

## Choice for Consumers

*More agency debate about antitrust enforcement better serves democracy for everyone.*

By Cheryl A. Leanza and Harold J. Feld

It now appears that the Department of Justice and the Federal Trade Commission, under pressure from Sen. Ernest Hollings (D-S.C.), have rescinded their joint memorandum of understanding that officially assigned antitrust review for each commercial sector to one agency or the other. This bodes well for the American people, who benefit from the overlapping jurisdiction. In democracy, as in engineering, redundancy and cross-checks are desirable features, not bugs.

Both the process the agencies used to draft the joint memorandum and the debate that followed its announcement provide critical lessons for antitrust policy in the future. Looking ahead, we hope that this experience will provide some valuable lessons about antitrust enforcement for decision-makers and the public alike beyond “Don’t anger the chairman of your Appropriations Committee.”

### NOT JUST FOR INSIDERS

Perhaps the most valuable lesson is this: Antitrust is not an insider game where a chosen few can formulate policy among themselves. What first drew dramatic opposition to the joint memorandum was not what it said, but how it was drafted. Public interest groups cried foul at once, arguing that the government’s decision to invite private parties to secretly draft a nationwide policy not only violates federal laws, but also creates bad policy. How could the agency heads hope to be seen as proceeding fairly when they consulted only their closest friends, not the public?

Politically, it proved a catastrophe that probably doomed the joint memorandum from the start. Democratic FTC commissioners were justly livid that Chairman Timothy Muris not only conducted secret negotiations with Charles James, the assistant

attorney general for antitrust, on a matter affecting the whole commission, but also that Muris intended to implement the resulting policy without internal debates or a vote. Hollings—who chairs both the Commerce Committee, which oversees the FTC, and its Appropriations subcommittee, which controls the DOJ’s budget—rightly observed that it lies with Congress to assign permanent divisions between the agencies. And Congress, he said, chose to create concurrent jurisdiction.

If nothing else, the agencies must learn that antitrust policy is no longer a game of insiders and chosen experts. Given the centrality of competition in our economy and democracy, broad policy decisions must flow from public debate conducted via open processes under federal law.

Another lesson is that debating the assignment of the most important mergers on a case-by-case basis is healthy. The primary flaw in the joint memorandum was its failure to recognize the difference between a minor ministerial decision and assignment of a major merger with sweeping market and the policy implications. Determining which agency will review a merger that could affect virtually every aspect of American life is not a routine matter.

Giving each agency an opportunity to review a particular matter gives antitrust enforcement an important pro-enforcement bias. If one agency spots an issue or problem that the other does not wish to pursue, enforcement options remains available. Developing a formula for assigning particular industry sectors, as the joint memorandum did, is precisely the wrong approach for the most important decisions. The most challenging mergers should not be preassigned before they are examined.

Going forward, the agencies should look at the merger assignment process as an important intended feature of Congress’ determination to create concurrent jurisdiction, rather than as an administrative nuisance.

One benefit of the recent brouhaha is that it highlights that improving the procedural process is still a good idea. No one argues with the goal of adopting a transparent process, creating predictable deadlines, and ensuring that the agencies can communicate with each other using common terms. These changes need not harm the important process of assigning large, high-profile mergers. An open and predictable process is particularly important to assist the public, which might otherwise find it inaccessible.

### CRITICAL DIFFERENCES

The DOJ and the FTC possess critically different attributes, each of which may be necessary in any given industry sector. Underlying the joint memorandum was an assumption that only “marginal substantive differences” would flow from the identity of the investigating agency. In many instances, this is true. But in the most important cases, the identity of the agency is critical.

The FTC is an independent, bipartisan, multi-member commission with public votes. The DOJ is part of the administration and led by a single individual. The FTC can more easily engage in ongoing oversight than the DOJ. In addition, the FTC possesses rule-making authority, under which the commission can adopt policies and rules that respond to trends, but which may not justify action in a particular case.

For example, in some future instances, it may be most appropriate that the FTC handle politically sensitive cases. Suppose a merger involving a major newspaper chain were reviewed just before a presidential election in which editorial endorsements might be regarded as decisive. Wouldn't public confidence be greater in an approval granted by a 5-0 decision of the FTC than by an assistant attorney general who serves at the pleasure of the president? And if that decision were 3-2 along party lines, won't democracy be better served if the public is aware of it? Conversely, in some cases, the DOJ's structure allows it to achieve significant pro-consumer outcomes that may not emerge from the FTC. While no one familiar with the performance of the staff at the Antitrust Division or the FTC doubts their integrity and fair-mindedness, appearances do matter, and the staff cannot direct the decisions of their politically appointed superiors.

All of this means that keeping either agency potentially involved in any given case will strengthen, not weaken, the

expertise applied to each industry sector. The joint memorandum was sometimes mischaracterized as increasing the expertise of the staff working on particular issues. In the past and in the future, an important consideration in assigning cases should always be recent agency experience. But requiring both agencies to examine and then consult on the most difficult mergers ensures that both enforcement agencies will develop a comprehensive approach. It sensitizes both agencies to emerging, cross-cutting issues and forces them to track overall picture rather than focusing on narrow industry sectors.

The joint memorandum, in contrast, permanently assigned all industries to one agency or the other and imposed arbitrary deadlines that defined when an agency's experience was no longer relevant. The FTC would have been precluded from acting in telecommunications and media cases, although it possesses significant experience in that area.

Ironically, the joint memorandum did not address the prior practice of one agency agreeing that a particular case would not “count” toward its expertise if the other agency would defer to its consideration of that case. Such agreements had the perverse effect of depriving the public of expertise developed in each agency. Going forward, the agencies will hopefully stop using this counterproductive practice.

### MEDIA MERGERS ARE DIFFERENT

Perhaps the most controversial aspect of the joint memorandum was the assignment of telecommunications and media mergers to the Department of Justice. The debate over the joint memorandum raised the public and agency consciousness on a critical point: Media mergers are different. The media affects our society on every level. It provides us with news and information necessary for a free democracy and shapes our values through mass entertainment that saturates our awareness. Convergence and the pervasiveness of the Internet as a content distributor now put telecommunications mergers in the same class as media mergers. Because competition in this most important sector is critical, concurrent jurisdiction is particularly essential here.

While pundits may focus on the controversy and the politics involved, we hope that the agencies and the public will ultimately benefit from improved antitrust enforcement.

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