

FIFTH UNITED NATIONS CONFERENCE TO REVIEW
ALL ASPECTS OF THE SET OF MULTILATERALLY
AGREED EQUITABLE PRINCIPLES AND RULES FOR
THE CONTROL OF RESTRICTIVE BUSINESS PRACTICES
Antalya, Turkey, 14–18 November 2005

**THE COMBINATION OF PROSECUTORIAL AND ADJUDICATIVE FUNCTIONS
AT THE UNITED STATES FEDERAL TRADE COMMISSION**

Submission by the UNITED STATES OF AMERICA

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The views expressed are those of the U.S. Federal Trade Commission's Office of General Counsel and are not necessarily those of the U.S. Federal Trade Commission or any of its individual Commissioners.

Introduction

The competition agencies participating in this conference illustrate the wide variety of structures that can be used for the effective enforcement of competition laws. The structure that this paper focuses on is that of the United States Federal Trade Commission (“U.S. FTC”) which exercises both prosecutorial and adjudicative functions. The U.S. FTC investigates possible violations of competition and consumer protection law. After such an investigation, if a majority of the Commissioners believe a law violation has occurred, they may decide (among other options) to challenge the conduct by conducting an adjudicative proceeding.¹

For an adjudicative proceeding to occur, the Commissioners must authorize the filing of an administrative complaint. If the respondent contests the charges, the respondent will have the opportunity to defend itself in a trial-type proceeding conducted at the U.S. FTC.² After the proceeding is completed, the Commissioners will issue a final decision either dismissing the complaint or requiring the respondent to remedy a law violation. If the Commissioners issue a decision against the respondent, the respondent is entitled to judicial review of the decision by a federal appellate court.

The combination of investigative, adjudicative, and other functions allows an administrative agency such as the U.S. FTC to apply its expertise in adjudicative matters and can therefore lead to the development of a consistent and sophisticated regulatory regime.³ At the same time, there must be safeguards built into the structure to ensure a

¹ The U.S. FTC also has the authority to remedy law violations by entering into a consent order with the respondent or by litigating an enforcement action in the federal courts. The U.S. FTC shares enforcement of the competition laws with the United States Department of Justice (“U.S. DOJ”), which is a prosecutorial agency that seeks remedial orders in federal courts of general jurisdiction.

² Typically, the Commissioners will decide to have a hearing officer (an “Administrative Law Judge”) conduct the adjudicative proceeding and issue an “initial decision.” Either the agency’s prosecutorial staff or the respondent may decide to appeal the initial decision to the Commissioners. During the appeal, the Commissioners review the initial decision, receive additional written briefs, conduct an oral argument, and then issue a final decision and order.

³ The U.S. FTC also has the authority, among other activities, to promulgate rules that regulate industry (primarily on consumer protection matters) and to conduct studies for the U.S. Congress and the public.

fair adjudication. For example, a decision of the Jamaica Court of Appeal raises the question of whether there is a violation of natural law when an administrative agency exercises both prosecutorial and adjudicative functions.⁴

Courts in the United States have addressed an analogous issue under the U.S. Constitution and have found that the combination of prosecutorial and adjudicative functions in an administrative agency such as the U.S. FTC does not automatically create a “risk of actual bias or prejudgment” amounting to a violation of procedural fairness, or due process.⁵ An important part of the court’s analysis is to assess the risk of actual bias by looking at the underlying structure of the agency being challenged.⁶ As discussed below, the institutional structure of the U.S. FTC complies with this due process principle by internally separating the agency’s prosecutorial and adjudicative functions. The U.S. FTC’s structure is also based on the Administrative Procedure Act, which is a federal statute that contains specific procedural requirements for agency adjudications.⁷

I. Mechanisms that Separate Prosecutorial and Adjudicative Functions
A. The Delegation of Prosecutorial Functions and the Restrictions on Ex Parte Communications

To ensure fairness, the U.S. FTC has put in place internal mechanisms that separate the investigative and adjudicative functions of the agency at key points in its decisionmaking process. The Commission has an investigative role until the time when it authorizes the issuance of a complaint against a respondent. When the complaint is issued, the five Commissioners who head the U.S. FTC are then considered to be in an adjudicative role and they are no longer involved in the investigation and prosecution of the matter. During the adjudicative proceeding, the Commissioners will be isolated from the prosecutorial staff, except as matters may come before the Commissioners on the record in their judicial capacity. All communications on the merits of the case, from the agency’s prosecutorial staff or from those outside the agency, must be on the public record. This restriction on “*ex parte*” communications is based on the constitutional principle of due process, requiring the Commissioners to decide the matter on the record developed during the administrative adjudication. The restriction ensures that the

⁴ *Jamaica Stock Exchange v. Fair Trading Commission*, Supreme Court Civil Appeal No. 92/97 (2001).

⁵ *Withrow v. Larkin*, 421 U.S. 35, 47-48 (1975) (relying on *FTC v. Cement Institute*, 333 U.S. 683 (1948)).

⁶ For example, in *Withrow*, the U.S. Supreme Court addressed a challenge to the structure of a state medical licensing board. The Court noted that “the Board had organized itself internally to minimize the risks arising from combining investigation and adjudication.” *Id.* at 55 n. 20.

⁷ 5 U.S.C. §§ 551-706.

agency's prosecutorial staff do not present influential material to the Commissioners that the respondent has no opportunity to rebut.

One challenge for an agency with such a structure is to demonstrate that it has been vigilant in maintaining its internal separation of functions. At the U.S. FTC, there is extensive training to inform all staff about the rules that separate prosecuting staff from the Commissioners (and those who advise the Commissioners) in an ongoing adjudication. All matters which are in adjudication at the agency are clearly indicated to alert the Commissioners of that status. In addition, questions about how the rules should be implemented in a particular situation are resolved by an advisory office in the agency.

B. The Procedure for Seeking Disqualification of Agency Adjudicators

Another possible concern with this structure is to ensure that the agency adjudicators will act impartially. The structure of the U.S. FTC addresses this concern by providing procedures for the disqualification of Commissioners. Commissioners may be disqualified from participating in an adjudicatory matter if they have prejudged the facts of the case or otherwise have been connected with the case or the parties in a way that casts doubt on their ability to render an impartial decision. The U.S. FTC has an internal ethics office that assists the Commissioners in determining if they have a conflict of interest. In addition, the U.S. FTC allows a respondent to request the disqualification of a Commissioner, and the matter can be resolved by a court if necessary.

One basis for disqualification is if the Commissioner has a financial interest in the outcome. Another basis for disqualification of a Commissioner in a formal adjudication is if the Commissioner makes statements from which an observer would conclude that the Commissioner "has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."⁸ There must be a particularized showing of bias on the part of the Commissioner.

II. Why is this combination of functions compliant with due process (natural justice)?

Although there is internal separation of functions at the U.S. FTC, the issue has been raised that the structure nonetheless allows the Commission to authorize the issuance of a complaint, and then later to adjudicate that complaint after a hearing. How does the Commission assure an impartial adjudication when it has already made a preliminary determination regarding the investigation?

In order to authorize the issuance of a complaint, a majority of the Commissioners must find that there is "reason to believe" that a law violation has occurred. The reason to believe determination is "a threshold determination that further inquiry is warranted."⁹ Thus, the Commissioners make this determination before all the relevant information (from the investigation) has been produced, and before the investigational targets have fully presented their arguments against liability. In this context, finding "reason to believe" does not mean that a Commissioner made up his or her mind before a full debate on the issues, or that the Commissioner would necessarily find a law violation applying

⁸ *Cinderella Career & Finishing School, Inc. v. FTC*, 425 F.2d 583, 591 (D.C. Cir. 1970). In this case, the court found that a Commissioner was disqualified because of a speech attributing liability to the respondent.

⁹ *FTC v. Standard Oil Co. Of California*, 449 U.S. 232, 241 (1980).

the stricter “preponderance of the evidence standard” on the more developed factual record at the end of the case. In a similar context, the U.S. Supreme Court has held that “the mere exposure to evidence presented in nonadversary investigative procedures is insufficient in itself to impugn the fairness of board members at a later adversary hearing.”¹⁰ Indeed, a Commissioner voting to issue an administrative complaint is expected to keep an open mind on factual as well as legal issues and ultimately decide the case applying a stricter standard of proof on the whole record. As a result, there have been cases where the Commissioners have determined after a full adjudication that a respondent has not violated the law.¹¹

If the Commission’s decision is not based on the facts developed in the official record, then the decision will be susceptible to being overturned on appeal to a reviewing court. The availability of review by an impartial, independent judiciary is an important check to ensure the fairness of agency adjudications. At the same time, the reviewing judge should give some deference to the agency’s adjudication in light of the agency’s expertise on the subject. The standard of review for courts reviewing the U.S. FTC’s adjudications is whether there is “substantial evidence” to support the agency’s factual determinations.¹² The Commission’s findings of fact must be supported by “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹³ If the agency’s fact-finding procedures were inadequate or incomplete,

10 *Withrow* at 55. The Court explained further that it does not violate due process of law for “members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings.” *Id.* at 57. The Court concluded that the agency adjudicators “would not be so psychologically wedded to their complaints that they would consciously or unconsciously avoid the appearance of having erred or changed position.” *Id.* The Court analogized the role of the agency adjudicators to that of judges who preside over preliminary criminal proceedings (such as the issuance of arrest warrants on the basis of probable cause) and then later preside over the criminal trial. *Id.* at 56.

11 *See e.g. ITT Corp.*, 104 F.T.C. 280 (1984) (overturning an initial decision by the agency’s hearing officer that found the respondent had attempted to monopolize the wholesale white bread baking market by engaging in price discrimination and predatory pricing); *Household Finance Corp.*, 98 F.T.C. 68 (1981) (overturning initial decision finding violation of the Truth in Lending Act).

12 *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986). This standard is established by the Administrative Procedure Act and is used to review the decisions of other administrative agencies, such as the U.S. Securities and Exchange Commission. *See e.g., Sheldon v. SEC*, 45 F.3d 1515 (11th Cir. 1995).

13 *Indiana Federation of Dentists* at 454 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1938)). Under well established case law, a reviewing court must give some deference to an agency’s consistent interpretation of a statute, unless it is “arbitrary and capricious” or “contrary to the plain meaning of the statute.”

the court can either engage in a *de novo* review of the claim, or it can remand the case back to the agency for further factual development. With regard to questions of law, the reviewing court gives some deference to the U.S. FTC's "informed judgment" that a particular commercial practice is unlawful.¹⁴

Conclusion

In summary, the combination of prosecutorial and adjudicative functions can have important benefits and can allow a competition agency to effectively implement a regulatory policy depending on the country's particular political and legal culture. Although this structure can raise the issue of whether there is sufficient internal separation of these functions, the mechanisms in place at the U.S. FTC illustrate that a competition agency can exercise both functions in a manner consistent with due process.

¹⁴ *Indiana Federation of Dentists* at 454; *Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993).