Administrative Adjudication at the US FTC

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This paper provides an overview on decision-making at the United States Federal Trade Commission ("FTC" or "Commission"), focusing on the FTC's administrative adjudication powers. The mechanisms for protecting procedural fairness are also highlighted, including how the FTC safeguards these rights in a system where the Commission both a prosecutor and adjudicator. It was prepared for a conference on antitrust litigation system in Korea and is intended as an introduction to the FTC's litigation processes to inform a more robust discussion at the conference.[2]

Legal Framework

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

Two government bodies, the FTC and the Antitrust Division at the U.S. Department of Justice ("DOJ"), are responsible for enforcing the federal antitrust laws. Enforcement also occurs through private litigation. The individual states may also bring court cases under the Sherman Act and the Clayton Act.

Agency Structure

The FTC is an independent, federal regulatory commission. Both FTC and DOJ are part of the executive branch of government. DOJ is part of the U.S. President's administration. Of the three primary antitrust statutes in the United States, DOJ enforces one, the Sherman Act; the FTC enforces another, the FTC Act; and both enforce the Clayton Act. Due to their underlying structure, the agencies have different relationships with the courts.[3]

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[2] For additional information about the FTC's administrative adjudication see http://www.ftc.gov/about-ftc/what-we-do/enforcement-authority. See also D Bruce Hoffman and M Sean Royall, Administrative Litigation at the FTC: Past, Present, and Future (2003) 71 Antitrust Law Journal 319.

[3] The U.S. federal court system is as follows: the highest federal court is the Supreme Court of the United States. Beneath the Supreme Court are 13 Circuit Courts of Appeals, twelve of which are assigned regions into which the country is divided. Within each of the twelve regions, there are 94 lowest level courts, known as District Courts. Supreme Court Justices, judges in the Courts of Appeals, and District Court judges are appointed for life terms by the President, subject to confirmation by the United States Senate. Federal court judges are generalists.

The FTC was established in 1914 to be an expert competition and consumer protection body with broader authority in competition matters than the existing legislation, the 1890 Sherman Act. The FTC's expertise was intended to carry over into adjudication, and the agency was given the authority to investigate, prosecute, and adjudicate enforcement matters, subject to appeal in the federal courts.[4] President Wilson and the U.S. Congress believed that the FTC, acting as an adjudicator, would facilitate the development of antitrust policy while simultaneously enhancing certainty and accuracy in the decision of specific antitrust cases.[5]

Prosecutorial and Adjudicative Functions

Combining prosecutorial and adjudicative functions in the same agency requires careful attention to appropriate procedures that will promote independent decision-making. Similar to other U.S. government agencies with similar powers, the FTC has a number of external safeguards to balance the Commission's powers, spanning the three branches of government. At the judicial level, the possibility of appeal of Commission decisions is a clear discipline on the FTC powers.[6] Also, Commission orders can only be enforced by application to the federal district courts. At the executive and legislative level, the selection and appointment of commissioners is another important safeguard. All five commissioners are appointed in seven year staggered terms by the President, with confirmation by the U.S. Senate. No more than three commissioners can be from the same political party, and the commissioners can only be removed for good cause. Also at the legislative and executive level, the U.S. Congress controls

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District Courts are not specialized by subject matter, and, with rare exceptions, neither are the higher courts.

Antitrust cases make up a tiny fraction of cases in the federal court system. For example, a recent study attempted to gather every reported decision in which a federal district court judge published a ruling on the merits of a substantive antitrust claim between 1977 and 2007, and the sample included 644 cases, which includes both federal agency cases as well as private actions. See Joshua D. Wright and Angela M. Diveley, Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission, (2012) Journal of Antitrust Enforcement, pp. 1-22 at 9. Another study looked at the Supreme Court and found that in the last ten years the Court has decided twelve antitrust cases, and that antitrust cases account for 1.5 percent of the Supreme Court's opinions. Douglas Ginsburg and Joshua Wright, "Antitrust Courts: Specialists vs. Generalists", Fordham International Law Journal, Vol. 36, No. 4, pp. 788-811, May 2013, at 790.

[4] In addition to its law enforcement duties, the FTC was also given the authority to conduct studies of industries and business practices.

[5] See Marc Winerman, The Origins of the FTC: Concentration, Cooperation, Control, and Competition, 71 Antitrust Law Journal 1 (2003).

[6] Appeals of Commission decisions following administrative adjudication are made to one of the 13 Circuit Courts of Appeals. As described further below, this discipline is made more powerful by the fact that appeals can be to the Circuit court of the respondent's choice.

appropriations of the FTC's budget, with important input from the Executive branch agency, the Office of Management and Budget. The agency is subject to continual oversight by Congress, and it is common for FTC commissioners or staff to testify before the congressional oversight committee or other committees.

The FTC also has robust internal safeguards, and over past century, the FTC's adjudicative procedures have been amended multiple times in order to enhance these safeguards. Generally speaking, the procedures been revised to mirror more closely the processes in federal courts. Among the more prominent reforms were the significant changes adopted with and as a result of the Administrative Procedures Act.[7] As a result of these changes and continuing today, independent administrative law judges conduct initial hearings with appeals to the Commission, and agency employees who participate in the investigative or prosecutorial functions are prohibited from playing a role in the decision-making process.[8]

The rest of this paper addresses the FTC's competition law enforcement actions, focusing on administrative adjudication. The next section explains how the FTC determines whether to proceed through administrative adjudication or in federal court. The remainder of the paper is organized chronologically, discussing the investigative stage, then initiating a lawsuit, followed by settlements, and finally appeals. The final section summarizes the major differences between administrative adjudication and federal court, highlights the key aspects of due process of the FTC's adjudicative process, and raises questions for further discussion at the conference.

FTC's Law Enforcement Powers

All FTC law enforcement actions start with investigations, and the vast majority of investigations are either closed or result in a settlement.[9]

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[7] The Administrative Procedure Act (APA), Pub.L. 79–404, 60 Stat. 237, enacted June 11, 1946. Former FTC Commissioner Thomas Rosch paints a dismal picture of the administrative litigation process around the time of the adoption of the APA: "At that time, there were problems from a due process perspective with the way the agency functioned. Hearing officers were often subordinate employees of the agency who could be hired and fired based on their decisions, and there was no internal separation required between the Commission and the hearing process." Three Questions About Part Three: Administrative Proceedings at the FTC, Remarks of J. Thomas Rosch before the American Bar Association Section of Antitrust Law Fall Forum, Washington, DC, November 8, 2012, available at: http://www.ftc.gov/sites/default/files/documents/public_statements/three-questions-about-part-three-administrative-proceedings-ftc/121108fallforum.pdf

[8] Statutory provisions outside the control of the FTC govern the supervision, case assignments, pay, and termination of the administrative law judges.

[9] While the FTC may open more than 200 competition investigations every year, only a small fraction of these result in any enforcement activity. Annual statistics on the number of FTC's enforcement activities for merger and anticompetitive conduct cases are available here: http://www.ftc.gov/competition-enforcement-database. By way of example, in fiscal year 2013, the FTC had 23 merger enforcement actions, which include 16 consent decrees, two abandoned

Some investigations result in litigation, when parties choose not to settle and the Commission finds "reason to believe" that a party has engaged in an "unfair method of competition" and that a proceeding would be in "the interest of the public."[10]

The FTC can litigate cases either through administrative adjudication before an Administrative Law Judge (ALJ) and the Commission ("Part III"), or through federal court litigation before district courts.[11]

Through Part III, the FTC can seek a "cease and desist" order and other prospective relief, including divestiture, dissolution, fencing-in, and reporting and monitoring requirements.

The FTC can also litigate in federal district court. The FTC go to federal district court in aid of its administrative proceedings, seeking a preliminary injunction to preserve the status quo pending completion of administrative adjudication. [12] As noted above, to seek a ruling that a party has violated a Commission order, the FTC must go to district court.

Monetary relief is unavailable in Part III, so the FTC also goes to district court when the agency is seeking the financial remedies of disgorgement (where the wrongdoer has to give up the ill-gotten gains) or restitution (restoring the victim to the position it would have been absent the violation by, for example, requiring the wrongdoer to refund the victim's overpayments.)

Whether to pursue a case in Part III or in district court is a decision the FTC makes on a case by

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or "fix-it-first" transactions, and authorization for five preliminary injunctions. For non-merger cases, the FTC had four consent agreements and no Part III or district court filings.

[10] There is no statutory or regulatory definition regarding what it means to have a "reason to believe" or whether a lawsuit is in the public interest. Commissioner Rosch explains: "In its 1980 decision in FTC v. Standard Oil of California, the Supreme Court held that the FTC's application of the 'reason to believe' standard in conjunction with voting out a complaint is not 'final agency action' under the Administrative Procedure Act; instead, the Court held, it is 'a threshold determination that further inquiry is warranted' and, as such, is not subject to judicial review." Rosch continues, "the 'reason to believe' standard is consistent with standards used by prosecutors (including the DOJ's Antitrust Division) in making prosecutorial decisions in civil cases." See, e.g., http://www.ftc.gov/sites/default/files/documents/public_statements/three-questions-about-part-three-administrative-proceedings-ftc/121108fallforum.pdf

[11] In contrast, to enforce the Sherman Act or the Clayton Act, DOJ must initiate an action in federal district court as the Plaintiff, where procedure is governed by the Federal Rules of Civil or Criminal Procedure. The federal district court will then determine whether the law has been violated and, if so, order appropriate remedies.

[12] In deciding whether to grant a preliminary injunction, the court's task is to determine, "weighing the equities and considering the Commission's likelihood of success, [whether] such action would be in the public interest." The district court's action is subject to review by a federal appeals court and ultimately the U.S. Supreme Court.

case basis. The FTC frequently chooses to enforce antitrust law through Part III administrative proceedings, particularly when there is a novel issue of law. Merger investigations, where the FTC has already gone to court to pursue a preliminary injunction, may continue in district court as well as through a simultaneous process in Part III.[13] The speed of the administrative process is a factor because it is more predictable and often faster than pursuing a case in the district courts. Accounting for the administrative law judge's initial decision, as well as any review by the Commission of that decision, the administrative proceeding will typically conclude within fourteen months in cases in which the Commission has sought preliminary injunctive relief, and no longer than twenty months in all other cases. Other factors may warrant pursuing a complaint in federal court, for example, if the FTC wants to seek remedies unavailable in administrative litigation, or if the FTC is joining a private suit. The state of case law in the federal appellate courts may also be a factor. Because the respondent can choose which regional appellate court will hear the appeal, and appeals of district court decisions are generally heard by the particular appellate court responsible for that district, if the FTC is looking to create a split among the appellate courts so that the Supreme Court will consider an issue, they may pursue a case in the district court, where respondent "forum shopping" on appeal is more difficult.

All the appeals of Commission decisions following administrative adjudication are to the federal appellate courts, the Circuit Courts of Appeal. In all federal court cases, the procedures are governed by the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

Investigations

[13] For unconsummated mergers, a complaint is filed in Part III and in federal district court simultaneously. Often the first action that is decided is the preliminary injunction, which is granted or denied in district court. In many cases, the preliminary injunction ruling can be outcome determinative, with parties often abandoning the transaction if the injunction is granted, and similarly, the FTC may choose not to pursue litigation if the injunction is denied. A recent exception to this is the Whole Foods Market, Inc. and Wild Oats Markets, Inc. merger, when the FTC choose to litigate the case even after losing the preliminary injunction hearing. In that case, the Circuit Court of the District of Columbia reversed the district court's denial of the FTC's request for a preliminary injunction to block the merger of Whole Foods and Wild Oats. The D.C. Circuit discussed the appropriate standard for reviewing the FTC's request for a preliminary injunction. The Court "determined that a district court must use a sliding scale in balancing the likelihood of the FTC's success against the equities. It found that the district court misapplied this standard by focusing only on the FTC's likelihood of success and failing to consider the equities. The D.C. Circuit added that "[t]he equities will often weigh in favor of the FTC" and that "the FTC will usually be able to obtain a preliminary injunction blocking a merger by rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation." The D.C. Circuit concluded that by raising such issues, the FTC creates a presumption favoring a preliminary injunction." William Baer and Deborah Feinstein, Changing Emphasis: How Whole Foods Advances the FTC's Efforts to Transform Merger Litigation, Global Competition Policy, September 2008, at 9, citing FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1, 35-36 (D.D.C. 2007), rev'd 533 F.3d 869 (D.C. Cir. 2008).

The FTC opens approximately 200 to 250 competition investigations annually.[14]

The procedures for investigations are codified in publicly available rules of practice (Part II Rules).[15] The Part II rules are revised as appropriately, most recently in 2012 to expedite investigations, incorporate modern discovery methods, and increase engagement with parties. The length of an investigation depends on the complexity of the factual and legal issues involved, whether it is a premerger investigation, or a consummated merger or conduct investigation.

An important feature of FTC investigations is the direct and meaningful engagement with parties and FTC staff and decision-makers.[16] From the earliest stages and continuing throughout the investigation, parties are encouraged to meet with the lawyers and the economists charged with investigating the conduct at issue. These discussions encompass the procedural course of the investigation (including the scope of document requests) and staff's substantive theories of the case. During an FTC investigation, staff is available to meet with the subject of an investigation at its request. Parties are free to request meetings with agency personnel, including investigating staff, the Director of the Bureau of Competition, and Commissioners, at the appropriate stage of the investigation.[17]

Parties are especially urged to open a continuing dialogue with agency economists early in any investigation, in order to address issues related to the collection and analysis of relevant data and the applicability of different potential economic theories.[18] Parties are also free to submit "white papers" containing argument, facts, and theories they believe relevant during the investigation. Notably, Part II of the Commission's rules, which govern investigations, state: "Any person under investigation compelled or required to furnish information shall be advised of the purpose and scope of the investigation and of the nature of the conduct constituting the alleged

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[14] These are rough estimates for recent years. Precise information about the number of investigations opened annually was unavailable at the time of publication.

[15] Part II of the FTC's Rules of Practice, 16 C.F.R. § 2.1 et seq.

[16] This paragraph is from the U.S. submission to the OECD's Competition Commission, "Roundtable on Procedural Fairness: Transparency Issues in Civil and Administrative Proceedings" February 2010, available at: http://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/transparency_us.pdf. For more information see the full submission. See also Edith Ramirez, "Core Competition Agency Principles: Lessons Learned at the FTC", Keynote Address at the Antitrust in Asia Conference (May 2014), available at: http://www.ftc.gov/system/files/documents/public_statements/314151/140522abachinakeynote.pdf.

[17] Agency staff and parties meet frequently in person, affording each side an opportunity to discuss face-to-face the various factual and legal issues raised by the investigation. Then, as an investigation moves close to a decision about whether to bring an enforcement action, meetings are also available, upon request, with senior managers, including commissioners.

[18] See "Best Practices for Data, and Economics and Financial Analyses in Antitrust Investigations," available at http://www.ftc.gov/be/bestpractices.shtm.

violation which is under investigation and the provisions of law applicable to such violation."[19]

Initiating a Lawsuit

The vast majority of investigations are either closed or result in a settlement.[20] When litigation is pursued, the process is that the FTC legal staff writes a memo to the Commission recommending that a lawsuit be initiated. The memo includes a proposed complaint and a proposed remedy. The Bureau of Economics prepares a separate recommendation memo, which can take a position different from the legal memo. The legal and economic staff investigating the case meet with and brief each of the Commissioners individually about the case, and answer any questions Commissioners have. The parties under investigation may submit a "white paper" to the Commissioners, explaining why the Commission should not initiate a lawsuit. The white paper can include legal and economic analyses, as well as documents and other evidence the party wants the Commissioners to consider in reaching its decision. While there is no formal hearing before a complaint it filed, the parties under investigation are given an opportunity to meet with the FTC's senior legal and economic managers as well as with each commissioner. It is not unusual for the FTC to alter or refine its thinking in response to these meetings and submissions.

The Commissioners hold a non-public meeting to discuss the case, and then decide, by majority vote, whether proceeding would be in the public interest, and if so, to initiate the lawsuit by issuing a complaint. These meetings are open to all FTC professional employees, including the investigating case team. All decisions to initiate a lawsuit, whether in administrative adjudication or in federal court, must be approved by the Commissioners by a majority vote.

Similar to a complaint filed in federal district court, the administrative complaint must contain a recital of the legal authority and jurisdiction for institution of the proceeding, a clear and concise factual statement sufficient to inform each respondent with reasonable definiteness of the type of acts or practices alleged to be in violation of the law, where practicable a form of order which the Commission has reason to believe if the facts are found to be as alleged in the complaint, and notice of the time and place of the hearing. The respondents' answer must provide a concise statement of the facts constituting each grounds of defense and a specific admission, denial, explanation, or statement that the respondent has no knowledge.

Once the Commission issues its complaint, the Commissioners are considered to be in an adjudicative role and they are no longer involved in the investigation and prosecution of the matter. FTC staff who conduct the investigation or the prosecution of the case are prohibited from participating in the Commission's decision or review of the matter. In addition, ex parte contacts about the matter between FTC staff and respondents and the ALJ or the Commissioners are strictly prohibited.

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[19] 16 C.F.R. § 2.6.

[20] The FTC concludes a matter either by issuing a final order at the conclusion of adjudication in Part III, or by entering into a settlement with the parties, or by concluding that no enforcement action is necessary in a closing letter to the parties. Each of these actions results in a public announcement, except when an agency closes a pre-merger review.

Commencement of Administrative Adjudication

Adjudication starts when the Commission issues a complaint. All of the proceedings that follow are subject to the agency's rules of practice ("Part III Rules").[21]

The burden of proof is on the FTC staff (complaint counsel) to prove that a violation has occurred, but, "the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto."[22] The standard of proof applicable to most disputed factual issues is a "preponderance of the evidence", which is the same standard of proof required in civil cases in federal court.

The Part III Rules have strict deadlines to expedite adjudication. In practice, this means that the trial is typically expected to occur within five months of the filing of the complaint in cases in which the agency is also seeking preliminary injunctive relief in federal court, and within eight months in all other cases.

Discovery is available to any party to the extent it may be reasonably expected to yield information relevant to the allegations of the complaint, the proposed relief, or the defenses of any respondent. Parties are expected to work in good faith to resolve discovery disputes before going to the ALJ. The ALJ can grant or deny the motions, as well as to impose sanctions against any party refusing to cooperate. Although the ALJ can restrict discovery in ways not allowed in federal court, in practice they have not done so.

For evidence, the standard for admission in administrative adjudication is if the evidence is shown to be "relevant, material, and reliable." While this includes evidence that might not be admissible in a federal court, the Federal Rules of Evidence may be cited as persuasive authority in Commission proceedings. An example of evidence that would be admissible in Part III but would not be allowed in a jury trial is expert reports, which is admissible hearsay evidence.

The procedural rights granted to respondents in FTC adjudications are similar to those in a court proceeding. For example, at the administrative trial, the respondents have the right of due notice, cross examination, presentation of evidence, objection, motion, argument, and all other rights essential to a fair hearing.

The hearings before the ALJ are public, unless the ALJ has issued an *in camera* order protecting selected information from public disclosure. The complaint, hearing record, and initial decision are public documents, except to the extent they contain confidential information submitted by private parties.

The administrative law judge is expected to file an initial decision within one year after the Commission's issuance of a complaint, and must be filed within 70 days of the filing of the last-

[21] Proceedings are governed by Part III of the FTC's Rules of Practice, 16 C.F.R. § 3.1 et seq. The Federal Rules of Civil Procedure may be consulted for guidance and interpretation of Commission rules.

[22] 16 C.F.R. § 3.43.

filed proposed findings, conclusions and order, or 85 days from the closing of the record if the parties waive filing of proposed findings.

Settlements

At virtually every stage of the investigation or trial proceeding, the FTC is open to settlement negotiations. The opportunity for settlement as an essential part of antitrust enforcement – an appropriate settlement is often sufficient to achieve the goals of the antitrust enforcement while both conserving resources and enabling the parties to achieve their legitimate business objectives.

The Commission's acceptance of a proposed consent agreement initiates a public process, whether before or after an enforcement action has been initiated. Every consent agreement proposed must contain certain provisions, largely designed to ensure that the decree is enforceable and legally sustainable in case compliance problems arise later. If the FTC accepts a proposed consent agreement, the proposed agreement and complaint are available for public comment.[23] To facilitate input by the public, the Commission simultaneously publishes an analysis to aid public comment, which explains in lay terms the violations alleged and proposed remedies. It is intended to disclose information sufficient to educate the public about the facts and underlying rationale of the proposed consent agreement, and describe the competitive harm addressed, the nature and extent of the evidence involved, the nature of the proposed remedy vis-à-vis the harm identified, and the consumer impact of the competitive harm. After the comment period closes, the Commission evaluates the record and determines whether to accept, change, or reject the settlement.

Appeals to the Commission

The first appeal, available to either complaint counsel (FTC staff) or respondents or both, is an appeal from the ALJ's initial decision to the Commission. The Commission reviews the ALJ's decision *de novo*, meaning that the Commission is not bound by the ALJ's evidentiary rulings, findings of fact, or conclusions of law. Based on the Administrative Procedures Act and the FTC Act, the Commission has, in short, all of the powers it would have had if it had issued the initial decision.

As part of the review, the Commission will receive briefs and hear oral arguments by both parties, and render a written decision, subject to the majority vote of the Commission. If the Commission and ALJ disagree with respect to a finding of fact, it is the Commission's findings, not the ALJ's, that are due deference on appeal to the federal courts of appeal. The Commission should defer to the ALJ's findings concerning a witness's credibility, where those findings of fact are based on the ALJ's observation of the witness's demeanor at trial. The Commission administrative orders become effective automatically on the sixtieth day after service, unless stayed by the Commission or a federal court.

[23] By way of example, a press release with links to the complaint, consent order, and associated documents included the analysis to aid public comment is available here: http://www.ftc.gov/news-events/press-releases/2014/03/ftc-approves-final-order-settling-charges-endo-health-solutions.

Appeals to the Circuit Court of Appeals

The next appeal is only available to the respondent, who can appeal the Commission's decision to the federal courts. Respondents may file in any federal appellate court where the method of competition or act or practice in question was used or where such person resides of carries on business, which has the practical effect of giving the respondent the choice of court.

The Commission's findings of law are reviewed *de novo*, but like other agency decisions under the Administrative Procedure Act, they are given some deference to the extent they involve interpretation and application of the FTC Act.

More specifically, the Federal Rules set out that the Court of Appeals is bound by the Commission's findings of facts, so long as the facts are supported by evidence.[24] The courts have interpreted this language to mean that a "substantial evidence" test applies. This test asks whether the Commission's findings are supported by "such relevant evidence as a reasonable mind might accept as adequate," not whether the reviewing court "making its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences" would reach the same conclusion.[25]

The test is deferential to the FTC. It is less stringent than the "preponderance of the evidence" test, and a Commission finding can be wrong without being unreasonable.[26]

Some observers have noted, however, that in practice in some cases the Commission may not be accorded this deference, and that the appellate courts' deference to the Commission's fact finding can be tied to their determination of whether the Commission correctly analyzed the question of law. One former FTC commissioner said, "it seems very clear to me that when a Court wants to reject the Commission's conclusions as a matter of law, it reviews the Commission's analysis de novo and gives the Commission's factual findings little deference."[27]

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[24] 15 U.S.C. 45(c).

[25] Indiana Federation of Dentists v. FTC, 476 U.S. 447, 454 (1986).

[26] See, e.g., Adolph Coors Co. v. FTC, 497 F.2d 1178, 1184 (10th Cir. 1974), cert. denied, 419 U.S. 1105 (1975) (And where there is a possibility of drawing two inconsistent inferences from the evidence, the Commission is not prevented from drawing one . . . . If the inference is supported by substantial evidence, it cannot be set aside even though the court could draw a different inference."

[27] See Three Questions About Part Three: Administrative Proceedings at the FTC, Remarks of J. Thomas Rosch before the American Bar Association Section of Antitrust Law Fall Forum, Washington, DC, November 8, 2012, available at: http://www.ftc.gov/sites/default/files/documents/public_statements/three-questions-about-part-three-administrative-proceedings-ftc/121108fallforum.pdf

Conclusion

The combination of prosecutorial and adjudicative functions is a great responsibility for the FTC commissioners and staff. While expert judges allow the Commission to pursue novel theories and difficult cases, the separation of responsibilities at various stages in a case and other procedural safeguards are essential to the proper functioning of these dual functions.

There are lively debates around the globe about the combination of these functions into a single agency, there is little criticism of the FTC. This is likely because, as this paper has demonstrated, in most respects, FTC administrative adjudication mirrors federal court, particularly with respect to a full trial and the due process rights afforded to the parties. The similarities are particularly important with regard to transparency and parties' opportunities to respond to agency's concerns and their opportunities to be heard before an adverse decision it taken

The principle differences between Part III and federal court litigation are timing, a different test for evidence, and appeals. The timing is more predictable in Part III, and more evidence may be admissible than in federal court. Differences in appeals include that in the first appeal, from an ALJ decision to the Commission, the Commission is not required to give any deference to the ALJ's findings of fact. Also, the Commission's final decisions, when appealed, are subject to a more deferential standard of review than applied to district court judgments.

Recently, critics have noted that an overwhelming number of Commission decisions favor complaint counsel (FTC staff) when an ALJ decision is appealed to the Commission. Critics call into question the expertise of the FTC's adjudicators and decision-makers, noting that Commission decisions are more likely to be appealed and more likely to be reversed than district court decisions.[28]

These criticisms raise important questions to address at the conference: how does the FTC's protection of due process compare to other domestic and international regimes? What accounts for the Commission's apparent favoring of FTC staff in decision-making? How well functioning is the FTC is the decisions are more likely to be appealed and reversed than a district court decision?

[28] See Joshua D. Wright and Angela M. Diveley, Do Expert Agencies Outperform Generalist Judges? Some Preliminary Evidence from the Federal Trade Commission, (2012) Journal of Antitrust Enforcement, pp. 1-22.