claim of privilege, the person must provide a statement of reasons for such noncompliance as specified in the staff formal interpretation dated September 13, 1979, and § 803.3(d)."

Any individual and the parties to a merger are welcome to contact the PNO so as to ask questions about report requirements on hypothetical or actual mergers. If, despite all the clarification, the parties submit to the FTC a non reportable operation, the staff "discard" the filing and return the undue filing fees.

Premerger notification doubts may be addressed by means of formal interpretations [10] issued by the Commission after being placed in the public record for comments. Further day-to-day concerns, nonetheless, can be clarified *in casu* by means of informal interpretations of the staff – a mix of lawyers and paralegals with premerger-oriented training. PNO informal constructions, whether oral or written, are not binding.

Nota:

10 http://www.ftc.gov/bc/hsr/frmlintrps/index.shtm

Premerger queries usually come through informal phone calls. In more complicated matters, the oral questions may also be (e)mailed later asking for written confirmation of given understanding. The outcomes of the written understanding are the so-called PNO informal interpretation letters [11] .

Nota:

11 http://www.ftc.gov/bc/hsr/informal/index.shtm

The PNO is responsible for clarifying a myriad of questions and it shall remain clear that its informal help is a useful but not binding guideline. However unbinding, following the PNO's instructions may yield two very important outcomes. First, the lack of notification after a pro-report PNO advice will certainly counterweigh the usual lenient approach of the Commission towards a first failure to report. Second, an advice not to report from the PNO may not preclude the Commission's right of surveillance or to ask for information about the merger [12] , but it naturally deprives the Commission of the willingness and lessens its legitimacy to collect fines for not reporting [13] .

Nota:

12 For an example, please refer to Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc., File nº 011 0234, Docket nº 9315.

"The fact of the matter is that the parties were advised by the Staff of the Federal Trade Commission that they were not required to file an HSR Form, which would have given the government prophylactic notice of the Merger. Moreover, Complaint Counsel did not file suit until more than four years after the Merger." (Pretrial Brief of Respondent Evanston Northwestern Healthcare Corporation, page 43)

13 This consequence may raise a matter for discussion on whether lawyers would or not be able to assess the operation in a broader perspective than ordinary paralegals. It is commonsense, however, that the PNO performs an outstanding job and that failures in informal advices cannot be entirely curbed. Since the advice is informal, I also mention that the FTC stands a chance of collecting the fines in a civil suit to be filed with the District Court. Nevertheless, unless evidently deceived by the consulters, such choice would increasingly impair not only the PNO, but also the trust in the agency's rule of reason and sense of justice.

The PNO is also responsible for summarizing the Notification and Report Form into the "Premerger Notification and Report Summary". After processing the papers, its Deputy Assistant Director ("DAD") is entitled to forward the Premerger Notification and Report Summary to a shop [14] and recommend early termination [15] to its Assistant Director ("AD"). In fact, except for major cases, the whole procedure is usually decentralized to the PNO expert who primarily received the notification.

Nota:

14 As already said, a "shop" is the generic denomination given for every team working on area-specific mergers. Currently the FTC has four merger areas, each one dealing with a specific industry.

15 "The Commission has been active in protecting consumers from anticompetitive mergers and anticompetitive conduct. Through 11 months of fiscal year 2007, the agencies have received 1967 premerger filings, an increase of 23 percent from the same time period of fiscal year 2006. Reflecting an increase in investigative activity, the number of requests for additional information issued by the Commission increased over the same period. The Commission's merger enforcement actions also

have increased this year. Thus far in fiscal year 2007, there have been 21 mergers in which the Commission brought merger enforcement actions to preserve competition or the parties abandoned proposed mergers after Commission staff expressed concerns about anticompetitive harm. This number includes three litigated preliminary injunction actions in federal district court seeking to block proposed mergers involving petroleum refiners, natural gas companies, and premium natural and organic supermarkets. Also this year, the Commission has brought 12 nonmerger enforcement actions. The Commission continues to focus its enforcement efforts on sectors of the economy that have the greatest impact on consumers, such as health care, energy, retail, technology, and real estate." (Prepared Statement of the Federal Trade Commission Before the Antitrust Task Force of the Committee on the Judiciary United States House of Representatives – Washington , D.C. , September 25th, 2007)

NON REPORTING ISSUES

Should the parties merge without notifying the FTC/DOJ or complying with any other requirement of the Clayton Act, the merger may be deemed illegal and the Commission may seek injunctive relief and civil penalties. Whether to seek injunctive relief or not is a question of whether the Commission has reason to believe that the transaction violates the antitrust laws [16] .

Nota:

16 http://www.ftc.gov/bc/hsr/postconsumfilings.shtm

Pursuant to the 15 U.S.C. §18a of the U.S. Code (Hart-Scott-Rodino Act [17] ("HSR") or section 7A of the Clayton Act, defined as 15 U.S.C. §§ 12-27), any party who fails to comply with any provision of this section shall be liable to the United States for a civil penalty of not more than $10,000 [18] for each day during which such person is in violation of said section. Such penalty may be recovered in a civil action brought by the United States by means of the FTC or the DOJ. If the parties fail to comply with the notification requirement or any request for the submission of additional information or documentary material within the waiting period as may be extended by the Second Request, the federal district court may also order compliance and extend the waiting period, as well as grant any other remedy it may consider necessary and/or appropriate.

Nota:

17 The HSR established premerger in the US . According to Peter W. Rodino. Jr., one of the fathers of the premerger legislation "Hart-Scott-Rodino was intended to give the anti-trust agencies two things: critical information about a proposed merger and time to analyze that information and prepare a case, if necessary. From what I hear, the legislation absolutely has transformed merger enforcement. Competition, as well as the consumer, has benefitted." (statement of Peter W. Rodino. Jr. on the Nota:

25 th anniversary of the HSR) In other words, the HSR made it possible for both the FTC and the DOJ to enjoin a merger without having to "unscramble the eggs".

18 As adjusted by the Federal Register annually.

Nevertheless, the FTC is used to charging only repeat offenderswith non-report penalties. In this sense, in most cases first-time non-com-pliance does not result in civil actions. According to Barry Nigro, Deputy Director of the FTC's Bureau of Competition in 2004 "[a]lthough the Commission has often declined to seek penalties from a party that makes an inadvertent mistake and fails to file, once he is aware that he doesn't have a complete understanding of the HSR Act he needs to go back and learn about the Act so he doesn't make a second mistake" [19] . An example of that can be found in William H. Gates, III's acquisition of voting securities of Republic Services, Inc. and ICOS Corporation. According to the FTC's release [20] :

Nota:

19 http://www.ftc.gov/opa/2004/05/gates.shtm

20 Ibidem.

> "On November 2, 2001, Gates acquired additional shares of Republic that put his holdings over 10 percent of the outstanding shares of Republic. Gates did not file under the HSR Act prior to making that acquisition, relying on the exemption from the reporting requirements for acquisitions solely for the purpose of investment. That exemption is limited, however, to holdings that do not exceed 10 percent of the shares. Gates discovered the violation and made a corrected filing on November 16, 2001.
>
> The FTC's Premerger Office informed Gates by letter that it would not recommend civil penalties for this violation, but also informed him that he 'is accountable for instituting an effective program for entities he controls to ensure full compliance with the Act's requirements. Nevertheless, six months later on May 9, 2002, Gates violated the HSR Act when he acquired shares in ICOS. Again, Gates did not file under the HSR Act prior to acquiring the voting securities, relying on the same exemption. Gates was not eligible the exemption for acquisitions made solely for the purpose of investment because he was on the board of directors of ICOS."

The aforementioned example highlights that the FTC is interested in using the first non-compliance as an educative instrument to those that do not have a complete understanding of the HSR [21] . The agency is also keen to reduce the fine depending on the defendant's cooperation. On the other hand, the Commission tends to seek substantial penalties for the

second mistake. In the abovementioned case, the Commission vote to refer the complaint to the U.S. Department of Justice for filing on the FTC's behalf was 5-0.

Nota:

21 In determining whether and how much civil penalties are warranted, the Agencies will consider all of the facts, including among other factors, the parties' explanations, whether the violation was the result of understandable and simple negligence, whether a filing was made promptly after discovering the failure to file, whether the parties realized any benefit or advantage from their failure to file, and whether the parties have implemented adequate measures to prevent any future violations. The Agencies reserve the right to take action against any violation of the Act. (http://www.ftc.gov/bc/hsr/postconsumfilings.shtm)

MEETING THE THRESHOLDS

An operation is only required to be reported once it fulfils three conditions concomitantly: (a) commercial enterprise, (b) size-of-person and (c) size-of-transaction. The first is also the easiest to be explained: either of the parties must be engaged in commerce or in any activity affecting commerce. The following two are a little bit more complex.

According to the Clayton Act, one of the parties must have annual net sales or total assets valuing at least $ 100 million and the other at least $ 10 million [22] . The annual net sales must be those as stated in one's last regularly prepared annual statement. Both assets and sales must comprise the sales and assets of all controlled entities, domestic or and foreign, included within the person.

Nota:

22 As adjusted by the Federal Register annually.

The value set forth by the Clayton Act is nevertheless a reference, since the amount is updated annually according to the change in the level of the gross national product. The accurate value is published every January by the Federal Register as "Revised Jurisdictional Thresholds for Section 7A of the Clayton Act".

On the other hand, the size-of-transaction is met if the acquiring person will hold as a consequence of the acquisition an aggregate amount of voting stock and assets of the acquired person worth more than $ 50 million (as adjusted by the Federal Register annually).

As already said, reporting demands the joint co-existence of the three aforementioned conditions. The aforesaid notwithstanding, the parties are also to report when the acquiring person will hold as a consequence of the acquisition an aggregate amount of voting stock and assets of the acquired person worth more than $ 200 million (also as adjusted by the Federal Register annually), irrespective of size-of-person requirements. In this specific case, size-of-person conditions are dismissed. Another partial exception to the size-of-person test happens when the acquired person is not engaged in manufacturing. In this particular case only its total assets are considered in determining its size if the turnover happens to be less than 100 million dollars.

The size of the transaction is measured by identifying the voting securities and assets to be held as a consequence of the operation. This includes cash, voting securities, tangible and intangible assets, besides any liability to be assumed by the acquiring person [23] . Voting securities are calculated based on the weighted voting rights of a determined class of shares. The percentage is derived from the ratio of the number of votes for directors of the issuer divided by the total number of votes for directors which presently may be cast by that class, multiplied by the number of directors elected by that class divided by the total number of directors [24] .

Nota:

23 http://www.ftc.gov/bc/hsr/introguides/guide2.pdf. Page 13 (2).

24 http://www.ftc.gov/bc/hsr/introguides/guide2.pdf. Pages 14/15 (c).

Authorized but unissued voting or treasury securities should be omitted, as well as convertible voting securities that have not yet been converted and do not have a present right to vote [25] . Convertibles are only reportable when filing notifications for their conversion.

Nota:

25 Likewise, CADE has persistently differentiated actual from convertible securities for reporting purposes, albeit not devoting the corresponding importance to the voting rights.

Voting securities acquired in earlier transactions are valued on the basis of their current worth, not their historical purchase price. In this regard, the values of the securities are to be evaluated according to their classification into publicly traded and untraded (NADSAQ-quoted or not traded on a national securities exchange), pursuant to the following pattern:

(i) for publicly traded, the higher between the market price and the acquisition price;

(ii)if the acquisition price of publicly traded securities has not been assessed, the market price;

(iii) for untraded, the acquisition price;

(iv)if the acquisition price of untraded stock has not been assessed, the fair market value.

The relevant person for the system is the ultimate parent entity (UPE) of both the buyer and the seller, that is, the entities that ultimately control them [26] . As defined by law (16 C .F.R. [27] § 01.1(b) [28]), control may be expressed in four different meanings: (i) holding 50% or more voting securities of the same issuer (corporate); (ii) right to 50% or more of the profits (financial); (iii) right to 50% or more of the assets in the event of dissolution (asset); (iv) contractual power to designate 50% or more of the board of directors (management). In this sense, control can obviously be performed simultaneously and jointly by two or more agents.

Nota:

26 According to the Copperweld doctrine, there must be a “complete unity of interest” amongst the entities and “the parent may assert full control over the subsidiary at any moment that the subsidiary fails to act in the parent’s best interest” 467 U.S. at 771 – 72 In this sense, schizophrenic networks where there is no financial integration or ultimate full control over their members lack unity and cannot be deemed UPEs pursuant to Copperweld.In this very sense, please refer to the Complaint Counsel’s Revised Pretrial Brief in the Evanston matter (Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc., File nº 011 0234, Docket nº 9315), dated January 27, 2005.

27 Code of Federal Regulations.

28 16 C .F.R. § 801.1 concerns “coverage rules”.

It must also be clarified that the term “aggregate amount of stock and assets” stands for the joint holdings that arise from time and personal ties, like those that can be established between spouses and between parents and their minor children. As well, “aggregate” also refers back to previous purchase operations of assets and securities involving the same persons. In this sense:

(i) previously owned voting securities must be aggregated to the new acquisition;

(ii)assets acquired previously to the acquisition of the voting securities must not be aggregated with them [29] . The opposite is untrue;

Nota:

29 The Commission explained the exclusion of assets in the second instance when it promulgated Rule 801.13: “Once assets are sold, they confer no continuing ability to participate in the affairs of the acquired person, and so prior acquisitions of assets need not be considered for purposes of subsequent acquisitions of stock”.

(iii) new assets are only aggregated with previous assets acquisitions that have not been reported previously.

(a)nevertheless, even if the former operation has not been reported, the following transaction must only be aggregated with it if it has happened pursuant to a letter of intent signed or an agreement entered into not later than 180 that the first operation was consummated;

(b)however, if the assets acquisitions belong to the same agreement which calls for multiple purchases, purchases taking place within the period of one year – and no longer than that – must be aggregated for reporting purposes.

It should be observed that these three conditions must be applied for every single acquisition that may derive from an operation, irrespective of if it concerns a parental, subsidiary or holding corporation. In this sense, the minority participation in a corporation not controlled by the acquired company that will arise as a collateral result of the operation must also be reported in the Premerger Notification and Report Summary if it meets the criteria established in the Clayton Act.

I would remark a very practical topic in the process of notification to the FTC and the DOJ. It is called “the notification thresholds” and was conceived in order to prevent the parties from filing after every single acquisition performed between the very same acquiring and selling persons or corporations. Pursuant to this system, the parties have one year after the waiting period to conclude the notified operation. If this condition is reached, the parties are granted five more years to increase the transfer of shares up to the next threshold. The operation is only reportable when and if the parties do reach said following threshold. The 50% threshold, which represents the acquisition of the control, represents the highest threshold and after that no other notification is needed. The thresholds for the acquisitions of voting securities are as following:

(i) $ 50 million (as adjusted by the Federal Register annually);

(ii)$ 100 million (as adjusted by the Federal Register ann-ua-lly);

(iii) $ 500 million (as adjusted by the Federal Register annually);

(iv)25%, if valued at greater than $1 billion (as adjusted by the Federal Register annually);

(v)50%, if valued at greater than $50 million (as adjusted by the Federal Register annually).

Some other operations are not reportable to the FTC or DOJ, since they have been characterized as unlikely to harm competition, for instance:

(i) stock splits that do not increase the percentage owned by any stockholder;

(ii)acquisitions of voting securities for investment purposes only, provided that they do not exceed 10% of the outstanding voting securities of the issuer and/or such acquisition does not vest upon the purchaser the power to elect alone one representative or more to the board of directors [30] ;

Nota:

30 This is also true according to the Brazilian Corporations Law (section 141, § 4, I), since partners holding at least 15% of the voting securities are entitled to appoint a member of the Administrative Council. The right to follow as an insider the decisions of the board is a clever and compelling way to enforce a cartel or get access to sensitive commercial information. The Brazilian Corporations Law (section 141, § 4, II) also entitles partners holding non voting securities but owning at least 10% of total assets to appoint a member of the Administrative Council. The cited case involving Bill Gates consisted in a double violation of subsection (ii).

(iii) acquisitions by a bank, banking association, trust, investment or insurance company for the purpose of investment of voting securities, according to a plan of organization or dissolution;

(iv)acquisitions by a bank, banking association, trust, investment or insurance company for the purpose of investment of assets in the ordinary course of business;

acquisitions of obligations that are not voting securities [31] ;

Nota:

31 Obligations must be read as securities or bonds allowing for rights, but not assets. According to American rules, even not involving voting securities, the operation must be reported when the acquiring person will hold as a consequence of the acquisition an aggregate amount of assets of the acquired person worth more than $50 million. Such threshold is justified by the financial control of the acquired entity. For details, please refer to 16 C .F.R. § 801.1(b), also cited above.

acquisitions of convertible voting securities [32] ;

Nota:

32 Note, however, that subsequent conversions of convertible voting securities may be subject to the requirements of the act. Also, pursuant to 16 C .F.R. § 801.32 “[A] conversion is an acquisition within the meaning of the act. Example: Assume that acquiring person ‘A’ wishes to convert convertible vo-ting securities of issuer ‘X’, and is to receive common stock of ‘X’ valued in excess of $ 50 million (as adjusted). If ‘A’ and ‘X’ satisfy the criteria of Section 7A(a)(1) and Section 7A(a)(2)(B)(ii), then ‘A’ and ‘X’ must file notification and observe the waiting period before ‘A’ completes the acquisition of the X common stock, unless exempted by Section 7A(c) or the regulations in this part. Since § 801.30 applies, the waiting period begins upon notification by ‘A’ and ‘X’ must file notification within 15 days. [43 FR 33537, July 31, 1978, as amended at 66 FR 8690, Feb. 1, 2001; 70 FR 4992, Jan. 31, 2005]”. In the case of the consummation of an acquisition by acceptance of tendered shares of payment, pursuant to Rule 801.33 “The acceptance for payment of any shares tendered in a tender offer is the consummation of an acquisition of those shares within the meaning of the act. [48 FR 34433, July 29, 1983]”.

(vii) additional acquisitions by owners of already 50% of the voting securities;

(viii) acquisitions in the ordinary course of business;

(ix) acquisition of special categories of real property:

(a)new facilities;

(b)used facilities [33] ;

Nota:

33 “An acquisition of a used facility shall be exempt from the requirements of the act if the facility is acquired from a lessor that has held title to the facility for financing purposes in the ordinary course of the lessor’s business by a lessee that has had sole and continuous possessi on and use of the facility since it was first built as a new facility.”

(c)unproductive real property;

(d)office and residential property;

(e)hotels and motels;

(f) recreational land;

(g)agricultural property [34] ; and

Nota:

34 “(g) […] Agricultural property is real property that primarily generates revenues from the production of crops, fruits,

vegetables, livestock, poultry, milk and eggs (certain activities within NAICS sector 11).

1) Agricultural property does not include either:

(i) Processing facilities such as poultry and livestock slaughtering, processing and packing facilities; or

(ii) Any real property and assets either adjacent to or used in conjunction with processing facilities that are included in the acquisition; or

(iii) Timberland or other real property that generates revenues from activities within NAICS subsector 113 (Forestry and logging) or NAICS industry group 1153 (Support activities for forestry and logging).

(2) In an acquisition that includes agricultural property, the transfer of any assets that are not agricultural property or assets incidental to the ownership of such property (cash, prepaid taxes or insurance, rentals receivable and the like) shall be subject to the requirements of the act and these rules as if such assets were being transferred in a separate acquisition."

(h)retail rental space; warehouses.

(x)regulated industries, since competitive effects are also analyzed by such other agencies [35] ;

Nota:

35 "Nevertheless, these various antitrust doctrines share one important principle: antitrust's main job is to pursue anticompetitive private conduct that is not effectively controlled or constrained by government officials." (Areeda & Hovenkamp, op. cit.)

For further guidance, please refer to the state action doctrine.

intraperson acquisitions [36] ;

Nota:

36 Despite the terminological imbroglio, please refer to corporate reorganization and corporate restructu-ring in CADE's case laws.

(xii) acquisitions of foreign assets or voting securities should not be subject to the reporting requirements unless the assets or voting securities being acquired have a direct impact on U.S. commerce.

Further items are set forth in 16 C .F.R. Section 802 [37] , in the 1890 Sherman Act (15 U.S.C. §§ 1-7), which already included export trade immunities (§ 7Sherman Act or 15 U.S.C. § 6a [38]), and in the Clayton Act (15 U.S.C. § 17) [39] . Sullivan and Harrison assign the exemptions to major national policies or industrial concerns [40] :

Nota:

37 Generally referred to as Rule 802:

"§ 802.1 Acquisitions of goods and realty in the ordinary course of business.

§ 802.2 Certain acquisitions of real property assets.

§ 802.3 Acquisitions of carbon-based mineral reserves.

§ 802.4 Acquisitions of voting securities of issuers or non-corporate interests in unincorporated entities holding certain assets the acquisition of which is exempt.

§ 802.5 Acquisitions of investment rental property assets.

§ 802.6 Federal agency approval.

§ 802.8 Certain supervisory acquisitions.

§ 802.9 Acquisition solely for the purpose of investment.

§ 802.10 Stock dividends and splits; reorganizations.

§ 802.20 [Reserved]

§ 802.21 Acquisitions of voting securities not meeting or exceeding greater notification threshold (as adjusted).

§ 802.23 Amended or renewed tender offers.

§ 802.30 Intraperson transactions.

§ 802.31 Acquisitions of convertible voting securities.

§ 802.35 Acquisitions by employee trusts.

§ 802.40 Exempt formation of corporations or unincorporated entities.

§ 802.41 Corporations or unincorporated entities at time of formation.

§ 802.42 Partial exemption for acquisitions in connection with the formation of certain joint ventures or other corporations.

§ 802.50 Acquisitions of foreign assets.

§ 802.51 Acquisitions of voting securities of a foreign issuer.

§ 802.52 Acquisitions by or from foreign governmental corporations.

§ 802.53 Certain foreign banking transactions.

§ 802.60 Acquisitions by securities underwriters.

§ 802.63 Certain acquisitions by creditors and insurers.

§ 802.64 Acquisitions of voting securities by certain institutional investors.

§ 802.65 Exempt acquisition of non-corporate interests in financing transactions.

§ 802.70 Acquisitions subject to order.

§ 802.71 Acquisitions by gift, intestate succession or devise, or by irrevocable trust.

§ 802.80 Transitional rule for transactions investigated by the agencies."

38 "Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless — (1) such conduct has a direct, substantial, and reasonably foreseeable effect — (a) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or (b) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and (2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States ."

39 "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

40 Op. cit., page 85.

> "Conscious choices are made to relax or minimize enforcement in certain industries where market competition would lead to diminished social welfare. The expressed exemptions are of two kinds: (1) those that further broad national policy, and, (2) those that apply to specific industries. Among the former are the promotion of the right of workers to organize, combine and bargain collectively; the promotion of export activity; the encouragement and promotion of research, development and technical change; the need to minimize restrictions on national defense capabilities in times of emergency; and the need to promote small business development. Industry's specific exemptions include insurance, railroads, agriculture, fisheries and professional golf." [41]

Nota:

41 Antitrust exemptions may be consequence of regulatory exercise. The insurance exemption is a recurrent illustration of that.

Worth addressing that besides such legal exemptions, the PNO has also construed that marketing and exclusive distribution rights are not reportable whenever there is no transfer of assets or any provision establis-hing exclusive grant of any trademark, copyright or patent. According to the PNO, exclusive distribution contracts [42] do not represent significant transfer of assets and thus are not reportable according to the Clayton Act [43] .

Nota:

42 "Less restrictive alternative: nonexclusivity joint sales arrangements that require participants to sell exclusively through the joint agency must be viewed with greater suspicion than nonexclusive arrangements. In cases of exclusivity, the joint sales agent can become an effective cartel manager, and police the sales of each participant and ensure that output is restrained to the monopoly level. By contrast, if participants are able without effective restriction to make unlimited non-agency sales in the same market, then achieving the desired output restriction will be much more difficult or even impossible.

Thus, in Ohio-Sealy the Seventh Circuit cited as one factor in approving a joint sales agreement under the rule of reason that 'no licensee is foreclosed from competing for the business independently [...] . 'By contrast, Asarco cited exclusivity as one factor justifying condemnation of an arrangement by which one firm jointly marketed the output of both. Under the arrangement the firm designating the other as agent was 'precluded from marketing' any of its lead through separate channels." (Arreda & Hovenkamp, op. cit., 137c3)

43 Unlike the American construction, Brazilian antitrust law (section 54, *caput*) demands that every single act of whichever kind that may lessen or harm competition or result in market power, irrespective of being a conduct or a merger, be reported. Such understanding creates two important outcomes. First, even cartels are reportable pursuant to the Brazilian law. Second, approaching beyond structural concerns, the Brazilian competition system becomes more intervening and preventive than the American homologous.

On the other hand, non-merger report exemption does not mean lack of punishment. According to the Collaboration Guidelines (Op. cit., page 14):

"Competitor collaborations may involve agreements jointly to sell, distribute, or promote goods and services that are either jointly or individually produced. Such agreements may be procompetitive, for example, where a combination of complementary assets enable products more quickly and efficiently to reach the marketplace. However, marketing collaborations may involve agreements on price, output, or other competitively significant variables, or on the use of competitively significant assets, such as an extensive distributions network, that can result in anticompetitive harm. Such agreements can create or increase market power or facilitate its exercise by limiting independent decision making; by combining in the collaboration, or in certain participants, control over competitively significant assets or decisions about competitively significant variables that otherwise

would be controlled independently; or by combining financial interests in ways that undermine incentives to compete independently. For example, joint promotion might reduce or eliminate comparative advertising, thus harming competition by restricting information to consumers on price and other competitively significant variables."

Such understanding is quite interesting since the FTC seems to be more lenient about distorting issues which, if on the one hand cannot be identified as asset acquisitions, on the other hand are evident concentration-oriented instruments that can wreak the very harmful results a structural monopoly can lay upon the market [44] . Quoting Areeda and Hovenkamp [45] :

Nota:

44 Generally, neither are joint ventures reportable pursuant the HSR. The parties are nevertheless invited to voluntarily give knowledge of said agreements. Voluntary notice enables the Administration to follow said agreements from the beginning and consists of an important signal to the FTC and the DOJ that there is no conspiracy or deceitful practice coming from the parties – thus diminishing the likelihood of having criminal lawsuits brought against them.

45 Op. cit., 2137c2.

> " *Structural similarity to horizontal merger* . A horizontal agreement providing for complete integration of distribution and sales can produce significant savings and generally cannot harm competition more than a complete merger of its participants. As a result, a structural analysis similar to that undertaken for horizontal mergers should provide a threshold for inquiry. For example, a complete and exclusive integration of sales by two 5 percent firms should ordinarily be lawful, because a merger of the same two firms would be lawful in nearly all cases. When the sales or distribution venture is nonexclusive, then it can be reasonable even at significantly higher concentration levels. Of course, structural analysis of this type is relevant only for joint sales agreements properly defined as ancillary restraints."

To some degree, one can ascertain that the HSR applied literally differs the remedies to and the efficacy of the combat of monopolistic entities depending on whether there is a merger-structural or a conduct agreement. Actually, the American legislation is the result of a learning process that has shown that vertical agreements are always efficient (because, at least, transaction costs are cut-off) and that seldom do inefficiencies surmount the benefits of said covenants. In this sense, the American authorities do not have to deal *a priori* with the burdensome analyses of innocuous vertical agreements where no assets are transferred, although they will always have the right to pursue the parties whenever they hear of malpractices resulting from said agreements.

Unlike CADE, when non-competition or distribution exclusivity clauses are set forth in the merger agreement and a possible competitive harm is identified, the FTC usually tackles the merger issues apart from the structural matters. The staff assigns such differentiation to the premerger rationale: the merger itself shall be analyzed as soon as possible whereas the conduct analyses need not be as expeditious. However, when the time frame of both analyses overlap they can be delivered at once.

The FTC and the DOJ learn about illegal non-merger conducts from different means, like complainants' contacts, newspapers and information provided in the course of the investigation. Even though only merger operations are subject to notification, whenever non-merger violations are found in the analysis of the merger [46] the FTC or the DOJ is required to tackle it.

Nota:

46 The Anticompetitive Practices in the FTC also deals with the harmful effects of "non compete clauses", which duration may vary case-by-case depending on that market's characteristics.

The FTC and the DOJ are also concerned about premerger analysis' infringements. In this sense, evidence that the parties had already been acting as one sole entity before the end of the waiting period gives them both the right to seek civil penalties. Amongst such practices are sharing confidential information affecting commerce, the establishment of joint pricing and marketing strategies, price-fixing and agreements not to compete in particular markets. Examples of the aforesaid are the lawsuits brought by the DOJ in order to recover civil penalties which involved Gemstar-TV Guide International, Inc./ TV Guide, Inc. [47] and Computer Associates International, Inc./Platinum Technology International, Inc. [48] .

Nota:

47 United States v. Gemstar-TV Guide Int'l, Inc., 2003-2 Trade Cas. (CCH) 74,082 (D.D.C 2003) (complaint alleges that within days of agreeing to merge, Gemstar and TV Guide agreed to allocate specific service provider customers between them, reaching specific understandings as to which company would approach and negotiate with particular customers during the premerger period), http://www.usdoj.gov/atr/cases/f200700/200737.htm

"4. Under both Section 7A of the Clayton Act and Section 1 of the Sherman Act, Gemstar and TV Guide were required to remain separate and independent economic actors prior to expiration of the Section 7A waiting period and prior to consummation of the merger, respectively. They failed to do so. Beginning in June 1999, when they first began negotiations that would lead to the merger agreement, and continuing throughout the waiting period, Gemstar and TV Guide entered into agreements eliminating or reducing competition between them. Among other things, they agreed to "slow roll" two large service providers; to allocate markets, customers and other responsibilities between the two firms; and to fix the prices and contract terms offered to customers. Further, they effectively merged most of their IPG operations prior to the expiration of the statutory waiting period."

48 United States v. Computer Associates International, Inc., et al., 2002-2 Trade Cas. (CCH) 73,883 (D.D.C. 2002)

(government challenged, inter alia, extraordinary “conduct of business” provisions in a merger agreement between Computer Associates and Platinum Technologies, which were direct horizontal competitors in 6 mainframe systems software markets. Among other things, Platinum was prohibited from offering mainframe systems software customers discounts greater than 20% off list price without Computer Associates’ consent). (http://www.usdoj.gov/atr/cases/f9200/9246.htm)

“2. The Merger Agreement contained extraordinary ‘conduct of business’ provisions that prevented Platinum from undertaking certain competitive activities during the HSR waiting period without CA’s approval, including determining the prices and terms it would offer to its customers. Under the Merger Agreement, Platinum could not, without CA’s prior written approval: offer discounts greater than 20% off list prices, vary the terms of customer contracts from an agreed-upon ‘standard’ contract, offer computer consulting services over 30 days at a fixed price, or enter into contracts to provide year 2000 (‘Y2K’) remediation services. CA was ‘the sole arbiter’ of whether to grant exceptions to these business restrictions during the HSR waiting period and installed a Division Vice President at Platinum headquarters to approve Platinum customer contracts. Platinum conceded in its May 14, 1999, SEC 10-Q filing that the ‘extremely tight restrictions’ on its ability to conduct business without CA’s consent ‘could have a severe detrimental effect’ on its business.

3. In addition, during the period that the proposed merger was being reviewed pursuant to the HSR Act, CA reviewed competitively sensitive information about Platinum’s customers and business strategy. CA also made day-to-day management decisions, including decisions related to the manner in which Platinum recognized revenues.”

“37. CA, upon contracting to acquire Platinum, exercised unlawful control over Platinum’s business in violation of the HSR Act by:

a. installing CA employees at Platinum headquarters to review and approve customer contracts;

b. restricting Platinum’s right to set discounts for software products and consulting services without CA approval;

c. limiting Platinum’s right to negotiate terms of customer contracts without CA approval;

d. limiting Platinum’s right to enter into fixed-price contracts without CA approval;

e. limiting Platinum’s right to offer Y2K remediation services without CA approval;

f. collecting and disseminating within CA competitively sensitive information, including the identity of Platinum’s prospective customers and the specific price, discounts and contract terms offered to each customer; and g. making day-to-day management decisions, including decisions related to recognition of revenue and participation at industry trade shows.

38. CA and Platinum were continuously in violation of the HSR Act during the period beginning on March 29, 1999, and ending on May 25, 1999, a total of 58 days. Each defendant is liable to the United States for a maximum civil penalty of $ 11,000 per day.”

THE ANALYSIS

The FTC usually has 30 days to analyze the purchase (15 days, if cash tender offer or bankruptcy) – the so called “waiting period” –, but the analysis does not commonly exceed 15 days if early termination is asked by the parties. Early termination is provided according to Section 7A(b)(2) of the HSR. The timing is still subject to the length of information provided, agency’s workload and specificity of the operation. “Early termination” happens every time merger approvals take place previously to the expiration of the waiting period. Early termination is only granted when asked by any of the defendants. Inasmuch as early termination places the names of the parties in the public records and said operations are usually confidential, very often parties decide rather not to ask for it and wait until the waiting period expires.

If the shop agrees with the PNO and so does the DOJ, the operation may be completed. In the case of early termination, the shop must contact the PNO as soon as possible. If not, the shop simply returns the file to PNO within the waiting period and the waiting period expires without the FTC’s manifestation. However, the Commission is empowered to open investigations or merger proceedings and even decide to deepen the analyses on the cases the shops are already working on. In such matters, only the Commission is entitled to close the investigations.

If at least one of the agencies needs further clarification, clearance is needed and both agencies decide which one should work on such a case based on historical prevalence (the highest expertise is decided by going five years behind and seeking for the one which is gone further in that very product; if none, going ten years behind; if neither agency has dealt with that product, the highest expertise is eventually decided in a tough dispute which follows the steps previously established by the agencies). None of the agencies can make outside contact until clearance is done. Until the other agency “clears” the request, third parties cannot be contacted and the investigation is limited to collecting information from public sources. The only exception is a joint meeting the FTC and the DOJ can arrange to hear the defendants. Clearance rules are set forth in two agreements issued in 1993 and 1995, jointly called the Clearance Agreement. Clearance negotiations involve not only the PNO, but also the Commission, Directors and other members of the staff.

The most remarkable differences between the DOJ and the FTC are the broader political independence and the administrative procedure characterizing the FTC. Even though it is true that the Commission’s orders can be appealed, the parties are aware of the fact that premerger approval shall be expeditious and that the courts are not likely to reverse the findings of the agency’s legal and economic experts. In this sense, every time the Preliminary Injunction (“PI”) is granted by the federal District Court enjoi-ning the consummation of the merger the enforcement power of the agency increases – not only due to the court’s concurrence with the FTC, but in as much as contesting the Commission’s orders can be rather costly and eventually make the operation unviable. Independence , on the other hand, is a result of the joint decision of five commissioners, provided that only three of them can be members of the same political party.

It must be clear that during the waiting period and after clearance the shops are authorized to lead investigations, studies and take any investigative measures that may be necessary to clarify the case. In the meanwhile the defendants may also voluntarily or not provide the FTC with more information than requested in the Notification and Report Form that is submitted to the PNO and the DOJ. The FTC may hear competitors and third parties as well, always subject to non-disclosure notification in those cases where the operation or its details are confidential. The same applies to the cases where alternative buyers are also called to be in conference with the staff. Such investigation is carried on by a lead attorney who is assisted by an economist as well as other lawyers and financial or accountancy experts, depending on the complexity of the matter (the “team”).

Constantly, the lead attorney and his or her team – including the lead economist – meet with the AD, DADs and

corresponding Deputy Director so as to update the status of a certain matter. Anytime the shop becomes convinced that the operation cannot harm competition, the shop shall contact the PNO or return the file, depending on whether it is a case of early termination or not.

Should the team in charge of the matter find that those punctual pieces of information do not suffice and convince the AD and corresponding Deputy Director that there may be need for further information from the parties, a memorandum or two memoranda is/are prepared by the lead attorney and/or economist and forwarded to the Merger Screening Committee, that gathers to decide whether or not a Second Request with or without compulsory process should be recommended to the chairman [49] . Compulsory process is sought in every case when testimony or information cannot be obtained by voluntary means. Subpoenas are then issued in order to require than a certain document be prepared or that under-oath oral testimony be provided. Therefore, due to the bureaucratic path to be trod, compulsory process should be pursued only when information cannot be achieved otherwise.

Nota:

49 Issuing or not the Second Request is also a strategic decision-making process. Even before submitting the matter to the Merger Screening Committee, the attorneys of the team and then the AD and DADs must counter weigh their beliefs and findings with the probability that the court will buy their argument to at least grant PI. In the premerger system, where an expeditious procedure is essential for the effectiveness of the deal, once granted the PI by the federal district court there is an increasingly likelihood that the parties will soon come to an agreement with the FTC or at least will not rebut the Commission's opinion. If the likelihood that the PI will be granted is minimal, the agency will almost certainly neither further the analysis nor go to court for an unlikely divestiture order.

The Merger Screening Committee consists of Directors and Deputy Directors of the BC and the BE, BC and BE staff assigned to the matter and a representative from the PNO [50] , provided that Attorney advisors from various Commissioners' offices may also attend. If the committee agrees, three days prior to the end of the waiting period a recommendation is sent to the Chairman, who is empowered to issue the Second Request. Compliance with the Second Request is subject to appeal to the General Counsel of the FTC. If the Committee disagrees, the transaction can be consummated. In any case, neither the BC Director nor the BE Director are empowered to give the final word. Whenever there is dissent, both bureaus can express their divergent approaches to the Chairwoman, who shall eventually decide whether or not to issue the Second Request [51] .

Nota:

50 The meeting takes place after the preparation of a single joint memorandum written by the merger shop or two memoranda, if the BE decides to prepare its own separately. The short memo(s) shall include concurrence from the shop AD, the assigned economist and supervisors, as well as from the BE Director. Whenever the BE decides to send its own memo, only the AD's approval is necessary in the shop's paper. The memo or memos are eventually sent to the BC Director who shall deliver his position in the meeting, after listening to the lead attorney and lead economist assigned to the matter.

51 Discussions between economists and lawyers become an extra incentive for both lawyers and economists to understand the countervailing party's theory. Therefore, not only should lawyers have economic background, but also economists should have legal knowledge.

It is important to mention that when the Merger Screening Committee assembles it usually happens by the end the waiting period and normally there would be no time or need for early termination. It is of utmost importance to highlight that even though time running out is tantamount to the operation allowance, the expiration of the waiting period does not preclude the FTC's right to reverse the operation at any time [52] . Even though granting early termination and the expiration of the waiting period may prevent the FTC from enjoining the merger in an *a priori* analysis, however inefficient it may be the FTC is always entitled to pursue post-merger or *a posteriori* enforcement.

Nota:

52 Complaint Counsel's Revised Pretrial Brief in the Evanston matter (Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc., File No. 011 0234, Docket No. 9315), dated January 27, 2005: "While the Hart-Scott-Rodino Act establishes reporting requirements regarding certain types of transactions, the Act expressly states that:

'[a]ny action taken by the Federal Trade Commission or the Assistant Attorney General or any failure of the Federal Trade Commission or the Assistant Attorney General to take any action under (15 U. C.A. 9 18aJ shall not bar any proceeding or any action with respect to such acquisition at any time. [...] 15 U.S. C.A. 9 I 8a(i)(I).'

Further, totally apart from the provisions of the Hart-Scott-Rodino Act, the Supreme Court has regularly recognized that the government retains the authority to challenge a merger sometime later. United States v. E.1. du Pont de Nemours & Co. , 353 U.S. 586 (1957)."

The Second Request extends the waiting period for 30 additional days (or 10 days, if cash tender offer or bankruptcy) and must be issued prior to the expiration of the waiting period. The "dies a quo" for the 30-day countdown is the substantial compliance of the defendants with the Second Request. In this sense, consummation is withheld for longer than 30 days, since a Second Request in a significant transaction requires months to be properly answered. If the shop finds that the response is deficient, the new waiting period will start when the parties correct the deficiencies. If the defendants do not comply with the determination of the shops, the BC may intervene and reject the submission – also known as "bounce".

The Second Request brings a long roll of questions and is deemed very costly to the parties and to the Commission as well – advisors estimate that the parties routinely spend millions of dollars in significant operations due to Second Requests and the whole analysis lasts between six and nine months on average. The query includes econometric studies, marketing and investment plans, price zone information, surveys on competitors and data alike. Due to its overwhelming burdensome effects upon the parties, the Second Request can have the unintended effect of causing the parties to abandon a transaction [53] .

Nota:

53 Obviously, one cannot suggest that the FTC illegally uses the Second Request as a bargain weapon. Actually, the Second Request is only issued after a series of analyses have been processed and there are clear chances that the merger would lead to anticompetitive outcomes. However, the American legislation itself, in order to give a certain degree of independence to the Commission and forge an efficient and practical system, assigned to the Chairman the use of an essential toll of enforcement that will demand full and voluntary cooperation from the parties from the filing on.

In lieu of demanding substantial compliance, the shop may alternatively ask that a specific question be addressed prior to the others expecting that such an answer provides the staff with all necessary information. This proceeding is called “quick look”. In the “quick look”, the FTC issues a Second Request and then enters into an agreement with the parties whereby the latter promise not to comply with the Second Request until a negotiated term set forth by said agreement expires. During this period the staff will analyze the preferred information and, if the doubts are clarified, full compliance with the Second Request is not necessary. If the answer is not good enough to convince the staff, the FTC will not be able to dismiss the additional and costly answers.

Very often laymen erroneously take the quick look for the fast track proceeding. The fast track belongs to another set of rules which govern procedure in adjudicative proceedings and that shall be conducted expeditiously. Due to such rules, in fast track proceedings the Administrative Law Judge (ALJ) shall file an initial decision within 56 days following the conclusion of the evidentiary hearing and no later than 195 days after the triggering event, and the Commission will issue a final order and opinion within 13 months after the triggering event [54] . (16 C .F.R. §§ 3.2 and 3.11A)

Nota:

54 16 C .F.R. §3.11A (c)(3): “The Commission may extend the date for issuance of the Commission’s final order and opinion in the following circumstances: if necessary to permit the Commission to provide submitters of in camera material or information with advance notice of the Commission’s intention to disclose all or portions of such material or information in the Commission’s final order or opinion; or if the Commission determines that adherence to the 13-month deadline would result in a miscarriage of justice due to circumstances unforeseen at the time of respondent’s election of fast-track procedures.”

The Second Request is the response to the lack of time to analyze a complicated matter, too. If there is not plenty of time to investigate in the waiting period, the staff have no other alternative than seeking a Second Request. In order to avoid such costly remedy in ordinary cases the system has developed the “pull and re-file” mechanism, allowing the parties to withdraw their case subject to re-filing it within 48 hours. Re-filing is also subject to previous consent from the BC and the PNO, that shall be notified of the precise time the case will be withdrawn.

The “pull and re-file” process is voluntary and shall not be suggested by the FTC – the staff constantly only clarifies that there is such an option. However pro-efficient it may be, withdrawing does not consist in a commitment from the BC not to issue a Second Request and it is quite important that the lead attorney, the BC or the PNO highlight such uncompromised offer to the defendants. Another very useful method developed by the FTC and increasingly used consists of agreements entered into with the defendants whereby the parties to the notified operation concur to await more than the waiting period to consummate the merger.

Both remedies are agile responses of the staff, who are acquainted with the fact that the Second Request queries are commonly more extensive than the specific information they needed or can handle and sometimes could even have been replaced by the pull and re-file mechanism. Even though a “quick look” approach may be given to the analysis so as to avoid triggering the whole costly paperwork prematurely, the “quick look” does not consist in a waiver of the full responses by the Administration and in the end the shop can find the “quick look” answers to be inconclusive. As a matter of consequence, in order not to delay the “dies a quo” of the extended waiting period – which is only triggered when substantial compliance with the Second Request is achieved –, not rarely do the defendants feel bound to preemptively answer the whole request promptly.

As it should become clear, my opinion is that the Second Request is effective, but not always efficient. It is effective in the sense that the answers cover such an array of issues and asks for so much undisclosed information that it usually achieves the proposed knowledge to comfortably approve or disapprove of an operation. But it is only entirely efficient when the operation does demand that amount of information.

However, it can be deemed “economically efficient” when costs overwhelm the parties’ financial capacity to afford substantial compliance with the queries and the parties feel obliged to enter into consent agreements or desist. The economic efficiency comes form the time and resources spared. On the other hand, if the latter is not the case, that is, if the parties can comply with the Second Request but the questions overwhelm what could be considered reasonable for that specific case, the costs incurred and the amount of useless information asked clearly show that the queries should be limited case-by-case to the strictly necessary content in order to curtail the snowball.

If after the whole analysis the staff regard the operation to be anticompetitive, it recommends the Commission to seek PI before the District Court so as to enjoin the operation from happening. If granted, the PI would allow the FTC to bring the case upon an administrative judge within 20 days of the granting. In this sense, the Commission issues a complaint setting forth its

charges and awaits the parties' response. Should they settle the charges, a consent agreement is signed and is placed on the public record for comments. In the consent agreement the parties waive all rights to judicial review, but do not admit liability at all for any unlawful practice. Consent agreements are prepared by the Compliance staff, who is in charge of drafting and negotia-ting every Commission order, monitoring company conduct required by said order and going to court to seek enforcement.

If the respondents contest the charges, the complaint is adjudicated before an ALJ. The ALJ renders an initial decision. If the opinion is appealed, the Commission renders what is called final decision, which can be overruled only by the judiciary. If the PI is not granted, the Commission may appeal to the Appellate Court and then to the Supreme Court, pleading jointly for an injunction pending appeal, which would hold in abeyance the approval of the operation until the appealing court renders its judgment.

The defendants and the plaintiff usually come into consensus by means of consent agreements entered into before the PI or right after it is granted. Since (i) the Commission would seldom overrule the prior understanding which has led the FTC to file a lawsuit with the District Court and (ii) the parties to the consent agreement seek a quick response in a premerger analysis, appealing to the Appellate Court is rare. Consent agreements are prepared by the Compliance team who has the central role of developing appropriate remedies for the proposed mergers. However, the consent agreement must be approved by the Commission and then placed on the public record for comments [55] .

Nota:

55 CADE has recently adopted the same procedure for the TCC entered into with Sao Paulo 's Shopping Center Iguatemi, which was condemned for the radius clauses set forth in the lease contracts.

The Compliance staff are also in charge of finding relief for illegal mergers – both unreported and reported but reevaluated. Civil remedies can be classified according to three basic categories, that is, conduct or beha-vioral, structural and monetary remedies, which are commonly associated with, respectively, preventing unfair methods of competition, divestiture and restitution. Due to verlasting precedents [56] , Compliance has the steady belief that structural remedies like divestiture [57] – and not conduct approaches – are the core relief for the structural competitive problems from illegal horizontal mergers. This is also the feeling shared by the Commission itself:

Nota:

56 In the recent Evanston matter, the Commission issued a behavioral ruling to set up separate payor-contract negotiating teams for each former premerger hospital entity within the ENH system with a firewall between the teams. Such an opinion vacated the ALJ's order of divestiture. Similar remedy has been adopted by CADE in the recent Ripasa SA Celulose e Papel and Votorantim Celulose e Papel SA matter in the entirely different cellulose/paper market and in a scenario where Ripasa should be regarded as a necessary outgoing player.

57 "Based upon this clear mandate, the FTC considers divestiture as a standard component of its remedial options. See, e.g., Hospital Corp. v. FTC 807 F .2d 1381 1393 (7thCir. 1986) (affirming FTC order requiring merged hospital to divest assets); Olin Corp. 113 FTC. 400 (1991) (requiring merged firm to divest assets to restore competition; Fruehauf Trailer Co. , 67 FTC. 878 (1965) (ordering divestiture of two acquired competitors ten years after merger). As the judge in Olin Corp. explained, 'It is axiomatic that the normal remedy in Section 7 cases is the divestiture of what was acquired unlawfully. Indeed, divestiture is the remedy specified in Section 1 I(b) of the amended Clayton Act.' 113 FTC. at 584. Commission precedent holds that 'a presumption should favor total divestiture' over partial divestiture, and that 'the burden rests with respondent to demonstrate that a remedy other than full divestiture would adequately redress any violation which is found. Freuhauf, 90 F . C. 891 , 892 n. l (1977).

The Commission s recent order in Chicago Bridge underscores the FTC's statutory authority to order the divestiture of all assets obtained in an unlawful merger. After finding a section 7 violation, the Commission noted that the Clayton Act specifically contemplates divestiture as a remedy and that '[m]uch of the case law has echoed this sentiment and found divestiture the most appropriate means for restoring competition lost as a consequence of a merger or acquisition. Chicago Bridge at 93. The Commission ordered the Respondent to form two separate, stand-alone divisions and divest one of them within six months of the final order. Chicago Bridge at 94.' " (Complaint Counsel's Revised Pretrial Brief in the Evanston matter)

> "Structural remedies are preferred for Section 7 violations. See United States v. E.I. du Pont de Nemours & Co., 366 U.S. 316, 329 (1961) (calling divestiture 'a natural remedy' when a merger violates the antitrust laws). As we recently said, '[m]uch of the case law has […] found divestiture the most appropriate means for restoring competition lost as a consequence of a merger or acquisition.' In re Chicago Bridge & Iron Co., No. 9300, 2005 WL 120878, at 93 (FTC Jan. 6, 2005). Divestiture is desirable because, in general, a remedy is more likely to restore competition if the firms that engaged in pre-merger competition are not under common ownership. There are also usually greater long-term costs associated with monitoring the efficacy of a conduct remedy than with imposing a structural solution."
>
> "Divestiture is the preferred remedy for challenges to unlawful mergers, regardless of whether the challenge occurs before or after consummation." (Chairwoman Majoras' opinion in the Evanston matter)

The FTC is also entitled to solve matters involving anticompetitive practices [58] , including cartels. Both the Anticompetitive Practices and the Healthcare Services & Products divisions work on conduct cases. The cartel jurisdiction notwithstanding, not seldom does the FTC clear cartel investigations to the DOJ due to the fact that it lacks criminal jurisdiction. Lack of criminal jurisdiction also implies that the FTC cannot be part of criminal investigations carried on by the DOJ and FBI or make use of the amnesty (leniency) program.

Nota:

58 For civil penalties in cases of unfair and deceptive acts or practices, please refer to FTCA § 5 (a) (b) (m).

Criminal prosecution is justified in egregious violations with evidence of willful and intentional conduct, like agreements among competitors to fix price, rig bids, allocation of territorial and product markets [59] . Both corporations and individuals can be sued for criminal violations of competition laws. Pursuant to the 15 U.S.C. § 56(b) "[w]henever the Commission has reason to believe that any person, partnership, or corporation is liable for a criminal penalty under this subchapter, the Commission shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate criminal proceedings to be brought" . According to Sullivan and Harrison [60] :

Nota:

59 The US system is interested in curbing the exercise of monopoly power – that is, the ability to fix price and restrict output – as well as any attempt to achieve it.

60 Op. cit., page 45, including footnote 1

> "Antitrust law can be enforced on several levels. Public enforcement is pursued on the federal level by the Department of Justice Antitrust Division and the Federal Trade Commission (FTC). The two agencies have concurrent jurisdiction over several sections of the Clayton Act and the Robinson-Patman Act. Only the Department of Justice has criminal jurisdiction however. The Department has also authority over the Sherman Act, while the FTC exercises additional authority over the Federal Trade Commission Act. On the state level, state attorneys general have authority to file Sherman Act suits for damages or equitable relief as parens patriae on behalf of individuals (consumers) residing within the state. Private civil enforcement can be commenced by 'aby person who [is] injured in his business or property' by reason of a violation of 'anything forbidden in the antitrust laws.' the action can be for either treble [61] damages or injunctive relief. Reasonable attorney's fees and costs are permitted under either a damage award or injunctive relief."

Nota:

61 15U.S.C. § 15 (a): "Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances".

None of the antitrust legal statutes defined criminal jurisdiction and the DOJ itself was assigned the task of defining its borders pursuant to its internal policies. In sum, one can define as competition crimes egregious violations of antitrust laws or hardcore cartel. According to the ScottHammond's speech delivered at the 3rd Nordic Competition Policy Confe-rence September 12th, 2000 [62] :

Nota:

62 Fighting cartels – why and how? Lesson common to detecting and deterring cartel activity, available on http://www.usdoj.gov/atr/public/speeches/6487.htm.

> "In the United States , hardcore cartel activity – such as price-fixing, bid-rigging, and customer and market allocation agreements – is a felony violation of our criminal laws, and both corporations and individuals may be held liable."

Insofar as the rules are established internally by the DOJ, one can argue that it could be subject to constant political influence and cause uncertainty. In order to prevent such a possibility the federal courts – before which the DOJ must bring every lawsuit – have adopted a very strict cons-truction of antitrust crimes, thus avoiding uninvited stretches. Quoting the United States Court of Appeals for the Ninth Circuit in the United States v. A. Lanoy Alston:

> "The district judge also noted that this criminal prosecution 'bothered' his 'sense of fair play' when contrasted with the civil action in SCTLA, and expressed concern with the way prosecutors charged defendants in drug cases with mandatory minimum sentences. 1991-1 Trade Cas. at 65,472, 65,476. Absent a showing of discrimination or other unconstitutional misconduct in its charging decisions, such an inquiry into the prosecutor's motives is improper. Wade v. United States , 118 L . Ed. 2d 524, 112 S. Ct. 1840 (1992); United States v. Redondo-Lemos, 955 F .2d 1296, 1298-1303 (9th Cir. 1992). We interpret the district judge's statements as stray comments given the opportunity to engage the government attorney in a dialogue, rather than grounds for his decision on the merits of the pending motions.
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> [...]
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> Finally, we are told that this is the first criminal antitrust prosecution of health care professionals in half a century. See Brief for the ADA and the AMA as Amici Curiae at 4. While it is not our place to question the government's motives in elevating to the criminal level a dispute normally handled as a civil enforcement matter, the crushing consequences of a criminal conviction on the lives and careers of the defendants singled out for such treatment makes it all the more important that the [**28] district judge spell out with specificity what the jury must find in order to convict. Although both

criminal and civil violations may be made out under the same substantive [*1215] provisions of the Sherman Act, 'the Act has not been interpreted as if it were primarily a criminal statute; it has been construed to have a generality and adaptability comparable to that found [. . .] in constitutional provisions'. United States v. United States Gypsum Co., 438 U.S. 422, 439, 57 L . Ed. 2d 854, 98 S. Ct. 2864 (1978) (internal quotation marks omitted). The district court should therefore be chary of wholesale adoption of jury instructions developed primarily in the civil enforcement context. It may deem it appropriate instead to pattern its instructions around the unique setting of a criminal prosecution. We leave this, like other matters on remand, in the capable hands of the district judge."

Owing to the aforementioned, the FTC does not deem itself as a natu-ral anti-cartel agency. Nevertheless, the FTC's administrative work in conducts has led to important consent agreements with the infractors. Once the agency settles the disputes by means of consent agreements – after being subject to public comment and made final by the Commission –, such order becomes binding upon the defendants and if breached it may result in the civil penalty defined in section 7A of the Clayton Act, currently estimated in $ 11,000.

The FTC is entitled to seek civil penalties for violations of the Commission's orders63. In such cases, the Commission shall inform the Attorney General of the exercise of such authority. Reporting to the DOJ is mandatory and is justified as a means to centralize the control of civil actions and thus help create jurisprudence by means of linear complaints. The rules on the commencement, defense, intervention and supervision of litigation and appeal by the Commission or the Attorney General are set forth in 15 U.S.C. § 56.

Nota:

63 15U.S.C. § 56, 16C .F.R. §1.95(b) and section 7A(g) of the HSR.

The phases of the processes involving anticompetitive practices are quite similar to the merger proceedings. After clearance, an economist from the BE must be assigned to assist. After 60 days, the Evaluation Committee decides whether to close the investigation, further the initial phase or convert it into a full phase. The Evaluation Committee consists of the Directors and Deputy Directors of the BC and BE, along with representatives from the BC Policy and Coordination Office and BC and BE staff assigned to the matter.

Once opened, (i) the full phase can lead the Commission to issue an administrative complaint (where it sets forth its charges [64] , just like in the merger proceedings) and the matter may go through the ALJ and the Commission, (ii) the parties can enter into a consent agreement or (iii) the investigation is closed. In full phase investigations, compulsory process is usually sought by the BC, depending on the Commission's approval. Nevertheless, compulsory process may be dismissed when the BC finds that it may be counter-productive. In this case, the BC does not depend on the Commission's approval to continue the investigation. Initial phase investigations are usually closed by the staff. Full phase without process may be closed by the BC. If compulsory process has been authorized, only the Commission can close the investigations.

Nota:

64 As a matter of consequence, the ALJ and the Commission may enter an order requiring the defendants to cease and desist or divest.

The staff nonetheless can also choose between going through the administrative procedure or going directly to the federal district court. If the staff opt for the second choice, it will litigate in the federal district court and there will be no administrative decision. Such a path – which is the only one that DOJ must always follow in its suits – is usually chosen when there is an urgent need for intervention or in cases where the remedy can only be reached through court.

Although it may be even usual to follow such a procedure in behavioral cases, in merger matters, once granted the PI, the administrative way is very effective because the defendants tend to enter into consent agreements with the FTC. Moreover, even if it goes all the way through the ALJ and the Commission, the matter will have been decided by two bodies of experts in antitrust law, which will provide the courts with subsidy to their rulings. Recurrent appeal to the courts instead of going through the administrative procedure would also weaken the FTC and deprive the society of the neutral and well-regarded findings of America's natural antitrust agency.

Exhibit I

Rudimentary representation of merger and non merger procedures.

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