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Procedural Fairness in the Deliberations and Determination Phases

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PROCEDURAL FAIRNESS IN THE DELIBERATIONS AND DETERMINATION PHASES

Good Afternoon. I am pleased to be here this afternoon with my colleague from Indonesia to continue the discussion of procedural fairness into the deliberations and determination phase.[1] As my colleague from the United States Federal Trade Commission (FTC), Deirdre Shanahan, noted in her presentation earlier this afternoon, procedural fairness is a topic that is taken very seriously by U.S. antitrust enforcement officials.

It is the position of the U.S. antitrust enforcement agencies, stated many times, that regardless of the substantive outcome of a government's antitrust investigation, it is important that parties involved know that the process used to arrive at that outcome was fair. Substance and process go hand in hand. Complaints about process lead to concerns that substantive results are flawed, whereas a fair, predictable, and transparent process bolsters the legitimacy of the enforcement outcome.

In the United States, the importance of procedural fairness is ingrained in our legal system. The Fourteenth Amendment to our Constitution prevents the government from depriving "any person of life, liberty, or property, without due process of law."[2] Although the kind of process that is due in a particular circumstance depends on many considerations, our Supreme Court has laid out some general guideposts focusing on government transparency and the right of private parties to participate meaningfully in

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[1]Before proceeding further with my remarks, I need to state that the views expressed herein are my own, and do not purport to represent the views of the United States Department of Justice.

[2] U.S. Const., amend. XIV, § 1.

government proceedings affecting them. For instance, the Court has explained that "[a]n elementary and fundamental requirement of due process ... is notice reasonably calculated ... to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[3] Similarly, the Court has stressed that "[t]he fundamental requisite of due process of law is the opportunity to be heard" at "a meaningful time and in a meaningful manner."[4]

Before specifically discussing procedural fairness in the context of enforcement of U.S. competition law and policy, I though I would start with an overview of the work of the Department of Justice (DOJ) in the antitrust enforcement area. DOJ is a cabinet department of the U.S. government. DOJ's antitrust enforcement mission is carried out through the activities of its Antitrust Division, which is headed by the Assistant Attorney General for Antitrust, Christine Varney.

Through its enforcement of the Sherman Act,[5] Clayton Act,[6] and other federal statues that include competition-related provisions, DOJ is responsible for challenging anticompetitive mergers, anticompetitive unilateral conduct and for prosecuting cartel activity. Merger challenges and enforcement activity against anticompetitive unilateral conduct are brought as civil actions. Hard core cartel conduct is prosecuted criminally.

DOJ is a prosecutorial agency. DOJ cannot unilaterally impose sanctions or remedies – in the civil or criminal context. In all cases in which it seeks to take action

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[3] *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

[4] *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) and *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

[5] 15 U.S.C. §§ 1-7.

[6] 15 U.S.C. §§ 12-27.

against conduct it believes to be anticompetitive, DOJ must initiate an action in an appropriate U.S. district court in order to enforce the law. The court determines whether the law has been violated, and orders any relief or remedy required.

As mentioned by Deirdre in her earlier presentation, the FTC is an independent federal agency, and operates under somewhat different procedural rules than does DOJ. In this presentation, I will only be addressing DOJ's procedures, not those of the FTC. I should also note that the procedural rules that DOJ operates under differ somewhat in the civil and the criminal contexts.

I'll begin by focusing on DOJ's deliberations in the civil antitrust enforcement context. Again, this would most frequently involve merger investigations, and would also encompass investigations into potentially anticompetitive unilateral conduct. Our previous panel has brought us through the evidence and information gathering phase, so our lawyers and economists have now developed enough information to begin formulating at least some tentative theories and conclusions.

An important initial point is that our information gathering process does not stop when we reach the deliberative stage of our investigative process. We attempt during our investigations to have an ongoing conversation with parties, so parties have an accurate view of our concerns. These communications are intended to help avoid situations where the parties are surprised by the scope of our concerns and to facilitate a meaningful dialogue as an investigation progresses. In the Division, these conversations begin between the parties and the staff in the early stages of the investigation; more senior staff and policy officials will become involved as the investigation proceeds. These

communications are, of course, subject at all times to appropriate confidentiality constraints.

As our investigation proceeds into the deliberations phase, we also encourage parties to submit to us what we call "white papers," addressing the critical elements of a case from the parties' perspective. White papers serve an important role in our investigations, allowing us to assess the strengths and weaknesses of our theories before making an ultimate decision on the merits. Whether in the form of a white paper or not, however, we make it clear to the parties that we are willing to receive information from them at any time during an investigation.

As the investigation proceeds, we also work hard to keep an open mind, so that we are able to effectively evaluate the information and arguments that we are encouraging the parties to bring to us. There is no reason to continually accept information from the parties to a merger under investigation or the entity under investigation in a unilateral conduct investigation, if we have already predetermined the outcome. In certain investigations, in order to be sure we are accurately assessing the information and arguments that the parties are presenting us, part of the investigative staff will be tasked with presenting the parties' point of view in a mock adversarial exercise – all with the aim of making sure we make the best decision possible.

After collecting information, and assessing it with an open mind, and allowing the parties and their counsel to meet with senior decision-makers in the Division up to and including the Assistant Attorney General, we reach the point in every investigation where Division officials must make a decision. If the determination reached is not to bring an enforcement action, the parties will be notified of that fact. In significant civil

investigations, we will issue a closing statement, explaining why we did not bring an action in that particular case. Division officials believe these closing statements play an important role in enhancing the transparency of our processes, thereby enabling parties to better understand enforcement decisions and feel that they are being treated fairly and impartially.

If the determination Division decision-makers reach in a particular matter is that an enforcement action is warranted, that also will obviously be conveyed to the parties. As I mentioned earlier, DOJ does not have the authority to unilaterally impose remedies or sanctions. In this circumstance, we must bring an action in federal court to obtain appropriate relief.

In our court system, neutral judges who have no connection to the Division are tasked with deciding disputed issues of fact and assessing the soundness of our legal theories. Among other important functions, judges rule on evidentiary disputes, assess witness credibility, and decide contested issues of fact. (In civil actions tried to a jury, the jury decides disputed issues of fact and in that regard, also assesses the credibility of witnesses.)

Under our system, the allegations against the parties in the action will be set forth in a complaint, which is filed in court and is available to the public. The minimum contents of civil complaints, as well as of criminal charging documents, are a matter of federal procedural rules and Supreme Court case law. These rules require a civil complaint to contain a "short and plain statement of the grounds for the court's

jurisdiction," as well as a "short and plain statement of the claim showing that the pleader is entitled to relief."[7]

When DOJ's case proceeds to court, the defendants are entitled as a matter of constitutional law and federal procedural rules to extensive review of the evidence that DOJ has gathered for its case. The standard rules for discovery in civil litigation govern DOJ's cases,[8] and those rules, for example: require the government (indeed all parties to a litigated matter) to provide documents, as well as the names of individuals, that it may use to support its claims; entitle defendants to request documents from the government; entitle defendants to depose the government's witnesses; and to obtain substantial information about the government's expert testimony, if any.[9]

When a case proceeds to court, constitutional law and rules of federal procedure provide many opportunities for defendants to present evidence and make arguments in their favor. These federal procedural rules are specifically the Federal Rules of Civil Procedure and the Federal Rules of Evidence. These rules apply to all litigants in federal court and provide quite detailed instructions about the course of a litigation and the kinds of evidence that can be considered. Among the procedural rights litigants enjoy under these rules are the right to legal representation, to present witnesses and documentary

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[7] *See e.g.*, Fed. R. Civ. P. 2, 3, 7-8; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). A criminal indictment of information must be a plain, concise, and definite written statement of the essential facts constituting the offense charged. *See* Fed. R. Crim. P. 7(c)(1).

[8] *See* Fed. R. Civ. P. 26-37, available at http:// www.uscourts.gov/rules/CV2008.pdf

[9] In criminal cases, U.S. constitutional guarantees require other sorts of affirmative disclosures. *See, e.g.*, *Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

evidence, to cross-examine the government's witnesses or experts, to present legal arguments to the judge as to why the case should not proceed, and to test the legitimacy of documentary evidence. The nature and timing of actual trial proceedings vary widely according to the needs of the parties and the schedules of particular judges.

It bears noting that DOJ remains open to entertaining settlement negotiations at virtually every stage of the antitrust investigation or trial proceeding.[10] DOJ views the opportunity for settlement as an essential part of its role as an antitrust enforcer: an appropriate settlement is often sufficient to achieve the goals of the antitrust enforcement effort, while both conserving resources and enabling the parties to reach their legitimate business objectives.

When DOJ concludes a civil antitrust action by settlement or consent decree, it is required by a statute known as the Tunney Act to prepare and file a complaint, proposed settlement, and a competitive impact statement to be filed in federal district court.[11] The Tunney Act provides for wide publication of the details of any proposed settlement, and for a period of public comment on the proposal. The statute requires DOJ to consider those comments, and the court must ultimately determine that the settlement is in the public interest before it can take effect.[12]

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[10] Of course, even though a party may be willing to settle early in an investigation, DOJ must have sufficient information to be satisfied that there is a sound basis for believing that a violation will otherwise occur before negotiating any settlement. *See, e.g.*, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2004), available at www.justice.gov/atr/public/guidelines/205108.htm

[11] 15 U.S.C. § 16.

[12] In criminal cartel matters, plea agreements are usually public documents, and the district court typically holds a public hearing before agreeing to accept the guilty plea. Fed. R. Crim. P. 11(C)(2) requires that the parties must disclose the plea agreement in

In those instances in which a settlement is not reached and a case proceeds to a decision on the merits, that decision, whether of a judge or a jury, is public. This decision is subject to further review by our appellate courts and, potentially, our Supreme Court. Litigation in our federal appellate courts is governed by the Federal Rules of Appellate Procedure;[13] the Supreme Court has its own set of publicly available procedural rules.[14]

I have focused my remarks thus far on the issue of procedural fairness in the civil context. Procedural fairness is obviously also extremely important in the criminal context, although the issues and the rules are somewhat different. Without getting into a lengthy discussion of our criminal investigations and procedures, I will note that our criminal cartel investigations are generally carried out under the guidance of a grand jury; grand jury proceedings are carried out in secret. This secrecy is to enhance the effectiveness of the investigation, but also to protect the reputations of those under investigation who are ultimately not charged. Should, at the conclusion of one of these investigations, a grand jury issue a charge – what we call an indictment – charging individuals or firms with an antitrust crime, this document is, absent unusual circumstances, returned in open court.

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open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

[13]*See* Fed. R. App. P., available at www.uscourts.gov/rules/AP2009.pdf

[14]*See* Rules of the Supreme Court of the United States, available at www.supremecourt.gov/ctrules/2010RulesoftheCourt.pdf

Ultimately, however, virtually all indictments are made public. The Federal Rules of Criminal Procedure govern discovery in criminal actions;[15] and constitutional guarantees apply as well.[16]

Criminal antitrust trials in the Unites States, as with all other criminal trials, are presided over by neutral federal judges, and criminal defendants have the constitutional right to have disputed issues of fact decided by an impartial jury.[17] The course of criminal litigation is governed by the Federal Rules of Criminal Procedure; criminal trials are also conducted in accordance with the Federal Rules of Evidence. Criminal trials in antitrust cases are conducted in public. Jury decisions as well as any judicial decisions generated during the trial are also public. Defendants in criminal cases enjoy the right of appeal; such appeals are governed by the Federal Rules of Appellate Procedure.

In short, our system is not perfect, but procedural fairness is an issue that we in the United States take very seriously. We try to reach the right substantive result in all of our cases – criminal as well as civil – and to do so in a way that respects the procedural rights of those entities and individuals who are the subjects of our investigations and our enforcement actions.

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[15] *See* Fed. R. Crim. P., available at www.uscourts.gov/rules/CR2009.pdf

[16] In criminal cases, U.S. constitutional guarantees require other sorts of affirmative disclosures. *See, e.g., Giglio v. United States*, 405 U.S. 150 (1972); *Brady v. Maryland*, 373 U.S. 83 (1963).

[17] *See* U.S. Const., amend VI.