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BY THE COMPTROLLER GENERAL 111680

Report To The Congress

OF THE UNITED STATES

Closer Controls And Better Data Could Improve Antitrust Enforcement

The Department of Justice's Antitrust Division and the Federal Trade Commission enforce Federal antitrust laws aimed at preventing anticompetitive business practices and market structures. GAO's review of 294 antitrust investigations showed that the two agencies can improve their operations by

--more closely monitoring enforcement direction;

--evaluating the effectiveness of enforcement efforts;

--providing closer management control over investigations; and

--maximizing the use of available support services, such as professional economists and investigative personnel.

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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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To the President of the Senate and the CW000001
Speaker of the House of Representatives

This report, requested by the Chairman, Senate Select SEN05900
Committee on Small ~~Business,~~ discusses the need for the
Federal Trade Commission and the Department of Justice's AGC00059
Antitrust Division to improve Federal antitrust enforcement.
The report makes recommendations to the Attorney General and
the Chairman of the Federal Trade Commission. AGC00414

Copies of the report are being sent to the Director, Office of Management and Budget; the Attorney General; the Chairman, Federal Trade Commission; and several congressional committees.

Comptroller General
of the United States

Contents

ABBREVIATIONS

CID	Civil Investigative Demand
EPO	Economic Policy Office
FBI	Federal Bureau of Investigation
FTC	Federal Trade Commission
GAO	General Accounting Office
RA	Research Analyst

COMPTROLLER GENERAL'S
REPORT TO THE CONGRESS

CLOSER CONTROLS AND BETTER DATA COULD IMPROVE ANTITRUST ENFORCEMENT

D I G E S T

Two agencies share responsibility for enforcing Federal antitrust laws:

--The Justice Department's Antitrust Division, through civil and criminal legal proceedings.

--The Federal Trade Commission (FTC) through adjudication before Administrative Law Judges.

GAO compiled data on 294 antitrust investigations over a 3-year period and concluded the agencies could do a better job of directing enforcement activities if they had better records of how their staffs use their time. GAO also compiled staff time data showing the extent to which the enforcement agencies are directing resources to the basic objectives of the antitrust laws. (See app. II.)

MANAGEMENT NEEDS MORE INFORMATION TO KEEP TRACK OF ENFORCEMENT ACTIVITIES

Both the Antitrust Division and FTC organize enforcement activities by program areas but could keep better track of how their staffs use their time. The Antitrust Division sets its enforcement priorities by estimating expenditures directed at two primary objectives--reducing private conspiratorial conduct and reducing oligopoly and monopoly (undue and illegal economic concentration and market structure).

Without accurate records, the Division cannot adequately manage the direction of antitrust enforcement or tell the Congress whether its appropriations are spent as planned.

Although budget documents showed that the Division planned greater expenditures under the oligopoly and monopoly program, GAO

found that its attorneys spent more time on conspiratorial conduct investigations. (See p. 8.)

FTC measures how its staff is used according to broad programs, but it does not keep records of the time spent pursuing particular types of violations. For example, FTC statistics show that 10 percent of its fiscal year 1978 professional staff time was devoted to horizontal restraint violations, such as price fixing and boycotts. GAO found that the statistics are incomplete: such violations account for 23 percent, not 10 percent, of FTC's resources. (See p. 10.)

In the past, neither agency emphasized using evaluations to provide management information on the agency's effectiveness in restoring and maintaining competition. Both are beginning to develop this capability and, in some cases, are interested in evaluating the effects of similar enforcement activities, such as successful challenges to anticompetitive mergers. For efficiency, the two agencies could use existing liaison procedures to share information on their evaluation plans and strategies. Both agencies should consider a joint task force to study ways to evaluate antitrust enforcement and/or joint evaluation efforts. (See p. 12.)

CLOSER CONTROL OVER INVESTIGATIONS IS NEEDED

Both agencies need to tighten control over investigations. GAO's review of 294 antitrust investigations showed that they are monitored mostly on an informal basis. Some investigations might have been conducted more efficiently with closer management control.

Most FTC program directors did not require formal written status reports for work under way; communication was frequently oral, and most efforts to monitor work were on an "ad hoc" basis. There were no guidelines for attorneys to use to set the scope of the investigation. (See p. 19.)

Within the Antitrust Division, management oversight is conducted at several levels, but better control is needed over the status and progress of investigations. The Division has no general criteria on how long investigations should take, and most are not subject to time frames. (See p. 27.)

During GAO's review, both agencies took steps to strengthen oversight. (See pp. 23 and 31.) In addition, at the completion of the review, FTC adopted new requirements to improve investigational planning. Attorneys are required to discuss certain relevant issues in their memoranda recommending investigations and prepare plans for each investigation proceeding beyond the initial phase. (See p. 32.)

BETTER USE OF ECONOMISTS AND OTHER STAFF NEEDED

Although both agencies call on economists to assist in antitrust enforcement, economic assistance often is not requested on a timely basis. FTC's operating manual implies that economic assistance should be sought early. At the Antitrust Division, this decision is generally left to the staff attorney in charge of the investigation. Such assistance is particularly important in merger investigations where market definition and economic effect are important to showing a violation. (See p. 35.)

In both agencies, GAO found cases where economic assistance could have facilitated enforcement efforts. (See pp. 36 and 39.)

Both agencies should explore the use of other professionals to assist on antitrust investigations. Although the Federal Bureau of Investigation can assist the Division in such areas as gathering and analyzing data, the Division does not monitor the extent of such assistance or how it could be used more effectively. (See p. 41.)

FTC employs research analysts to assist its attorneys. However, it needs to establish a desired ratio of attorneys to analysts

and encourage program directors to consider the ratio when filling vacancies. (See p. 42.)

RECOMMENDATIONS

The Antitrust Division should:

- --Accumulate data on the use of resources by enforcement programs. Such data would help plan and monitor efforts and inform the Congress of how resources are expended. (See p. 15.)

- --Evaluate the effectiveness of enforcement efforts in promoting competition. (See p. 15.)

- --Strengthen management control over the progress of antitrust investigations to facilitate their orderly development and progress. (See p. 33.)

- --Provide guidelines on the role and use of economists and Federal Bureau of Investigation agents. (See p. 44.)

The FTC should:

- --Accumulate information on the extent resources are used to pursue each type of violation of the antitrust laws. (See p. 15.)

- --Specify the type of investigations which should receive economic assistance, and require the early involvement of economists in investigations. (See p. 44.)

The Antitrust Division and FTC together should:

- --Insure that evaluation plans and strategies be shared to avoid duplication and to increase the base of knowledge each agency has of the other,

- --Establish a joint task force to plan a unified and comprehensive approach

to evaluating antitrust enforcement, and

--Undertake joint evaluation efforts. (See p. 15.)

AGENCY COMMENTS

The Department of Justice agrees with GAO's recommendations that improvements are needed in its antitrust enforcement operations. Justice said that its Antitrust Division either has already decided on means of implementing the recommendations or, in the case of joint work with the FTC, is prepared to go forward. (See app. VI.)

FTC's Bureau of Competition Director said that GAO's report makes a useful contribution to FTC's efforts to improve the effective use of its competition mission resources. (See app. VII.)

The Director objected to GAO's recommendation that information be maintained to show the extent to which resources are used to pursue various practices prohibited by the antitrust laws. (See p. 16.) He agreed that FTC and the Antitrust Division should work together more on evaluation efforts. He informed GAO of action taken to increase and improve this work. (See p. 18.)

While not commenting specifically on GAO's recommendation to improve the use of available economic assistance, the Director highlighted actions taken by FTC to secure economic assistance on antitrust investigations. (See p. 128.)

GAO believes knowledge of the resources used to pursue various practices prohibited by the antitrust laws is essential for FTC to adequately plan and manage its enforcement direction.

Tear Sheet

CHAPTER 1

INTRODUCTION

The Department of Justice's Antitrust Division and the Federal Trade Commission (FTC) share the mission of protecting and promoting competition in the marketplace by enforcing Federal antitrust laws. The basic antitrust legislation consists of the Sherman Antitrust Act (15 U.S.C. §1-7 (1976)), the Clayton Act (15 U.S.C. §12-27 (1976)), and the Federal Trade Commission Act (15 U.S.C. §41-45 (1976)). The two agencies have concurrent statutory responsibility to enforce the Clayton Act. Only the Antitrust Division enforces the Sherman Act, while FTC exclusively enforces the FTC Act. FTC can, through the prohibition of unfair methods of competition provided by Section 5 of the FTC Act, handle Sherman Act civil violations.

ANTITRUST DIVISION

The Assistant Attorney General has stated that the Division's broad mandate is to make competition work throughout the American economy. To fulfill its mission the Division conducts eight program activities.

Two major enforcement programs

The programs for reducing private conspiratorial conduct and for reducing oligopoly and monopoly account for the major portion of the Division's resources and are most directly related to traditional antitrust law enforcement. As enacted in the 1978 budget, the two programs account for about 68 percent of the Division's total budgeted resources of $32.1 million.

The primary objective of the conspiratorial conduct program is to maintain competition throughout the economy by reducing conspiratorial conduct and practices which restrain trade and are prohibited by section 1 of the Sherman Act. Under the oligopoly and monopoly program, the Division seeks to prevent and eliminate undue and illegal economic concentration and market structure which are in violation of section 2 of the Sherman Act or section 7 of the Clayton Act. As shown by the table on page 3, for the 3-year period ended September 30, 1978, approximately 10,000 professional staff months (attorneys and economists) were spent investigating and litigating potential antitrust violations under the two programs.

Washington headquarters' sections and eight field offices carry out the Division's litigative and investigative efforts under the programs. According to the Division's organizational scheme, Washington sections are responsible for specific commodities or specialized activities and the eight field offices are responsible for geographic areas spanning all commodities.

Professional Time Charged by the Division's Two Major Programs

Programs	1976 (note a) Person months	1976 (note a) Percent	1977 Person months	1977 Percent	1978 Person months	1978 Percent	Total person months
Program to reduce private conspiratorial conduct:							
Investigations	1,368	60	1,510	61	1,479	65	4,357
Litigation	908	40	964	39	803	35	2,675
Total	2,276	100	2,474	100	2,282	100	7,032
Program to reduce oligopoly and monopoly:							
Investigations	289	28	329	36	467	48	1,085
Litigation	759	72	577	64	509	52	1,845
Total	1,048	100	906	100	976	100	2,930

a/Figures represent data for the 12-month period ended September 30, 1976. The next two columns represent fiscal years 1977 and 1978.

FEDERAL TRADE COMMISSION

FTC has three major operating bureaus--Competition, Consumer Protection, and Economics. The Bureau of Competition enforces the antitrust laws. Regional offices and the Bureau of Economics assist the Bureau of Competition.

FTC's stated antitrust mission is to encourage the unrestrained operation of economic forces in a free and competitive market environment. Major objectives of the competition mission include:

--Improving, or preventing reduction in, the quality of necessary goods and services.

--Increasing the opportunity for, or preventing artificial barriers to, increased competition in the provision of necessary goods and services.

--Investigating and initiating enforcement action to rectify the structure, conduct, and performance of selected industries which exhibit competitive problems.

--Providing information and advice to the Congress and other Federal, State, and local governmental bodies concerning competitive questions, especially where regulatory mechanisms may unduly limit the supply or raise prices.

About $27 million of the Commission's $63 million fiscal year 1978 budget was expended on antitrust enforcement. During that year, FTC used 1,694 work-years; 377 professional work-years were expended on antitrust enforcement.

Enforcement programs

Most antitrust activity under the competition mission is planned, budgeted, and managed under nine program areas. Four programs focus on broad industries or sectors of the economy --energy, food, health care, and transportation-- which have a significant impact on consumer spending and evidence rapidly escalating costs and high profit margins. Three general programs focus on mergers and joint ventures, horizontal restraints, and distributional or vertical restraints in various industries. One program--industrywide-- is structure oriented; that is, it focuses on matters involving monopolies, attempted monopolies, and other related problems that may occur across an industry. The ninth program addresses compliance activity with regard to Commission cease and desist or divestiture orders.

Law enforcement efforts within the programs principally involve three major activities: investigations, litigation, and major study projects that may lead to investigations. As shown in the following table, 70 percent of total competition workhours were spent on these activities during fiscal year 1978.

Program/ Sector	Investigations percent (note a)	Litigation percent (note a)	Major study projects percent (note a)	Total program work-hours
Energy	9	56	28	89,900
Food	19	72	1	129,900
Health	66	23	5	80,400
Transportation	53	21	21	62,500
Industry-wide	55	7	31	47,000
Mergers/joint ventures	41	26	21	95,700
Horizontal restraints	56	10	18	75,800
Distributional restraints	31	28	7	60,100
Percent of total competition mission work-hours	30	28	12	b/ 862,000

a/Percent of total work-hours allocated to programs.

b/Total competion mission work-hours, including compliance activities and overhead.

ANTITRUST LAWS AND ENFORCEMENT DIRECTION

The antitrust laws are based on a belief that a competitive market system can best provide optimum use of economic resources and maximum consumer benefit. As such, the laws seek both to prevent anticompetitive behavior or conduct and to preserve and promote competitive market structures.

To consider the extent to which the enforcement agencies are directing resources to the two basic objectives of the antitrust laws, we compiled data on the professional staff time (lawyers and economists) devoted to investigations and litigation, by each agency, for a 3-year period. The results of our analyses and a further discussion of the antitrust legislation are in appendixes I and II.

HOW ENFORCEMENT EFFORTS ARE COORDINATED

Faced with concurrent jurisdiction for enforcing much of the antitrust laws, the two agencies clear individual investigations under a formal liaison agreement and hold periodic meetings to discuss enforcement policy and direction.

Formal liaison agreement

The agreement, formally established in 1948, requires that before either agency pursues an investigation it send a clearance request to the other agency. The agencies have designated liaison officers who review clearance requests to prevent unwarranted duplication of investigation activity. Where agreement is reached as to the agency which will conduct an investigation, the other agency will not participate. If agreement cannot be reached at the liaison level, the matter is referred to a higher staff level and, if necessary, can be taken to the Assistant Attorney General for Antitrust and the Chairman of the FTC for negotiation and settlement.

We did not extensively review this clearance process or consider whether the concurrent jurisdiction should be continued. In January 1978, shortly before we started our review, the Senate Committee on Governmental Affairs issued a report which concluded that the time required to clear most investigations under the liaison agreement was not a cause for serious concern. It also said that, generally, the liaison arrangement appears to have worked well in accomplishing its principal purpose--avoiding outright duplication of effort. Our review did not produce information contrary to these conclusions.

Periodic meetings

Regarding concurrent jurisdiction, the Senate Committee on Governmental Affairs, while concluding that the present Government structure of antitrust enforcement is basically sound, suggested that the two agencies initiate joint high level policy planning and coordination. The Committee reported that the two agencies had tentatively agreed to conduct meetings among high level staff on a regular quarterly basis, with the Assistant Attorney General and the FTC Chairman participating to the extent possible. We followed up on this tentative agreement and found that meetings were held during 1978. An agenda was prepared for each meeting, but no formal document disclosing matters discussed and agreements reached was prepared.

CHAPTER 2

MORE MANAGEMENT INFORMATION NEEDED TO PLAN AND MONITOR DIRECTION OF ENFORCEMENT EFFORTS

Both the Antitrust Division and FTC need to accumulate additional information for planning and monitoring programs. Although the Antitrust Division plans and conducts enforcement efforts by major program areas, it does not track and monitor actual use of resources by these programs. Thus, it cannot be fully assured that resources are being used as planned. FTC directs and monitors resources for specific programs but does not monitor the extent that resources are used for specific types of violations.

Projects designed to evaluate the effectiveness of antitrust enforcement efforts would also provide useful feedback for planning and monitoring purposes. Both agencies are presently in the early stages of developing this capability. They should coordinate work to avoid duplication of efforts.

MANAGEMENT INFORMATION NEEDED

Each agency should accumulate additional resource utilization information in order to comprehensively plan and monitor their enforcement direction. Both conduct enforcement activities by major program areas. The majority of the Antitrust Division's enforcement efforts are conducted under two programs--the private conspiratorial conduct program and the oligopoly and monopoly program. FTC operates under nine programs--four aimed at specific industries and five concerned with specific kinds of anticompetitive practices.

Antitrust Division needs to more closely monitor utilization of resources by program area

The Division does not currently have a system which accumulates total resource utilization data by program area, and it cannot monitor resource use against budget plans. Although the Division's management information system tracks professional attorney time, it does not track all resource costs to investigations and cases or to enforcement programs.

As submitted to the Congress for appropriation approval and oversight purposes, the Division's budget allocates requested funds to individual program areas. As the only planning document prepared showing the expected use of resources, it provides for greater resource expenditures under the program to reduce oligopoly and monopoly than

under the program to reduce private conspiratorial conduct. Anticipated expenditures for the two enforcement programs for fiscal years 1978 and 1979 are shown below.

Programs	Fiscal years 1978	1979
	--(000) omitted--	
Reduction of private conspiratorial contact	$ 9,087	$10,337
Reduction of oligopoly and monopoly	13,450	14,401

During our review, we noted that total time charges by attorneys during fiscal year 1978 to matters under the two programs were in approximate 2 to 1 ratio in favor of the conspiratorial conduct program. This ratio may be inconsistent with the relationship between the two programs as shown in the Division's budget documents.

We asked the Division to provide data on actual costs to compare with expected resource utilization. According to Division officials, this data is not available because actual costs incurred are not tracked by investigation or major enforcement program. Office of Operation officials said the best estimate would be to apply average professional costs to the programs and estimate clerical and support time and costs for each program. Based on average salary costs for attorney time and other cost data provided by the Division, we estimated 1978 actual costs as follows:

Programs	Estimated cost for fiscal year 1978	Amount shown in fiscal year 1978 budget
	----------(000 omitted)---------	
Private conspiratorial conduct	$12,179	$ 9,087
Oligopoly and monopoly	9,496	13,450

As shown, our estimate of actual cost does not correspond to the Division's budget plans and indicates that actual resource use may not be consistent with enforcement plans presented to the Congress.

A Division official said that resource estimates under the two programs were based on workload estimates provided by field offices and Washington sections. Although support-

ing documentation is not available, he said that the Division believes that actual resource expenditures are more in line with budget estimates than our estimates indicate. This is because while activities under the oligopoly and monopoly program are less attorney intensive, they require more clerical and other support resources.

He acknowledged that the Division has not manually compiled all resource expenditures records in the past to determine actual resource utilization. Such a task would have to be undertaken to determine actual expenditures. He told us the Division is planning to develop the capability to accumulate actual total costs by program category, which will provide management with data on resource utilization to plan and direct antitrust efforts.

Such a system is necessary. The Division sets its enforcement direction by estimating resource expenditures directed at its two primary enforcement objectives--reducing private conspiratorial conduct and reducing oligopoly and monopoly. Without accurate resource utilization data, however, the Division cannot adequately manage the direction of antitrust enforcement or accurately disclose to the Congress how resources appropriated for antitrust enforcement are being spent.

FTC should consider classifying expenditures by type of violation

Information that FTC uses to plan and monitor the utilization of resources does not fully disclose the resources used to pursue specific anticompetitive practices. Without such data, FTC cannot make adequate judgments about future resource expenditures.

The following table compares resource utilization data (about 471,000 professional workhours) as disclosed under FTC's program structure with our analysis of resource use by type of violation.

Comparison of Case-Related Resources by Program and Type of Violation; Fiscal Year 1978

FTC information		Our information (note a)	
Program structure	Percent of resources	Violation	Percent of resources
Industry programs (Energy, Food, Transportation, Health)	62		
		Interlocks	1
Industry-wide (Monopoly)	6	Monopoly	34
Merger	14	Mergers and joint ventures	25
Horizontal restraints	10	Horizontal restraints	23
Distributional restraints	8	Vertical restraints and price discrimination	17

a/Resource data grouped by primary violation. See p. 58 for explanation of how primary violations were determined.

As shown, the information provided under the program structure does not totally disclose the level of effort devoted to particular types of violations. This lack of information occurs primarily because under the four industry programs--accounting for 62 percent of the resources--various types of violations may be pursued which are not reflected in the management data by specific violation. For example, as shown by the above table, information provided by the program structure shows 10 percent of the resources were spent on horizontal restraint practices. Our compilation of resource use by violation, however, disclosed that 23 percent of the resources were used on horizontal restraint practices.

Similarly, the information provided under the program structure does not completely disclose the level of effort devoted to violations concerned with breaking up or preventing the concentration of economic power, caused by monopolies and mergers. The program structure data shows that 20 percent of resources were used for these purposes, whereas our analysis shows about 60 percent of the resources were used. The absence of such data prevents FTC from fully monitoring

resource expenditures and judging whether too much or too little attention is being paid to any one of the various practices prohibited by law.

EFFECTIVENESS OF ENFORCEMENT EFFORTS SHOULD BE EVALUATED

Neither the FTC nor the Antitrust Division has in the past placed a high priority on evaluating enforcement activities to assure that resources are effectively employed. The FTC's Bureau of Competition did not have an employee devoting full time to evaluation efforts, thus, progress on three evaluation projects was slow. Officials of the Antitrust Division's Office of Policy Planning told us that few evaluative efforts have been undertaken because of a lack of staff.

During fiscal year 1978, the Bureau of Competition had three evaluation projects underway. One, started during the fiscal year 1976 transitional quarter, was initially begun as an impact evaluation of vertical restraint cases. In mid-1978, its objectives were substantially reduced and changed, and completion was reset for December 1978. As of May 1979, the study had not been completed.

The other two projects were initially funded in fiscal year 1978 with an allocation of $130,000. Total estimated completion cost is $230,000. One study seeks to (1) focus on the criteria used to target industries for investigation, (2) determine the effectiveness of the criteria used, and (3) develop information indicating whether other more reliable indicators are available. The other study is directed at evaluating and measuring the effectiveness of various kinds of merger enforcement relief.

Contracts were to be awarded early in 1978, but most of fiscal year 1978 was spent working on the evaluation methodologies. One official in the Office of Policy Planning attributed the slow progress to two factors: (1) a low level of commitment in the Bureau to the concept and need for evaluation; and (2) a lack of appropriately trained inhouse personnel to develop the methodologies, select contractors, and manage major research studies. Rather than designate a full-time evaluation specialist, the Bureau of Competition relied on staff attorneys to plan and manage the study efforts. However, according to a Office of Policy Planning report on internal evaluation efforts, they, have neither the time nor inclination to effectively manage a series of complex social science studies. The report recommends hiring inhouse evaluation specialists.

Bureau officials told us that responsibility for completing evaluation efforts has recently been centralized in the Office of the Assistant Director for Planning. In commenting on our draft report, FTC said that the creation of this office, together with recent action to upgrade its evaluation office, reflect the Bureau's commitment to evaluation. It also reflects an acknowledgement that an important feature of the evaluation process is not merely the study of effects of past action but thoughtful preparation for future action. FTC also informed us of two impact evaluation studies conceived in December 1978 which are now underway and of two study reports issued during August and October 1978 which are primarily concerned with future antitrust action and direction. (See p. 126.)

The Antitrust Division's Office of Policy Planning initiated a project in 1978 to comprehensively analyze past activities on price fixing and other conduct violations that the Division conducted during fiscal years 1974 to 1978. According to the officials who initiated the project, its purpose is to identify characteristics of such matters and equate them to resources spent and accomplishments achieved. One official told us that information is available on a case-by-case basis but has not been comprehensively analyzed before. The analysis will document past activities which can be used in directing and assessing future efforts. Similar analyses are planned for Sherman II and Clayton 7 activities.

Both the Division's Economic Policy Office (EPO) and Office of Policy Planning have proposed that projects be undertaken to demonstrate the impact past antitrust enforcement has had in promoting competition. Several studies were suggested including (1) a study of markets where a case, such as price fixing, has been successfully concluded to determine the effect on prices and (2) a study on a successfully litigated merger case, to determine whether competition had been restored. In proposing these studies, EPO officials suggested that the results could help evaluate the enforcement programs. These projects are included in Office of Policy Planning fiscal year 1980 planning documents. If done, they would provide needed insight into the effectiveness of antitrust enforcement.

As can be seen, both the FTC and Antitrust Division are at the early stages of developing an evaluation capability and are interested in evaluating the effects of similar enforcement activities. For example, the Antitrust Division is considering a study of the effects on competition from successfully litigated merger cases; meanwhile, FTC's Bureau of Competition is designing a study to evaluate merger

enforcement relief to determine if increased competition has resulted from successful challenges. In the interests of efficiency, the two agencies could use existing liaison procedures to share information on their evaluation plans and strategies. Both agencies might also wish to consider a joint task force to study means for evaluating antitrust enforcement and/or joint evaluation efforts.

CONCLUSIONS

Both agencies need to accumulate additional information for program planning and monitoring purposes. While the Division allocates resources and conducts enforcement efforts by program areas, it does not track and monitor actual utilization of resources under these programs; thus, it cannot be fully assured that its resources are being used as planned. Our analysis of the utilization of the major component of these resources--professional attorney time--under the Division's two major programs indicates a disproportionate share of professional resources devoted to the private conspiratorial conduct program as compared to the Division's budgetary projections. Resource utilization data is necessary to adequately manage the direction of antitrust enforcement and to accurately disclose to the Congress how resources, appropriated for antitrust enforcement, are being spent. Thus, the Division needs to modify its management information system to provide resource utilization data by major enforcement program.

FTC, on the other hand, directs and monitors antitrust resources for programs focused on specific industries and for programs which are concerned with certain types of anticompetitive behavior or practices. FTC's management information system, however, does not generate information under the four industry programs which shows the use of resources by various practices prohibited under the antitrust laws. Without such information, FTC cannot fully judge the level of effort devoted to any one of the various practices prohibited by law. To provide FTC's management with more complete data for program planning and monitoring, we believe FTC needs to have information on the extent to which resources are being devoted to the various unlawful antitrust practices.

Neither FTC nor the Antitrust Division have in the past emphasized projects to evaluate the effectiveness of antitrust law enforcement. Although FTC's Bureau of Competition began one project in 1976 and two others in fiscal year 1978, the progress of these projects was slowed by the Bureau's low level commitment and by the lack of in-house evaluation specialists. Recent Bureau actions appear to reflect a new

commitment to evaluating antitrust activity. The Division, however, had shown little commitment to evaluate its enforcement efforts and directions. One project was begun in 1978 to comprehensively analyze past price fixing and other conduct activities. The Division's Economic Policy Office and Office of Policy Planning have suggested other projects to evaluate the impact past enforcement has had on promoting competition. Such projects would provide management useful insight into the effectiveness of enforcement activities.

As both agencies are in the early stages of developing evaluation capabilities, they should, through established liaison procedures, coordinate their evaluative plans and strategies.

RECOMMENDATIONS

We recommend that the Attorney General insure that the Antitrust Division

- --accumulates actual resource utilization data by enforcement program to better plan and monitor the direction of enforcement efforts and to provide the Congress with accurate information on use of resources,

- --provides for a continuing assessment and evaluation of the effectiveness of enforcement efforts in promoting and restoring competition.

We recommend that the Chairman, FTC,

- --require that program structure information be supplemented with information showing the total extent to which resources are used to pursue the various practices prohibited by the antitrust laws.

We also recommend that both the Attorney General and FTC Chairman

- --insure that evaluation plans and strategies be shared to avoid duplication of effort and increase each agency's knowledge of the other,

- --establish a joint task force to plan a unified and comprehensive approach to evaluating antitrust enforcement,

- --undertake joint evaluation efforts to maximize resources and results.

AGENCY COMMENTS AND OUR EVALUATION

The Department of Justice, in its October 19, 1979, response to our draft report, informed us that the Antitrust Division has already decided on means of implementing the above recommendations. In the case of joint work with the FTC, the Division said it is prepared to coordinate evaluation efforts with the FTC in areas of joint antitrust jurisdiction.

The Department pointed out, however, that, in a complex law enforcement area such as antitrust, evaluation projects tend to be quite expensive and that the Antitrust Division may need additional resources to undertake a comprehensive evaluation program. (See app. VI.)

FTC, in its response of October 22, 1979, objected to our recommendation that information be maintained to show the total extent to which resources are used to pursue various practices prohibited by the antitrust laws.

FTC said it presently has the capability to identify cases in terms of violations but generally has not preferred to track resources by violations. FTC believes that our recommendation would be hard to implement because (1) many investigations begin by focusing on one species of violation and end up in pursuit of another and (2) some investigations involve multiple violations, such as price discrimination coupled with monopolization. (See app. VII.)

We recognize that our recommendation may be difficult to implement. However, FTC should know the extent to which resources are being used to pursue various practices prohibited by the antitrust laws. FTC acknowledged in its comments on our draft report that the comparision of the antitrust activities of the Antitrust Division and the FTC by violation over a 3 year period is particularly useful and provides an entirely new analysis. (See app. II.)

A major part of appendix II is an analysis of the utilization of resources by type of violation (see page 57). Information needed for this analysis was easily obtained from the Antitrust Division's management information system but difficult to obtain from FTC's management information system. A Bureau of Competition Deputy Director agreed that the data produced by FTC's system was not usable for the purpose of analyzing activity by violation. Only because of his extensive knowledge was it possible to classify investigations and cases by primary violation.

We manually computed the resources expenditure data for each violation category shown on page 60.

FTC believes that our recommendation would be hard to implement because (1) many investigations begin by focusing on one species of violation and end up in pursuit of another and (2) some investigations involve multiple violations. Investigations do change focus as they progress and some are concerned with more than one distinct violation. However, the Antitrust Division designates for each investigation and case a primary violation and, in view of the similarities of enforcement activities, it seems that FTC could manage to do the same. Also, actions taken by the Bureau Director to improve investigational planning (see page 31) should reduce the number of investigations which start after one species of violation and end up in pursuit of another.

We are not objecting to FTC's decision to direct its resources into specific industries. But without the type of information called for by our recommendation, top management officials, as well as congressional committees, have no basis on which to address the adequacy of antitrust enforcement being directed to the various practices prohibited by the antitrust laws. The enforcement activities of the two agencies are very similar; we believe it would be beneficial to have, on a continuing basis, comparable information on the total Federal enforcement effort directed toward the various practices prohibited by law.

In November 1979, FTC supplemented its comments with information which discloses that a Commission-wide task force is studying the Management Information System. Part of this task force's responsibility is to make recommendations concerning violation codes and other data in input documents and the ability to extract information on a violation code basis. It is anticipated that the task force will complete its work and that the new system will be implemented in the late winter or the early spring.

Regarding program evaluation efforts, FTC agreed that in the past it lacked the in-house expertise to conduct evaluations of its enforcement efforts. FTC believes that we have not sufficiently recognized its current response to the problems, which includes not only the study of the effects of past actions but thoughtful preparation for future action. After completing our review work, we were informed of evaluation-type activities completed in 1978 and evaluation studies begun in 1979 which were not mentioned in our draft report.

(See page 126.) Other recent efforts include consolidating evaluation efforts in one office and designating a new Deputy Assistant Director for Evaluation.

FTC agreed that its evaluation efforts should be coordinated with the Antitrust Division but feels that they do not need to hire evaluation specialists. It said the Bureau of Competition's Planning Office is now staffed with six full-time attorneys with diverse backgrounds, and ongoing evaluation projects are being completed by this Office and the Bureau of Economics.

If the Bureau's Planning and Evaluation Offices are able to formulate plans for continuing evaluation efforts and the increased resources result in more timely and beneficial products, the problems identified during our review will be corrected.

CHAPTER 3

MANAGEMENT CONTROL OVER INVESTIGATIONS CAN BE STRENGTHENED

Improved management control over investigations could help assure that antitrust enforcement is conducted as expeditiously and efficiently as possible. Management oversight at FTC and the Antitrust Division is usually informal; most investigations are not guided by formalized plans, milestones, or realistic completion dates. At FTC, we found that 71 percent, or about 100 of the investigations reviewed, did not use formalized investigative plans. Although management oversight is provided at various levels within the Antitrust Division, the Division does not have a systematic procedure for determining the status and progress of investigations.

To evaluate methods of managing antitrust investigations, we reviewed 294 investigations--142 conducted by FTC's Bureau of Competition and field offices and 152 conducted by the Antitrust Division.

FTC INVESTIGATIONS

The FTC program and regional office directors responsible for the day-to-day management of investigations need to monitor and control investigations more closely. Only two program directors required formal written status reports for ongoing work; communication was frequently oral and most efforts to monitor investigational progress were "ad hoc." According to many attorneys, resource and times estimates for various investigational deadlines and completion dates were usually guesses.

Finally, as recognized by antitrust experts, practical remedies should be identified and appropriate legal theories should be developed early in the investigation. Yet, in some cases attorneys did not identify these remedies nor develop these theories until late in the investigation.

During the course of our review, the Director, Bureau of Competition, implemented new management techniques and placed increased emphasis on existing ones to strengthen management's control over enforcement activities. Management improvement actions are discussed on pages 22, 23, and 31.

Scope of investigations are broad

There are no FTC guidelines or criteria available for assisting or guiding an attorney in setting the scope of an investigation. Bureau officials, however, have recently

issued guidelines to help attorneys select and plan investigations for certain violations such as mergers and vertical restraints. According to attorneys, the scope of investigations is usually based on prior investigations and experience. This results in the scope being as broad as possible to reduce the chance of missing some evidence or violation.

The Acting Director of the Bureau of Economics agreed that attorneys often request more information than they need for fear of missing some data. The Bureau of Economics frequently tries without success to narrow subpoena requests. Thus, many cases are unfocused for long periods of time and are frequently more complex than necessary.

For example, one investigation began in June 1974 as a merger investigation. In January 1975, the investigation was expanded to consider restraints of trade and monopolization practices.

In July 1975, the Bureau of Economics stated that:

> "* * * while the Bureau supports the use of compulsory process, we are uneasy about the broad scope of the investigation envisaged by the attorney."

The current lead attorney told us that when he was assigned to the investigation, in December 1976, he felt that the scope was too broad and he narrowed the legal focus by eliminating alleged price discrimination practices from the scope.

At the time of our review, more than 31,000 hours had been charged to this investigation over a 4-1/2-year period, at an estimated cost of about $767,000.

Another case, opened by Commission in June 1974, remained open although the Bureau of Competition recommended twice to the Commission that the case be closed because it was too broad. In both recommendations the Bureau said the possibility of developing significant violations of law was too remote to justify the needed staffing; in fact, it said FTC failed to uncover either economic or legal evidence of anticompetitive conduct. More than 29,000 hours have been charged to this investigation over a 4-1/2-year period, at an estimated cost of about $730,000.

These two case examples illustrate problems and delays which can occur, at considerable expense, without adequate management controls.

Status reports are usually not prepared

Assistant and regional directors are required to submit periodic written status reports to the Bureau director for use in workload review sessions. Staff attorneys, however, are not required to keep managers informed about the progress of an investigation through formal status reports. The status reports found in the files were not uniformly formatted and appear to have been prepared on an ad hoc basis. Attorneys and responsible managers told us that communication about the status of investigations is usually oral.

Status reports are effective devices for monitoring the progress of investigations. Two programs we reviewed required formal written status reports. In one of these, the Assistant Director required a written monthly report providing information on relevant action dates, activity during the past months, projected activity for the coming month, and deadlines. In addition, he required a more comprehensive written quarterly report. This Assistant Director told us that, of the 18 investigations active when he was assigned the program area, 15 were closed after reviewing status reports.

The Bureau Director told us that he favors more formalized communication between attorneys and assistant directors.

Time and resource estimates are unrealistic

Time and resource estimates appear to be meaningless. In 64 of the cases we reviewed, attorneys told us that resource estimates and time frames had been established. Actual hours compared to estimates are shown in the table below:

Actual hours used compared to estimated hours	Number of cases	Percent (note a)
Within 20 percent	10	17
More than 20 percent below	11	19
More than 20 percent over	37	64
Total	b/58	100

a/Rounded to the nearest whole percent.

b/Comparative data not available for six cases.

According to many attorneys, time and resource estimates were usually guesses. One lead attorney said that most attorneys just plug in some figures because the Bureau does not provide any guidelines for estimating time and resource requirements. According to one assistant director, most lead attorneys do not have the experience to accurately estimate resource needs. Bureau management agreed that more needs to be done to improve the use of time and resource estimates. However, management pointed out that the accuracy of these estimates is quite variable, since the factors over which FTC has no control--delays by respondents and motions to quash subpoenas--are so unpredictable.

However, in one program where the Assistant Director stressed the importance of meeting established deadlines, those deadlines were met in all investigations we reviewed. In a December 16, 1977, memorandum, he said that all assignments given staff attorneys were to be in writing and include a precise deadline for completion of the work. If the attorney could not meet the deadline imposed, he or she had to explain why.

The Director of the Bureau of Competition is aware that deadlines at FTC have had little meaning because the staff have not taken them seriously. Our analysis of 44 investigations between July 25, 1977, and March 23, 1978, disclosed that 29 of the investigations, or about 66 percent, expeienced at least two slippages. We also found that the deadlines for 20 of them, or about 45 percent, changed at least once.

Slippage of deadlines is often unavoidable when due, for example, to subpoena enforcement activities or changing priorities. What is necessary is that the Bureau monitor deadlines and insure that where slippage occurs, valid reasons exist for the slippage.

In September 1977, the Director instituted a system of uniform time standards for action by his office and the Bureau of Economics in certain matters. However, one Deputy Director told us in November 1978, that the time standards memorandum of September 1977 had never been strictly enforced primarily because the Bureau had the impression things were working well.

In a November 28, 1978, memorandum, the Bureau Director again emphasized the importance of deadlines. He stated:

> "An essential feature of any program to reduce delay is time deadlines which are enforced, with individual accountability for failure to

meet them. Most successful entrepreneurial enterprises operate on the basis of firm deadlines, and the Government law business should be no exception."

The memorandum also pointed out that the Bureau Director's office will continue to set deadlines in writing at periodic workload sessions for all matters handled by assistant directors. It also said no useful purpose is served by imposing unrealistic schedules, and it directed that deadlines be negotiated between lead attorneys and assistant directors before workload sessions. Requests for extension must be in writing from the Assistant Director, and meeting deadlines will be considered in assessing professional performance.

During our review, Bureau management placed increased emphasis on the role of periodic workload sessions between the Bureau management and assistant and regional office directors. These sessions are the primary mechanism for establishing operating level priorities and monitoring the progress of various matters. Topics for discussion at the sessions include status of matters, theory of matters, personnel difficulties, and staffing needs. The most tangible outcome is establishing internal deadlines which are subsequently monitored by Bureau management.

FTC has only recently established criteria on how long investigations should take. In the case of initial (roughly equal to preliminary) investigations, decisions concerning continuation or termination should be made within the first 100 hours. No comparable requirement exists for full (roughly equal to formal) investigations. Bureau officials emphasized that while criteria would be useful for resource planning, establishment of criteria requires flexibility and recognition of the different requirements for different kinds of investigations, for example, horizontal versus conglomerate mergers.

The average investigation remains open for a long time. Information for the 142 investigations we reviewed showed that the average preliminary investigation was opened for 12 months, while the average formal investigation was opened for 28 months. Preliminary investigations ranged from between less than 1 month and 51 months; formal investigations ranged

between less than 1 month and 96 months. The following table shows how long investigations were open.

Months	Investigations	
	Preliminary	Formal
0 - 6	22	5
7 - 12	32	9
13 - 18	14	11
19 - 24	11	8
Greater than 25	7	23
Total	86	56

Bureau management have taken recent steps to emphasize the importance of establishing and meeting deadlines. These steps should, if closely monitored, improve staff performance. When Assistant Directors stressed deadlines as important management tools, our review showed they were met.

Practical remedies and appropriate legal theories are not firmed up early

Substantial agreement exists among antitrust experts that proper management involves early identification of practical remedies and development of appropriate legal theories. However, we found instances where investigations proceeded without early consideration of either the remedy or legal theory.

In a speech on November 18, 1977, before the Eleventh New England Antitrust Conference in Boston, Massachusetts, the FTC Chairman stated that

> "Too much effort has been expended on proving liability for violations of law, while insufficient thought has been devoted to remedies, and what thought there has been has often come too late. Remedy is the bottom line of (antitrust) enforcement and must therefore receive far more attention."

James Halverson, a former director of the Bureau of Competition, also stated that remedy identification is the

single most important step in an investigation and can be determined during the early stages of an investigation. In a recent speech, he said

> "* * * the Government's trial lawyers have been making a grave error by their frequent use of an unrefined blunderbuss approach to investigations and antitrust complaints, firing out widely varying theories and alternative markets and submarkets, hoping that at least one will hit the target. Ironically, tightly drafted complaints and restrained and controlled document and discovery requests would get the Government to trial much sooner and with better ammunition."

The acting director of the Bureau of Economics also agreed that remedies should be considered at the start of an investigation. He believes formal investigations should not be approved unless viable remedies have been considered and chosen.

Clear evidence exists that in at least five instances, investigations proceeded for some time without the consideration of practical remedies or the development of a firm legal theory. For example, one of the five investigations was opened in June 1975 and closed in May 1978. The investigation's purpose was to consider whether the structure, performance and conduct of certain food industries impeded effective competition. In a January 20, 1978, status report, the lead attorney stated, "Since this matter is still a preliminary investigation, no decision has been made on the relief that would be requested." He also pointed out that, although he needed an economist to identify the consumer and industry impact of any structural relief, one had not yet been assigned. This investigation used 918 work-hours, at an approximate cost of $23,000.

Another investigation,1/ which was still active as of April 1978 at an approximate cost of $198,000, was started in January 1974. Its purpose was to consider whether a municipality created a monopoly by authorizing only one company to provide taxi services at an airport. Throughout most of the case history, staff members were unsure (1) whether the investigation fell within FTC's jurisdiction and (2) what action they should take if the matter was in FTC's jurisdiction. In an October 1975 memorandum to the Commission requesting the issuance of a complaint, the region stated that no attempt had been made to negotiate a consent order partially because "we are unsure of what the precise terms of such an order should be at this time."

In March 1976, a newly assigned lead attorney to the investigation informed the Assistant Regional Director that he was uncertain whether the investigation fell within FTC's jurisdiction. In another memorandum of July 15, 1976, the same attorney informed the Bureau of Competition that:

> "I am now convinced that the legal theories favored by the previous lead attorneys on the case must be given less emphasis and stronger theories pursued."

On February 7, 1977, a regional attorney in a third revision of the proposed complaint stated that:

> "From the beginning of its investigation of the * * *, staff has had difficulty proposing relief."

Finally, based upon a request for evaluation of the case from the Assistant Director for Regional Operations, a staff attorney recommended on September 29, 1977, that

> "While the * * * case may have merit from an economic policy standpoint, from a legal standpoint, the case should be held in abeyance * * *."

1/In its response to our draft report, FTC told us that it does not consider this investigation to be a typical example of an Antitrust investigation.

The lead attorney informed us on January 31, 1979, that he recently recommended the case be closed primarily because (1) the monopoly had been modified by the respondents, and (2) private litigation seeking damages suffered from the monopoly is in process.

Bureau officials subsequently issued an economic report, distributed nationwide, which they believe has had a positive influence on the provision of taxicab services at a number of airports.

ANTITRUST DIVISION INVESTIGATIONS

The Division needs also to monitor and control its investigations more closely to insure that they are conducted efficiently and expeditiously. Management oversight of investigative activities is conducted at several levels within the Division. The senior attorney in charge and the section/field office chief provide day-to-day supervision through meetings and internal memoranda. On a less routine basis the Office of Operations and Office of the Assistant Attorney General oversees and monitors investigations. Management's overview primarily emphasizes policy and legal aspects of investigations, such as the appropriateness of a civil or criminal proceeding, the necessity for using compulsory process, and the adequacy of evidence to file a civil suit or criminal charges. While these are important concerns, management needs also to monitor its investigations more closely to insure that they progress adequately.

Our review disclosed that the Division did not have a systematic means to

-- routinely determine the status of investigations with little or no time changes over a long time and

-- monitor progress of investigations to assure they are conducted as efficiently and expeditiously as possible.

Many investigations are inactive

Using the Division's management information system, the Antitrust Caseload Evaluation System, we found that many investigations are inactive. As of March 31, 1978, 149 of 559 open investigations, or 27 percent, had been inactive--with no attorney time devoted to them for the 6-month period ended March 31, 1978. For the 18-month period ended March 31, 1978, attorneys worked less than 1 month on 145, or 26 percent, of the investigations. The extent of inactive investigations varied among the Division's Washington and field sections, ranging from 3 percent to 48 percent of the investigative workload. Of the 145 investigations with little or no time charged during the 18-month period, 123 were preliminary investigations, 7 were grand jury investigations, and 15 were civil investigative demand 1/ (CID) investigations.

Several factors may explain this inactivity, such as failure to formally close investigations that have been completed and some investigations taking precedence over others. However, at the time of our review, Division management did not have a systematic means to routinely monitor the investigative workload to identify, close, or take other appropriate action on inactive investigations. We asked the Division to identify such inactive matters before our own analysis, but it could not readily provide accurate data. Division officials told us that they would have to ask each section and field office to review workload data to identify the status of investigations and take appropriate action. They also pointed out that the Division's workload would be further cleared by meetings that were being held by the Assistant Attorney General with each section and field chief to discuss pending workload.

Progress not monitored by milestones

The Division has no general criteria on how long investigations should take, and most investigations are not subject to time frames. Information on the 152 investigations we reviewed showed that 59 percent were open for more than 12 months, and about 32 percent for over 24 months. On the average, preliminary investigations were open for 20 months, grand jury investigations for 21 months, and CID investigations for 36 months. No benchmarks exist, however, which

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1/A civil investigative demand is similar to a subpoena. The Division uses it to obtain documents and/or oral information from companies when the suspected violation appears to be a civil violation.

management can use to identify investigations open for abnormally long periods of time which may need senior level attention. The Division is considering the use of "exception reports" to facilitate management oversight of its enforcement workload. Parameters would be established for investigations, and those activities falling outside them would be reported on an exception basis. Division officials told us that such reports would be a useful management tool; however, as of April 1979, such time limits or parameters had not been established.

Effective monitoring of investigations is also handicapped by the absence of milestones or operating plans to measure progress. Of the 152 investigations we reviewed, 129 did not have estimates of time required or completion milestones. In addition, attorneys told us that only eight investigations had operating plans.

Such management tools are particularly needed because the Division opens many investigations based on preliminary information and suspicions which require the systematic accumulation of information on sometimes complex legal and economic issues. For example, one investigation we reviewed began in July 1972, as a result of an article in the Wall Street Journal, about a merger in the advertising industry. To prove a violation of section 7 of the Clayton Act, the attorney had to define the lines of commerce and the geographical area involved. However, the staff had difficulty in obtaining meaningful gross revenue data to define the product market. Notwithstanding the difficulties in developing data on the product market, the staff continued with the investigation and submitted several drafts of a proposed civil complaint alleging a violation of the Clayton Act. The field chief disagreed with the proposed civil complaint because

--the investigation yielded no evidence that the merger had a nationwide effect in the lines of commerce and

--the proposed case was lacking in true economic significance and could not be justified in the light of more important matters pending in the Division.

In March 1976, almost 4 years after it was initiated, the Deputy Director of Operations closed the investigation citing the same basic reasons as the field chief. The attorney estimated that 24 staff months were spent on this matter.

According to the staff attorney, the field chief did not closely monitor the progress of this investigation other than asking him when it would end. Consequently, the shortcomings were not timely resolved by management.

Another investigation which we reviewed would have been improved by obtaining certain relevant data at the beginning of the investigation. This investigation dealt with alleged customer and territorial restrictions in the carpet industry which had sales of approximately $3 billion. The investigation lasted approximately 4-1/2 years and was conducted, at various stages, by three different attorneys.

We discussed the investigation with the last attorney assigned, who had closed the investigation in 1977. He told us the primary factors influencing the decision to close the matter was the fact that the suspected company had a very small percentage of industry sales--.5 percent of the market--and had not made a profit in the 10 years; this fact was determined 3 years after the investigation began during a financial audit conducted by the FBI. The attorney told us he did not know why such data had not been obtained earlier by the previous attorneys assigned. Based on estimates provided by the attorney, this investigation required about 36 staff-months.

Our review also disclosed that the Division's investigative activities have sometimes been hampered by the lack of early development of firm legal theories. For example, in a 1978 study of the Division's past investigations in concentrated industries, the Office of Policy Planning analyzed four prior investigations and concluded:

> "* * * little effort was made to develop a legal theory applicable to the concept of joint monopolization and most of the debate in the files concerned discussions of whether the known facts about each industry would permit the Division to characterize it as a shared monopoly. Consequently, these inquiries remained primarily theoretical discussions of possible cases the Division might wish to pursue* * *"

Of the four investigations pursued, only one developed into a case. In evaluating this matter the Office of Policy Planning pointed out:

> "A wide range of alternative proposed legal theories were spawned by the 1965 to 1976 * * * investigation * * * Though many of

these approaches presented viable enforcement alternatives, few were fully developed both in terms of theory and in application to the facts* * *"

This case was filed in 1973, and the Government dismissed it in 1976. Division records only show staff-months expended on this case from October 1975. From October 1975 until the case's termination, 38 staff-months were charged to this matter.

During our review the Division implemented a project to require and provide milestones. Field offices and Washington sections were requested to identify their five most important matters (that is, investigations or cases) and to schedule completion dates for them. According to agency officials, the primary purpose of the effort, is to enable the executive and operating officials to agree on expected results and to provide a means to measure progress. Several section and field chiefs told us that they believe that this type of schedule will be a useful management tool for monitoring the progress and direction of enforcement activities.

CONCLUSIONS

Antitrust investigations can be lengthy; however, improved planning and management techniques can reduce unnecessary and wasteful delays. We found that (1) the scope of investigations are sometimes very broad, (2) monitoring procedures are often informal and ad hoc, (3) time and resource estimates are not effectively used to monitor progress and to evaluate performance, and (3) viable remedies, detailed legal theories, and other pertinent information are not always considered or obtained early in the investigation.

We believe that investigations could be made timely through the use of formal investigative plans which (1) establish realistic completion dates and resource requirements and provide for periodic reports on the status of investigations. Such plans could also assure that broad scope investigations are efficiently managed and that critical technical aspects and information are considered early in an investigation. A written record would also make it easier for newly assigned attorneys to learn what has to be done on an investigation.

FTC ACTION TAKEN

On July 25, 1979, the Director, Bureau of Competition, issued a memorandum to all Bureau and regional office staff establishing new requirements which should improve investi-

gational planning and correct the management deficiencies discussed in this chapter. To improve the Bureau and Commission decisionmaking process, the Director is requiring that all memoranda which recommend that an investigation continue beyond the preliminary stage--normally 100 hours or 90 days--include a

--statement of the issues,

--precise statement of the legal theory or theories involved,

--discussion of possible remedies, and

--discussion of policy issues and other relevant considerations.

The Director recognizes that poor investigational planning has, on some occasions, led to excessively lengthy and inefficient investigations; thus, he is requiring that an investigational plan be prepared for each investigation proceeding beyond the initial phase. This plan must be approved by the appropriate Assistant or Regional Director, no later than 30 days after the investigation is approved.

For merger cases, the plan must be approved by an Assistant or Regional Director within 30 days after receipt of materials in response to a second request for information under the Hart-Scott-Rodino Act (see p. 94), or within 30 days of a Bureau decision to seek compulsory process, whichever is earlier.

Each plan, which must be updated monthly or, as required by Assistant or Regional Directors, will discuss the following issues:

--The information necessary to reach a judgment concerning each major issue involved in the investigation.

--Sources for the necessary information.

--The means to be used to get the information.

--Necessary inputs from the Bureau of Economics or consultants and when such input should be sought.

--Contingencies which affect the ability to get necessary information.

--Timetable for the investigation in two parts (overall and to next decision point).

--The amount of resources (work-years and dollars) expected to be used.

RECOMMENDATION TO THE ATTORNEY GENERAL

We recommend that the Attorney General insure that the Antitrust Division strengthen management controls over the progress of antitrust investigations to facilitate both their orderly development and progress. In doing so, consideration should be given to using:

--Operating plans, which describe what, how, when, and who will do each activity in an investigation and provide for the early development of the legal theory to be used and consideration of the remedy to be sought.

--Realistic completion dates and resource requirements to measure progress and performance, subject to events beyond the control of the enforcement agency.

AGENCY COMMENTS

The Department of Justice, in response on October 19, 1979, to our draft report, informed us that the Antitrust Division has taken actions to strenthen management control over the progress of antitrust investigations by

--requiring the development of operating plans to guide the progress of investigations;

--establishing an improved automated file numbering system;

--requiring weekly reporting of time by professional and paraprofessional personnel and the establishment by section and field office chiefs of target dates and estimated resource usage for completion of all major phases of antitrust matters, regulatory procceding, and special projects; and

--producing reports that will inform Division management, including section and field office chiefs, of the progress of the investigations

and identify matters that will be coming up for decision and matters that are past due requiring follow-up action. (See app. VI.)

Prior to receiving our draft report for comment, FTC took significant actions to strengthen management control over enforcement activities. The Director of FTC's Bureau of Competition, in commenting on our draft report (See app. VII), stated that the draft under emphasized the (1) progress that has been made to improve investigative planning (see p. 31), (2) importance of the "100-hour" procedure to limit the length of preliminary investigations (see p. 23), and (3) effect of the periodic workload sessions between the Bureau Director and the Assistant and Regional Directors as a way of managing cases and investigations and enforcing deadlines. (See p. 23.)

CHAPTER 4

IMPROVED AVAILABILITY AND USE OF ECONOMISTS AND OTHER PROFESSIONAL STAFF NEEDED

Both FTC and the Antitrust Division employ professional economists; yet, our review showed that such assistance was not always requested in a timely fashion. In some instances, economic assistance could have facilitated enforcement efforts.

FTC's operating manual implies, but does not require, that economic assistance be sought early in an investigation. The Antitrust Division also has no formal policy for determining when economists should be consulted; the decision is generally left to the staff attorney in charge of the investigation. Both agencies need to provide written guidelines on the role and use of economists.

The agencies should also explore the use of other available professionals to assist in enforcement activities. Although the FBI represents an available resource to the Antitrust Division, it has not emphasized the Bureau's use. In addition, FTC needs to encourage expanded use of research analysts to assist antitrust attorneys.

USE OF AVAILABLE ECONOMIC ASSISTANCE COULD BE IMPROVED

Early involvement of economists is essential to the proper development of many antitrust investigation. According to FTC's operating manual, economists are generally useful in all cases when there are market definition problems or where an anticompetitive effect must be shown to establish a law violation. One type of investigation which must develop an acceptable market definition and consider anticompetitive effects concerns mergers prohibited by Section 7 of the Clayton Act. Yet we found that economic assistance was not requested on all merger investigations.

Economic assistance at the Antitrust Division

The Division's Economic Policy Office (EPO) is responsible for providing antitrust economic analysis support. It is staffed with professional economists whose skills can be used from the preliminary investigation stage through to actual litigation and final judgment stages. As of March 1978, EPO had 42 economists.

During the period October 1975 to September 1977, EPO economists provided assistance on 246, or 16 percent, of 1,502 investigations active during that period. Assistance was provided on 41 of the 196 grand jury investigations, 27 of 135 CID investigations, and 178 of the 1,171 preliminary investigations.

Of the 152 investigations reviewed, EPO assistance was requested in 46. The following table shows the types of investigations with economic assistance.

Types of investigation	Total number of investigations	Economic assistance
Preliminary	91	28
Grand jury	34	8
CID	27	10
Total	152	46

The Division has no formal policy or guidelines for determining when economic assistance should be requested, the staff attorney generally makes this decision. Some attorneys who we talked with believed economic assistance unnecessary in investigating most conspiratorial conduct practices prohibited by Section 1 of the Sherman Act. Since such practices are illegal, they believed economic analysis unimportant and unnecessary.

Attorneys did generally agree, however, that economic analysis was important in the investigation of other violations--such as mergers or monopolies--where anticompetitive impact had to be demonstrated and where product and geographic markets had to be defined. Despite this, of 34 merger investigations we reviewed, economic assistance was not requested on 18, or approximately 53 percent. Moreover, in 5 of the 16 merger investigations which received economic assistance, such assistance was requested by attorneys 11 or more months after the investigations started. In some cases, EPO assistance could have facilitated the Division's handling of such matters.

For example, an attorney worked 8 months on a preliminary investigation and recommended filing a civil complaint to divest a merger. At that point, however, the field chief disagreed with him because the merger had a minor economic impact on the industry. When the Office of Operations received the attorney's recommendation and the chief's dissenting opinion, it had a staff economist evaluate the findings of the investigation. He found that the merger was

insignificant. Operations closed the investigation 2 years after the attorney's original recommendation. In our opinion, economist support should have been requested early during the investigation to determine the economic impact of the merger.

In another case, two attorneys investigated a merger and recommended a civil suit. The field chief disagreed with the recommendation because of its minimal economic significance. In this instance economic assistance was not requested until 21 months after the investigation was authorized. Economic analysis supported the field chief's concerns, and the Office of Operations closed the matter in 1976.

A third investigation demonstrates the benefits of early participation by economists in ongoing investigations. This matter which was initiated in 1972, dealt with alleged monopolization and merger violations. The assigned attorney worked on this and other investigations over a 4-year period. In 1976 the attorney recommended further investigation to focus on pricing policies of the target company and on the possibility that they were aimed at driving competitors out of the market. At this point economic assistance was requested to review the facts accumulated. Based on analysis the assigned economist concluded that it would be extremely difficult to demonstrate anticompetitive intent and effect and recommended closing the investigation. The section agreed with the economists' conclusions, and the matter was closed.

Our review also revealed that attorneys may sometimes avoid seeking economic assistance. For example, some attorneys said the following:

--To call for economic assistance is a sure way to close a matter.

--Economists consistently oppose filing certain types of cases.

--Economists work too independently and make decisions which conflict with legal judgments.

We cannot judge how widespread such feelings are or the impact they have on enforcement activities. Discussions with Division officials revealed the general feeling that attorney/economists relations are good and have been continually improved over recent years with more and more interaction. The existence of such views, however, indicates a need for clearer guidance on the role of economists.

Economic assistance at the Federal Trade Commission

The Bureau of Competition receives economic assistance from the Economic Evidence section of the Bureau of Economics. Yet, 94 of 142 investigations we reviewed received no economic assistance. Most of these were regional office investigations and in the preliminary or early stages of investigation, as shown in the following table.

Investigations Without Economic Assistance

Type of investigation	Headquarters		Regional		Total	
	Total	No assistance	Total	No assistance	Total	No assistance
Preliminary	27	13	59	52	86	65
Formal	26	11	30	18	56	29
Total	53	24	89	70	142	94

Of the 34 investigations we reviewed which cited Section 7 of the Clayton Act as a potential violation, 12 investigations (35 percent) received no economic assistance, as illustrated below.

Section 7 - Clayton Act Investigations Without Economic Assistance

Type of investigation	Headquarters		Regional		Total	
	Total	No assistance	Total	No assistance	Total	No assistance
Preliminary	13	6	8	3	21	9
Formal	12	3	1	0	13	3
Total	25	9	9	3	34	12

Although FTC's operating manual implies, but does not require, that economic assistance be sought in the early stages of an investigation, we found that of 48 investigations which received economic assistance, 8 requested assistance more than 2 months after the investigations were started.

Instances were found where the progress of an investigation was impeded by the lack of timely economic assistance. For example, in February 1977, a region started an investigation of a horizontal merger and requested assistance from the Bureau of Economics. In February 1978, the Bureau of Economics recommended that the investigation be closed because the anticompetitive effect of the merger was not considered significant. The lead attorney told us that a decision on this investigation might have been reached sooner had an economist been available in the region. Early economic assistance might also have avoided some duplication of effort which occurred while awaiting headquarters' economic input.

In another example, an FTC region initiated a price discrimination investigation in March 1972 and conducted nonpublic hearings in November. However, because the respondents' corporate headquarters were located within the jurisdiction of another FTC region, the case was transferred to that region in the spring of 1974 for further investigation. Because this investigation has not been provided sufficient economic assistance, according to the new lead attorney, a price discrimination violation had not yet been established. Areas such as market definitions and consumer injury had not been explored in sufficient detail at the time of the actual transfer of the files.

Consequently, the lead attorney focused the investigation upon developing economic data required to support the violation. Based upon this research, he concluded that the alleged price discrimination violation should be replaced by a monopoly violation. It was not until December 1974 that headquarters provided an economist to assist in the investigation. At that time, the economist agreed with the conclusions of the regional attorney. Subsequently, headquarters assigned several economists to this investigation. At the time of our review, the lead attorney had concluded that the respondent had violated the law, and the attorney was finalizing a complaint.

The lead attorney believed that the investigation would have been shortened by at least 2 years had an economist been assigned at its initiation.

The investigation has been active for approximately 7 years. As of April 30, 1978, about 9,000 hours had been charged, at an approximate cost of $223,000.

During our review, only 4 of 10 FTC regional offices had an economist. After our fieldwork was completed, steps were taken to improve the availability of economic assistance for regional office investigations. According to the Assistant Director for Economic Evidence, his office has assisted five regional offices in locating and hiring highly qualified local economists, on a part-time basis.

Headquarters' request for economic assistance not completely fulfilled

As shown above, economic assistance was not provided in 24 headquarters' investigations--13 preliminary and 11 formal. While economic assistance was probably not requested for some of these investigations and not needed for others, our review disclosed that the Bureau of Economics has not been able to fulfill all requests for assistance received from the Bureau of Competition. The Assistant Director furnished us information showing that during the period February 1977 to December 1978, he was unable to provide complete assistance in 54 of 77 requests. The level of assistance provided for these 54 requests ranged from a low of 5 percent to a high of 85 percent and averaged 49 percent of what was needed.

Assistant Directors supervising specific program areas for the Bureau of Competion usually make requests for economic assistance on antitrust matters to the Assistant Director for Economic Evidence in the Bureau of Economics. The Assistant Director meets weekly with his deputies and decides which requests will receive assistance and the extent of assistance.

The Bureau of Economics is attempting to provide some assistance on all requests from the Bureau of Competition. It may be that some assistance is better than none; however, in view of the substantial number of requests which cannot be completely fulfilled, we felt that the Bureau of Competition should consider having all requests for economic assistance flow through one official. This person would judge their relative importance and assist the Bureau of Economics in allocating its resources. While the Assistant Director of Economic Evidence does receive some advice from the Bureau, he told us that a more systematized approach would be helpful in making staffing decisions. In May 1979, the Bureau Director implemented such an approach by designating a deputy director as the focal point for all economic assistance requests from headquarters and field office staff.

GREATER USE OF THE FBI IN ASSISTING THE ANTITRUST DIVISION ON INVESTIGATIONS SHOULD BE EXPLORED

The Antitrust Division should explore greater use of the Federal Bureau of Investigation (FBI) in conducting antitrust investigations. Under its Antitrust and Civil Matters Program, the FBI can provide support, through investigative activity, to the Antitrust Division. Such support can take several forms, including conducting interviews of business officials, obtaining data on business practices, analyzing and examining accumulated data, and providing technical services, if necessary, such as handwriting analysis and fingerprinting.

Division attorneys normally initiate FBI participation in antitrust matters. The attorneys' request for assistance is channeled through the Office of Operations to the FBI headquarters antitrust unit where it is relayed to the appropriate field office. The necessary agents are then assigned to the matter. Division records show that during fiscal year 1978, FBI assistance was requested on 35 investigations.

The Division's Office of Operations could not tell us whether the FBI could have been effectively used on additional investigations. An official explained that attorneys responsible for the matter usually decide whether to request FBI assistance. He pointed out that the Assistant Attorney General has emphasized to section and field chiefs that the FBI is available and willing to support the Division. The official believes the Division is moving toward increased use of the FBI. He acknowledged that the Division does not, however, systematically monitor the extent to which the FBI is used or how it can be used more effectively.

In our view, such an effort would be worthwhile and would enable the Division to be more certain that the FBI is used most effectively. For example, the Division has no current written guidelines to assist the staff attorney in deciding to use the FBI or describing the types of assistance it can provide. Currently, this must be communicated largely by word of mouth, and attorneys may be hesitant to request FBI assistance because of someone else's past experiences. One section chief told us, in addition, that he believed the FBI could be used more often if clear information was available as to what services they could provide. By monitoring the assistance provided on investigations, the Division could develop an inventory of services; such an inventory could be distributed to Division attorneys to enhance their awareness of FBI assistance.

Such monitoring would also identify any difficulties or limitations experienced in FBI investigations. For example, several attorneys told us that FBI agents may not have the necessary training in antitrust enforcement. The special agent supervisor of the FBI headquarters unit told us the agents receive no specialized training in antitrust enforcement. If this is a limiting factor, the Division and the Bureau can resolve it. The Antitrust Division, for example, has developed an in-house training program and has provided training sessions for personnel of U.S. Attorney and State Attorney General offices. Such ongoing training opportunities could be made available to FBI agents as well.

GREATER USE OF CONSUMER PROTECTION SPECIALISTS AND RESEARCH ANALYSTS SHOULD BE EXPLORED

Antitrust investigative work requires a review and analysis of documents. While this review is usually done by attorneys, the work could be more economically performed by other professional staff.

Professional staff, other than attorneys (called Research Analysts (RAs) at FTC headquarters), were used on one-third of the investigations reviewed at FTC headquarters. Field office investigations received assistance from investigators called Consumer Protection Specialists.

According to FTC's position description:

--A Consumer Protection Specialists is a field office resource who conceives, institutes, and conducts on-site investigations at the grass roots level, stemming from consumer complaints, advertising monitoring, direct observation or awareness, or supervisory instruction.

--An RA is a headquarters resource who performs many of the same activities as a consumer protection specialist. However, the major thrust of the RA's involvement is the provision of direct litigation support by means of intensive investigative research and analysis of file research data, subpoena returns, published data, and the fruits of previous or preliminary onsite investigative findings.

As indicated above, an RA can provide assistance to attorneys by reviewing and analyzing documents. Instances where additional staff were needed to review documents were

noted, but no RA had been used on the investigation. Document review work could possibly also be more economically performed by RAs rather than attorneys. The average grade level for RAs assigned to the Bureau's investigative programs was GS-9, while the average grade level of attorneys was GS-13. The annual salary difference between the two grade levels is over $10,000.

For example, on one investigation, extensive subpoenas sent to 72 organizations produced documents requiring eight file cabinets of storage space. Although two attorneys were assigned to review the documents, this staffing level was insufficient to handle the volume of documents received. At the time of our review, this investigation was over 2 years old. Although 10 different attorneys have been assigned to it for varying periods of time, RAs have never provided assistance.

A June 1977 status report for another investigation which had been underway since March 1976 disclosed that documents which had been on hand for several months had not been reviewed. During the latter part of June, additional documents were requested from several companies. A September 1977 status report indicated that a substantial volume of documents needing review had been submitted or made available to staff by competitors of the target company. Around this time, however, the staff assigned to this investigation was reduced to one attorney who spent most of his time reviewing documents and preparing a memorandum to close the investigation. As of August 1978, the closing memorandum had not yet been approved by the Assistant Director in charge of the program. This investigation had at least eight different attorneys assigned over a 2-year period but made no use of RAs.

The Bureau's Assistant Director for Budget and Management told us that the Bureau had not established a desired ratio of attorneys to RAs. Program Directors are assigned a certain number of positions which they can fill with attorneys, RAs, or clerical personnel.

As of November 1, 1978, the ratio of attorneys to RAs in the Bureau's six investigative programs was about six to one. The programs which were heavily involved in litigation had a smaller ratio, while other programs had a much larger ratio. For example, the Petroleum Section of the Energy program had a ratio of about 2 to 1, while the Merger/Joint Venture and Food programs had a ratio of 17 to 1. While the Bureau has stipulated its desire that the ratio of professional to clerical staff be about 2-1/2 to 1, no such stipulation has been made concerning attorneys to RAs.

CONCLUSIONS

Not all antitrust investigations require economic analysis or even the same level of assistance. However, when it is needed, the need and actual provision of service should be determined as early as possible. The progress of some investigations had been impeded by lack of timely economic assistance. Also, investigative work could possibly be done more efficiently if each of the enforcement agencies increased their use of other professionals to assist attorneys.

Presently, the Antitrust Division cannot be certain that it is using FBI assistance to its fullest potential. The Division should explore the potential for greater utilization of the FBI in antitrust enforcement and establish written guidelines on the role and use of FBI agents.

FTC's Bureau of Competition needs to establish a desired ratio of attorneys to RAs and encourage Program Directors to consider the ratio when filling vacancies. RAs can provide assistance to attorneys by reviewing and analyzing documents. Such work can be done more economically by RAs; instances where additional staff were needed to review documents were noted, but no RAs had been used on these investigations.

RECOMMENDATIONS

To improve the use of available economic assistance, we recommend that the FTC Chairman direct the Executive Director's office to revise the Operating Manual to

--more specifically suggest the type of investigations which should receive economic assistance and

--expressly require the early involvement of economists in such investigations.

The Attorney General should require that the Division formalize its policy on the role of economists in assisting on antitrust investigations and provide guidelines on how and when they can be most effectively used.

To increase the use of other professionals to assist attorneys in investigative work, we recommend that the Attorney General emphasize and provide guidelines on the role and use of FBI agents in assisting on antitrust enforcement activities and, where necessary, provide antitrust training to FBI agents. The FTC Chairman should direct the

Bureau of Competition to establish a desired ratio of RAs to attorneys and encourage consideration of the desired ratio in filling vacancies.

AGENCY COMMENTS AND OUR EVALUATION

According to the Department of Justice, the Antitrust Division has essentially completed a new manual which will include sections on the role and use of both economists and the FBI. The manual will provide specific information as to the type of assistance economists and FBI agents can provide, the stage of a matter at which assistance should be sought, and the procedures for obtaining assistance. (See app. VI).

The Director of FTC's Bureau of Competition informed us that the Bureau agrees fully that economists should be available as a matter of course to assist in preparing antitrust cases. He also said that the Bureau should attempt to employ more research analysts to aid in the investigative process. The Bureau believes that no important antitrust case needing economic assistance goes without that assistance. Any delays in seeking economic assistance resulted from simple failure at the outset of investigations to discover factual patterns clearly indicating the need for such assistance. (See app. VII).

Our review did not identify situations where the need for economic assistance was recognized but not requested. We did, however, find that about 65 percent of the investigations reviewed did not receive economic assistance. (See p. 38) FTC has taken action to improve the availability of economic assistance in its regional offices and has improved the process for obtaining assistance at the headquarters level. However, we believe that the manual revision called for by our recommendation would help assure that antitrust investigations which need economic assistance receive it in a timely manner.

CHAPTER 5

SCOPE OF REVIEW

As requested by the Chairman, Senate Select Committee on Small Business, we examined the antitrust enforcement activities of the FTC and the Antitrust Division of the Department of Justice. For this purpose we analyzed the direction of enforcement efforts of the two agencies over the 3-year period ended fiscal year 1978, as indicated by resource utilization.

We also examined 294 antitrust investigations that were active as of, or after, September 5, 1975, to determine how they were managed, how economists and other support staff were used, and how long they took to complete. Of the investigations reviewed, FTC conducted 142 of them and the Division, 152. For this purpose we reviewed investigative files and, where access was foreclosed by the Antitrust Division because of legal restrictions, we ascertained needed data through interviews with designated staff attorneys.

In conducting our work, we also reviewed antitrust legislation and the pertinent policies and procedures of the two agencies. We interviewed executives, staff attorneys, and staff economists.

Our work was conducted at FTC's and the Antitrust Division's headquarters in Washington, D.C., and at both agency field locations.

ANTITRUST LEGISLATION

The Sherman Antitrust Act (15 U.S.C. §1-7 (1976)), the Clayton Act (15 U.S.C. §§12-27 (1976)), and the Federal Trade Commission Act (15 U.S.C. §§41-45 (1976)), make up the basic antitrust legislation. Each shares the objective of protecting and promoting competition in the market place.

The Sherman Act's substantive provisions make contracts, combinations, and conspiracies "in restraint of trade" unlawful and prohibit monopolization as well as attempts, combinations, or conspiracies to monopolize. (15 U.S.C. §§1-2 (1976)). Precisely what the Congress intended the Sherman Act to prohibit, however, is difficult to divine from the act's general directives of "promoting business rivalry," "competition," "preserving private enterprises," "preserving small business," "promoting consumer welfare," and the "control of private power."

Neither the critical statutory language--"restraint of trade" and "monopolization"--nor these very general expressions of intent were the subject of extensive analysis in the congressional debates. This, perhaps wisely, allowed the courts to apply the Sherman Act to a multitude of factual situations, large and small, that were to develop inevitably in an everchanging economy.

The major substantive provisions of the Sherman Antitrust Act are:

> "SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal* * *." 15 U.S.C. §1 (1976).

> "SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with other person or persons to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, * * *." 15 U.S.C. §2 (1976).

Although the term "restraint of trade" is not defined by the Sherman Act, the courts have construed the term to cover a seemingly endless variety of horizontal and vertical

trade restraining agreements. Vertical restraints appear in the form of agreements among persons or corporations at different levels of the market structure--that is, between a manufacturer and its distributors--as opposed to horizontal restraints. Horizontal restraints are agreements among competitors at the same level of the production or distribution process that is, among competing manufacturers or among competing distributors.

Generally, horizontal restraints of trade include (1) competitor agreements concerning price or price fixing, (2) competitor agreements concerning the division of markets or customers, (3) concerted refusals to deal or boycotts, (4) competitor mergers and acquisitions, and (5) joint ventures. Vertical restraints of trade include: (1) exclusive dealing agreements, (2) restrictions on the territory in which a manufacturer's distributor may sell and restrictions concerning the customers with whom a distributor may deal, (3) restrictions on the location of a distributor's place of business or area of operations, (4) vertical price fixing, commonly referred to as resale price maintenance, (5) vertical mergers and stock acquisitions, and (6) tying arrangements or requirements that a distributor purchase a product or service he/she does not want as a condition to obtaining a desired item or service.

Section 2 of the Sherman Act deals with monopolization and defines three separate and distinct offenses. Under section 2, every person or corporate entity who shall (1) monopolize, (2) attempt to monopolize, or (3) combine or conspire with others to monopolize will have violated the Sherman Act.

Like the Sherman Antitrust Act, the Clayton Act of 1914 seeks to ensure a competitive economy. The Clayton Act supplements the Sherman Act, however, by directing its substantive proscriptions against certain types of market behavior that constitutes an existing restraint of trade and against market behavior that, if left unrestrained, would have a substantial likelihood of becoming a restraint of trade.

Section 2 of the Clayton Act as amended by the Robinson-Patman Act makes it unlawful for sellers to discriminate in the price charged purchasers on the sale of commodities of like grade and quality where the price discrimination may have the effect of substantially lessening competition. Section 3 of the act prohibits certain tying and exclusive dealing arrangements. Section 7 deals with mergers and

acquisitions of stocks or assets of firms engaged in interstate or foreign commerce. Mergers and acquisitions covered by section 7 in general are unlawful if they would tend to create a monopoly or substantially lessen competition. And, section 8 of the Act covers corporate interlocks and prohibits certain persons from serving concurrently as a director of two or more corporations that are direct competitors.

The third major piece of legislation concerned with protecting and promoting a competitive economy is the Federal Trade Commision Act of September 26, 1914 (15 U.S.C. §§41-45 (1976)) which established an independent trade commission--the Federal Trade Commission--responsible to the Congress. The act authorized FTC to define and prohibit "unfair methods of competition."

Although the FTC Act is not defined by the Congress as an antitrust law, the broad prohibitions in section 5 actually overlap and embrace the market conduct covered by the Sherman and Clayton Acts, as, for example, pricefixing, boycotts, and anticompetitive mergers. The reach of section 5 goes further, however, and extends to (1) practices that would violate the Sherman and Clayton Acts but for some technical or restrictive provision in those acts, (2) conduct having a market effect comparable to that of the behavior prohibited by the principal antitrust laws, (3) practices that could develop into an antitrust law violation, and (4) conduct that violates the "spirit or policy" of the Sherman or Clayton Acts. Because the FTC may proceed against business conduct in commerce that is simply an "unfair * * * practice" (as opposed to an unfair method of competition in an antitrust sense), it is now well established that section 5 covers a wide variety of practices that are not within the scope of either the Sherman or Clayton Acts.

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ANALYSIS OF ANTITRUST ENFORCEMENT EFFORTS

THEORIES OF ANTITRUST ENFORCEMENT

The fundamental principle underlying the antitrust laws is that competition should be the basis of the economic system of the United States. Competition, in its purest sense, leads to a variety of social benefits, including economic efficiency and the maximum consumer welfare. In addition, a competitive economy goes hand-in-hand with a free and democratic social and political system. Indeed, a competitive market is frequently referred to as a "free" market.

Most economists agree that competition is beneficial in most circumstances, but that is where the agreement ends. Debate centers on the meaning of competition, under what circumstances markets perform in a competitive manner, and what steps the Government should take to protect and/or restore competition.

The textbook definition of competition includes four parts relating to the structure of a market:

1. Many buyers and sellers.
2. Sellers produce homogeneous products.
3. Sellers may easily enter and leave a market.
4. Buyers and sellers have perfect information about the market.

Few, if any, real markets fit the economists' textbook definition. A competitive market structure, however, is not viewed as an end in itself, but rather as a means to the desirable social goals of economic efficiency, consumer welfare, and economic democracy. Markets may satisfy these goals so long as the prices of goods and services correctly reflect the costs of producing those goods and services.1/

1/ Technically, the condition for economic efficiency and maximum social welfare is that prices equal marginal social costs in all markets. Marginal social cost is the cost to society of producing one additional unit of the particular good or service.

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Clark has coined the term "workable competition" to apply to markets which, although not fitting the economic definition of perfect competition, nevertheless achieve the desirable objectives of competition.1/

The notion of workable competition includes considerations of market conduct and performance, rather than simply the structural textbook definition. Since performance--measured by such things as level of prices, output, and economic profit, efficiency of production, and rates of invention and innovation--is more difficult to assess than market structure, the "workability" of competition in specific markets is the subject of the wide debate. In particular, the debate centers on the relationship, if any, between market concentration and the degree of competitive behavior and performance.

For example, Leonard W. Weiss has stated:

> "Economic theory does yield a pretty definite answer to the question of whether high concentration involves a lessening of competition. In spite of some uncertainty about the precise functional form, the theoretical answer seems to be a consistent yes." 2/

He goes on to conclude that "the bulk of the [empirical] studies show a significant positive effect of concentration on profits or [profit] margins." 3/

1/ J.M. Clark, "Toward a Concept of Workable Competition," American Economic Review (June 1940), pp. 241-256. See also F.M. Scherer, Industrial Market Structure and Economic Performance (Chicago: Rand McNally and Co., 1970), pp. 36-38.

2/ L .W. Weiss, "The Concentration Profits Relationship and Antitrust," in Goldschmidt, et. al., eds., Industrial Concentration: The New Learning (Boston: Little, Brown and Co., 1974), p. 193.

3/ Ibid, p. 202.

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A similar view was summarized in the Neal Report on antitrust, submitted to President Johnson:

> "In the years since the Sherman Act was adopted there has been growing recognition that monopoly is a matter of degree. A firm with less than 100% of the output of an industry may nevertheless have significant control over supply, and thus be in a position to impose on the economy the losses associated with monopoly: lower output, higher prices, artificial restraints on the movement of resources in the economy, and reduced pressure toward cost reduction and innovation. Likewise, a small number of firms dominating an industry may take a similar toll, either because the small number makes it easier to arrive at and police an agreement or because, without agreement, each will adopt patterns of behavior recognizing the common interest.
>
> 'In general it may be said that the smaller the number of firms in an industry -- at least where that number is very small or where a very small number is responsible for the overwhelming share of the industry's output -- the greater the likelihood that the behavior of the industry will depart from the competitive norm." 1/

Harold Demsetz has reached a different conclusion:

> "The theoretical support of the market concentration doctrine * * * is weak or nonexistent. On the empirical side, it is clear that more studies reveal a positive correlation between profits and concentration than do not.

1/ White House Task Force Report on Antitrust Policy, reprinted in Antitrust and Trade Regulation Report, Number 411 (May 27, 1969), p. 5.

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> 'There are enough of those [studies] that fail to show such a correlation, however, that the policymaker ought not suppose that conclusive evidence of this statistical relationships exists * * * But even if [further study] should reveal a positive correlation, there would still remain a serious problem for policy, for what can be inferred from a positive correlation?" 1/

The debate over the effect of a concentrated market structure on the degree of competition carries over directly to antitrust enforcement policy. The antitrust laws themselves fall into two distinct categories. The laws against monopolizing and anticompetitive mergers are concerned with promoting and maintaining competitive market structures, while those prohibiting a variety of horizontal and vertical restraints, such as price fixing and price discrimination, are concerned with preventing anticompetitive behavior or conduct. The debate among antitrust experts centers on whether a structure or conduct oriented antitrust policy is the better method of achieving the benefits of competition.

Structuralists believe that anticompetitive conduct and social harm follow from anticompetitive structure, characterized by a high degree of market concentration and difficult entry for new firms. Those who believe in a conduct approach, on the other hand, feel that any general policy against market concentration would pose an obstacle to industrial efficiency, and could destroy the market incentives provided by a free market economy. The conduct approach does not directly call for the alteration of industry structure but is directed at various kinds of behavior seen as harmful to competition.

1/ H. Demsetz, "Two Systems of Belief about Monopoly," in Goldschmidt, et. al. eds., op. cit., p. 174.

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The structuralists have advocated new antitrust laws, which would require the dissolution of large firms in concentrated industries, based on structural criteria alone. These legislative proposals include the late Senator Hart's Industrial Reorganization Act, 1/ the Neal Report's Concentrated Industries Act, 2/ proposals contained in Kaysen and Turner's book, Antitrust Policy, 3/ and, most recently, in the 1979 report of the National Commission for the Review of Antitrust Laws and Procedures. 4/

Posner, while he agrees with the desirability of un concentrated markets, has pointed out several practical difficulties with pursuing a policy of industrial deconcentration. 5/ He argues that attacking large companies in concentrated industries could result in lengthy and costly litigation, and that even if won by the Government, deconcentrating industries through the breakup of existing firms would be difficult. The length and expense (to all parties) of litigation, the difficulty in formulating and imposing a satisfactory remedy, and the lessening of incentives for large companies in concentrated industries to actively compete, all limit the practicality of a purely structural antitrust policy.

1/ Reprinted in Goldschmidt, et al., eds., op cit., pp. 444-448.

2/ Ibid, pp. 449-456.

3/ C. Kaysen and D. F. Turner, Antitrust Policy: An Economic and Legal Analysis (Cembridge, Mass.: Harvard University Press, 1959). See especially ch. 3: "A Policy for Antitrust Law."

4/ Report to the President and Attorney General of the National Commission for the Review of Antitrust Laws and Procedures, John H. Shenefield, Commission Chairman, Jan. 22, 1979, pp. viii, 142ff.

5/ R.A. Posner, "Problems of a Policy of Deconcentration," in Goldschmidt, et. al., eds., op. cit., pp. 393-400.

At the other extreme, from those advocating industrial deconcentration, some observers feel that concentrated industry structure itself is not undesirable and should be no offense. For example, Bork has recently argued that: "Antitrust should have no concern with any firm size or industry structure created by internal growth or by a merger more than 10 years old." 1/ Similarly, McGee advocates abandoning any presumption of an anticompetitive effect associated with a concentrated market structure. A reviewer of McGee's book, In Defense of Industrial Concentration, summarized McGee's policy recommendations as follows:

> "(1) establish a rebuttable presumption that a firm that has grown to monopoly size has done so lawfully;
> (2) abandon all presumptive rules as to mergers, analyzing each merger on its total economic effect, with special tolerance for those deemed likely to achieve efficiencies;
>
> (3) remove legal barriers to entry into the regulated industries; and
>
> (4) reject for all policymaking purposes whatever the myth that there is a relation between competition and high concentration." 2/

Between the structuralist and behavioral views are those who feel that while concentrated market structure itself is no offense, it is a breeding ground for potential conduct violations; therefore concentrated markets deserve special scrutiny by the antitrust agencies. The Stigler report on antitrust, presented to President Nixon less than a year after the Neal report, stated:

1/ R.H. Bork, The Antitrust Paradox: A Policy at War with Itself. (New York: Basic Books, Inc., 1978), p. 406.

2/ J.R. Brodley, "Massive Industrial Size, Classical Economics, and the Search for Humanistic Value," Stanford Law Review, v. 24 (June 1972), pp. 1156, 1157. The article is a review of J.S. McGee, In Defense of Industrial Concentration. (New York: Praeger Publishers, 1971).

"* * * the correlation between concentration and profitability is weak, and many factors besides the number of firms in a market appear to be relevant to the competitiveness of their behavior. While a flat condemnation of oligopoly thus seems to us unwise, we commend to the Antitrust Division a policy of strict and unremitting scrutiny of the highly oligopolistic industries. If, in any of these industries pricing is found after careful investigation to be substantially noncompetitive, the Division will have a clear basis for proceeding against the leading firms under Section 1. Collusion that can be incontrovertibly inferred from behavior (such as persistent, stable price discrimination in the economist's sense) should not bring immunity from the Sherman Act, and we are confident that structural remedies will be sanctioned by the courts in cases where, due to the number of firms and the other conditions of the market, lesser remedies are likely to be unavailing. In assessing the gain from such structural remedies, account should be taken of any reduction in efficiency which the remedy entails." 1/

Thus, the Stigler report took the position that while market structure alone should not be the basis for antitrust enforcement, the antitrust agencies should give careful attention to conduct in concentrated industries.

In their empirical analysis of price fixing conspiracies, Hay and Kelly reach a similar conclusion:

1/ Report of the Task Force on Productivity and Competition (The Stigler Report), reprinted in Antitrust Law and Economics Review, 2 (Spring 1969), p. 13-36.

"* * * Conspiracy among competitors may arise in any number of situations but it is most likely to occur and endure when numbers are small, concentration is high, and the product is homogeneous." 1/

The next section contains our analysis of recent antitrust enforcement efforts by the Antitrust Division and the FTC. These efforts are compared and analyzed in the light of the above discussion of theoretical approaches to antitrust.

OUR ANALYSIS OF ANTITRUST ENFORCEMENT EFFORTS

The antitrust laws are based on the recognition that efficient use of economic resources and a high degree of choice and utility for consumers can be best obtained under a competitive market system. As such, these laws are concerned both with preserving and promoting competitive market structures and with preventing anticompetitive behavior or conduct.

To analyze the antitrust enforcement efforts of the Antitrust Division of the Department of Justice and the FTC, we compiled data on the professional staff time (lawyers and economists) devoted to investigations and litigation, by each agency, for a 3-year period. For the Antitrust Division, the time covered in the analysis is October 1, 1975, through September 30, 1978, while the FTC data include fiscal years 1976 (July 1, 1975 - June 30, 1976), 1977 (October 1, 1976-September 30, 1977), and 1978 (October 1, 1977 - September 30, 1978), but exclude the transition quarter (July 1, 1976 - September 30, 1976).

For each investigation or litigated matter, we identified the following:

--Type of violation: structural (monopoly, merger and joint venture, interlocking directorate) and conduct (horizontal and vertical restraints, such as price fixing, and price discrimination).

1/ G.A. Hay and D. Kelly, "An Empirical Survey of Price Fixing Conspiracies," Journal of Law and Economics, (1973) pp. 26-27.

--Nature of market structure: enforcement activity in manufacturing industries was grouped according to whether the industry was concentrated or unconcentrated.

The Antitrust Division provided us with data grouped by primary violation. As explained below, most of the violation categories used to disclose enforcement efforts of the Antitrust Division correspond to particular sections of the antitrust laws.

The FTC pursues a variety of violations under the broad authority provided by section 5 of the FTC Act. Furthermore, the FTC's program structure does not completely disclose enforcement activity by type of violation. A high-ranking official of the Bureau of Competion classified FTC's enforcement activities (investigations and litigation) by primary violation for us. (See p. 11).

Finally, both the Antitrust Division and FTC provided us with lists of enforcement activities arranged by 4-digit Standard Industrial Classification (SIC) number of the industry in which the alleged violation took place. 1/ We used the 4-digit SIC numbers to classify each investigative or litigated matter by type of market structure, as explained in appendix III.

Distribution of enforcement effort by violation

In analyzing antitrust resource allocation by type of violation, we grouped resources under two major categories--structural and conduct violations.

Structural violations include monopolization and attempts to monopolize, mergers, and interlocking directorates.

The Division pursues structural violations under section 2 of the Sherman Act, and sections 7 and 8 of the Clayton Act.

1/A discussion of the SIC system can be found on p. 96 in app. III.

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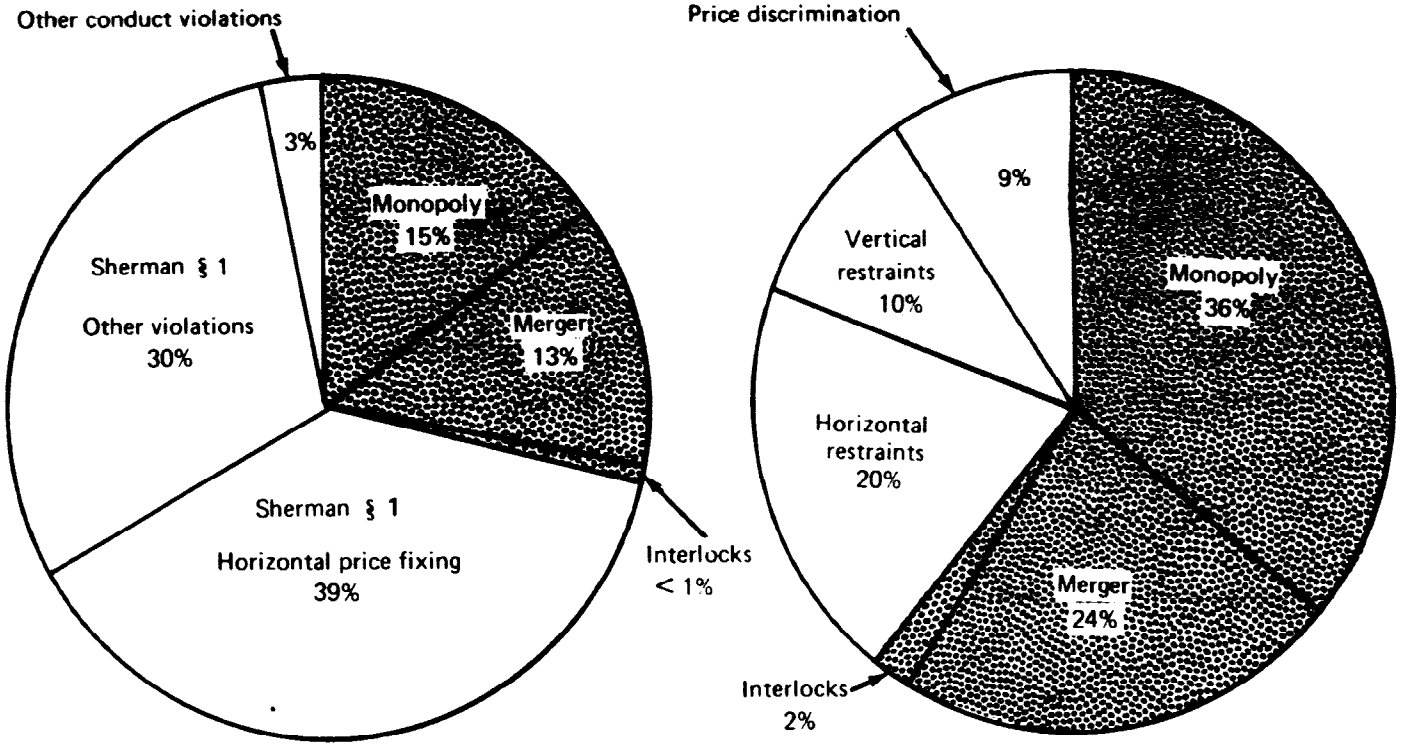
Conduct violations include horizontal price fixing; other horizontal restraints (for example, boycotts, customer or territorial allocation, bid rigging); vertical restraints (such as, vertical price fixing and price squeezing); and other conduct violations, including price discrimination, tie-in sales, exclusive dealing. Because of its special emphasis at the Division, we reported horizontal price fixing as a distinct conduct violation and grouped as a separate category, other horizontal and vertical restraints. Together, these two categories include all violations of section 1 of the Sherman Act. Other Clayton Act violations that the Division pursued were grouped in a third conduct category.

Conduct violations that FTC handled were grouped into three categories, slightly different from those used for the Division: horizontal restraints (including horizontal price fixing and other horizontal restraints), vertical restraints, and price discrimination.

The charts on page 60 summarize the distribution of antitrust enforcement activity by type of violation, for each agency. In addition, the tables on pages 61 and 63 show the allocation of professional time to various violations, for the fiscal years 1976-1978. These tables present resource utilization data for investigations and litigation separately and a combined total.

ANTITRUST RESOURCES BY TYPE OF VIOLATION
ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION
1976 – 1978 (note a)



ANTITRUST DIVISION
100% = 9,961 months (note b)

FEDERAL TRADE COMMISSION
100% = 1,350,900 hours (note c)

a/ See page 57 for exact dates included.
b/ Excluding 216 months not classified by type of violation.
c/ Excluding 39,800 hours not classified by type of violation.

Conduct violations
Structural violations

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ANTITRUST DIVISION

Percent Of Professional Staff Time By Violation

Fiscal Years 1976, 1977, And 1978

Type of matter / Year	Structural violations				Conduct violations				Grand total (note b)	Total professional time (months) (note c)
	Monopoly	Merger	Inter-locks	Total structural (note b)	Horizontal price fixing	Other Sherman I	Other conduct (note a)	Total conduct (note b)		
Investigations:										
1976	3	14	0	17	51	31	0	83	100	1,657
1977	4	13	0	18	51	31	0	82	100	1,835
1978	8	16	0	24	49	27	0	76	100	1,946
Litigation:										
1976	23	18	1	42	20	30	8	58	100	1,666
1977	26	9	0	35	28	29	7	65	100	1,545
1978	31	7	0	39	26	30	5	61	100	1,313
All matters:										
1976	13	16	0	30	36	30	4	70	100	3,323
1977	14	11	0	26	41	30	3	74	100	3,380
1978	17	12	0	30	39	28	2	70	100	3,259
All matters:										
1976-1978	15	13	0	28	39	30	3	72	100	9,961

a/Includes price discrimination, tying arrangements, and Clayton IV litigation concerned with recovering damages for the U.S. Government.

b/Detail may not add to total due to rounding.

c/Excluding 216 months not classified by type of violation.

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FEDERAL TRADE COMMISSION

Percent Of Professional Staff Time By Violation

Fiscal Years 1976, 1977, and 1978

Type of matter / Year	Structural violations				Conduct violations					Total professional hours (100s) (note b)
	Monopoly	Merger	Inter-locks	Total structural (note a)	Horizontal restraints	Vertical restraints	Price discrimination	Total conduct (note a)	Grand total (note a)	
Investigations:										
1976	21	21	2	44	28	18	10	56	100	2,092
1977	23	28	2	53	23	14	10	47	100	2,395
1978	25	25	1	51	34	8	7	49	100	2,435
Litigation:										
1976	51	23	(c)	74	10	9	6	25	100	2,237
1977	52	20	4	76	10	8	6	24	100	2,074
1978	43	26	(c)	69	11	7	13	31	100	2,276
Total:										
1976	38	22	1	61	19	13	8	40	100	4,329
1977	38	24	3	65	17	11	8	36	100	4,469
1978	34	25	1	60	23	7	10	40	100	4,711
All matters:										
1976-1978	36	24	2	62	20	10	9	39	100	13,509

a/Detail may not add to total due to rounding.

b/Excluding 398 hundred hours not classified by violation.

c/Less than 1 percent.

Comparison of resource utilization data discloses that the direction of enforcement efforts of the two agencies is different in some respects and similar in others.

The chart on page 60 shows that about 70 percent of the Division's enforcement effort goes to conduct or behavior violations prohibited by section 1 of the Sherman Act, with about 40 percent of the resources being devoted to one violation--horizontal price fixing. FTC's direction of effort is slanted toward structure violations which required over 60 percent of resources used for enforcement activities over the 3-year period.

The difference in emphasis on conduct or behavior practices is partly due to the fact that, under the Sherman Act, the Division has sole authority to criminally prosecute restraint of trade practices.

The two tables on pages 61 and 63 show the share of professional staff resources devoted to various violations during the 3-year period. In one area of current interest, mergers, the FTC's overall effort has increased from 22 percent of total resources to 25 percent; the Division's overall effort declined by 4 percent from 16 to 12 percent of total effort. Both agencies, however, increased their investigative effort on mergers from 1976 to 1978.

Monopoly violations consumed 15 percent of the Division's resources and 36 percent of FTC's during the period studied. For each agency, most of the time spent on monopolization practices was required by the two "big" cases that each agency is pursuing. At FTC, the ready-to-eat cereal and petroleum industry cases used 20 percent of all resources (56 percent of the monopoly resources). The computer and communication industry cases being pursued by the Division required 10 percent of total resources (69 percent of the monopoly resources.)

FTC continues to be the only agency actively enforcing the Robinson-Patman Act against price discrimination, which amended section 2 of the Clayton Act in 1936. In the past, a large share of FTC's antitrust orders involved price discrimination. From 1945 through 1965, over 72 percent of FTC's final orders involved price discrimination, 1/ and as recently as fiscal year 1963, that figure was 94 percent. 2/ As noted by Alan Stone, in spite of the past emphasis placed by the FTC on price discrimination violations:

> "* * * few laws have occasioned so much criticism from economists and legal draftsmen, and the act is widely regarded as the product of an organized political effort to preserve the traditional marketing system of independent merchants against the encroachments of mass distributors and chains, whose low prices made them popular with consumers during the business crisis of the 1930s. 3/

For the 3 fiscal years 1976 to 1978, we found that 9 percent of FTC's resources were devoted to pursuing price discrimination violations. We also found that, for the period of our study, 10 percent of FTC's final orders issued involved discrimination. 4/ Thus, over approximately the past 15 years, a dramatic shift away from price discriminations violations is evident.

Resources devoted to concentrated industries

As explained in appendix III, our analysis of antitrust resources devoted to concentrated industries was restricted by data limitations to the manufacturing sector of the economy. For the 3-year period analyzed, both agencies devoted

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1/ Alan Stone, Economic Regulation and the Public Interest: The Federal Trade Commission in Theory and Practice (Ithaica, N.Y.: Cornell University Press, 1977), p. 99.

2/ R.A. Posner, "The Federal Trade Commission," University of Chicago Law Review, 37.47 (1969), p. 55.

3/ Stone, op. cit., p. 95.

4/ A more detailed discussion of agency output of final orders is found below at page 78.

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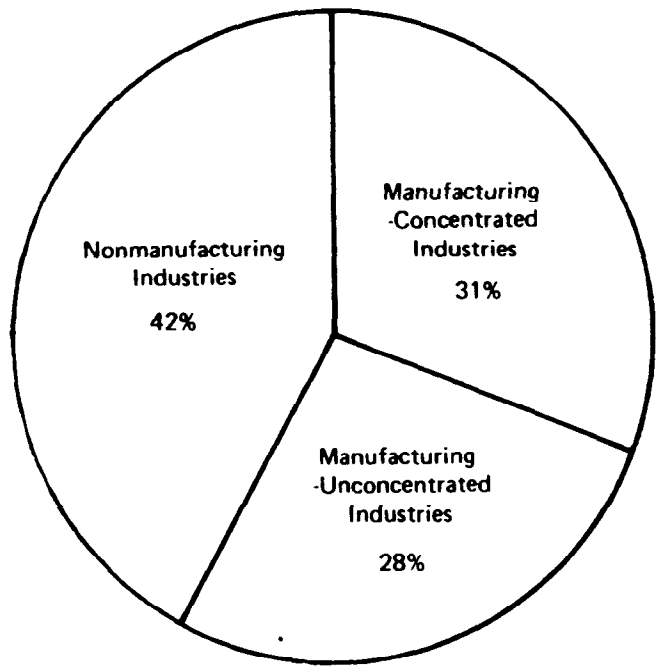
approximately 60 percent of their investigative and litigative effort to manufacturing industries (59 percent for the Division and 64 percent for FTC). FTC increased its share of resources devoted to manufacturing from 58 percent to 70 percent from 1976 to 1978, while the share of the Division's resources used on manufacturing industries fell from 64 percent to 55 percent.

To consider the extent to which enforcement efforts in manufacturing industries were directed to concentrated markets, manufacturing industries receiving enforcement attention were classified as "concentrated" or "unconcentrated", based on a classification process used by Clabault and Burton, and Meehan and Mann. This classification procedure, along with its limitations, is explained in appendix III. Industries classified as concentrated basically correspond to those with four-firm concentration ratios exceeding 50 percent, after adjustment for geographic market size.

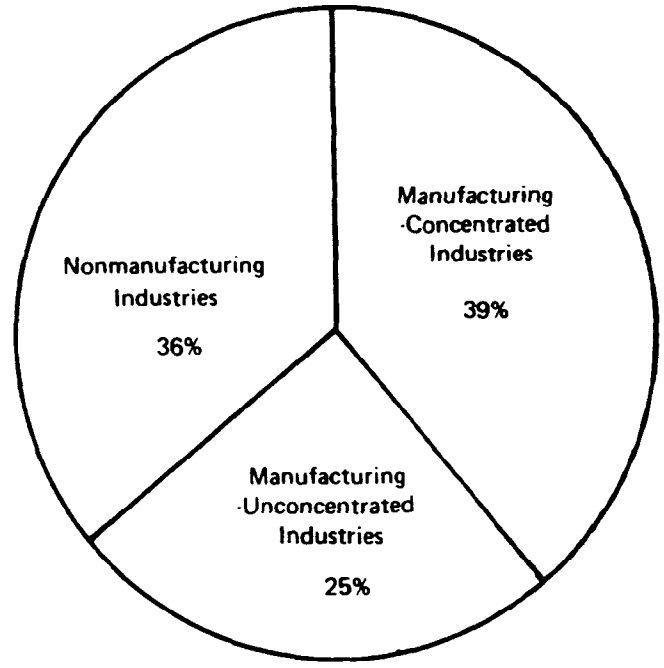
The charts on page 68 show the distribution of agency resources between manufacturing and nonmanufacturing industries and the breakdown within manufacturing between concentrated and unconcentrated industries.

Restricting attention to matters involving manufacturing industries, the charts on page 69 shows that the Division's effort devoted to concentrated industries fell from 56 percent in 1976 to 48 percent in 1978, averaging 53 percent for the 3 years. FTC's effort in concentrated manufacturing industries fluctuated between 59 and 64 percent of annual effort, averaging 61 percent for the 3 years.

ALLOCATION OF ANTITRUST RESOURCES BY TYPE OF INDUSTRY
ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION
1976 – 1978 (note a)



ANTITRUST DIVISION
100% = 10,085 months (note b)



FEDERAL TRADE COMMISSION
100% = 1,358,000 hours (note c)

a/ See page 57 for exact dates included.
b/ Excluding 92 months not classified by type of industry.
c/ Excluding 32,900 hours not classified by type of industry.
NOTE: Detail may not add to total due to rounding.

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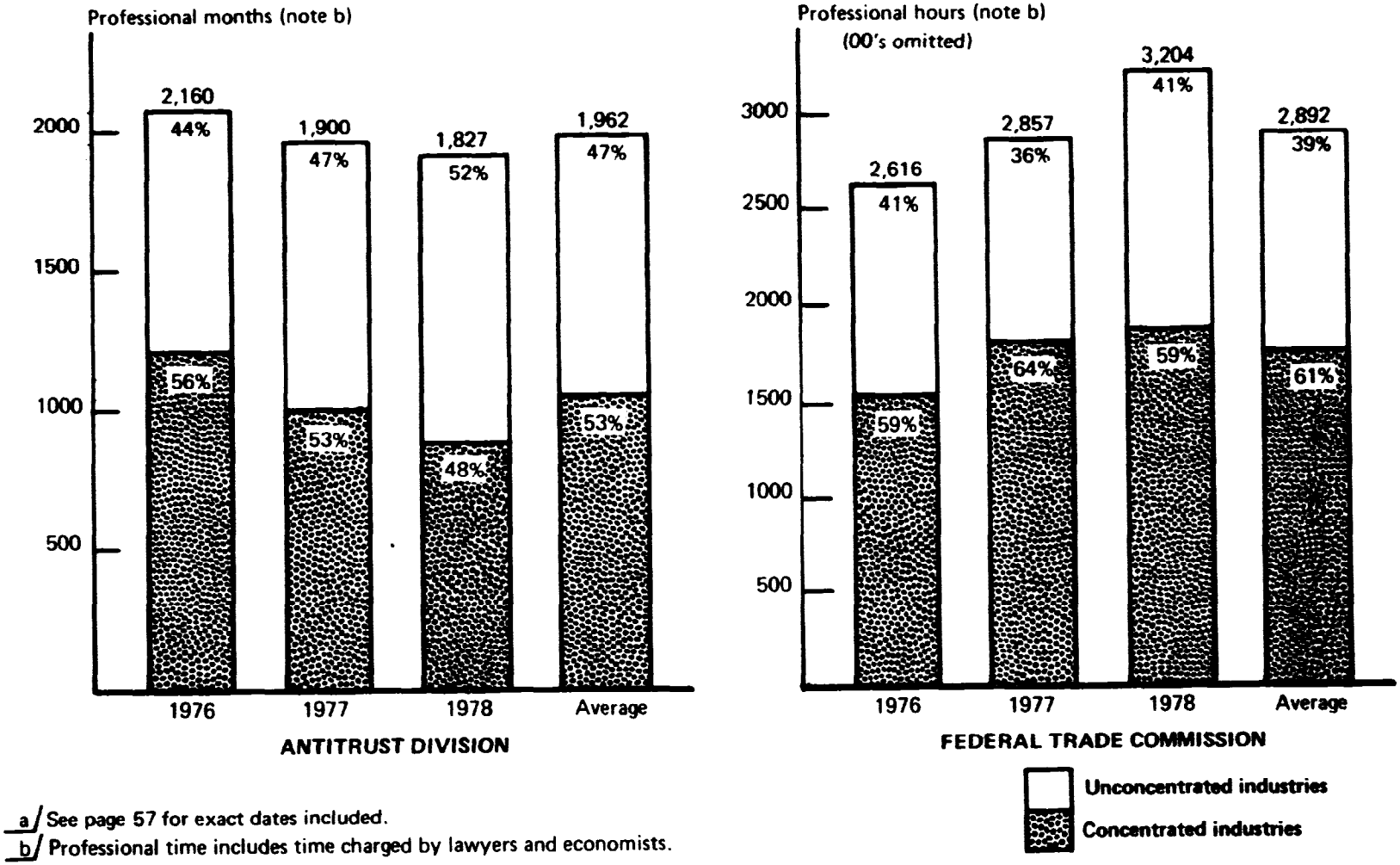
ANTITRUST RESOURCES IN CONCENTRATED AND UNCONCENTRATED MANUFACTURING INDUSTRIES
ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION
1976, 1977, 1978 (note a)



a/ See page 57 for exact dates included.

b/ Professional time includes time charged by lawyers and economists.

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To better understand the percentage of enforcement resouces being devoted to concentrated industries, the chart on page 71 presents a breakdown of all manufacturing industries, compared to antitrust enforcement efforts. The chart shows that, of their resources devoted to manufacturing industries, the Antitrust Division and FTC spent respectively 53 percent and 61 percent in concentrated industries. By comparison, concentrated industries comprise only 32 percent of all 4-digit SIC manufacturing industries and account for 40 percent of manufacturing sales.

The tables on pages 73 and 75 extend the analysis of resources devoted to manufacturing industries by showing the enforcement effort by type of violation and by type of matter. The tables also indicates the share of effort in each violation and type of matter category which was devoted to concentrated industries.

As shown by the chart on page 60, FTC devotes relatively more resources to structural violations than the Division. Nevertheless, the tables on pages 73 and 75 show that of those resources devoted to structural violations in manufacturing industries, each agency devotes about two-thirds of its effort to concentrated industries (65 percent for the Division and 67 percent for FTC).

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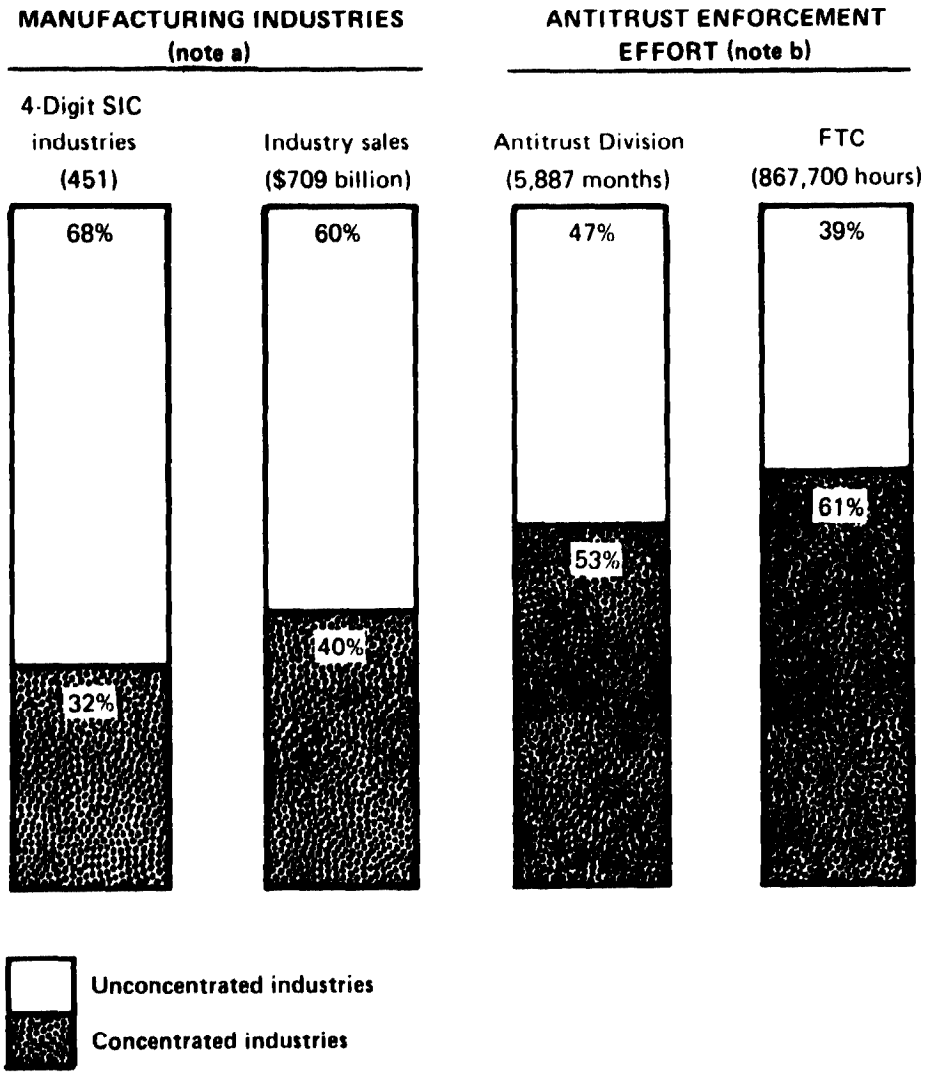
DISTRIBUTION OF CONCENTRATED AND UNCONCENTRATED MANUFACTURING INDUSTRIES AND ANTITRUST ENFORCEMENT EFFORT



a/ Based on 1972 Census of Manufacturing.

b/ See page 57 for exact dates included.

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Antitrust Division Resources
In Manufacturing Industries
By Violation With Percent
In Concentrated Industries
October 1, 1975 - September 1978

	Structure violations				Conduct violations				
	Monopoly	Merger	Interlocks	All structural	Horizontal price fixing	Other Sherman I	Other conduct (note a)	All conduct	All violations
Investigations									
Months	183	614	3	800	1,479	559	2	2,040	2,840
(Percent in concentrated industries) (note b)	(59)	(40)	(0)	(45)	(33)	(41)	(50)	(35)	(38)
Litigation									
Months	920	445	0	1,365	596	634	310	1,540	2,905
(Percent in concentrated industries)	(95)	(41)	(c)	(77)	(23)	(72)	(100)	(59)	(68)
All Matters									
Months	1,103	1,059	3	2,165	2,075	1,193	312	3,580	5,745
(Percent in concentrated industries)	(89)	(41)	(0)	(65)	(30)	(58)	(100)	(45)	(53)

a/Includes price discrimination, tying arrangements, and Clayton 4 litigation concerned with recovering damages for the U.S. Government.

b/Example: Of 183 professional staff-months spent on monopoly investigations in manufacturing industries, 59 percent involved concentrated industries. Thus, 41 percent involved unconcentrated industries.

c/No resources in any manufacturing industries.

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Federal Trade Commission Resources
In Manufacturing Industries
By Violation
With Percent In Concentrated Industries
Fiscal Years 1976, 1977, 1978

	Structural violations				Conduct violations				
	Monopoly	Merger	Interlocks	All structural	Horizontal restraints	Vertical restraints	Price discrimination	All conduct	All violations
Investigations									
Hours (in hundreds)	1,373	1,092	38	2,503	719	727	418	1,863	4,366
(Percent in concentrated industries)	(75)	(43)	(45)	(60)	(27)	(38)	(79)	(43)	(53)
Litigation									
Hours (in hundreds)	1,549	1,265	61	2,875	403	479	554	1,436	4,311
(Percent in concentrated industries)	(100)	(38)	(95)	(72)	(63)	(67)	(51)	(60)	(68)
All matters									
Hours (in hundreds)	2,922	2,357	99	5,378	1,122	1,206	972	3,299	8,677
(Percent in concentrated industries)	(88)	(40)	(76)	(67)	(40)	(49)	(63)	(50)	(61)

Regarding enforcement effort directed toward conduct violations, of the Division's resources spent on horizontal price fixing violations in manufacturing industries, only 30 percent were aimed at concentrated industries. (See p. 73) The breakdown between investigation and litigation shows that 33 percent of the investigation of horizontal price fixing was in concentrated industries and only 23 percent of the litigation was in these industries. These figures are somewhat surprising in the light of the theoretical discussion of price fixing on page 57, where it was noted that price fixing was "most likely to occur and endure when numbers [of firms] are small, concentration is high, and the product is homogeneous." 1/

One explanation for the Division's relatively large share of horizontal price fixing resources used in unconcentrated industries might be that those violations occurred primarily in local or regional markets, where census concentration ratios understate true market concentration. We attempted to minimize this factor by adjusting the census concentration figures of industries which were identified as local or regional.

Another factor influencing the Division's allocation of resources to horizontal price fixing is that those violations may be more difficult to identify and prosecute in concentrated industries. Concentrated industries, or oligopolies, may develop methods of coordinating pricing without formal conspiracy through the use of so-called facilitating devices, which are mechanisms for exchanging price information, standardizing products and prices, and methods of punishing deviations from industrywide practices. This informal coordination is much more difficult to attack than the more formal arrangements required to coordinate the many members of a less concentrated industry. New approaches to applying the antitrust laws against informal coordination, or so-called shared monopoly, are discussed on page 87.

For all violations, both agencies devote relatively more time to concentrated industries at the litigation stage than at the investigation stage. Both agencies used about 68 percent of their litigation resources in concentrated industries. The relative emphasis of concentrated industries in litigation

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1/ Hay and Kelly, loc. cit.

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compared to investigation may indicate that concentration is considered as a criteria for proceeding with litigation or that firms in concentrated industries are more willing and able to engage in protracted litigation.

OUTPUT OF THE ANTITRUST AGENCIES

To disclose information on the output of the Federal antitrust agencies we compiled information on the number of cases won by the Division and FTC. Using just the number of cases, however, ignores the fact that cases may be of vastly different quality in terms of resources used, remedies sought and imposed, precedents set, and benefits to competition. Furthermore, the antitrust agencies can affect competition in ways other than issuing orders. The mere existence of some investigations or cases may deter potential violations. Nevertheless, we felt that it would be beneficial to examine how cases are settled by the agencies and what kinds of violations the agencies have been most successful in pursuing.

The table below presents a brief summary of the numbers of matters won, through litigation or negotiation, by each agency from July 1, 1975, through September 30, 1978.

Total Matters Won by Year (note a)

Fiscal 1976, Transition Quarter, 1977, 1978

Year	Antitrust Division	FTC
1976	63	30
TQ	15	4
1977	43	23
1978	65	20
Total	186	77

a/ Includes matters litigated and won, consent decrees, nolo contendere, and guilty pleas. Does not include seven cases dismissed by the Division after proposed mergers were abandoned.

In a recent speech, the Chairman, FTC, said that the decline in output at FTC reflects several factors, including:

--reexamination of the agency's priorities and approach to case selection;

--examination of alternative enforcement strategies such as rulemaking, intervention before other Government agencies, and legislative proposals;

--deferral to the Justice Department on most horizontal collusion cases; and

--emergence of State antitrust enforcement and private antitrust cases.

FTC, in response on October 22, 1979, to our draft report, informed us that the number of matters won increased to 54 in fiscal year 1979 (43 consent orders and 11 adjudicative complaints).

Following is an explanation of how cases are settled by the two agencies; this discussion is followed by a description of agency output by type of violations.

Procedures for terminating cases

If the Division feels that an investigation has produced sufficient evidence to warrant pursuing a violation, it may file a civil or a criminal complaint or both, as appropriate, with a Federal District Court. The resulting discovery period and litigation may result in (1) a litigated victory or defeat, (2) the Government dismissing its case, or (3) the Government negotiating a settlement. In civil cases, settlements are in the form of consent decrees, while in criminal cases, defendants may enter pleas of nolo contendere, meaning that they admit no past guilt but they agree not to perform the alleged violation in the future. Fines and/or jail sentences may be imposed in criminal cases, while civil enforcement normally contemplates injunctional relief, such as cease and desist orders, restraining orders, and corporate divestiture. Cases won or lost at the District Court may be appealed to the United States Court of Appeals and finally to the Supreme Court.

The procedures at FTC are considerably different from the Division. First, FTC can bring only civil cases, having

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no criminal authority. Second, FTC frequently enters into consent decrees while still at the investigative stage, without formally filing a complaint. Third, FTC cases are first heard by an FTC administrative law judge (ALJ), rather than a Federal court. After the FTC has issued a litigated order, the case can be appealed to the United States Court of Appeals and the Supreme Court.

Antitrust output by type of violation

The charts on page 81 show the distribution by violation category of matters won by each agency from fiscal year 1976 to fiscal year 1978.

Eighty percent of the cases won by the Antitrust Division involve conduct violations under section 1 of the Sherman Act. Price fixing violations (including both horizontal and vertical price fixing) accounted for 62 percent of the total output. Structural violations--monopoly and merger--made up only 14 percent of the Division's victories. 1/

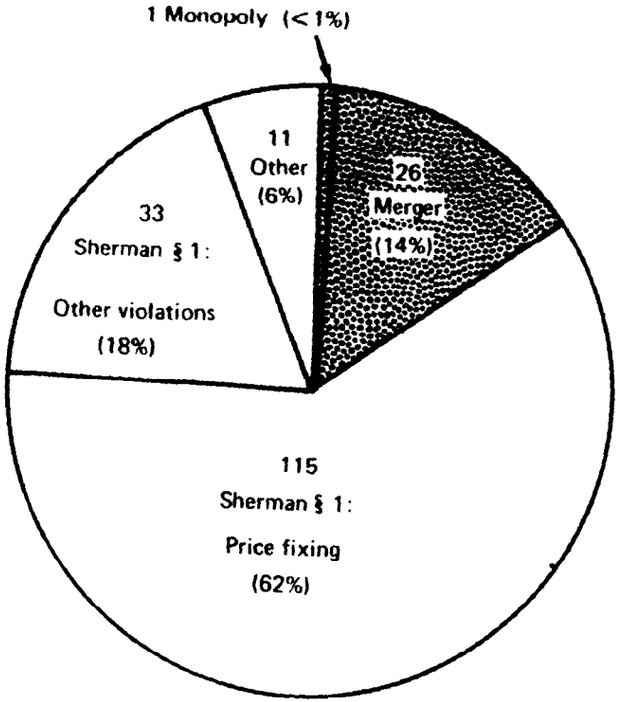
At the FTC, 56 percent of the matters won involved conduct violations, and 44 percent involved structural violations. Merger and monopoly violations accounted for 27 percent. The remaining structural matters (17 percent of the total) consisted of 13 orders against interlocking directorates. Six of these orders grew out of investigations of six petroleum companies in fiscal 1976, 2/ and four more involved life insurance companies, in fiscal year 1978.

The tables on pages 83 and 85 present the distribution of agency output by violation in greater detail, indicating the ways that various matters terminated.

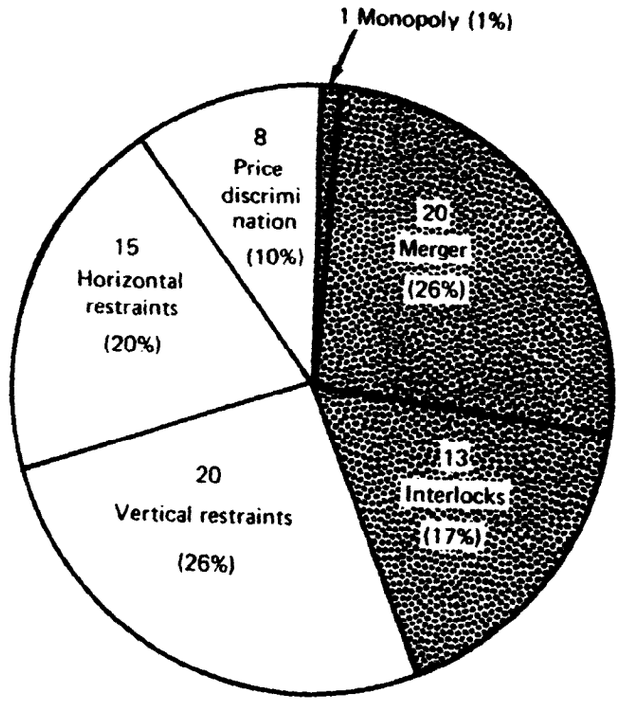
1/ The Division also dismissed seven cases after proposed mergers were abandoned. If these are counted as cases won, then structural matters accounted for 34 of 193 cases won, or 18 percent.

2/ Two consent orders were issued against each of six petroleum companies, forbidding interlocks. For our analysis, these twelve orders were counted as six orders.

ANTITRUST MATTERS WON BY TYPE OF VIOLATION
ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION
JULY 1, 1975 – SEPTEMBER 30, 1978



ANTITRUST DIVISION
186 Matters Won



FEDERAL TRADE COMMISSION
77 Matters Won

Structural violations

Conduct violations

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Antitrust Division Cases Won at the District Court Level
July 1, 1975 - September 30, 1978

	Structural violations			Conduct violations			
	Sherman 2 monopoly	Clayton 7 merger	Total structural violations (note a)	Sherman 1 price fixing	Sherman 1 Other	Total conduct violations	Total, all violations (note b)
Won:							
Litigated	0	6	6	6	2	8	16
Consent (note c)	1	20	23	40	24	64	89
Nolo plea (note d)	0	0	0	66	7	73	77
Guilty plea (note d)	0	0	0	3	0	3	4
Total Won	1	26	29	115	33	148	186

a/Including two interlocking directorate violations

b/Including 9 other violations.

c/Consent decrees issued only in civil cases.

d/Pleas entered only in criminal cases.

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FTC Cases Won at the Commission Level
July 1, 1975 - September 30, 1978

Won:	Structural violations				Conduct violations				
	Monopoly	Merger	Interlocks	Total structural violations	Horizontal restraints	Vertical restraints	Price discrimination	Total conduct violations	Total, all violations
Final litigated orders	0	9	1	10	1	3	1	5	15
Consent from litigation	1	7	2	10	1	2	4	7	17
Consent from investigation	0	4	a/10	14	13	15	3	31	45
Total won	1	20	13	34	15	20	8	43	77

a/Twelve consent orders issuded in fiscal 1976 against six petroleum companies were counted as six consent orders.

Each agency has exactly one successful monopolization case, each settled by consent decree. The small number of monopolization orders in part indicates the difficulty of successfully formulating and litigating a monopolization case and of devising an acceptable remedy, since one of the chief reasons that monopolization cases are fought so hard is that remedies frequently seek some form of divestiture or corporate breakup.

NEW DIRECTIONS IN ANTITRUST ENFORCEMENT

Both the Antitrust Division and the FTC are currently working on several new directions for antitrust enforcement. First, both agencies are interested in testing current antitrust laws for their applicability to shared monopolies or industries in which a few firms control a large share of a market. Second, the growing number of large mergers has heightened interest at the agencies and by the Congress in ways to challenge more potentially anticompetitive mergers.

Shared monopoly efforts

In November 1977, both Assistant Attorney General for Antitrust Shenefield and FTC Chairman Perschuck stated that they planned to pursue "big" antitrust cases which would rely on the theory that competition is restricted in concentrated markets, where a few firms are dominant. 1/ In such markets it is frequently argued that the dominant firms, even in the absence of explicit collusion, can tacitly coordinate their marketing strategies and restrict competition.

FTC currently has two "big" shared monopoly cases against the petroleum industry (filed in 1974), and the ready-to-eat breakfast cereal industry (filed in 1972).

1/ L.E. Demkovich, "The New Antitrust Leaders are Focusing on the Big Cases," National Journal, Nov. 5, 1977, pp. 1720-1724.

The complaint against eight oil companies alleged that:

> * * * * the eight companies had "pursued a common course of action" to deny supplies of crude oil to independent refiners and refined products to independent marketers and had caused customers "to pay substantially higher prices" than would have prevailed "in a competitively structured market." 1/

Similarly, the cereal case charges major cereal producers with jointly monopolizing the cereal industry.

In addition to these two ongoing cases, FTC is considering using section 5 of the FTC Act to proceed against a company or group of companies without proving intent to violate the law.

The current Antitrust Division "big" monopoly cases are against IBM (filed in 1969), and AT&T (filed in 1974). The Division is now planning new activity in the area of shared monopoly. A 1978 internal study on the Division's efforts in concentrated industries pointed out

> "* * * in general, the Division's enforcement program has continued to emphasize price fixing cases with the result that oligopolists who are able to collude without an express agreement are often not subjected to antitrust scrutiny. Since the bulk of the Government's efforts are directed toward uncovering explicit conspiracies, the anti-competitive behavior found in certain concentrated industries remains largely unexamined."

In April 1978 testimony before the Senate Committee on the Judiciary, the Assistant Attorney General stated that a high priority of the Division is to investigate and, where appropriate, challenge the structure or concerted practices of so-called "shared monopoly" industries.

1/ Edward Corwin, "U.S. v. Big Oil - A Legal Snarl," New York Times, July 17, 1977, reprinted in Edwin Marshfield, ed., Monopoly Power and Economic Performance, 4th ed. (New York; W.W. Northon & Co., 1978) p. 278.

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The Assistant Attorney General stated that the Division's shared monopoly focus will be on industries with dangerous levels of concentration and questionable performance. He also stated that the Division is convinced that major industries dominated by a handful of firms--particularly firms exhibiting parallel and coordinated behavior--can engender most of the same ill effects as might be expected from a classically monopolized industry. The Assistant Attorney General pointed out that the Division is convinced that the antitrust laws can be effectively used to prevent or eliminate parallel practices in such industries that facilitate the coordination of prices or production or cause the exclusion of new competitors. He also said that the Division is actively seeking to develop improved tests and methods for identifying such industries and practices.

The Division's shared monopoly efforts have been directed toward (1) developing legal theories on how to apply sections 1 and 2 of the Sherman Act to shared monopoly situations and (2) establishing a systematic means to identify and investigate oligopolistic industries. According to an internal staff study, several previous Division shared monopoly efforts since 1973 had been hindered by, among other reasons, a lack of legal or economic analysis of the problem, ineffective use of economists, and an ongoing debate over how the antitrust laws relate to oligopolistic industries. A memorandum providing theories for the use of section 1 in shared monopoly investigations was prepared in May 1978, and a similar memorandum for the use of section 2 was being finalized in June of 1979.

The Division's Economic Policy Office and Office of Operations have reviewed economic data on a large number of concentrated industries and produced lists of possible target industries. Together with ongoing shared monopoly investigations the Division had identified, by the end of 1978, approximately 160 product lines in 74 industries for shared monopoly study activities. Division officials believe that their "shared monopoly" efforts will be the most systematic examination of industry concentration in the history of the Division.

In late 1977, the Division hoped to have a shared monopoly case ready to file by early 1979. As of June 1979, although no case has been filed, several investigations are continuing from which the Division hopes to get a shared monopoly case.

Both agencies hope that, win or lose in their shared monopoly cases, important precedents will be set. They feel that a victory would lay groundwork for future litigation, while a loss would lend support for new legislation.

Proposed conglomerate merger legislation

Both the Antitrust Division and FTC have expressed growing concern over the resurgence of merger activity in the last half of the 1970s. According to recent FTC testimony before the Senate Committee on the Judiciary:

> "1978 represented a high point in recent large merger activity. Of the 2,106 acquisitions announced during 1978, 80 were of firms valued at $100 million or more, almost double the 41 $100 million mergers announced in 1977. The value of all publicly-announced mergers was reported as $34.2 billion. This figure represents a 56 percent increase over the $22 billion reported in 1977 and the highest dollar total of merger activity within the past ten years."

At the same hearings, Department of Justice testimony echoed the FTC's concerns, and stated:

> "In recent years, mergers have been almost exclusively of a conglomerate variety, representing about 80 to 90 percent of industrial merger activity measured by assets. In contrast, conglomerate mergers accounted for only 38 percent of industrial mergers in 1950."

Part of the reason for the increase in conglomerate merger activity has been the success of section 7 of the Clayton Act against horizontal and vertical mergers, combined with the Act's relative failure in the pure conglomerate area. Section 7 prohibits mergers which would tend to create a monopoly or substantially lessen competition in any market. Horizontal mergers (mergers between competitors) and vertical mergers (mergers between firms in a supplier-purchaser relationship) have fairly clear anticompetitive implications within specific markets.

The consequences of conglomerate mergers are less well understood. The chief concern raised by conglomerate mergers has been a continuing increase in aggregate concentration. 1/ While market concentration measures the share of a particular market held by a few large firms, aggregate concentration measures the share of the entire economy controlled by the largest corporations. Conglomerate mergers, however, do not have the same direct implication for competition within specific markets, and, therefore, the courts have been generally unwilling to apply section 7 of the Clayton Act to block purely conglomerate mergers.

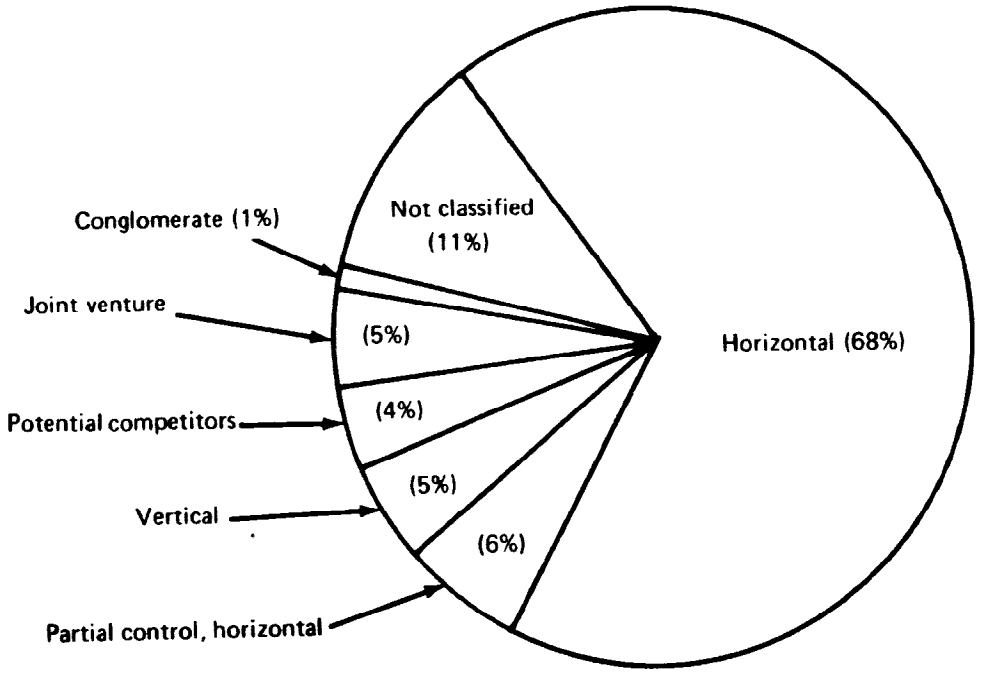
In light of the high level of conglomerate merger activity, one Antitrust Division official acknowledged that while every major merger would be reviewed by either the Division or FTC, conglomerate mergers were difficult to attack unless they exhibited some specific anticompetitive effect. The kinds of anticompetitive effects looked for include horizontal or vertical elements of a merger, the elimination of a potential competitor, the entrenchment of a firm in a market, and increased possibilities for reciprocal dealings between firms. Thus, the chart on page 92 indicates that the Division classified only 1 percent of its merger activity as dealing solely with conglomerate mergers, and the vast majority of the resources involved the horizontal or vertical aspects of mergers.

Similarly, FTC reported that of 39 merger investigations in progress in fiscal year 1978, 21 were conglomerate mergers; only six, however, did not also involve some horizontal or vertical aspects.

Because the concerns raised by conglomerate mergers are over increases in aggregate concentration, rather than lessening competition in specific markets, many antitrust policymakers feel that the control of conglomerate mergers would require new legislation. Therefore, on March 8, 1979, the Chairman, Senate Judiciary Committee, introduced a bill (S. 600) called the "Small and Independent Business Protection Act of 1979" to control conglomerate mergers--the merger of two companies from different industries.

1/ See testimony by John H. Shenefield, Assistant Attorney General, Antitrust Division and Alfred F. Dougherty, Jr., Director, Bureau of Competition, FTC before the Senate Committee on the Judiciary, March 8, 1979.

CLAYTON § 7 ENFORCEMENT ACTIVITY BY THE ANTITRUST DIVISION
OCTOBER 1, 1975 – SEPTEMBER 30, 1978



ANTITRUST DIVISION
100% = 1,335 months

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The objective of the bill is to preserve the diversity and independence of American business by prohibiting mergers or acquisitions if

--each person has assets or sales exceeding $2 billion;

--each person has assets or sales exceeding $350 million, and there is no economic jusification for the merger;

--one person has assets or sales exceeding $350 million and the other person has 20 percent or more of the sales during the calendar year immediately preceding the acquisition in any significant market.

Mergers or acquisitions involving persons other than those with assets or sales exceeding $2 billion would be allowable if the transaction would substantially enhance competition or yield economies of scales or other substantial efficiencies.

In introducing S. 600, the Chairman pointed out that the dollar value of all corporate mergers and acquisitions rose from about $12 billion in 1975 to $34 billion in 1978 and stated that

> "* * * These figures * * * describe a pattern by which the independent enterprises are increasingly absorbed within the corporate umbrella of conglomerates to which they may bear no logical economic relationship. Unless the growth of new companies can be said to match the disappearance of existing companies, the inevitable result is that more economic power is now concentrated in fewer and fewer hands.* * *"

Both the Antitrust Division and FTC support the enactment of legislation to slow the continuing increase in the level of economic concentration.

In testimony before the Senate Committee on the Judiciary, the Assistant Attorney General, Antitrust Division stated:

> "* * *. We are faced in this country with a serious, fundamentally disturbing pattern of economic concentration, a pattern of which giant conglomerate mergers are a part, a pattern which carries with it social, political

> and competitive threats inconsistent with the nation's fundamental democratic precepts. We perceive these apparent dangers, yet feel constrained in reacting to them by a lack of precise measures. And so our choice is, essentially, whether to watch, and wait, and hope that proof positive will somehow develop or to act now in defense of the values of diversity on which our economy and our entire society are founded. I believe that we can enact legislation eliminating the influence of giant conglomerate mergers on economic concentration without any significant adverse effects on the freedom and flexibility of our economy to grow in the public interest. * * *."

The Director of FTC's Bureau of Competition informed the Committee that:

> "It is clear that the conglomerate merger movement raises political and social issues of national scope and importance. While the ultimate ramifications of the movement are unclear, serious questions concerning the role of the large conglomerate firm in our national life are apparent. In light of the unpredictability of the movement's ultimate effects, and the dangers inherent in the process of unlimited growth through conglomeration, it is essential that Congress act immediately to preserve the status quo by enacting legislation to limit the continuing growth of the nation's largest corporations through conglomerate mergers."

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, Public Law No. 94-435, 90 Stat. 1390, requires an advance notification and informational report to FTC and the Antitrust Division of certain acquisitions of voting securities or assets by firms of a certain size or larger. Premerger notification rules required by the act were issued on July 31, 1978, with an effective date of September 5, 1978. Through December 31, 1978, 355 mergers or acquisitions were reported under the rules. Of the total filings considered for investigation (319) FTC selected 33 and the Antitrust Division selected 39, as disclosed in the following table.

	Filings		Selected by FTC	Selected by Antitrust Division	Total selected	
	Number	Percent	(number)	(number)	Number	Percent of filings
Total	319	100%	33	39	72	23%

Of the 67 filings selected for investigation which could be classified by merger enforcement theory, 64 percent were horizontal mergers, 21 percent conglomerate, 12 percent horizontal/conglomerate combinations, and 3 percent vertical.

As discussed above, S. 600 would establish three separate tests to prevent mergers or stock acquisitions. The first test would forbid any merger or acquisition if both the acquiring and acquired person have assets or sales exceeding $2 billion. Of the 319 transactions, we identified 5 which would have fallen in this category. Of these, two were selected for investigation--one by FTC and one by the Division.

The second test would prevent mergers or acquisitions where both persons have assets or sales exceeding $350 million, unless the firms could establish one of three affirmative defenses. We identified 39 merger or acquisition transactions between firms that individually had sales or assets in excess of $350 million. Of these, 16 were selected for investigation--7 by the FTC and 9 by the Division.

We did not analyze the filings under the third test required by S. 600 because information needed (that is, amount of sales in any significant market) was not readily available.

In summary, the enforcement agencies did not select for investigation 3 mergers or acquisitons that would have been prohibited by S. 600 under the first test and 23 mergers that would have been subject to challenge under the bill's second test.

APPENDIX III

METHOD USED TO CLASSIFY MATTERS BY INDUSTRY STRUCTURE

THE STRUCTURE OF THE U.S. ECONOMY

For accounting purposes, the Bureau of the Census has divided the U.S. economy into 12 major categories, into which all economic activity is classified. The table on page 97 shows the distribution of national income among the various categories for selected years from 1929 through 1977.

Within each major division, each business establishment is assigned to a seven digit product line category, with each successive digit of the code representing a finer degree of classification. An example of the Standard Industrial Classification (SIC) system follows:

Major division	2	Manufacturing
Major group	28	Chemical and allied products
Industry group	284	Cleaning and products
Census industry	2844	Toilet preparations
Product class	28445	Other cosmetics and toilet preparations
Commodity	2844511	Suntan lotions

Percent of National Income by Industry Division for Selected Years, 1929 - 1977

Industry division	Year					
	1929	1939	1947	1958	1967	1977
Manufacturing	25	25	30	29	30	26
Wholesale and Retail Trade	16	17	19	16	15	15
Government and Government Enterprises	6	12	9	13	14	15
Services	10	10	9	10	12	14
Finance, Insurance, and Real Estate	15	11	8	11	11	11
Contract Construction	4	3	4	5	5	5
Transportation	8	6	6	4	4	4
Agriculture, Forestries, Fisheries	10	8	9	5	3	3
Electric, Gas, and Sanitary Services	2	2	1	2	2	2
Communication	1	1	1	2	2	2
Mining	2	2	2	2	1	2
Rest of the World	1	(a)	(a)	1	1	1
Total Percent	100	100	100	100	100	100
Total ($billion)	87	73	200	368	653	1,555

a/Less than 1 percent

Source: 1972 Census of Manufacturing, p. XI and Survey of Current Business, July, 1978, p. 53.

Detail may not add to 100% due to rounding.

Each 5 years, as a part of the Census of Manufacturing, the Bureau of the Census calculates market concentration for each of the four digit census industries in the manufacturing sector of the economy. Unfortunately, several drawbacks to the Census information exist. First, it covers only the manufacturing sector of the economy. To date, there is no reliable source of market concentration information for the rest of the economy. Second, and perhaps more crucial, the four digit census industries do not always correspond to a meaningful definition of a market.

The most important and the most difficult problem in looking at market concentration is defining markets. Ideally, markets should consist of all products which are viewed as ready substitutes by a common group of purchasers. Thus, the concept of a market consists not only of the physical product involved, but also of the geographic location where the product is available and the cost of transporting the product. Finally, market boundaries depend on the ease of substitution among producers, since producers of different products which are related in their production process may be potential competitors.

Occasionally, substitute products, such as cane and beet sugar, or metal cans and glass jars, are included in separate census industries. Other times, products which are not substitutes are included in very broad census industry titles, such as pharmaceutical preparations. In addition, information is presented only for the domestic economy of the United States, and no correction is made for the geographic size of the market. In cases where there is competition from abroad, such as in the steel, automobile, and television receiver industries, the Census statistics will overstate the effective degree of concentration. On the other hand, when competition is local or regional, such as in the newspaper or readymixed concrete industries, the reported concentration based on share of a national market will be too low.

Despite the problems cited above, the "Census of Manufacturing" concentration data do provide a starting place to investigate the level of market concentration in the economy. Even with its shortcomings, the data can help reveal trends in market concentration over time. The concentration figures will show whether average market concentration has been rising or falling and which particular industries have been becoming more concentrated.

The concentration data reported by the Census of Manufacturers consists of the share of the national market held by the 4, 8, 20, and 50 largest firms. These are referred to, respectively, as the 4-firm, 8-firm, 20-firm, and 50-firm concentration ratios. The most commonly used measure of market concentration is the 4-firm concentration ratio.

It should be stressed again that the level of concentration in an industry does not automatically indicate the level of competition in that industry.

First, as noted above, the market definition may be innaccurate. For example, the reported four-firm concentration ratio for SIC industry number 2711, newspapers, is 17 percent, meaning that nationally, the four largest newspaper companies account for 17 percent of all newspaper sales. However, this figure overlooks the fact that most newspapers serve a local market in which there are fewer than four competitors. In those local markets, the four-firm concentration ratio would be 100 percent. Second, even when the market definition is acceptable, a single concentration ratio hides information about the size of specific firms. The level of competition in an industry with a 4-firm concentration ratio of 80 percent could be different if the largest firm's share was 75 percent than if the four largest firms each held 20 percent of the market. Third, concentration ratios do not measure the presence of potential entrants into a market. If entry is relatively easy, and a number of firms poised at the edge of the market exist ready to enter, then firms already in the market will be unable to set prices higher than the competitive level without attracting entry. By contrast, industries where entry is difficult due to high costs, or patented or secret technology, may be less competitive than industries with easier entry.

All other things equal, however, market concentration does offer one indication of how competitive an industry is likely to be. Highly concentrated industries are likely to contain firms which recognize their mutual interdependence and the futility of overly vigorous competition. In these industries, firms may reach a tacit, or an overt, agreement regarding pricing or other marketing strategies. One common form of such recognition of mutual interdependence is price leadership, in which one firm, the price leader, announces a new price, and is soon followed to that price by other members of the industry. Such pricing behavior is more likely to succeed in an industry dominated by a few

large firms. An outright conspiracy is also probably easier to devise and maintain among a few firms, rather than many. The more firms in such an agreement, the more chances for a "leak."

OUR CLASSIFICATION PROCEDURE

We obtained lists of investigations and litigated matters open during 1975 through 1978, from both the Antitrust Division and the FTC. 1/ The agencies supplied the four-digit SIC number indicating the principal industry in which the alledged violation occurred.

In order to analyze each agency's antitrust effort devoted to concentrated industries, we sought a method of classifying the four-digit SIC industries according to industry structure. We based our classification method on one used by Meehan and Mann, which groups the SIC industries into seven structure categories. 2/ We then further grouped industries into two categories--concentrated and unconcentrated.

Meehan and Mann's classification system, summarized on p. 103 uses the four and eight-firm concentration ratios published in the 1972 Census of Manufacturing to place industries into one of seven structure categories, ranging from IA, oligopoly to VI, atomistic. This method can only be used to classify manufacturing industries, since only for those industries are concentration ratios published.

1/ For a more complete discussion of the data obtained from the agencies, and the exact dates covered by the data, see page 57.

2/ Meehan and Mann, "The Enforcement of Antitrust, Who Benefits?" Discussion paper #64, August 1974, Department of Economics, Boston College, app. A. Meehan and Mann borrowed the procedure from Clabault and Burton, Jr., Sherman Act Indictments, 1955-1965, 1966, p. 134. The classification procedure is based on work by J. S. Bain, in Industrial Organization, second ed., 1968, pp. 137-144.

APPENDIX III

As noted earlier, four-digit SIC industry definitions do not always correspond to meaningful economic markets. Following Meehan and Mann, we used the work of Schwartzman and Bodoff to adjust the reported concentration ratios of local and regional industries to more accurately reflect their true market structure. 1/ We also followed Meehan and Mann in increasing the concentration ratio of SIC number 2834, pharmaceutical preparations, since that industry contains a large number of non-competing sub-products, and has also attracted antitrust attention.

The table on pages 104,105, and 106 lists each of the 451 four-digit SIC industries, along with the structure category to which it was assigned. Note that a total of 45 industries were moved to different structure categories as a result of revising concentration ratios (44 to account for local or regional markets, plus SIC number 2834, pharmaceutical preparations). The table on p. 107 shows the distribution of four-digit industries arranged by two-digit major industry groups, and by the seven structure categories.

For our analysis, we needed only two structure categories, one for concentrated industries, and one for unconcentrated industries. We therefore grouped Meehan and Mann's seven structure categories into two, corresponding to industry classes IA through III and IV through VI, respectively. Thus, concentrated industries correspond, for our analysis, to those industries with revised four-firm concentration ratios of 50 percent or greater and eight-firm concentration ratios of 70 percent or greater. 2/

1/Schwartzman and Bodoff "Concentration in Regional and Local Industries," Southern Economic Journal January 1971.

2/Several authors have suggested that there is a "critical" four-firm concentration ratio of 50 percent, or a "critical" eight-firm concentration ratio of 70 percent, above which industries become notably less competitive. For a summary of this literature, see L.W. Weiss, Quantitative Studies of Industrial Organization, "pp. 371-373, in M.D. Intriligator, ed., Frontiers of Quantitative Economics, 1971.

The table on p. 108 shows that overall distribution of manufacturing industries. The table indicates that 146 of 451 industries (32 percent) were classified as concentrated for this study. These concentrated industries accounted for 40 percent of 1972 manufacturing sales.

APPENDIX III

Classification Of Industries According To Seller Concentration

Type of industry (note a)		Concentration ratio for four largest Companies	Concentration ratio for eight largest companies	Total number of firms in industry
IA	Oligopoly	90 - 100	95 - 100	5 - 10
IB	Oligopoly	80 - 89	90 - 94	20 - 40
II	Highly concentrated	65 - 79	85 - 89	20 - 100
III	High - moderate	50 - 64	70 - 84	25 - 100
IV	Low - moderate	35 - 49	45 - 69	50 +
V	Barely concentrated	20 - 34	30 - 44	100 +
VI	Atomistic	0 - 19	0 - 29	100 +

a/ A four-digit SIC industry would be assigned to one of the types IA to VI, according to the relevant data for that industry. For a number of four-digit SIC industries, the 4-firm concentration ratio indicated one industry type while the 8-firm concentration ratio suggested another industry type. These ambiguities were resolved by the following scheme: (1) if a four-digit industry was X percentage points above the lower bound of the prescribed 4-firm concentration ratio for, e.g., Type III, then (2) the industry could have a deficiency of 2X percentage points below the lower bound of the prescribed 8-firm concentration ratio for Type III. i.e., a four-digit SIC industry with a 4-firm concentration ratio of 55% and an 8-firm concentration ratio of 60% would be considered a Type III industry.

Source: Meehan and Mann, op. cit., app. A, p. 2.

APPENDIX III

Classification Of Four-Digit Standard Industrial Classification (SIC) Industries By Industry Structure Type (1972)

SIC #	Class a/	SIC#	Class	SIC#	Class	SIC#	Class
2011	IV*	2095	II*	2328	IV	2492	IV
2013	V*	2097	IB*	2329	VI	2499	V*
2016	V*	2098	IV	2331	VI	2511	V*
2017	V	2099	V	2335	VI	2512	VI
2021	IV	2111	IB	2337	VI	2514	VI
2022	IV	2121	III	2339	VI	2515	IV*
2023	IV	2131	II	2341	VI	2517	IV
2024	II*	2141	II	2342	V	2519	V
2026	III*	2211	V	2351	VI	2521	V
2032	II	2221	IV	2352	V	2522	IV
2033	IV*	2231	IV	2361	VI	2531	V
2034	IV	2241	V	2363	VI	2541	VI
2035	V	2251	IV	2369	V	2542	IV*
2037	V	2252	VI	2371	VI	2591	IV
2038	IV	2253	VI	2381	IV	2599	VI
2041	IV	2254	IV	2384	V	2611	III
2043	IA	2257	V	2385	V	2621	V
2044	IV	2258	VI	2386	V	2631	V
2045	II	2259	III	2387	V	2641	IV
2046	III	2261	V	2389	V	2642	V
2047	III	2262	III	2391	IV	2643	V
2048	V	2269	V	2392	V	2645	IV
2051	IV*	2271	II	2393	V	2646	II
2052	III	2272	V	2394	IV*	2647	III
2061	IV	2279	II	2395	V	2648	IV
2062	III	2281	V	2396	III	2649	V
2063	II	2282	IV	2397	VI	2651	IV*
2065	IV*	2283	IV	2399	V	2652	V*
2066	II	2284	III	2411	VI	2653	V
2067	IB	2291	III	2421	VI	2654	IV
2074	IV	2292	IV	2426	VI	2655	III
2075	III	2293	V	2429	V	2661	III
2076	II	2294	III	2431	VI	2711	II*
2077	V	2295	IV	2434	VI	2721	V
2079	IV	2296	IB	2435	V	2731	VI
2082	II*	2297	IV	2436	IV	2732	V
2083	III	2298	IV	2439	VI	2741	V
2084	III	2299	V	2441	IV*	2751	V*
2085	IV	2311	VI	2448	VI	2752	VI
2086	II*	2321	V	2449	V	2753	V
2087	III	2322	IV	2451	V	2754	IV
2091	IV	2323	V	2452	V	2761	III*
2092	V	2327	V	2491	IV	2771	II

See notes at end of table.

APPENDIX III

SIC #	Class	SIC #	Class	SIC #	Class	SIC #	Class
2782	IV	3131	VI	3331	II	3493	IV
2789	V*	3142	IV	3332	IA	3494	VI
2791	VI	3143	IV	3333	II	3495	V
2793	V*	3144	V	3334	IB	3496	VI
2794	IV	3149	V	3339	IV	3497	IV
2795	V	3151	IV	3341	V	3498	V
2812	II	3161	IV	3351	IV	3499	V*
2813	IB*	3171	VI	3353	II	3511	IA
2816	III	3172	IV	3354	IV	3519	III
2819	III*	3199	VI	3355	II	3523	IV
2821	V	3211	IA	3356	IV	3524	IV
2822	III	3221	III	3357	IV	3531	IV
2823	IA	3229	II	3361	IV*	3532	IV
2824	II	3231	IV	3362	V	3533	V
2831	IV	3241	III*	3369	V	3534	III
2833	III	3251	IB*	3398	VI	3535	V
2834	IA**	3253	III	3399	V	3536	V
2841	III	3255	IV	3411	III	3537	IV
2842	IV	3259	IV	3412	IV	3541	V
2843	V	3261	III	3421	III	3542	VI
2844	IV	3262	II	3423	V	3544	VI
2851	V	3263	II	3425	III	3545	VI
2861	II	3264	IV	3429	IV	3546	IV
2865	IV	3269	V	3431	IV	3547	II
2869	IV	3271	III*	3432	V	3549	VI
2873	IV	3272	V*	3433	IV*	3551	VI
2874	V	3273	III*	3441	V*	3552	V
2875	IV*	3274	IV	3442	VI	3553	IV
2879	IV	3275	IB	3443	V	3554	V
2891	V	3281	IV*	3444	IV*	3555	IV
2892	II	3291	IV	3446	IV*	3559	VI
2893	IV	3292	III	3448	IV	3561	VI
2895	II	3293	V	3449	III*	3562	III
2899	VI	3295	V	3451	VI	3563	IV
2911	III*	3296	II	3452	VI	3564	V
2951	V*	3297	IV	3462	V	3565	VI
2952	III	3299	V	3463	II	3566	V
2992	V	3312	IV	3465	III	3567	V
2999	II	3313	II	3466	III	3568	IV
3011	II	3315	VI	3469	VI	3569	VI
3021	III	3316	IV	3471	VI	3572	IB
3031	IB	3317	V	3479	VI	3573	III
3041	III	3321	IV*	3482	IB	3574	II
3069	VI	3322	III	3483	IV	3576	III
3079	VI	3324	III	3484	III	3579	III
3111	VI	3325	V	3489	III	3581	III

See notes at end of table.

SIC #	Class	SIC #	Class	SIC #	Class	SIC #	Class
3582	III	3646	V	3715	IV	3851	III
3585	IV	3647	II	3721	II	3861	II
3586	III	3648	V	3724	II	3873	III
3589	VI	3651	IV	3728	IV	3911	V
3592	III	3652	IV	3731	IV	3914	III
3599	VI	3661	IA	3732	VI	3915	VI
3612	III	3662	V	3743	III	3931	IV
3613	IV	3671	IA	3751	III	3942	V
3621	IV	3672	IB	3761	III	3944	IV
3622	IV	3673	III	3764	III	3949	V
3623	IV	3674	III	3769	II	3951	IV
3624	IB	3675	IV	3792	V	3952	IV
3629	V	3676	IV	3795	IA	3953	V
3631	III	3677	VI	3799	V	3955	IV
3632	IB	3678	III	3811	V	3961	VI
3633	IB	3679	IV	3822	III	3962	V
3634	IV	3691	III	3823	IV	3963	V
3635	II	3692	IA	3824	III	3964	IV
3636	IB	3693	III	3825	IV	3991	V
3639	III	3694	III	3829	V	3993	VI
3641	IA	3699	V	3832	IV	3995	V
3643	V	3711	IA	3841	V	3996	IA
3644	V	3713	V	3842	IV	3999	VI
3645	V	3714	III	3843	IV		

a/See text, p. 103

*Adjusted to reflect local or regional nature of industry.

**Adjusted to reflect nonsubstitutable subproducts.

APPENDIX III

Distribution of Four-Digit SIC industry Groups By Industry Structure Category (note a)

SIC	IA	IB	II	III	IV	V	VI	TOTAL
20	1	2	9	9	17	9	0	47
21	0	1	2	1	0	0	0	4
22	0	1	2	5	10	9	3	30
23	0	0	0	1	5	15	12	33
24	0	0	0	0	4	6	7	17
25	0	0	0	0	5	4	4	13
26	0	0	1	4	5	7	0	17
27	0	0	2	1	3	8	3	17
28	2	1	5	5	9	5	1	28
29	0	0	1	2	0	2	0	5
30	0	1	1	2	0	0	2	6
31	0	0	0	0	5	2	4	11
32	1	2	4	7	8	5	0	27
33	1	1	5	2	9	6	2	26
34	0	1	1	8	10	8	8	36
35	1	1	2	10	11	9	11	45
36	4	5	2	9	10	8	1	39
37	2	0	3	5	3	3	1	17
38	0	0	1	4	5	3	0	13
39	1	0	0	1	6	8	4	20
TOTAL	13	16	41	76	125	117	63	451

a/See text, page 103.

APPENDIX III

Manufacturing Industries And Sales By Industry Structure Type

Industry classification	Number of industries		Sales	
	Number	Percent	($ billion)	Percent
IA	13	3	60	8
IB	16	4	14	2
II	41	9	68	10
III	76	17	142	20
Concentrated	146	32	284	40
IV	125	28	178	25
V	117	26	150	21
VI	63	14	97	14
Unconcentrated	305	68	425	60
Total	451	100	$709	100

Source: Industry classification, see text and Table on page 107. Industry sales, 1972 Census of Manufacturing.

Detail may not add to total due to rounding.

APPENDIX IV

Antitrust Division
Resource Utilization Data (Person Month)
Investigative Efforts
Fiscal Years 1976, 1977, and 1978

Type of industry and structure	Structure violations				Conduct violations					Grand total
	Monopoly	Merger	Interlocks	Total	Horizontal price fixing	Other Sherman I	Price discrimination	Other conduct	Total	
1976										
Manufacturing industries										
Concentrated structure	18	92	0	110	217	53	0	1	271	404
Unconcentrated structure	14	82	2	98	327	139	1	0	467	585
Total manufacturing	32	174	2	208	544	192	1	1	738	989
Nonmanufacturing	16	62	1	79	307	322	0	0	629	709
Not classified	0	2	0	2	0	1	0	0	1	3
Total	48	238	3	289	851	515	1	1	1,368	a/1,702
1977										
Manufacturing industries										
Concentrated structure	36	97	0	133	186	84	0	0	270	414
Unconcentrated structure	18	115	1	134	324	101	0	0	425	575
Total manufacturing	54	212	1	267	510	185	0	0	695	989
Nonmanufacturing	27	34	0	61	421	386	0	0	807	886
Not classified	0	0	0	0	2	3	0	0	5	5
Total	81	246	1	328	933	574	0	0	1,507	b/1,880
1978										
Manufacturing industries										
Concentrated structure	55	59	0	114	83	91	0	0	174	302
Unconcentrated structure	42	169	0	211	342	91	0	0	433	681
Total manufacturing	97	228	0	325	425	182	0	0	607	983
Nonmanufacturing	56	77	0	133	525	336	0	0	861	1,010
Not classified	0	7	2	9	1	10	0	0	11	20
Total	153	312	2	467	951	528	0	0	1,479	c/2,012

a/Includes 45 person months not classified by violation and rounding difference of 1 month.

b/Includes 44 person months not classified by violation and rounding difference of 1 month.

c/Includes 66 person months not classified by violation and rounding difference of 1 month.

APPENDIX IV

Antitrust Division
Resource Utilization Data (Person Month)
Litigative Efforts
Fiscal Years 1976, 1977, and 1978

Type of industry and structure	Structure Violations				Conduct Violations					Grand total
	Monopoly	Merger	Interlocks	Total	Horizontal price fixing	Other Sherman I	Price discrimination	Other conduct	Total	
1976										
Manufacturing industries										
Concentrated structure	307	89	0	396	47	219	3	135	404	812
Unconcentrated structure	0	157	0	157	136	65	0	0	201	358
Total manufacturing	307	246	0	553	183	284	3	135	605	1,170
Nonmanufacturing	77	51	11	139	146	181	0	5	332	480
Not Classified	0	6	0	6	0	31	0	0	31	37
Total	384	303	11	698	329	496	3	140	968	a/1,688
1977										
Manufacturing industries										
Concentrated structure	281	52	0	333	53	107	4	98	262	596
Unconcentrated structure	15	64	0	79	159	76	0	0	235	314
Total manufacturing	296	116	0	412	212	183	4	98	497	910
Nonmanufacturing	103	23	6	132	227	248	0	1	476	620
Not Classified	0	4	0	4	0	23	0	0	23	28
Total	399	143	6	548	439	454	4	99	996	b/1,558
1978										
Manufacturing industries										
Concentrated structure	283	42	0	325	37	133	3	67	240	570
Unconcentrated structure	34	41	0	75	164	34	0	0	198	274
Total manufacturing	317	83	0	400	201	167	3	67	438	844
Nonmanufacturing	94	12	0	106	134	233	0	2	369	495
Not classified	0	0	0	0	0	0	0	0	0	0
Total	411	95	0	506	335	400	3	69	807	c/1,339

a/Includes 21 person months not classified by violation and rounding difference of 1 month.

b/Includes 14 person months not classified by violation.

c/Includes 26 person months not classified by violation.

APPENDIX IV

Federal Trade Commission
Resource Utilization Data (Hours)
Investigative Efforts
Fiscal Years 1976, 1977, and 1978

Type of industry and structure	Structure Violations				Conduct Violations				
	Monopoly (100s)	Merger (100s)	Interlocks (100s)	Total (100s)	Horizontal restraints (100s)	Vertical restraints (100s)	Price discrimination (100s)	Total (100s)	Grand total (100s)
1976									
Manufacturing Industries									
Concentrated structure	207	86	6	299	42	155	121	318	618
Unconcentrated structure	125	131	12	268	143	177	42	362	630
Total Manufacturing	332	217	18	567	185	332	163	680	1,249
Nonmanufacturing	117	198	13	328	401	33	52	486	1,122
Not classified	0	15	7	22	3	5	0	8	37
Total	449	430	38	917	589	370	215	1,174	a/2,408
1977									
Manufacturing industries									
Concentrated structure	389	220	6	615	76	82	126	284	899
Unconcentrated structure	80	234	4	318	117	168	34	319	637
Total Manufacturing	469	454	10	933	193	250	160	603	1,536
Nonmanufacturing	76	186	24	286	324	66	88	478	832
Not classified	9	29	12	50	35	10	0	45	96
Total	554	669	46	1,269	552	326	248	1,126	b/2,464
1978									
Manufacturing industries									
Concentrated structure	422	168	5	595	77	37	82	196	791
Unconcentrated structure	150	253	5	408	264	107	13	384	792
Total Manufacturing	572	421	10	1,003	341	144	95	580	1,583
Nonmanufacturing	31	113	17	161	441	61	70	572	749
Not classified	7	69	0	76	41	1	0	42	120
Total	610	603	27	1,240	823	206	165	1,194	c/2,452

a/Includes 31,600 hours not classified by violation and rounding differences of 100 hours.

b/Includes 6,800 hours not classified by violation and rounding differences of 100 hours.

c/Includes 1,500 hours not classified by violation and rounding differences of 300 hours.

APPENDIX IV

Federal Trade Commission
Resource Utilization Data (Hours)
Litigative Efforts
Fiscal Years 1976, 1977, and 1978

Type of industry and structure	Structure Violations				Conduct Violations				
	Monopoly (100s)	Merger (100s)	Interlocks (100s)	Total (100s)	Horizontal Restraints (100s)	Vertical Restraints (100s)	Price Discrimination (100s)	Total (100s)	Grand Total (100s)
1976									
Manufacturing industries									
Concentrated structure	533	160	0	693	119	95	19	233	927
Unconcentrated structure	0	156	3	159	72	85	125	282	441
Total manufacturing	533	316	3	852	191	180	144	515	1,368
Nonmanufacturing	550	217	2	769	30	10	0	40	809
Not classified	60	0	0	60	0	0	0	0	60
Total	1,143	533	5	1,681	221	190	144	555	a/2,237
1977									
Manufacturing industries									
Concentrated structure	508	103	44	655	73	99	99	271	926
Unconcentrated structure	0	264	0	264	53	54	26	133	396
Total manufacturing	508	367	44	919	126	153	125	404	1,322
Nonmanufacturing	564	44	34	642	87	7	0	94	736
Not classified	16	0	0	16	0	0	0	0	16
Total	1,088	411	78	1,577	213	160	125	498	a/2,074
1978									
Manufacturing industries									
Concentrated structure	508	214	14	736	62	128	166	356	1,092
Unconcentrated structure	0	368	0	368	24	18	119	161	529
Total manufacturing	508	582	14	1,104	86	146	285	517	1,621
Nonmanufacturing	467	11	0	478	173	1	2	176	654
Not classified	0	0	0	0	0	0	0	0	0
Total	975	593	14	1,582	259	147	287	693	2,275

a/Includes net rounding difference of 100 hours.

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United States Senate

SELECT COMMITTEE ON SMALL BUSINESS
WASHINGTON, D.C. 20510

November 15, 1977

Honorable Elmer B. Staats
Comptroller General of the United
States
General Accounting Office
441 G Street, N. W.
Washington, D. C. 20458

Dear Mr. Staats:

I am writing in my capacity as Chairman of the Senate Select Committee on Small Business to request a General Accounting Office study of the performance of the Antitrust Division of the Department of Justice. I would also like GAO to review the Federal Trade Commission's activities as they relate to Antitrust Division activities.

The mission of the Antitrust Division, along with the Federal Trade Commission, is to protect and preserve our free enterprise system from monopoly, attempts to monopolize and unfair trade practices that harm competition. These goals are laid out specifically in the antitrust laws. How well they are achieved has a significant impact on the ability of small business to survive and compete. The fact that our nation's economic resources have become increasingly concentrated in a few large corporations, despite the existence of the antitrust laws, indicates that the laws either are ineffectively written or have been ineffectively enforced.

I understand that the General Accounting Office has not yet had the opportunity to conduct a broad-scale investigation into the effectiveness of the antitrust laws or their

enforcement. Because the new Administration appears interested in improving antitrust enforcement, this may be an excellent time for the GAO to conduct such an investigation and suggest remedies.

There are a number of important issues that should be considered, including whether or not these two organizations have sufficiently well-defined missions, whether or not clearly articulated goals are used to evaluate their allocation of resources among particular activities or cases, whether they simply react to complaints or initiate activities designed to achieve particular goals, whether there has been a proper allocation of responsibilities between the two organizations, and whether or not small business has received adequate protection under the antitrust laws. There are many other issues that might also be examined.

After the staff of the General Accounting Office has had an opportunity to determine what issues the GAO could effectively investigate and evaluate, I would appreciate a briefing. The staff of the Small Business Committee has already met with Mr. John Ols and other GAO staff members on this, and I would welcome having our two staffs work closely on the preliminary stage of the study. This would also allow for the proper scoping of the assignment as well as agreed upon reporting objectives.

I have no objection to a formal report being issued to Congress, but would like GAO to be ready to testify on its finding should hearings be scheduled before the report is issued.

Sincerely,

GAYLORD NELSON
Chairman

GN:wbo

UNITED STATES DEPARTMENT OF JUSTICE

WASHINGTON, D.C. 20530

Address Reply to the Division Indicated and Refer to Initials and Number

OCT 19 1979

Mr. Allen R. Voss
Director
General Government Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Voss:

This is in response to your request to the Attorney General for the comments of the Department of Justice (Department) on your draft report entitled "Management Of Federal Antitrust Enforcement Can Be Improved".

We have reviewed the General Accounting Office (GAO) draft report on the enforcement activities of the Department's Antitrust Division and the Federal Trade Commission (FTC) and believe that it represents a useful addition to the Antitrust Division's own assessment of improvements that need to be made in its operations. As the report notes, the Antitrust Division has had under way a number of projects now coming to fruition that are directly related to many of the recommendations made in the report. Indeed, as to each of the major recommendations, the Antitrust Division has either already decided on means of implementing the recommendations or, in the case of joint work with the FTC, is prepared to go forward. Our comments address each of the applicable recommendations.

GAO recommends that the Attorney General and the Chairman of the FTC ensure that evaluation plans and strategies be shared in order to avoid duplication of evaluation efforts and to increase the base and knowledge each agency has of the other, consider establishment of a joint task force to plan a unified and comprehensive approach to evaluating antitrust enforcement, and consider undertaking joint evaluation efforts to maximize resources and results.

Because the two agencies have somewhat different statutory authorities, the amount of joint evaluation that could be undertaken by the two agencies is limited. Nonetheless, in those areas where we do have joint enforcement jurisdiction, most notably in Clayton Act Section 7 mergers, a joint evaluation of the effectiveness of enforcement activities in restoring and maintaining competition would make sense. The Assistant Attorney General, Antitrust Division, and the Chairman of the FTC currently meet on a quarterly basis with senior members of their respective staffs to exchange information and discuss items of mutual interest. Rather than establishing a new task force to plan a unified approach to evaluating antitrust enforcement, the Division believes that these quarterly meetings would provide a good forum for such an effort. The Division intends to propose to the FTC that the subject of evaluation efforts be included on the agenda for the next quarterly meeting.

GAO recommends that the Antitrust Division develop the capability to collect additional data on the actual total use of resources by program category.

For the past several years the Antitrust Division has used a computerized data retrieval system as a management tool to track investigations and plan resource allocation. This system, the Antitrust Caseload Evaluation System (ACES), contains information on the nature and status of Antitrust Division matters.

After a comprehensive review of ACES, several significant changes were made in the system to enhance its usefulness to the Division for collection and analysis of resource data. Two Antitrust Division directives, DOJ File Number Policy and Personnel Time Reporting, were distributed on August 28, 1979, to implement these changes.

APPENDIX VI

The file number directive describes the Antitrust Division policy for assignment of unique DOJ file numbers to Antitrust Division activities. Assignment of numbers as described in the directive will enable the Antitrust Division to maintain document files adequately, manage the progress of investigations, cases and other matters and program categories. The directive outlines the types of matters that must receive file numbers and, for the first time, provides for the assignment of unique numbers to special projects. Examples of special projects include intra and interagency task forces established to develop new or revised policies, programs and procedures; major legislative initiatives; and major legal or economic research projects designed to evaluate antitrust enforcement policies and programs.

The time reporting directive requires Antitrust Division professional and paraprofessional personnel to report weekly to ACES the actual hours, including overtime hours, spent on Antitrust Division activities. This replaces the previous method of monthly reporting of percentage of time spent on activities. Time spent on matters with an assigned file number is reported to that file number. Twelve general activity categories are provided for reporting time spent on matters that are not assigned file numbers, e.g., state liaison activities, time spent reviewing files and preparing responses to requests for information under the Privacy or Freedom of Information Acts, and training. This modification of ACES will provide Antitrust Division managers with more accurate data on resource usage and will enable them to shift resources more efficiently as the need arises.

The Antitrust Division has also automated fiscal record-keeping so that beginning October 1, 1979, cost data such as travel, transcripts, and expert witnesses, will be accumulated by individual file number. This cost data, along with the cost of personnel, can be aggregated to provide information on resources expended by matter as well as by enforcement program. With these changes the Antitrust Division will have the necessary data to plan and monitor resource usage more effectively.

GAO recommends that the Antitrust Division evaluate the effectiveness of enforcement efforts in promoting and restoring competition.

APPENDIX VI

Greater emphasis must be placed on projects to evaluate the effectiveness of antitrust law enforcement. The Antitrust Division's Office of Policy Planning and the Economic Policy Office (EPO) have proposed such projects. Proposed studies would investigate issues such as: (1) how effective is relief, particularly injunctive relief, in preventing collusion; (2) what are the magnitudes of the deterrent effects of antitrust enforcement actions; and (3) what is the relative efficacy of government versus private enforcement. Industry specific studies would also be useful, particularly in areas such as the professions where antitrust activity has been intensive. The Antitrust Division also intends to explore the possibilities of coordinating evaluation efforts with the FTC in areas of joint antitrust jurisdiction, and employing some consultant assistance in devising and undertaking evaluation projects. It should be remembered, however, that in a complex law enforcement area such as antitrust, evaluation projects tend to be quite expensive. The Antitrust Division, therefore, may need additional resources to undertake a comprehensive evaluation program.

GAO recommends that the Antitrust Division strengthen management control over the progress of antitrust investigations to facilitate both their orderly development and progress.

In addition to requiring more unique file numbers and reporting actual hours, other revisions in ACES will provide improved information on, and greater control over, the progress of Antitrust Division activities. Section and field office chiefs are now required to establish target dates and estimate resource usage for completion of all major phases of antitrust matters, regulatory proceedings, and special projects. Major milestones as well as intermediate target dates may also be established as necessary. This change in ACES was implemented with the distribution on September 6, 1979, of an Antitrust Division Directive entitled, "Antitrust Caseload Evaluation System (ACES)".

From the data on target dates and estimated resources, reports will be produced that will inform Antitrust Division management, including the section and field office chiefs, of the progress of the investigations and identify matters in the "pipeline" that will be coming up for decision and matters that are past due requiring follow-up action.

A second project that has been under way for the past several months is the writing of a new Antitrust Division Manual. Six of the eight chapters of the manual have been completed and sent to the printer for reproduction; the remaining two chapters are in the final stages of completion.

The manual emphasizes the need to plan and control the progress of matters. For example, in Chapter III, Investigation and Case Development, planning is stressed as follows:

> At the beginning of any investigation, the staff should immediately determine the type of conduct involved and the scope of the investigatory effort. Planning sessions should take place at the time the preliminary inquiry request is being processed. At this stage, the chief of the section or field office and the staff should establish a plan describing what is to be done, how and when it will be done, and who will do each task. This investigative plan should also provide for early development of the legal theory to be employed and a determination of the relief to be sought.

The discussions in the manual on the requirements and procedures for investigations, case development, litigation and regulatory activities will be of significant assistance to Antitrust Division personnel in initiating and completing matters in a more timely and organized fashion.

GAO recommends that the Antitrust Division provide guidelines on the role and use of economists and Federal Bureau of Investigation (FBI) agents.

The new Antitrust Division Manual includes sections on the role and use of both economists and the FBI. The manual provides specific information as to the type of assistance economists and FBI agents can provide, the stage of a matter at which assistance should be sought, and the procedures for obtaining assistance. For example, in Chapter VI, Information Services, the manual states:

APPENDIX VI

The economists in EPO should be relied upon to identify and focus the economic issues involved in an investigation or case, assist in the development of the theory of the case, identify and put into appropriate form the data necessary to support the Division's position, and to assist in the development of the trial strategy as it pertains to the economic issues.

The FBI is particularly helpful in conducting a nationwide witness interview program, locating individuals whose whereabouts are unknown, compiling statistical data, or providing technical expertise such as handwriting or typewriting analysis. Use of the FBI is discussed in both Chapters III and VI of this manual.

In conclusion, the Antitrust Division uses a number of systems and procedures to provide management information and guidance to its personnel in planning and implementing enforcement responsibilities. These systems are under continual review, and recent improvements in them will further increase their usefulness. The Department believes the improvements are consistent with the recommendations made in the GAO report.

We appreciate the opportunity to comment on the draft report. Should you desire any additional information, please feel free to contact us.

Sincerely,

Kevin D. Rooney

Kevin D. Rooney
Assistant Attorney General
for Administration

APPENDIX VII

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580

BUREAU OF COMPETITION

October 22, 1979

Gregory J. Ahart, Esquire
Director, Human Resources Division
United States General Accounting Office
Washington, D.C. 20548

Dear Mr. Ahart:

The General Accounting Office's proposed report, "Management of Federal Antitrust Enforcement Can Be Improved," makes a useful contribution to the FTC's ongoing efforts to improve the effective utilization of its competition mission resources.

The report addresses three issues. First, a need is identified for more and better data relating to resource expenditures and the assessment of the effectiveness of FTC competition activities. Second, several suggestions were recommended for better management of Bureau of Competition investigations. Third, the increased use of economists and research analysts was encouraged. The draft report was accompanied by three appendices. The second appendix, a comparison of the antitrust activities of the Antitrust Division and the FTC over the three year period, 1976-1978, is particularly useful, and provides an entirely new analysis.

The only significant reservation we have to the draft is that it does not fully reflect the current effort to address most of the management problems identified, and the steps already taken to remedy them. This is due, in large part, to the fact that the time period selected for GAO study (1976-1978) included a change in FTC administration and a major reorganization and administrative overhaul of the Bureau of Competition. This problem can be eliminated in most instances by minor changes in emphasis, drawing into the report the new FTC administration's response to specific problems.

Taking the report section-by-section, we offer the following specific views. The first section of the draft deals with shortcomings in the way the FTC compiles data on its competition cases. Two examples are noted: failure to class expenditures on the basis of violations of law, and failure adequately to evaluate the effectiveness of antitrust efforts in specific violation areas. The first criticism is occasioned by the FTC's use of Program Areas in allocating budget resources. Specifically, GAO data show that 62% of the FTC's fiscal 1978 resources were committed to four industry programs: energy, food, transportation, and health care. Compilation of such data, the report states, does not allow easy

analysis of whether these expenditures were undertaken in the pursuit of mergers, monopolies, or other specific kinds of antitrust violations. According to GAO, "The absence of such data prevents FTC from fully monitoring resource expenditures and making such judgments as whether too much or too little attention is being paid to any one of the various practices prohibited by law." (p. 15) Examples provided include comparisons of FTC and GAO data. Three FTC "programs," horizontal restraints (DC), mergers and joint ventures (DB), and industrywide (monopoly) (DA), are reported by FTC to involve 10%, 14% and 6% of total resources, respectively. GAO figures, compiled by violation, show 23%, 25% and 34% to be the actual expenditures by violation.

The recommendation duplicates the present system; we presently have the capability to identify cases in terms of violations. However, the Commission generally has not preferred to track resources by violation. We prefer to identify key consumer sectors of the economy and commit our resources down whatever legal avenues are most appropriate to solve the competition problems identified. This system is an acknowledgement that there exist certain critical sectors and industries where consumers are hardest hit by various anticompetitive and inflationary pressures. The program suggested is also harder to implement than it appears. Many investigations begin by focusing on one species of violation and end up in pursuit of another. Too, some investigations involve multiple violations, such as price discrimination coupled with monopolization. We note that the Antitrust Division does not calculate its expenditures on the basis of individual violations, and divides all violations into just two categories, "private conspiratorial restraints" and "reduction of monopoly and oligopoly."

The second point of the first section, that the FTC needs more and better expertise in evaluating its enforcement effectiveness, is one example of where the draft report probably does not sufficiently recognize our existing response to the problem. The report is certainly correct that in the past the FTC lacked the in-house expertise to conduct evaluations of its enforcement efforts. But the report relegates to just one sentence, in the middle of page 13, the impact of the creation of the Bureau of Competition's Planning Office. This office, established in 1977, now consists of six full-time specialized attorneys. Creation of this office is an acknowledgement that an important feature of the evaluation process is not merely the study of the effects of past actions, but thoughtful preparation for future action. A number of projects and papers have been undertaken resulting in specific advice on proposed FTC Act Section 5 cases, as well as general theoretical work on the potential use of Section 5. As far as the evaluation of past activities is concerned, the draft report is correct that several evaluation projects have yet to be completed (pp 12). However, all of these projects are in the advanced stages of preparation. Two impact evaluation studies are underway, but not mentioned in the draft report. One project relates to vertical restraint cases, and is being prepared in response to a petition filed by Senator Kennedy. The other project deals with a study of the impact of specific FTC antitrust cases, such as Xerox

Corporation and Boise Cascade. Other evaluation-type activities that have been unmentioned in the draft report include the 246-page Vertical Restraints Task Force Report issued in October, 1978, and the 75-page Merger Task Force Report issued in August, 1978.

We agree with your suggestion that the FTC and the Antitrust Division should work together more to coordinate the evaluation of the effectiveness of antitrust cases. We feel the suggestion that we hire full time evaluation specialists has been accomplished to a large extent with the creation of the Planning Office and the ongoing evaluation projects being completed by that office and the Bureau of Economics.

The second main section of the draft report concerns the need for better case management. In particular, the draft indicates that failure in most cases (71% of the 142 FTC Competition cases between 1976-1978) to require staff to follow a written investigative plan results in a number of disadvantages, such as insufficient early focus on specific legal theory and remedy issues, unrealistic time and resource estimates, and indefinite guidelines on how long FTC Competition investigations take. */ Here again, the draft underemphasizes the progress that has been made by waiting until the very end of the section (p. 31) before revealing that the Bureau of Competition has undertaken to implement investigative plans and generally "to improve investigative planning and correct the management deficiencies discussed in this chapter." GAO's study project had a significant influence in the initiation of this internal procedural change. The draft report also underemphasizes the importance (p. 23) of the "100-hour" procedure to limit the length of preliminary investigations, and the efficacy of the periodic workloads between the Director and the Assistant and Regional Directors as a way of managing cases and investigations and enforcing deadlines. This lack of recognition of administrative changes is compounded when one considers that the period serving as GAO's data base straddles the initiation of changes called for in the draft. It might have been useful to analyze figures on delay, etc. both before and after the initiation of management changes.

The third section of the draft report deals generally with the subject of better use of professional staff, specifically economists and research analysts in litigation support roles. We agree fully that economists should be available as a matter of

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*/ Illustrative of the problem of unfocused investigations is a reference in the draft report (p. 26) to the [See GAO note.] investigation. The special problems of that case are perhaps unappreciated. Extremely difficult issues of Commission jurisdiction and appropriate relief persisted throughout this matter. The investigation was held in abeyance for a substantial period, awaiting both the outcome of an important Supreme Court case on the jurisdiction issue and the outcome of a private economic consultant study of the [See GAO note.] surface transportation problem. While these considerations may not fully explain the time taken to complete the investigation, we believe is not a typical example of an FTC antitrust investigation.

course to assist in the preparation of antitrust cases. We should also, as you suggest, attempt to employ more research analysts to aid in the investigative process. You indicate (p. 40), that the Bureau of Economics is unable to assist the Bureau of Competition on a significant percentage of matters (54 of 77 requests) where such assistance is requested. This indicates the need for the better use of economists in antitrust investigations. */ The fiscal 1980 budget does reflect an increase in Bureau of Economics resources. In other cases, not reflected in your data, we turn to outside consultants for economic assistance, because of the need for experts with unique qualifications for particular matters. In both determining appropriate cases for internal economic assistance, and in selecting expert outside consultants, the Bureau of Competition and Economics work cooperatively in determining priorities. In still other matters, as you acknowledge, special economic support by Bureau of Economics is simply not needed. Alleged delays in seeking economic assistance in connection with some investigations (p. 39) we believe result from simple failure at the outset of investigations to discover factual patterns clearly indicating the need for such assistance. It is certainly fair to say, generally, that no important antitrust case needing economic assistance goes without that assistance presently.

Regarding the excellent appendices to the draft report, very little need be added. One reference to a comparative decline in BC enforcement efforts when compared to the Antitrust Division (p. 79) may benefit from more current data. Compared with fiscal 1978, fiscal 1979 data show that there was a temporary decline in FTC cases in 1977-78. The number of consent orders accepted, for instance, rose from 12 in 1978 to 43 in 1979; the number of adjudicative complaints issued rose from 6 in 1978 to 11 in 1979. The 1977-78 lull is attributable in part to a major reorganization of the FTC by the incoming administration, and you acknowledge this explanation by Chairman Pertschuk (p. 79).

Two very minor corrections conclude our analysis of the draft report. On page 4, on page 38, and on page 40, references to "field offices" should read "regional offices," the FTC nomenclature. On page 40, a reference is made to Bureau of Competition "program directors."

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*/ One of the cases cited as an example of where economic assistance was not timely appears to be the [See GAO note.] investigation of [See GAO note.] (pp 39+40). This matter originated as a price discrimination investigation. It is normally not our policy to ask the Bureau of Economics to provide economists for such matters. In addition, this case involved particularly difficult factual and legal issues, including a major question regarding Commission jurisdiction under the Cappers-Volstead Act. A protracted subpoena fight was also a part of the history of this case. Finally, we note that when the focus of the investigation changed from price discrimination to possible monopolization, economic assistance was promptly requested and obtained. More generally, the Bureau of Economics has assisted five, rather than three (p. 40) regional offices to obtain economists as regional office employees.

APPENDIX VII

Strictly speaking, unlike the Bureau of Consumer Protection, the Bureau of Competition does not have "program directors." The line should read, "Assistant Directors supervising specific program areas."

In conclusion, we appreciate the opportunity to review your draft report, and we congratulate you on its overall excellence. We hope our observations and comments will assist you in your finalizing the report for issuance at an early date.

Sincerely,

Alfred F. Dougherty, Jr.
Director
Bureau of Competition

GAO note: The FTC requested that we delete this material.

(181580)

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