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Report to the Chairman, Committee on the Judiciary, House of Representatives

October 1990

JUSTICE DEPARTMENT

Changes in Antitrust Enforcement Policies and Activities

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General Government Division

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October 29, 1990

The Honorable Jack Brooks
Chairman, Committee on the Judiciary
House of Representatives

Dear Mr. Chairman:

Your April 6, 1989, letter requested that we provide information on the management and operations of the Department of Justice's Antitrust Division. This report highlights changes in the Antitrust Division's enforcement policies, priorities, and activities over the past decade.

As arranged with the Committee, unless you announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time, we will send copies of the report to the Attorney General, the Assistant Attorney General for Antitrust, and other interested parties.

Major contributors are listed in appendix III. If you have any questions on this report, please call me on 275-8389.

Sincerely yours,

Lowell Dodge

Lowell Dodge
Director, Administration of
Justice Issues

laws, along with economic analyses of the issues in particular cases, especially within the past 15 years.

GAO analyzed Division resources and enforcement activities for fiscal years 1970 through 1989. GAO also interviewed current and former Division officials, including the nine Assistant Attorneys General for Antitrust since 1972.

Results in Brief

Beginning in 1979, the Division began to file more criminal cases than civil cases. During the 1980s, the Division filed record numbers of criminal antitrust cases, most against restraints of trade such as price fixing and bid rigging. On the other hand, the Division brought fewer civil suits than it did in the previous decade and opposed fewer mergers.

These changes were directly related to shifts in the Division's policies and priorities and decreases in its resources. The Division emphasized criminal enforcement actions and left private parties to institute civil actions if they suffered antitrust injury from others. However, the number of private antitrust cases significantly decreased.

Along with the courts, Division investigations and policy-making increasingly emphasized economics. The Division regarded the self-correcting tendencies of markets as more reliable promoters of the public good than government intervention. Management directed Division economists to participate in revising the Division's various enforcement guidelines. Management said that in certain types of cases, it was less concerned with existing legal precedent than with whether conduct made economic sense.

Finally, resource reductions appear to have hampered Division operations. Budget reductions prevented it from hiring new attorneys for several years. In addition, staffing constraints limited the number of investigations the Division could initiate.

GAO's Analysis

Changing Enforcement Activities

Consistent with shifts in its enforcement policies and priorities, the mix of the Division's criminal and civil enforcement activities has changed significantly over the past 20 years. Between fiscal years 1981 and decreased, so did its staff. Between fiscal years 1980 and 1989, the Division staff declined from 883 (including 429 attorneys) to 458 (including 209 attorneys). (See pp. 31 to 36.)

Cuts Hamper Enforcement and Hiring

Resource constraints appear to have impeded the Division's antitrust enforcement. As the number of staff decreased between 1980 and 1989, the number of investigations initiated also declined, from 377 in 1980 to 220 in 1989. According to Division officials, they no longer open investigations into some matters—particularly mergers and other civil matters—that they would have investigated earlier, when they had more staff.

Budget reductions also hampered the Division's hiring of new attorneys. Because the Division needed to meet staffing reductions, it did not hire new attorneys in 1984, 1985, and 1987. (See pp. 36 to 38.)

Recommendations

GAO is making no recommendations.

Agency Comments

GAO discussed the facts contained in the report with Division officials, who generally agreed with these facts. Their views have been incorporated where appropriate.

Appendixes

Tables

Figures

competitors at the same level of the production or distribution process (e.g., among competing manufacturers or distributors). Vertical restraints are arrangements between persons or firms operating at different levels of the manufacturing or distribution chain (e.g., between a manufacturer and a wholesaler) that restrict the conditions under which firms may purchase, sell, or resell.[2] Section 2 of the Sherman Act also prohibits monopolization as well as attempts, combinations, or conspiracies to monopolize.

The Clayton Act, as amended, supplements the Sherman Act by proscribing certain types of market behavior that constitute an existing restraint of trade and other behavior that, if left as is, may restrain trade. Section 7 expands on the general prohibitions of the Sherman Act by prohibiting certain mergers or acquisitions of stocks or assets of firms engaged in interstate or foreign commerce. In general, mergers and acquisitions covered by section 7 are unlawful if they would tend to create a monopoly or may substantially lessen competition.

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, which added section 7A to the Clayton Act (15 U.S.C. section 18a), provides several mechanisms to assist the Division in investigating whether proposed mergers and acquisitions ("mergers") would be anticompetitive. According to the Antitrust Division Manual (which contains the Division's internal practices and procedures), until 1978, the Division investigated proposed mergers identified through the complaints of attorneys, citizen information, or reports in the trade press. This often made it difficult for the Division to investigate proposed mergers fully before they were consummated. The Hart-Scott-Rodino Act requires

[2]In general, vertical restraints of trade can 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, (5) vertical mergers and stock acquisitions, and (6) tying arrangements or requirements. Under a tying arrangement, a seller requires that the buyer of a good or service purchase a second, distinct good or service as a condition of purchasing the first.

- there is confusion in the law (e.g., when the courts are beginning to interpret the law differently);
- there is confusion caused by past prosecutorial decisions (e.g., when the Division changes the way it views certain types of conduct);
- there are truly novel issues of fact or law presented; or
- there is clear evidence that the subjects of the investigation were not aware of, or did not appreciate, the consequences of their action.

In these cases, the Division may initiate civil actions.

Criminal violations of the Sherman Act are punishable by fines and imprisonment. For antitrust felony violations, individuals may be fined $250,000, imprisoned for up to 3 years, or both, and corporations fined $1 million. However, individuals and corporations may also be fined twice the gross pecuniary gain the defendant derived from the crime, or twice the pecuniary loss imposed on another by the crime. In addition, the U.S. Sentencing Commission regarded jail sentences as critical to deterrence. Under the sentencing guidelines, for example, if an individual is convicted of a price fixing conspiracy, and that individual's company had $1 million to $4 million in sales that were the subject of the conspiracy, the guidelines require a minimum of 4 months' incarceration, absent mitigating factors.

Others Can Also Initiate Antitrust Cases

The Division shares responsibility for enforcing antitrust laws with the Federal Trade Commission (FTC) and state attorneys general. Only the Division enforces the Sherman Act, while FTC exclusively enforces the Federal Trade Commission Act of September 1914.[5] FTC also enforces portions of the Clayton Act. Its enforcement responsibilities related to antitrust include prevention of trade restraints (e.g., price fixing); price discrimination; and mergers, acquisitions, or joint ventures that may substantially lessen competition. The Hart-Scott-Rodino Antitrust Improvements Act of 1976, which amended the Clayton Act, authorizes state attorneys general to bring civil actions in the name of a state on behalf of resident consumers who have been injured as a result of a Sherman Act violation.

[5]The Federal Trade Commission Act established the FTC as an independent commission responsible to Congress and authorized it to define and prohibit "unfair methods of competition." Although the FTC Act is not defined by Congress as an antitrust law, the broad prohibitions in the act overlap and embrace the market conduct covered by the Sherman and Clayton Acts, such as, for example, price fixing, boycotts, and anticompetitive mergers.

Table 1.1: Antitrust Cases Filed by the Antitrust Division, FTC, and Private Parties in U.S. District Courts During the 12 Months Ending June 30, 1980 to 1989

		U.S. Cases			
Year	Total cases	Civil cases	Criminal cases	Private cases	Private cases as a percent of total
1980	1,535	39	39	1,457	94.9
1981	1,434	60	82	1,292	90.1
1982	1,148	29	82	1,037	90.3
1983	1,287	21	74	1,192	92.6
1984	1,201	24	77	1,100	91.6
1985	1,142	30	60	1,052	92.1
1986	922	39	45	838	90.9
1987	858	27	73	758	88.3
1988	752	28	70	654	87.0
1989	737	19	80	638	86.6
Total	**11,016**	**316**	**682**	**10,018**	**90.9**

Source: Administrative Office of the U.S. Courts.

Table 1.1 also shows that the number of private antitrust suits filed in the U.S. district courts has fallen by more than 50 percent in the past 10 years. One federal appellate judge attributed the drop in case filings to the increased difficulty of winning antitrust cases. Sanford Litvack, who served as Assistant Attorney General for Antitrust (AAG) in 1980 and 1981, concurred, saying that changes in antitrust rules have blended together to create greater obstacles for antitrust plaintiffs. Douglas Ginsburg, who served as AAG in 1985 and 1986, said that the decrease in cases filed may be partly attributable to less "frivolous" litigation being filed.

Supreme Court Decisions of the Past 15 Years Have Tended to Narrow the Application of the Antitrust Laws

The legislative histories of the basic antitrust laws speak to the primary objective of promoting full and free competition and to the goals of stemming the rising tide of economic concentration, protecting consumers, and protecting small business. The laws contain broad proscriptions for unlawful conduct that can be applied to a wide variety of market behavior. The key statutory phrases, "restraint of trade" and "monopolize," were not subjects of extensive analysis in the legislative histories. These were terms left for the courts to define in particular cases.

Since the 1890 passage of the Sherman Act, the courts have interpreted and applied the antitrust laws to various business practices that arose as our economy has developed. However, the evolution of the law has not always followed a consistent path. In the period from the 1940s requires the fact-finder to weigh all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition. Applying this test, the Court concluded that the particular activity in question did not impose an unreasonable restraint on competition and emphasized the arrangement's redeeming economic purposes. Departures from the rule-of-reason standard, the Court wrote, "...must be based upon demonstrable economic effect...."[10] The GTE Sylvania decision is an important departure from prior precedent involving an explicit adoption of economic analysis as the foundation of the decision.

The Supreme Court held that vertical restraints on prices (commonly referred to as resale price maintenance, or RPM) were illegal per se as early as 1911. (RPM occurs when a supplier and its distributors agree on resale prices.) However, two of its decisions in the 1980s restricted the factual circumstances it considered as constituting RPM:

- In Monsanto v. Spray-Rite Service Corp.,[11] Monsanto, a manufacturer of agricultural herbicides, refused to renew a 1-year distributorship held by Spray-Rite, a wholesale distributor of agricultural chemicals that engaged in discount operations. Spray-Rite alleged that Monsanto and some of its distributors conspired to fix the resale prices of Monsanto's products, and that Monsanto terminated Spray-Rite's distributorship in furtherance of that conspiracy.

The Supreme Court reaffirmed that a vertical price fixing conspiracy is illegal per se. However, the Court found that the Court of Appeals applied an incorrect standard of proof in the case. The Supreme Court indicated that permitting, as the Court of Appeals did, a price fixing agreement to be inferred from the existence of complaints from other distributors, or even from the fact that termination came about "in response to" complaints could deter or penalize legitimate conduct. The Court observed that manufacturers and distributors are naturally in constant communication about prices and market strategies. The Court held that before a conspiracy to fix prices can be found, there must be evidence that tends to exclude the possibility of independent action by

[10] Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 58-59 (1977).

[11] 465 U.S. 752 (1984).

should not be the basis of overturning over three-quarters' of a century of case law based upon real marketplace behavior."[13] These issues are still being debated through the legislative process.

Economic Analysis Affects Antitrust Doctrine and Division Operations

Changes in economic analysis have influenced the interpretation and application of the antitrust laws. The courts have responded to these changes in economic analysis,[14] and the reach of the antitrust laws has contracted. In addition, economic analysis has become more influential in affecting the operations of the Antitrust Division.

Formulated in the 1960s and promoted primarily by the "Chicago School" of economic thought,[15] "new economic learning" gained favor in the mid-1970s and 1980s. As pointed out by the American Bar Association Section of Antitrust Law Task Force on the Antitrust Division in its 1989 report, the new economic learning postulates that most markets are naturally competitive, and that mergers and vertical arrangements often create efficiencies. Previously, the dominant analytic framework for antitrust economics in the 1950s and 1960s viewed efforts by competitors to cooperate or to merge as attempts to increase prices, and it largely discounted claims of efficiency.

The influence of the new economic learning has been exerted through numerous channels. One important way is the use of this economic theory by certain legal scholars. This influence was intensified when some of these legal scholars were appointed to the executive branch and to the federal judiciary, particularly during the early 1980s. With these judicial appointments, the courts increasingly incorporated the new economic learning into antitrust jurisprudence. Partly as a result, some economic behavior that would have been assumed to be anticompetitive 30 years ago is now being accepted on economic efficiency grounds and found lawful.

At the same time, however, Congress and the courts have not yet entirely accepted the new economic learning. The American Bar Association report noted that important aspects of traditional antitrust policy

[13] House Report No. 438, 101st Cong., 2d Sess. 13 (1990).

[14] As used in this report, economic analysis, with respect to antitrust, is the study of market concentration, interrelationships between firms, and the effect of corporate restructuring on market concentration, profitability, and corporate pricing behavior.

[15] The term developed because of the many prominent academic proponents of this philosophy who have taught at the University of Chicago.

Overview of the Antitrust Division's Structure and Operations

The Division's mission is to promote and maintain competition in the economy. Its primary functions and goals include

- criminal and civil enforcement of the federal antitrust laws;
- intervention or participation before administrative regulatory agencies (e.g., the Federal Energy Regulatory Commission) in proceedings requiring consideration of the antitrust laws or competitive policies;
- developing and presenting the Department's antitrust legislative proposals and responding to requests for advice from Congress and from other agencies; and
- advising the President and the departments and agencies of the executive branch on the competitive implications of governmental action.

The AAG is responsible for leading and overseeing the Division's programs and policies. Four Deputy Assistant Attorneys General (Deputy) and the Director of Operations assist the AAG. As of late 1989, these Deputies oversaw a staff of 458, including 209 attorneys and 40 economists, organized in 2 offices, 10 sections, and 7 field offices. (See fig. 1.1.)

Each of the Deputies' responsibilities include the following:

- The Deputy for Litigation has overall responsibility for the Division's investigative and litigative activities. This Deputy has responsibility for the Division's two litigation sections, seven field offices, and the Executive Office.
- The Deputy for Regulatory Affairs manages litigation in the areas of regulated industries (e.g., communications). Either this Deputy or the Deputy for Litigation reviews all litigation matters before they are transmitted to the AAG for approval.
- The Deputy for Economic Analysis is primarily responsible for providing economic policy guidance to the AAG. This Deputy is responsible for the Economic Litigation and Economic Regulatory sections, which do economic research projects and provide economic analyses and recommendations for the Division's litigation and legislative programs.
- The Deputy for Policy and Legislation supervises the Legal Policy Section, the Appellate Section, and the Foreign Commerce Section.

The Director of the Office of Operations (Operations) reports to the Deputy for Litigation and the AAG. The Director assigns investigations, cases, and other matters to the various sections or field offices on the basis of the commodity or service involved, geographic area, type of violation, and availability of resources. The Director of Operations also reviews and approves all pleadings, memoranda, reports, and other legal documents submitted by staff in both the regulatory and litigation sections (including field offices) before sending them to the appropriate Deputy, the AAG, or other appropriate Division office for their review. The Director may disapprove actions proposed by the sections. Operations also acts as the Division's liaison with the FTC in its clearance procedure.

Overview of the Division's Investigative Processes

Along with the Division's economists, staff attorneys in the field offices, litigation, or regulatory sections are most directly responsible for investigating possible antitrust violations. Figure 1.2 summarizes the key steps in the Division's investigative review process. (More detailed descriptions of the different processes through which the Division investigates possible criminal and civil violations and reviews proposed merger transactions are included in app. I.)

criminal or civil violation in a grand jury proceeding, from a confidential informant, or through an anonymous tip.

If the staff believes that the matter merits some inspection, they will request that the Division open a preliminary inquiry (PI) or formal investigation into the matter. Operations must approve this request before coordinating with the FTC. During the PI, the staff usually will determine the type of criminal conduct involved, if any; analyze the affected market; review public documents; and request information and assistance from other agencies, if necessary. Division staff will also interview complainants, potential witnesses, and victims. They will sometimes request information on a voluntary basis from all parties involved. The staff may use a compulsory process to obtain further information and documents. The nature of the investigation strategy depends upon whether the Division is pursuing a possible civil or criminal antitrust violation.

- When the Division determines that a criminal investigation is warranted, it uses a federal grand jury to investigate the alleged offense. The Director of Operations forwards his own and the staff's recommendations, and the AAG must approve requests to convene a grand jury.
- In a civil investigation, rather than using a grand jury to obtain information from all parties, the Division employs special investigatory subpoenas called Civil Investigative Demands (CIDs). The AAG must also approve issuing all CIDs.
- In a merger investigation, if the staff determines that they need more information than that contained in the Hart-Scott-Rodino filing to evaluate the competitive effects of a transaction, the Division will issue requests for additional information ("second request letters") to the merging parties.

The staff determines whether to proceed criminally or civilly early in their investigation. Where it is unclear whether the conduct in question would be a civil or criminal violation, the Division's policy is usually to open a civil investigation. Two Supreme Court decisions restrict the government's ability to use evidence gathered during the course of a grand jury investigation in a subsequent civil case.[17] Thus, because information gained through a civil investigation may be used in a criminal investigation, but not usually vice versa, the Division recommends a civil investigation in these situations.

[17] United States v. Sells Engineering, Inc., 463 U.S. 418 (1983) and United States v. Baggot, 463 U.S. 476 (1983).

year 1990, the Division budgeted $17.2 million and 154 staffyears to this effort. Of nearly equal size in budget and staffyears, the other program ("Termination and Prevention of Private Cartel Behavior") supports the Division's efforts to investigate and litigate violations of section 1 of the Sherman Act, which makes illegal any contract, combination, or conspiracy in restraint of trade. Two other influential programs are the Division's appellate activities (including the program for filing amicus curiae briefs in federal courts) and its competition advocacy program, in which the Division attempts to persuade regulatory agencies to adopt the least anticompetitive regulations necessary and advocates more competitive approaches to economic problems.

Resources Decreased During the 1980s

Between fiscal years 1980 and 1989, the Division's appropriations fell by about 30 percent in constant 1982 dollars, dropping from $50 million to $36 million.[19] As its budget effectively decreased, so did its staff levels. At the end of fiscal year 1989, the Division employed a total of 458 staff, or 425 fewer staff (about half) of the 883 staff it had at the end of fiscal year 1980. Chapter 2 explores in greater detail the change in the Division's resources and the relationship between its staffing and enforcement activities.

Objectives, Scope, and Methodology

On April 6, 1989, the Chairman of the House Committee on the Judiciary requested that we review the management and operations of the Antitrust Division. Specifically, he asked us to determine the following:

1. What has been the impact of budget cuts on antitrust enforcement?

2. Have reductions in staff over the last 8 years impaired the Division's ability to attract and retain qualified lawyers?

3. How have economists been used in setting enforcement priorities within Justice?

4. Have the Division's enforcement actions with respect to mergers filed under the Hart-Scott-Rodino Act comported with its own merger guideline standards?

[19]The fiscal year 1989 appropriations was $44.9 million.

To determine the relationship of the Division's economists to its enforcement priorities and actions, we interviewed current and former Division officials, and we reviewed their testimony and published articles. To determine what projects the economists worked on, we examined data on how they charge their time. Finally, we determined the processes through which the Division, with input from its economists, reviews merger transactions (including proposed mergers of financial institutions) and develops criminal and civil cases.

With respect to the Division's merger enforcement activities, we compared the Division's 1984 Merger Guidelines, which are in effect, to the 1968 and 1982 versions. To determine if the Division's actions regarding proposed mergers complied with its Guidelines, we analyzed Division records and summaries of various proposed mergers.

The Division provided us with summary information on all mergers and acquisitions that it challenged between calendar years 1982 and 1987, along with information on proposed mergers and acquisitions either abandoned or restructured by the merging parties following notification of the Division's intent to challenge. Division officials prepared and provided us summaries of all mergers proposed between calendar year 1984 and 1987 in which they either filed a legal complaint, announced their intention to file a legal complaint, or requested additional information from the merging parties but did not contest the mergers. The Division had earlier summarized these cases for the House Committee on the Judiciary in response to questions the Committee had raised regarding the Division's response to proposed mergers. Summaries were not available except for the period 1984 through 1987. Altogether, we reviewed summaries of 156 proposed merger transactions. Additionally, the Division provided statistical data on the number of mergers that it did not challenge or for which it did not request additional data from the parties involved.

We did not verify the Division-prepared summaries because reviewing the voluminous data on each proposed merger would have been prohibitively time consuming.

To determine which enforcement areas have been reduced, we evaluated data on the Division's enforcement actions since fiscal year 1970. We interviewed Division officials concerning changes in those actions over time and reviewed testimony on changes in the Division's enforcement policies and priorities. Also, we examined the legislative histories of the various antitrust statutes, including the Sherman Act, the Clayton Act,

Limited Division Resources Constrain Enforcement Activities

After a period of growth throughout the 1970s, the Antitrust Division experienced a decade of significant reductions in its funding and staff levels. The Reagan administration shifted Justice resources toward other priorities and away from antitrust. Consequently, between fiscal years 1980 and 1989, the Division's appropriations fell by nearly 30 percent in constant dollars.

At the time of these reductions, the Division's management said that decreases in its resources would not impede its ability to enforce the antitrust laws and that enhanced automation and other operational improvements would help offset a reduction of staff. However, budget cuts precluded the Division from hiring new attorneys in 3 years. Restrictions on staff resources also limited the Division's ability to initiate investigations. As a result, the Division was unable to open investigations into certain matters. Since they left office, each of the past eight former AAGs has told us that he now regards the Division's resources as too limited.

The Administration Shifted Justice Resources Away From Antitrust

Antitrust enforcement was a relatively low priority for the Reagan administration. The Carter administration's budgets for justice issues shifted resources away from activities in the law enforcement mission and into litigation and judicial activities. During the 1980s, the Reagan administration placed increasing emphasis on Justice enforcement related issues, such as drug enforcement, prisons, and immigration. Although neither Carter's nor Reagan's budgets identified antitrust enforcement as a priority, the Carter administration added resources to antitrust enforcement and the Reagan administration shifted funds away from the Division. Between fiscal years 1977 and 1981, the Division's budget request rose from $33.9 million to $50.1 million (in constant 1982 dollars). Under the Reagan administration, in contrast, the Division's requests never exceeded $46 million in constant 1982 dollars, and its last request (for fiscal year 1990) was for $37.7 million in constant 1982 dollars.

The Reagan Administration Proposed a Series of Changes to the Division's Resources

Throughout the 1980s, the Department, the Office of Management and Budget (OMB), and the Division proposed a series of changes to the Division's resources, mainly involving its attorneys and support staff. Following congressional action on the Division's budget requests, all but four of these proposals were eventually implemented.

In addition, Division officials explained that the resolution of two large civil monopolization cases in 1982—one against American Telephone and Telegraph Company (AT&T) and the other against International Business Machines Corporation (IBM)—reduced its need for resources. In March 1981, when the cases were not demanding a high level of resources, the Division had about 20 full-time attorneys assigned to the AT&T case and 13 to IBM. In its fiscal year 1983 budget request, the Division allowed for a reduction of 30 positions related to the resolution of these cases. During the Division's appropriation hearings for fiscal year 1985, the AAG testified that the Division could accept the loss of another 35 positions, in part because it had resolved those two cases.

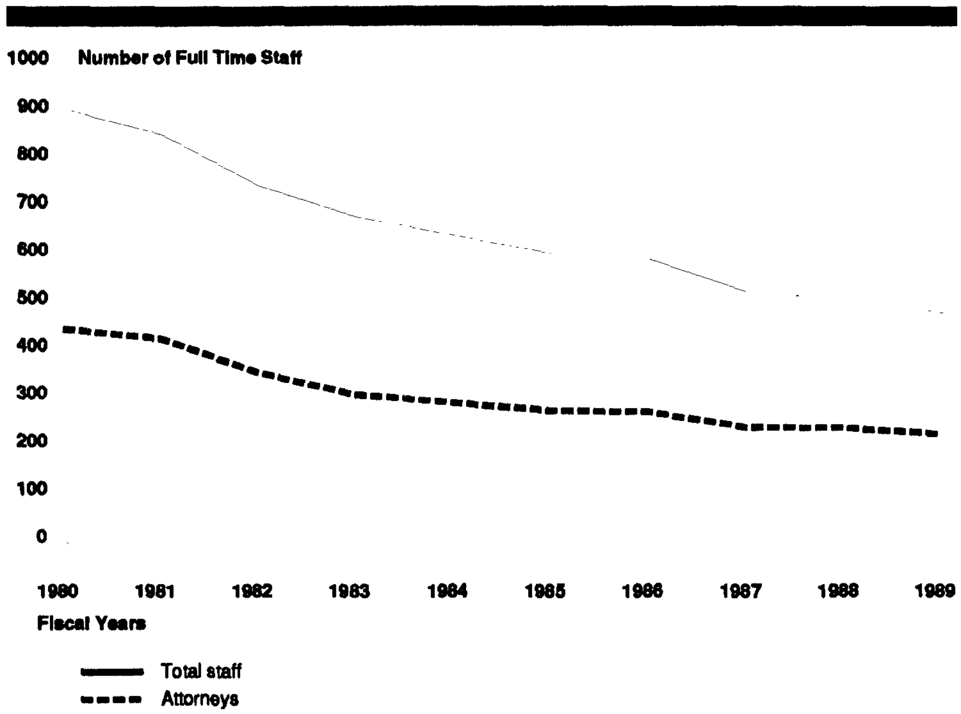
Congressional Committees Express Concern About the Division's Activities

While the administration was proposing those changes in the Division's resources, the House and Senate Committees on Appropriations were expressing their displeasure with the Division's enforcement activities. The Committees noted that the Division was failing to vigorously enforce the antitrust laws, particularly those related to vertical price fixing. As a result, with few exceptions the Committees were providing less funding than the President requested for the Division.

In 1981, for example, both Committees noted a change in the Division's enforcement activities. The House Committee on Appropriations reported that it would have provided additional funding for fiscal year 1982 if the funding would have resulted in additional antitrust protection. The Senate report for that year noted a reduced level of Division activity, and the Senate Committee therefore agreed to a portion of the administration's budget reductions.

The House Committee again reported that it would have provided more funding for fiscal year 1983 if that funding would have resulted in additional antitrust protection. The Senate Committee on Appropriations provided less than the President's request for the Division and forced it to absorb a pay increase. Similarly, in fiscal year 1984, the House Committee's report again expressed concern about the Division's enforcement actions. It recommended that the Division devote all of its resources toward vigorously enforcing the laws rather than intervening in private antitrust cases, which the Committee felt might be a misapplication of resources. The Division's 1984 appropriation included language prohibiting it from using any funds to overturn or alter the per se prohibition against RPM under the antitrust laws.

Figure 2.2: Antitrust Division Staffing Declined During the 1980s



Source: GAO analysis of Division data.

In implementing the resource reductions, the Division cut its individual budgets for enforcement programs differently, as shown in tables 2.1 and 2.2. The Division tended to maintain budget and staffing resources for its Cartel Prevention program (mostly criminal enforcement activities), but it more greatly reduced the allocation to other programs, including the merger review (Market Structure) and Competition Advocacy programs.

Table 2.1: Division Allocation of Budget Cuts Affects Programs Differently (In Thousands of Constant 1982 Dollars)

	Budgeted amounts			
Program	**Fiscal year 1981**	**Fiscal year 1989**	**Change**	**Percent change**
Cartel Prevention	$14,498	$14,143	($355)	−2.5
Market Structure	$20,348	$13,340	($7,008)	−34.4
Competition Advocacy	$2,592	$2,038	($553)	−21.4
Appellate	$1,062	$987	($74)	−7.0
Other (e.g., administration)	$11,612	$7,048	($4,564)	−39.3
Total[a]	**$50,111**	**$37,557**	**($12,555)**	**−25.1**

[a]Columns may not add to totals shown due to rounding.

Source: Antitrust Division.

Resource Constraints Appear to Have Limited Investigations

Resource constraints appear to have limited the number of investigations the Division initiated. As the number of attorneys decreased between 1980 and 1989, the number of investigations initiated each year also declined, from 377 in 1980 to 220 in 1989.

Several Division officials told us that they no longer open investigations into some matters—particularly mergers and other civil matters—that they would have earlier, when they had more staff. They also said that staff shortages have caused them to postpone opening some criminal investigations and to file fewer comments with regulatory agencies under the Division's competition advocacy program. Former AAG Donald Baker testified in 1987 that the Division was abandoning investigations at early stages, in part because of a lack of staff.

Each of the eight former AAGs with whom we spoke said that in retrospect, he now regards the Division's resources as too limited. For example, William Baxter said that the Division's enforcement staff has been stretched too thin.

Resource Constraints Have Also Limited Hiring of New Attorneys

As its budget declined through the 1980s, the Division found that the only way it could meet lowered staff ceilings in some years was by not hiring new attorneys. The Justice Department operates only one program for recruiting graduating law students, the Attorney General's Honor Program. Most Justice organizations, including the Division, participate in that program,[1] which Justice's Office of Attorney Personnel Management administers. The Antitrust Division participated in the program for 7 of the past 10 years. It did not participate in fiscal years 1984, 1985, and 1987 because of the need to meet staffing reductions.

When the Division's budget allowed it to hire new attorneys, the Division has attracted attorneys that it considered to be of high calibre. Data available from the Office of Attorney Personnel Management indicate that over 80 percent of the Division's Honor Program hires since fiscal year 1986 graduated in the top third of their classes.[2] The Division's section chiefs also report that they have generally been very pleased with the quality of their new attorneys.

[1]The U.S. Attorneys, the FBI, and the Office of the Solicitor General are organizations that recruit their own attorneys.

[2]Data on the class standing of the Division's Honor Program hires for previous years were not available.

Division Civil Enforcement Declined While Criminal Enforcement Increased

As its resources decreased over the past 10 years, the Division emphasized criminal enforcement of the antitrust laws and placed significantly less emphasis on civil enforcement. Division officials said that redirecting their resources toward criminal enforcement activities maximized the return on federal enforcement dollars and that their enforcement policies were following the evolution of the Supreme Court's decisions.

The Division's enforcement record reflects this change in emphasis. Although previous administrations also regarded the investigation and prosecution of criminal antitrust violations as a priority, the Reagan administration's Antitrust Division filed record numbers of criminal cases but filed considerably fewer civil antitrust cases and opposed fewer mergers.

The Division Refocused Its Enforcement Policies and Priorities

Changes in the Division's enforcement activities can be attributed in large part to changes in its enforcement policies and priorities. During the 1980s, Reagan administration AAGs redirected the Division's enforcement priorities to reflect the administration's philosophies. Under their direction, the Division applied the new economic learning, with its emphasis on efficiency, in its analysis of antitrust issues and relied more on the marketplace to remedy problems.

For example, according to both Messrs. Ginsburg and Rule, the costs of not condemning anticompetitive conduct would be ameliorated, if not eliminated, by the self-correcting tendency of the markets. They wrote that if the government does not intervene where later events indicate that it should have, competition will suffer for a time (although the government can still intervene later, if it becomes more apparently needed). On the other hand, if the government intervenes where it should not, later events will not generally reveal the error, let alone correct it. If uncertainty about the probable competitive effect of a proposed merger existed, they wrote, then federal antitrust enforcement policy should favor nonintervention, thereby reducing public restraints on the economy.

The Division also related its enforcement policies to its resources. Rather than devoting increasingly scarce federal resources to civil matters, Division officials said that private parties should bring civil actions if they were harmed by a competitor's conduct. Division officials said that their resources were most effectively used in bringing criminal actions example, he said that retail dealers can benefit from vertical arrangements that protect their efforts to provide services from "free riding" by others.[2] In 1983, Baxter testified that the Supreme Court's rule making RPM illegal per se creates undesirable consequences when RPM agreements can serve desirable economic ends consistent with the aims and purposes of the antitrust laws. He told us that in such cases, he was less concerned with existing legal precedent than with whether the conduct made economic sense.

In 1983, the Division filed an amicus brief with the Supreme Court in the case of Monsanto v. Spray-Rite Service Corp.,[3] discussed earlier, arguing that RPM should be evaluated under a rule of reason test. Under such a rule, RPM would be adjudged by reference to whether or not, in the context of the facts of each particular case, the practice has, or threatens to have, significant anticompetitive effects. The Court rejected that view. The Division has since stated that it would treat RPM as illegal per se.

In 1985, the Division issued its Vertical Restraints Guidelines, which set forth the general principles and specific standards it used in analyzing the likely competitive effects of nonprice vertical restraints. Congress disagreed with the Guidelines, indicating in a resolution[4] that they extend beyond nonprice vertical restraints and propose the avoidance of the per se rule of illegality for vertical price fixing. That congressional resolution went on to express the sense of Congress that those Guidelines were not an accurate expression of the federal antitrust laws or of congressional intent, should not be accorded any force of law, and should be recalled by the Attorney General. The Division has not withdrawn them.

[2]Statement of William F. Baxter, Assistant Attorney General, Antitrust Division, Before the Committee on Small Business, Subcommittee on State, Justice, Commerce, the Judiciary, and Related Agencies, Committee on Appropriations, U.S. Senate, September 9, 1982.

[3]465 U.S. 752 (1984).

[4]The resolution is embodied in Section 605 of the 1986 Department of Justice Appropriation Act, Public Law 99-180, 99 Stat. 1169.

which generally correspond with the different presidential administrations in office during those periods.

Table 3.1: Average Annual Criminal Antitrust Enforcement Activities

Fiscal years	Presidential administration[a]	Grand juries initiated	Criminal cases filed
1970 - 1976	Nixon/Ford	37	20
1977 - 1980	Carter	40	38
1981 - 1989	Reagan	51	81

[a]The Bush administration began 4 months into fiscal year 1989.

Source: Antitrust Division.

According to Division data, the vast majority of the criminal cases filed between fiscal years 1982 and 1988 involved criminal restraints of trade.[5] Of the 571 criminal cases filed between fiscal years 1982 and 1988, 521 (or over 90 percent) were restraint of trade cases. Over half of those 521 cases involved either price fixing or bid rigging in road construction (245 cases, or 47 percent); or government procurement (43 cases, or 8 percent). Although the Division's enforcement activities appear relatively concentrated in the road construction business, former AAG Rule said in 1988 that the Division's criminal enforcement activities have involved a more diverse group of industries and companies than ever before. The Division has not filed a criminal monopoly case since fiscal year 1977.

Civil Enforcement Activities

While the Division increased attention to criminal enforcement, its civil enforcement activities declined. Table 3.2 summarizes the decrease in the average number of civil cases filed annually since 1970. As with table 3.1, it divides those 20 fiscal years into three periods, which generally correspond with the different presidential administrations in office during those periods.

[5]Information was not available for fiscal years 1981 and 1989.

formula or rule that adequately distinguishes predatory from competitive conduct. Accordingly, although it has investigated allegations of predatory pricing, it last initiated a case alleging predatory pricing in 1972. Mr. Rule said that this also reflects changes in the law. He said that the courts have consistently rejected competitors' claims of predation against other firms since 1969. Citing the Supreme Court's decision in Matsushita Electric Industrial Corp. v. Zenith Radio Corp.,[7] Mr. Rule said that the courts no longer mistake vigorous successful competition as an antitrust violation.

The Division may not file particular types of cases for a number of reasons. If the Division believes it lacks sufficient evidence, it will not bring a case. In fiscal year 1988, for example, the Division reported receiving about 30 complaints regarding nonprice vertical restraints, but it concluded that there was insufficient evidence of an antitrust violation to warrant opening a formal investigation. Similarly, the Division will refer some complaints to the FTC or to state attorneys general rather then file cases itself. In fiscal year 1987, for example, the Division referred one complaint about possible RPM to a state attorney general and three complaints regarding nonprice vertical restraints to the FTC.

On the other hand, Division management has used its discretion in deciding which cases to pursue. As one official said, the Division has "...declined to bring cases that it might have been able to win, because it did not think, in the interests of the public and the purposes of the law, that it should win." Former AAG Ginsburg offered a similar comment, saying that although the staff attorneys claimed they would win given existing legal precedent, he declined to bring many cases because he believed that they did not make "economic sense" or were not in the public interest.

Change in Sentence Severity Reinforces Emphasis on Criminal Enforcement

Reforms of federal sentencing for antitrust violators reinforced the Division's emphasis on pursuing criminal rather than civil matters. In 1974, Congress increased the penalties for criminal violations of the antitrust laws from misdemeanors to felonies, and in 1984 it raised the fines that could be levied on convicted offenders.

According to the Deputy for Litigation, because the penalties for misdemeanor convictions were relatively small while those for civil violations were less limited, the Division filed both criminal and civil cases to help

[7] 475 U.S. 574 (1986).

November 1, 1989. Many fines mandated by the sentencing guidelines will exceed the statutory maximum fines.

Division officials welcomed these changes for their increased deterrent effect. Because the Department believes that higher fines are necessary to deter and adequately punish antitrust crimes, it has sought to have the statutory maximums raised again, to $10 million for a corporation convicted of violating the Sherman Act and $350,000 for an individual. Legislation containing these new maximums passed the House of Representatives in early 1990.[12]

The Division Has Challenged a Decreasing Percentage of Mergers

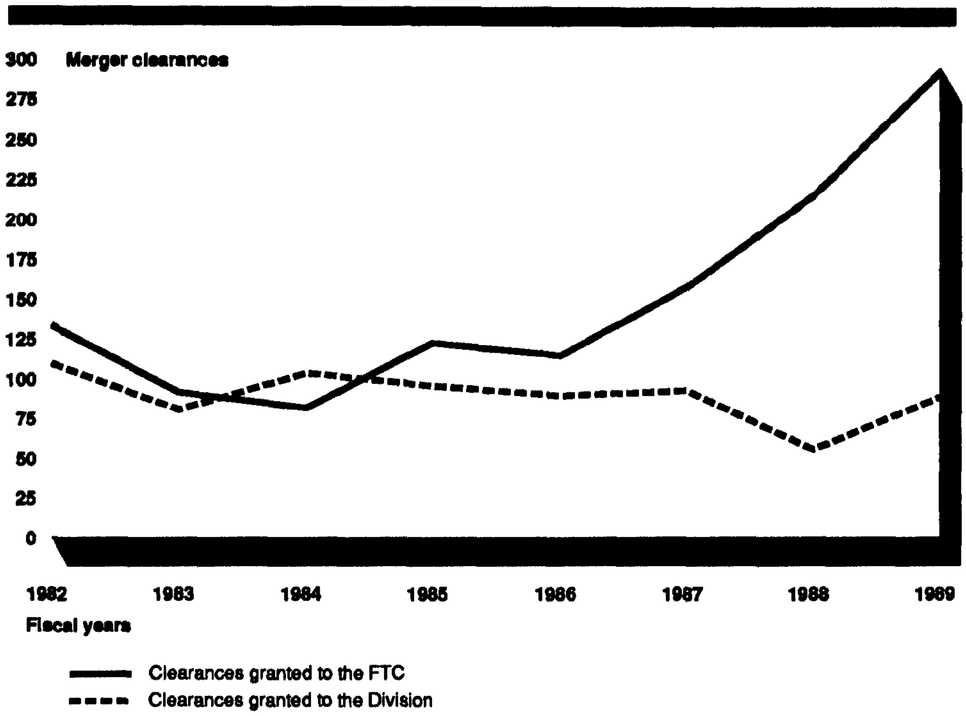
Merger enforcement represents another area of significant change. The Division's various AAGs have regarded their responsibility for challenging potentially anticompetitive mergers to be an important part of their enforcement program. However, as merger activity exploded during the 1980s, the Division placed a decreasing proportion of its resources into merger screenings and investigations, as noted in chapter 2.

The Division challenged a decreasing percentage of mergers over the past 10 years. As previously shown in table 3.2, the average number of merger cases filed annually dropped from an average of 14 per year during the early 1970s to 6 per year during the 1980s. The Division also investigated a decreasing percentage of mergers. Table 3.3 illustrates the change in the Division's merger investigations since 1978.

Because merger activity increased so much, the Division still most likely would have investigated a decreasing percentage of mergers. In our opinion, this would have occurred even if the Division's staffing had not decreased throughout the 1980s, because, as we discuss below, the Division revised its policies and merger enforcement guidelines. Given such changes, analyzing the relationship between staffing and workload would have required us to develop sophisticated productivity measures beyond the scope of this review.

[12] H.R. 3341. The Senate Committee on the Judiciary reported the companion bill, S. 995, to the full Senate in May 1990.

Figure 3.2: Merger Clearances to FTC and the Division: FTC Clearances Have Risen Significantly



Note: A single merger or acquisition may involve more than one Hart-Scott-Rodino reportable "transaction."
Source: GAO analysis of Division data.

Former AAG Rule said that so long as the FTC maintains an interest in and capability for investigating mergers in certain industries, the Division could clear some transactions to the FTC for investigation without undue concern that anticompetitive mergers would pass without federal scrutiny.

Second, the number of merger case filings decreased because, rather than litigating to block mergers, the Division encouraged parties to restructure mergers to alleviate its concerns about the competitive implications of the transaction. Using its "fix-it-first policy," the Division informs parties to a proposed merger of any competitive problems it uncovers during the investigation. It then attempts to work with the parties to eliminate those problems rather than resorting to litigation. Under this policy, the parties enter into binding agreements (such as consent decrees, which are filed with the court) to divest or otherwise eliminate aspects of the proposed transactions. Sometimes parties to a proposed transaction will become aware that the Division has concerns horizontal mergers but also for vertical and conglomerate mergers.[13] The 1980s revisions, however, stated that the Department's major concern is with horizontal effects. They adopted a more restricted role for challenging vertical mergers and virtually dropped conglomerate mergers as a competitive concern.

In addition, the 1984 revision to the Guidelines differs significantly from the 1968 Guidelines in how they define the relevant market for analysis, how they measure market concentration, and conditions under which the Department would be likely to challenge a merger.

The 1980s revisions to the Guidelines also differ from the 1968 version in the mitigating factors that the Division will consider before concluding that it will challenge a merger. The 1968 Guidelines included a limited number of mitigating factors. The Guidelines said that the Division would not ordinarily challenge a proposed merger that it otherwise would challenge if the proposed merger would prevent a company from failing. The Guidelines also said that the Division would not accept as justification for a merger the claim that the merger would improve economic efficiency, except under exceptional circumstances.

The 1984 Guidelines, on the other hand, include additional mitigating factors. These factors include recent trends in market concentration in the relevant industry, the presence of a proposed merger party that is failing financially, and the possibility that production efficiency can be enhanced by a proposed combination.

Some factors affect the Division's view of a firm's market share or concentration. The most important such factor involves "ease of entry": the ease with which new firms would enter a market. According to the Guidelines, if entry into a market is so easy that existing competitors could not succeed in raising price for any significant period of time without drawing new competitors, including foreign producers and domestic firms involved in the supply of similar goods, into the market, Justice is unlikely to challenge mergers in that market. The ease with which existing firms in a market could expand production is a related and important factor.

[13] Mergers and acquisitions have traditionally been categorized as "horizontal," "vertical," or "conglomerate," depending on the prior relationship of the parties. A horizontal merger involves two parties that supply competing goods. A merger between two parties supplying goods at different stages of production and distribution (for example, between a food wholesaler and a food retailer) is known as a vertical merger. Mergers between parties unrelated in their lines of business or between parties selling the same product but in different geographic markets are referred to as conglomerate mergers.

entry into the relevant market and the ease with which competitors could expand production in response to an increase in prices.

Table 3.4: Mitigating Factors Cited by the Division in 105 Merger Transactions Not Challenged

Factor	Frequency
1. Transaction dropped, abandoned, or altered	17
2. Index or change within standards	11
3. Relevant market definition is different from that used to calculate index	22
4. Ease of entry or expansion by existing firms	50
5. Few and sophisticated buyers	10
6. Industry structure changing or concentration measure misleading	8
7. Bankruptcy or financial distress	6
8. Other	16
Total	**140[a]**

[a]The number of mitigating factors totals more than the 105 transactions because the Division often cited more than one factor in its analysis of a transaction.

Source: GAO Analysis of Antitrust Division Cases.

Conclusion

The Division's enforcement philosophy changed during the Reagan administration. Relying more on the marketplace and third parties to address civil violation of the antitrust laws, the AAGs during the 1980s emphasized criminal investigation and prosecution of such activities as bid rigging and price fixing—activities that would not be corrected by the operations of the marketplace. This position was generally in line with the new economic learning. Accordingly, the Division brought more criminal cases than in the previous decade while substantially reducing civil (including merger) investigations.

With respect to merger investigations, the Division's Merger Guidelines provide direction on defining the relevant market; measuring market concentration; and analyzing conditions, including mitigating factors, under which the Division would likely challenge a merger. Because the Guidelines provide the Division flexibility in analyzing the effect of proposed mergers, particularly through its ability to apply various mitigating factors, it is difficult to conclude that the Division's merger enforcement actions do not comply with its Guidelines.

initiative. The Solicitor General must approve all amicus participation at the Courts of Appeals and the Supreme Court.

According to one former Division official, prior to 1981 the Division did not usually get involved in private cases. The reason for this was that counsel for both private parties and for the government were interested in the same issues, and the Division's involvement would be duplicative, and thus wasteful of scarce enforcement resources.

Beginning in 1981, however, former AAG William Baxter began a program of amicus filings designed to influence the courts in clarifying and reforming antitrust doctrine developed through private cases. He established a committee to track antitrust matters before the lower courts (usually the federal District Courts) to identify suitable cases for Division participation.[1] The Division concluded that this program was a "cost effective" means of reforming the antitrust laws, because it gives the Division an opportunity to influence a court's interpretation of the laws without going through the expense of investigating an alleged violation and bringing a case to trial.

Amicus Activity Increased Significantly in the Early 1980s

Between fiscal years 1970 and 1979, the Division filed amicus briefs in an average of two cases per year with the Supreme Court and another two cases with the U.S. Courts of Appeals. Between fiscal years 1980 and 1989, the Division filed amicus briefs in an average of nearly seven cases each year with the Supreme Court and four cases with the U.S. Courts of Appeals.[2]

Table 4.1 summarizes the amicus program's activity between fiscal years 1980 and 1989. It shows that the Supreme Court requested the Division's participation in most of the antitrust cases before it, but that the Division participated as an amicus on its own initiative in cases before the U.S. Courts of Appeals. The amicus program's resources and activity peaked during Mr. Baxter's tenure. After he established the amicus committee in 1981, the Division more than doubled the amount of time it charged to amicus efforts between fiscal years 1981 and 1983 and filed briefs in 45 cases—nearly half the number of cases in which the Division filed briefs in the 10 fiscal years between 1980 and 1989.

[1] Private counsel may also request the Division to participate as an amicus. In addition, Division staff in sections or field offices may recommend that it file an amicus brief in a private case.

[2] The Division also filed three amicus briefs in the U.S. District Courts between January 1981 and September 1989 (one at the request of the court).

Division was not successful in persuading the Court to adopt a blanket rule that competitors do not have standing to challenge proposed mergers on the basis of predatory pricing theory.

In general, the Division's briefs during the 1980s urged the courts to adopt economic analysis as a key determinant in its antitrust decisions. The judiciary had already begun to focus increasing emphasis on economic analysis by the mid-1970s.

The following are examples of three types of positions the Division took in its amicus program. The first example discusses the Division's position in several briefs that certain conduct did not fall within those categories of behavior previously considered to be per se illegal, and that the conduct should instead be subject to rule of reason analyses. The second example describes how the Division has urged the courts in some cases to increase the evidentiary requirements for an antitrust plaintiff to survive a motion for summary judgment and receive a jury trial. These first two examples illustrate how the Division has advocated narrowing the application or interpretation of the antitrust laws. The third example, however, illustrates the Division's attempts to restrict exemptions and immunities from the antitrust laws.

1. In several cases, the Division argued that a specific conduct did not fit within a category of per se illegality, but should instead be judged under a rule of reason test.

- In the brief it filed in the case of Northwest Wholesalers Stationers v. Pacific Stationery & Printing Co.,[4] the Division stated that termination of a membership in a retailers' purchasing cooperative (which the Court of Appeals had characterized as an illegal group boycott) was not so inherently anticompetitive that it would be deemed per se illegal without any inquiry into its likely effect on competition. The Division argued that a court faced with an alleged group boycott must take a "quick look" at the likelihood of anticompetitive consequences and the plausibility of any asserted efficiency-related justification before characterizing the activity as the sort of boycott to which the per se rule applies. The Supreme Court reversed the Court of Appeals' ruling and remanded the case to the lower court for rehearing under an analysis similar to that advanced by the Antitrust Division.

[4] 472 U.S. 284 (1985).

conspiracy to depress prices in the American market in order to drive out American competitors.

The Division argued that the evidence in the case was at least as consistent with a theory of independent conduct as it was with conspiracy. The brief focused on what the Division referred to as "the simple economic illogic of respondents' [plaintiffs'] allegations," stating that there was nothing in either the market structure or plaintiffs' evidence of below-cost pricing that tended to establish that the evidence of parallel pricing behavior supported a realistic theory of anticompetitive collusion.

The Supreme Court adopted a similar rationale to that set out in the Division's brief, holding that the plaintiff had not produced sufficient evidence to survive a motion for summary judgment. The Court stated that if the factual context renders the claim implausible, the plaintiffs must come forward with more persuasive evidence than would otherwise be necessary, and in this case, the Japanese corporations had no rational economic motive to conspire. The Court reversed and remanded the case to the Court of Appeals.

The Division's view is that even the most complicated antitrust cases should be resolved on summary judgment when the plaintiff has failed to produce sufficient evidence of an anticompetitive conspiracy.

3. The Division has also filed amicus briefs attempting to limit the scope of various exemptions and immunities from the antitrust laws. One example is the immunity of "state action" from the antitrust laws,[7] which stems from the fact that the Sherman Act regulates private conduct. The Division has filed several briefs arguing against application of the state action exemption.

Results of the Amicus Program

According to Division records, the courts adopted its position in the majority of its amicus briefs. Those records show that between fiscal years 1980 and 1989, the courts of appeals accepted the Division's position in 25 of 34 cases decided, and the Supreme Court accepted the Division's position in 38 of 47 cases decided.

[7]The "state action" doctrine is set out in Parker v. Brown, 317 U.S. 341 (1943).

Executive Summary

Purpose

The Department of Justice's Antitrust Division bears major responsibility for enforcing the federal antitrust laws. Under the Reagan administration, the Division significantly refocused its enforcement policies, priorities, and activities. It reduced emphasis on civil enforcement on the grounds that problems such as monopolization would be adequately controlled by the self-correcting features of the marketplace. It focused instead on criminal actions involving bid rigging and price fixing.

Concerned as to whether these new enforcement policies reflected the intent of the antitrust laws, the Chairman of the House Committee on the Judiciary asked GAO to review

- the changes in the Division's enforcement actions, particularly regarding its merger enforcement activities;
- the Division's use of economists to set enforcement priorities; and
- the impact of budget cuts on antitrust enforcement activities and on the Division's ability to recruit and retain qualified attorneys.

Background

The Antitrust Division is responsible for promoting and maintaining competition in the American economy by enforcing the federal antitrust laws. The Sherman Antitrust Act and the Clayton Act make up the basic antitrust legislation. The acts' objectives are to protect and promote competition in the marketplace.

The Sherman Act makes illegal any contract, combination, or conspiracy that results in a restraint of trade. The act also prohibits monopolization, as well as attempts, combinations, or conspiracies to monopolize. The Clayton Act supplements the Sherman Act. Section 7 of the Clayton Act prohibits mergers that may substantially lessen competition or tend to create a monopoly.

Because the key statutory phrases, "restraint of trade" and "monopolize," were not the subjects of extensive analysis in the legislative histories, they were left to the courts to define. Since the 1890 passage of the Sherman Act, the courts have interpreted and applied the antitrust laws to various business practices that have developed over time. From the 1940s through the early 1970s, the courts tended to have a broad view of the antitrust laws. But since then, Supreme Court decisions have tended to narrow the previous application of the antitrust laws. The courts' interpretation and application of antitrust law have been influenced by economic analyses of the objectives and effects of the antitrust

1989, the Division filed an average of 81 criminal cases annually, or over 4 times the average number of criminal cases filed annually between 1970 and 1976 (during the Nixon and Ford administrations) and over twice the average number of cases filed between 1977 and 1980 (during the Carter administration). Over half of the criminal cases filed between fiscal years 1982 and 1988 involved either price fixing or bid rigging in road construction or government procurement.

The Division filed fewer civil suits than it did previously. Division officials said that third parties should initiate civil suits if they suffered antitrust injury. Between fiscal years 1981 and 1989, the Division filed an average of 13 civil cases each year compared to 48 cases filed between 1970 and 1976 and 30 cases between 1977 and 1980. Between 1981 and 1989, however, the number of private antitrust cases decreased from 1,292 to 638. (See p. 15 and pp. 39 to 47.)

Merger Enforcement

On average, the Division filed fewer cases against anticompetitive mergers in the 1980s than it did in the 1970s. Nevertheless, GAO's review of Division-prepared summaries of 156 merger transactions proposed between 1982 and 1987 determined that the Division's merger enforcement actions do not obviously conflict with its merger enforcement guidelines. However, it is difficult to conclude otherwise, in light of the flexibility the Division has in interpreting and applying those guidelines. (See pp. 47 to 53.)

Economics Increasingly Important

Economics has assumed increasing prominence in the interpretation and analysis of antitrust issues over time. The courts have increasingly used economics in their interpretations of the antitrust laws. In addition, the Division has more fully integrated economists into its operations and assigned them to work on every matter the Division reviews. For example, with merger investigations, economists work with attorneys in their analysis. The Division also emphasized economic analysis in its policy-making. For example, Division economists participated in revising the Division's enforcement guidelines. (See pp. 19 to 20.)

Resource Cuts Were Significant

The Reagan administration shifted resources towards other priorities and away from antitrust. As a result, between fiscal years 1980 and 1989, the Division's budget decreased by over $14 million, or nearly 30 percent, in 1982 dollars—from $50 million to $36 million. As its budget

Contents

Abbreviations

AAG	Assistant Attorney General for Antitrust
AT&T	American Telephone and Telegraph Company
CID	Civil Investigative Demand
FTC	Federal Trade Commission
IBM	International Business Machines Corporation
OMB	Office of Management and Budget
PI	Preliminary Inquiry
RPM	Resale Price Maintenance

Introduction: Overview of Antitrust Law and the Department of Justice's Antitrust Division

The Department of Justice's Antitrust Division is responsible for promoting and maintaining competition in the marketplace by enforcing the federal antitrust laws. It shares enforcement responsibility with the Federal Trade Commission (FTC) and state attorneys general. The Division may bring either civil or criminal suits against anticompetitive conduct. In addition, private individuals injured in business or property as a result of violations of the antitrust laws may also institute civil antitrust actions in federal district courts.

The Division's enforcement policies and activities have shifted significantly over the past 20 years. In part, this shift reflects changing Division philosophies toward antitrust, changes in economic theories of antitrust, and constraints on the Division's resources. In addition, decisions of the U.S. Supreme Court have also influenced the Division's enforcement activities. During the 1980s, Division management said that its enforcement policies closely followed the evolution of the law. At the same time, however, the Division actively encouraged many of those changes by participating in court proceedings as an amicus curiae (friend of the court).

In 1989, the Chairman of the House Committee on the Judiciary requested that GAO review the management and operations of the Antitrust Division. This report provides an overview of the changes that occurred in the Division's enforcement policies and activities during the 1980s.

The Sherman and Clayton Acts Form the Basis of U.S. Antitrust Law

The antitrust laws are based on a belief that a competitive market system provides optimum use of economic resources and maximizes consumer benefits. As such, the laws seek to both prevent anticompetitive behavior and preserve and promote competition. The Sherman Antitrust Act (15 U.S.C. sections 1-7) and the Clayton Antitrust Act (15 U.S.C. sections 12-27) make up the basic antitrust legislation. Each shares the objective of protecting and promoting competition in the marketplace.

Section 1 of the Sherman Act makes illegal any contract, combination, or conspiracy that results in a "restraint of trade." The courts have construed the term to cover a variety of horizontal and vertical trade restraining agreements. Horizontal restraints[1] are agreements among

[1] In general, horizontal restraints of trade can 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) certain competitor mergers and acquisitions; and (5) anticompetitive joint ventures.

enterprises that have sales or assets in excess of certain thresholds[3] to submit information concerning the proposed transaction. After submission, the parties must wait a specified time (between 10 and 30 days, depending on the nature of the transaction) before the transaction can be consummated. This "premerger notification program" became effective in 1978 upon promulgation of regulations in accordance with the act.

Private anticompetitive conduct is subject to criminal and civil action. Because the Clayton Act provides solely for civil remedies, any investigation initiated under that act can only be a civil investigation. But because the Sherman Act is both a civil and a criminal statute, the Division must decide whether to proceed with a criminal or civil investigation.

According to the Antitrust Division Manual, the Division historically has proceeded with criminal investigation and prosecution in two types of cases: (1) those involving certain types of conduct, such as price fixing or bid rigging, that are judged under a per se test of illegality;[4] and (2) those where there is evidence that the defendants knew that they were violating the law and acted with flagrant disregard thereof.

However, the Manual also indicates that there are a number of situations where, even though the conduct may appear to be a violation of law that would be judged under a per se test, the Division believes that criminal investigation or prosecution may not be appropriate. These may involve situations where

[3]In general, for a transaction to be reportable under the Hart-Scott-Rodino Act, the acquiring person must have total assets or annual net sales of at least $100 million and must be acquiring voting securities or assets of a manufacturing person with annual net sales or assets of at least $10 million, or a non-manufacturing person with assets of at least $10 million. Similarly, the act is triggered if any person with total assets or annual net sales of at least $10 million is acquiring voting securities or assets of any person with annual net sales or total assets of at least $100 million.

In addition to these thresholds, a proposed transaction is generally reportable if as a result of the acquisition the acquiring person would hold 15 percent or more of the voting securities or assets of the acquired person, or an aggregate total amount of the voting securities and assets of the acquired person in excess of $15 million. The last requirement for a transaction to be reportable is that either the acquiring, or the acquired, person must be engaged in commerce or in any activity affecting commerce.

[4]The courts have found certain types of conduct to be per se antitrust violations, which means that the proof of the existence of the conduct establishes the defendant's illegal purpose. Per se rules in antitrust law are designed to outlaw conduct that is clearly anticompetitive in nearly all situations. The Division defines a practice as per se illegal "...if it appears highly likely that it will restrict the output of the collaborators or increase their price and there is no plausible procompetitive justification for the practice (i.e., there is no plausible argument that the practice actually increases efficiency and consumer welfare)."

To prevent duplication of activities, the Division and the FTC coordinate responsibility for investigations under a formal liaison or "clearance" agreement. Under this arrangement, either agency wishing to pursue an investigation requests clearance from the other to proceed. Because the FTC lacks authority to pursue investigations under the Sherman Act, however, it refers all possible criminal violations to the Division for investigation.

State attorneys general, acting on behalf of their states or states' residents, may bring suits under either the federal antitrust laws or their own states' antitrust laws. The Division may refer matters confined to a specific region or matters involving a relatively small amount of commerce to the antitrust section of the appropriate state attorney general's office.

In addition, section 4 of the Clayton Act authorizes private parties "injured in [their] business or property by reason of anything forbidden in the antitrust laws" to sue the offending parties and recover treble (threefold) their actual damages, costs, and reasonable attorney's fees. Private parties file the vast majority of antitrust cases filed in the U.S. district courts. Table 1.1 illustrates the extent to which the number of private cases has predominated over those filed by federal enforcement agencies over the past 10 years. Since 1980, nearly 91 percent of all antitrust cases filed in the U.S. district courts have been private cases.[6]

[6]The table does not identify litigation initiated by state attorneys general. According to the National Association of Attorneys General, data on the number of antitrust cases filed by state attorneys general are not available.

through the early 1970s, the courts tended to expand the scope of the antitrust laws. For example, the Supreme Court enjoined several mergers during this period, holding that the increased percentages of market share and concentration resulting from the mergers were presumptively illegal. In the last decade and a half, however, the Supreme Court has tended to rely more on economic analysis, and its decisions have narrowed the range of activities that constitute violations of the antitrust laws. The Court has looked at a broader range of factors to determine if a specific conduct is anticompetitive and has cut back on broad per se categories.

Two areas of antitrust law—mergers and vertical restraints of trade—illustrate the changes in the Court's analysis.

Mergers. The Supreme Court has narrowed the types of combinations considered to be violations of Section 7 of the Clayton Act. Following the Court's 1962 decision in Brown Shoe Co. v. United States,[7] judicial decisions focused on market concentration and the market shares of the combining firms. In 1974, however, in the case of United States v. General Dynamics Corp.,[8] the Court upheld the merger of two major coal producers even though it significantly increased market concentration, with two firms controlling about half of all coal sales in certain geographic regions. The Court found it appropriate to assess other pertinent factors affecting the coal industry and the business of the defendant, such as the fact that the acquired company did not have sufficient reserves to compete for long-term contracts, in deciding whether the merger might substantially lessen competition or tend to create a monopoly.

Vertical Restraints. Many antitrust experts believe that the Supreme Court began to refocus antitrust law on economic concerns starting with its decision in the 1977 case of Continental T.V. v. GTE Sylvania.[9] In that case, the Supreme Court held that a restriction placed by a manufacturer on the location at which a retailer could sell the manufacturer's product (a vertical restraint) was to be judged under a more lenient standard than the Court had earlier applied. Previously, the Court had considered such restrictions to be illegal per se. But in GTE Sylvania, the Court analyzed the restriction under the "rule of reason" test, which

[7]370 U.S. 294 (1962).

[8]415 U.S. 486 (1974).

[9]433 U.S. 36 (1977).

the manufacturer and distributor. That is, there must be direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Although the Court of Appeals applied an incorrect standard of proof, the Supreme Court found that there was sufficient evidence for the jury to have reasonably concluded that Monsanto and some of its distributors were parties to an "agreement" or "conspiracy" to maintain resale prices and terminate price-cutters. In addition, the Court indicated that it was reasonable to find that the termination of Spray-Rite was part of, or pursuant to, that agreement.

- Four years later, in Business Electronics Corp. v. Sharp Electronics Corp.,[12] the Supreme Court further narrowed the per se rule against vertical price fixing. Sharp Electronics Corporation, a manufacturer of electronic products, had terminated its contract with Business Electronics Corporation to sell Sharp products following a complaint from another retailer about Business Electronics' price cutting. Business Electronics brought suit, alleging that Sharp and the other retailer had conspired to terminate Business Electronics and that this conspiracy was illegal per se under section 1 of the Sherman Act.

The Supreme Court ruled in favor of Sharp, holding that the per se test of illegality would not be applied to a vertical agreement between a manufacturer and a dealer to terminate a second dealer, unless the first dealer expressly or implicitly agreed to set its prices at some level. The Court stated "There has been no showing here that an agreement between a manufacturer and a dealer to terminate a 'price cutter,' without a further agreement on the price or price levels to be charged by the remaining dealer, almost always tends to restrict competition or reduce output." In cases where no such agreement on price exists, the Court indicated that it would apply a rule of reason test.

Partly in response to these decisions, the House of Representatives in 1990 passed H.R. 1236, the Price Fixing Prevention Act of 1989, that would alter the evidentiary standards for federal civil antitrust claims based on RPM. The report accompanying that bill characterized the Court's decisions in Monsanto and Business Electronics as "disturbing" and criticized the economic theory underlying both decisions. It noted that "... a highly controverted theory lacking empirical grounding

[12]485 U.S. 717 (1988).

continue to be adhered to and even reinforced. For example, the per se rule against RPM, discussed earlier, remains in place, as does the ability to use section 2 of the Sherman Act against exclusionary behavior by a dominant firm.[16] In addition, the per se rule against horizontal price fixing and other cartel behavior, which was never challenged by the new economic learning, is perhaps stronger today than ever before.

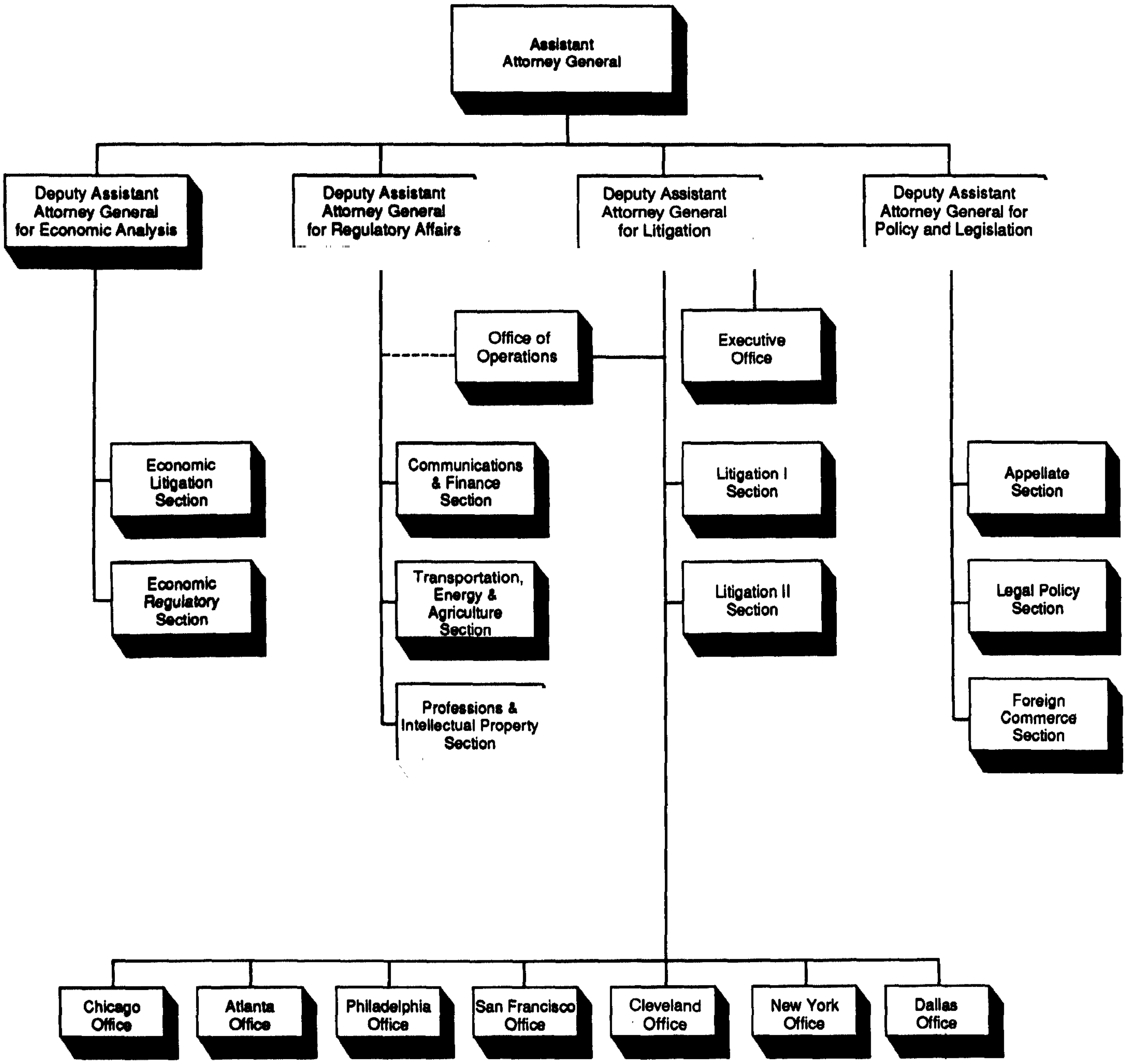
Nevertheless, as economic analysis has assumed increasing prominence over time in the interpretation of the antitrust laws by the courts, economists have become more fully integrated into the Division's operations. Economists are now recognized as having a role equal to that of lawyers in the development of antitrust merger policy and antitrust law enforcement.

Mr. Thomas Kauper, who served as AAG between 1972 and 1976, changed the organization of the Division's economic activities in 1973 by creating the Economic Policy Office, which was headed by an economist. According to former AAGs, over the next 10 years, as the Division identified a greater need for economic analysis, the economists became more integrated into antitrust analyses. The economists began working much more closely with staff attorneys in their investigations. During the 1980s, the Division became increasingly receptive to greater reliance on economic analysis.

AAG William Baxter (who served from 1981 to 1983) and AAG Paul McGrath (who served from 1983 to 1985) directed their economists to participate in revising the Division's enforcement policies regarding mergers and vertical restraints (the Merger Guidelines and the Vertical Restraint Guidelines). One of their goals, for example, was to bring the Merger Guidelines into line with developments in antitrust economics. In 1985, AAG Douglas Ginsburg elevated the Division's chief economist to a newly created position of Deputy Assistant Attorney General for Economic Analysis. In explaining the change, Mr. Ginsburg noted in a memo that the shift "is a recognition of the fact that economists properly have a role equal to that of lawyers in the development of antitrust policy and in the enforcement of the antitrust laws."

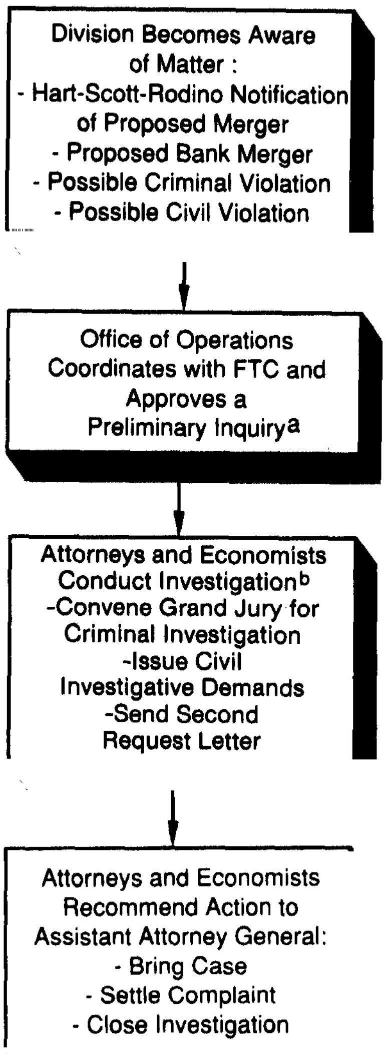
[16] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). (The Supreme Court upheld a jury verdict that a firm with monopoly power had attempted to exclude a rival on a basis other than efficiency, and therefore it violated section 2 prohibitions on monopolization or attempts to monopolize.)

Figure 1.1: Antitrust Division Organizational Chart



Source: Antitrust Division.

Figure 1.2: Summary of the Antitrust Division's Case Review Process



[a]Not required for bank mergers.

[b]Economists generally do not participate in criminal investigations.

The Division becomes aware of a possible antitrust violation or a proposed merger through various channels. The staff conducts reviews of most proposed mergers through filings required of the merging parties by the Hart-Scott-Rodino Antitrust Improvements Act. (Staff receive copies of merger applications involving depository institutions from the cognizant financial regulatory agency.) The staff may hear of a possible

Following the investigation, the staff recommends that Operations either close the investigation or that the AAG approve bringing a legal action.

Staff Economists' Role

While attorneys (e.g., the AAG or Director of Operations) make all the major decisions on cases, the Division assigns economists to work on virtually every matter it considers. In most criminal matters, their role is usually limited to providing expert testimony at trials at the request of the legal sections. But with investigations of proposed merger transactions and other civil violations, the economists are usually deeply involved.

According to Division officials, the economists spend most of their time analyzing mergers. Using information provided in the premerger filings, the attorneys and economists both initially review ("prescreen") premerger filings to determine if they present possible competitive problems. The economists then work with the legal staff during the investigation.[18] Their major contribution is to provide an analysis to allow the Division to assess the competitive implications of a merger and decide whether or not to oppose it.

Once the initial investigation is complete, the economist and the attorney write separate analyses of the matter. This system provides the AAG with independent recommendations on whether the Division should pursue particular cases. It also guarantees the economists an independent voice in case decision-making. If the Division decides to oppose a merger, the economist and the attorney again become a team in any subsequent work, whether it be settlement negotiations or litigation. (See app. I, fig. I.4, for a more detailed description of the Division's merger review process.)

Use of Division Resources During the 1980s

The Division devotes most of its resources to two enforcement programs. One program ("Preservation of Competitive Market Structure") focuses on reviewing premerger filings and enjoining mergers that may substantially lessen competition or tend to create a monopoly. In fiscal

[18]Prompted by a need to lessen the attorneys' workload when the Division had to review an unusually large number of merger filings, the Division used its economists to initially review proposed mergers for possible competitive overlaps for a relatively short time during late 1986. The change generated some concern that the economists' review weakened the Division's antitrust enforcement efforts. Bruce Owen, a former Economic Policy Office Director, said that the change probably meant that there would be a reduction in enforcement activity, "perhaps to less than optimal levels." Because of this concern, the Division restored the previous system beginning in 1987.

5. Have any areas of enforcement been abandoned or drastically reduced over the last 8 years, and were such actions justified and consistent with public law and congressional intent?

We analyzed data on the Division's resources and enforcement activities for fiscal years 1970 through 1989. We reviewed testimony and published material describing the Division's structure and operations.

To enhance our understanding of historical changes in the Division's enforcement strategies and philosophy, we spoke with former Division officials, including all AAGs who served since 1972. Table 1.2 lists those individuals, along with their dates of tenure.

Table 1.2: Assistant Attorneys General for Antitrust: 1972 to Present

Assistant Attorney General	Tenure
James F. Rill	6/89 to present
Charles F. Rule	7/87 to 4/89
Douglas H. Ginsburg	9/85 to 11/86
J. Paul McGrath	12/83 to 4/85
William F. Baxter	3/81 to 12/83
Sanford M. Litvack	2/80 to 3/81
John H. Shenefield	5/77 to 2/80
Donald I. Baker	8/76 to 5/77
Thomas E. Kauper	7/72 to 8/76

To analyze the impact of budget cuts and staffing reductions, we reviewed data on the Division's budget requests, appropriations, and authorized and actual staff levels from fiscal years 1970 to 1990. We reviewed proposals for transferring staff and enforcement responsibilities both into and out of the Division. We also interviewed senior Division officials regarding their budget, staffing, and the effect of staff cuts on their enforcement activities.

To evaluate the Division's ability to recruit and retain attorneys, we interviewed Division and Department officials. We reviewed data on the Department's recruiting program and information on new attorneys hired. Using data provided by the Division and the U.S. Office of Personnel Management, we compared the turnover of attorneys from the Antitrust Division with attorney turnover throughout the federal government.

and amendments to the laws. We also reviewed selected Supreme Court decisions involving the antitrust laws. Due to the large number of antitrust cases that have been decided by the Supreme Court, we focused our examination of case law on those areas identified in the Chairman's letter. They included vertical restraints, predatory pricing, and monopolization.

In our review of enforcement activities, we did not determine the basis on which cases were selected, pursued, or closed.

At the Chairman's request, we did not obtain agency comments on this report. We did, however, discuss the facts contained in the report with agency officials, who concurred with the facts. Their views have been incorporated where appropriate. Our work was done at the Division's Washington, D.C., and Philadelphia, PA, offices between April 1989 and May 1990, and in accordance with generally accepted government auditing standards.

- For fiscal year 1982, the Reagan administration proposed reducing the Division's budget request by nearly $6 million (12 percent) from the fiscal year 1982 budget originally proposed by the Carter administration. In response to the reduced funding, the Division closed its Los Angeles field office and transferred staff to the offices of the U.S. Attorneys.
- For fiscal year 1984, the Division agreed to transfer the responsibility and staffing for its Consumer Affairs Section to Justice's Civil Division. This transfer involved 38 positions and $1.7 million. The Department proposed to transfer an additional 55 positions and $2.8 million to the offices of the U.S. Attorneys. The Division suggested that it could either seek volunteers to transfer to the offices of the U.S. Attorneys, close another field office, or both.
- For fiscal year 1985, OMB again requested a decrease of 55 positions. OMB also proposed to transfer 20 positions from the Civil Aeronautics Board into the Division. The Division terminated one program and, at the end of the year, reorganized.
- For fiscal year 1986, the Department requested an increase of 104 positions, but OMB did not approve the request.
- For fiscal year 1987, OMB proposed to transfer to the Division 68 staffyears from the Interstate Commerce Commission, which the administration was proposing to terminate.
- For fiscal year 1988, AAG Ginsburg proposed a decrease of 100 authorized positions. OMB recommended that part of this reduction be offset by a transfer of 16 staffyears from the Interstate Commerce Commission.

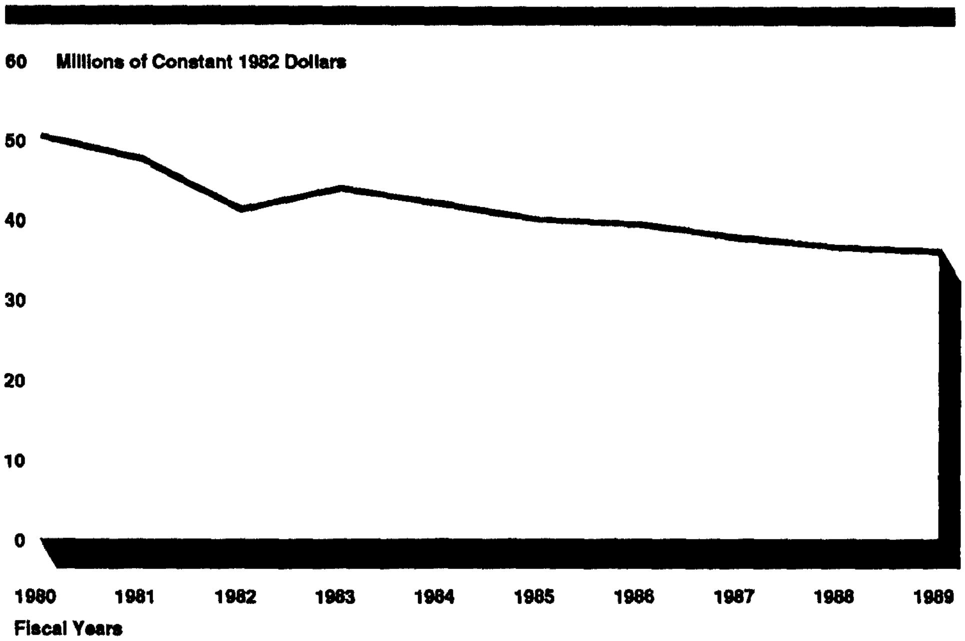
Four of the proposed changes to the Division's resources were not implemented. Neither the proposal in fiscal year 1984 to transfer 55 positions to the U.S. Attorneys nor the proposal in fiscal year 1985 to transfer staff into the Division from the Civil Aeronautics Board was approved by Congress. Similarly, because legislation to end the operations of the Interstate Commerce Commission was not passed, neither of the two attempts to transfer staff into the Division were implemented.

In various hearings during the 1980s, the AAGs testified that proposed resource reductions would not impede the Division's ability to enforce the antitrust laws. They said that operational improvements, such as enhanced automation, would help offset any staff reduction. The Division contracted out for some automated data processing and installed an electronic mail system to make the most of its limited resources. The AAGs also said that the Division's reliance on economic analysis would increase its efficiency, especially in regard to its merger reviews.

Division Resources Declined During the 1980s

As a result of administration proposals and congressional action, the Division's budget and staff levels declined substantially over the decade. Between fiscal years 1980 and 1989, the Division's budget decreased by $14.5 million, or 29 percent, in constant 1982 dollars—from $50.4 million to $35.9 million. As its budget declined, so did its staff. At the end of 1980, the Division's full-time staff totaled 883, including 429 attorneys. Nine years later, the Division's full-time staff of 458 included 209 attorneys—a reduction of 425 total staff (48 percent) and 220 attorneys (51 percent). Figures 2.1 and 2.2 illustrate the changes in the Division's appropriation and staffing levels.

Figure 2.1: Antitrust Division Appropriations Declined During the 1980s



Source: Antitrust Division.

Table 2.2: The Division Distributed Cuts in Positions More Evenly Across Programs

	Staff Positions			
Program	**Fiscal year 1981**	**Fiscal year 1989**	**Change**	**Percent change**
Cartel Prevention	253	215	−38	−15.0
Market Structure	276	157	−119	−43.1
Competition Advocacy	76	34	−42	−55.3
Appellate	31	16	−15	−48.4
Other (e.g., administration)	303	127	−176	−58.1
Total	**939**	**549**	**−390**	**−41.5**

Source: Antitrust Division.

Reversing the trend of past years, the Division's budget for fiscal year 1990 includes increases in staff funding. The budget for 1990 reduced the Division's appropriation to $32.2 million, but it provided the Division with an opportunity to increase its funding through the imposition of a $20,000 filing fee on proposed mergers to be shared with the FTC. The Appropriations Committees expected the fee to generate $20 million for the Division. When combined with the $32.2 million appropriation, this would then have yielded the Division $52.2 million, an increase of about $7 million over its 1989 appropriation. For fiscal year 1991, President Bush requested $33.7 million in appropriations, which, when combined with $20 million in filing fees, would yield $53.7 million for the Division.

Filing fees, however, have proven to be less than anticipated. On the basis of merger filings through May 1990, the Division estimates that it will receive $13 to $14 million in filing fees--substantially less than the $20 million anticipated. Although the Division received a supplemental appropriation of $2.5 million in late May 1990, its overall resources of about $48 million would be less than the $52.2 million expected for fiscal year 1990.

Resource Constraints Appear to Have Affected the Division's Enforcement Activities

Although Division management told Congress that decreases in its budget would not affect its enforcement activities, resource constraints appear to have impeded the Division's enforcement of the antitrust laws. Reductions in its budget and authorized staff level limited the Division's ability to hire new attorneys in some years. As the number of attorneys decreased over time, so did the number of investigations the Division initiated.

In addition to the difficulties Justice has encountered with its recruiting, the Department is finding that retaining qualified attorneys is also difficult. The Department does not conduct exit interviews to determine why employees leave, but most of the officials we spoke with believe that many Department attorneys leave for higher salaries in the private sector after having gained litigating experience. Division officials report that their attorneys also tend to leave after a few years for higher salaries in the private sector. Appendix II provides additional information on the attorney retention in the Department and the Division.

Conclusion

The nearly 30-percent decline in Division appropriations between fiscal years 1980 and 1989 appear to have affected its enforcement activities. The decline resulted in the Division's postponing criminal investigations and filing fewer comments with regulatory agencies. Limited resources also prevented the Division from hiring new attorneys, which in turn contributed to a reduction of investigations. All of the former AAGS we spoke with noted in retrospect that they believed the Division's resources to be too limited. Higher Justice priorities account for some need to reduce the Division's budget, yet we believe that the Division's resource level limited its ability to address possible violations of the antitrust laws.

against matters that are clearly harmful and that were concealed by the conspiring parties.

Thus, the Division redirected its enforcement priorities, focusing on criminal enforcement of the antitrust laws against cartel-type activities, such as price fixing and bid rigging. Although criminal enforcement has been a priority for the Division since at least the mid-1970s, beginning in 1980 the Division increased its emphasis on criminal enforcement activities. Later, AAG Ginsburg wrote that the "appropriate roles" of the antitrust enforcement agencies were, first, to prosecute cartel-type activities; and second, to promote competition in the economy and in government policy. Mr. Rule said that his number-one priority was "criminal cases and more criminal cases." Between fiscal years 1981 and 1989, the percent of the Division's staff time devoted to the criminal investigation and prosecution of cartel-type activities more than doubled, from 18 to 39 percent.

In contrast, the Division approached civil enforcement activities with what it called "appropriate sensitivity to the ultimate economic effects of prosecution." AAG McGrath testified in 1984 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary that an "overly restrictive enforcement policy" would deter conduct that possibly was efficiency-enhancing and beneficial to the economy. Between fiscal years 1981 and 1989, the percent of staff time devoted to civil investigations and cases dropped in half, from 24 percent to 12 percent. The Division's actions regarding vertical restraints, and RPM in particular, illustrate the approach toward civil enforcement actions taken by the Reagan administration's AAGs.

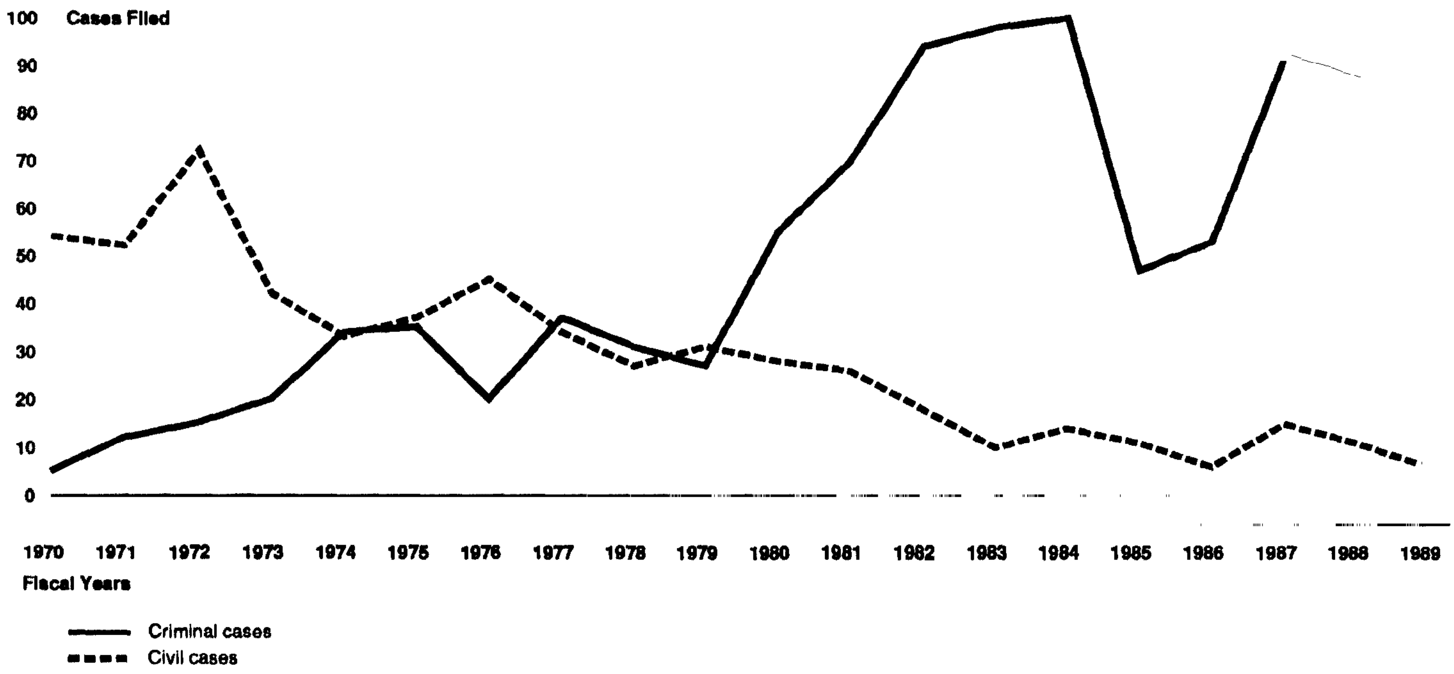
The Supreme Court has held that RPM was illegal per se under the Sherman Act as early as 1911,[1] but the Division began to advocate that RPM should no longer be treated so when William Baxter served as AAG. He testified in 1982 that most vertical arrangements should not be regarded as illegal per se as they serve competitive purposes. For

[1]The per se rule against resale price maintenance was articulated in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911). The Miller-Tydings Act, passed in 1937, granted state fair trade laws an exemption from the Sherman Act. These state laws allowed manufacturers to require retailers to resell at a price set by the manufacturer. Some state laws extended the minimum resale prices prescribed by contracts to persons who were not parties to the contracts, or nonsigners. In 1951, the Supreme Court in Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, ruled that this practice was illegal. Congress responded in 1952 by enacting the McGuire Act which permitted states to enact fair trade laws with nonsigner clauses. Under these clauses, a fair trade contract could be enforced against a nonsigner provided a manufacturer secured the signature of at least one retailer to a contract. The Miller-Tydings and McGuire Acts were repealed in 1975.

Overview of the Division's Enforcement Actions Since 1970

The Division's enforcement activities reflect the increasing priority accorded to criminal enforcement since the 1970s. Compared to its actions during the 1970s, the Division has greatly increased the number of criminal cases investigated and criminal cases filed in the U.S. district courts, and it has steadily reduced the number of civil cases filed. Figure 3.1 shows the trends in the number of criminal and civil cases filed since 1970.

Figure 3.1: The Division Has Filed More Criminal Cases Over Time



Source: GAO analysis of Division data.

Criminal Enforcement Activities

Compared to its experience between 1970 to 1976, the Reagan-era Division initiated an average of 14 more grand juries each year and quadrupled the number of criminal cases filed. With 100 cases filed in fiscal year 1984 alone, the Division filed more criminal cases then than it did during the 5 fiscal years 1970 through 1974. Table 3.1 summarizes the change in the average number of those activities done annually since fiscal year 1970. It divides those 20 fiscal years into three periods,

Table 3.2: Average Number of Civil Cases Filed Annually

Fiscal years	Average total[a] number of civil cases filed	Average annual number of cases by type: Restraint of trade cases	Monopoly cases	Merger cases	Other cases
1970 - 1976	48[b]	19	8	14	8
1977 - 1980	30	17	2	8	3
1981 - 1989	13	6	0[c]	6	1

[a]Rows may not add to totals shown due to rounding.

[b]As discussed later, the Division used to regularly file a companion civil case with each criminal case.

[c]The Division filed two civil monopoly cases, one in fiscal year 1981 and the other in 1983.
Source: Antitrust Division.

Between fiscal years 1981 and 1989, the Division filed an average of 13 civil cases each year—less than half the average number of civil cases it filed annually between 1977 and 1980, and less than one-third the average number of cases filed annually between 1970 and 1976. The Division has filed no civil case against any vertical restraint between fiscal years 1982 and 1989. Between 1976 and 1981, the Division opened 40 investigations into alleged RPM and filed 6 cases. It has since opened 11 investigations into alleged RPM, but it has not filed a case on the basis of those investigations.

The change in civil enforcement reflects a number of influences. In 1984, then AAG McGrath said that the Division brought fewer civil cases against vertical restraints because its resources were devoted to challenging behavior undetected by aggrieved parties (e.g., price fixing) and because "plenty of private plaintiffs" were challenging vertical arrangements.

In 1988, then AAG Rule attributed the absence of civil enforcement actions against vertical restraints to "dramatic" changes in the law. He said that beginning with its 1977 decision in GTE Sylvania, the Supreme Court has held that certain vertical restrictions—at least those that do not fix prices at which distributors may resell products—must not be condemned without proof that competition will actually be harmed.[6]

Mr. Rule also said that the decrease in civil enforcement "reflects the fact that federal enforcement agencies no longer file cases based on unsound theories that inhibit private procompetitive conduct." In 1986, for example, the Division noted that it had been unable to develop a

[6]See, for example, Monsanto v. Spray-Rite Service Co., 465 U.S. 752 (1984), and Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988).

ensure that a convicted defendant would pay a substantial penalty. Therefore, prior to the change, the Division routinely filed a companion civil case with each criminal case. After the penalties for criminal violations were raised, the Division gradually ceased filing civil cases along with its criminal cases. According to the Division's Deputy for Litigation, these changes to the antitrust laws exerted a significant effect on the Division's case filings. The change in the mix of criminal and civil cases is noticeable beginning in 1981.[8]

For Sherman Act violations committed before January 1, 1985, the penalties are a $1 million fine for a corporation and a $100,000 fine and/or 3 years' imprisonment for an individual.

- In 1984, Congress raised the fines for all federal crimes committed after December 31, 1984. The Criminal Fine Enforcement Act[9] raised the maximum penalties that could be given for violations of the Sherman Act. The $1 million fine for a corporation remains the same, as does the potential 3-year imprisonment for an individual. However, the act raised the maximum fine for an individual to $250,000, and it also provided that a corporation or individual could be fined twice the gross pecuniary gain the defendant derived from the crime or twice the pecuniary loss imposed on another by the crime. This could result in the imposition of substantially higher fines. This act was repealed in November 1987, but the penalties were re-enacted in December 1987 in the Criminal Fines Improvements Act of 1987.[10]
- Through the Comprehensive Crime Control Act of 1984, Congress established the U.S. Sentencing Commission[11] and directed it to promulgate to the federal courts criminal sentencing guidelines that provide "certainty and fairness in sentencing and reduc[e] unwarranted sentencing disparities." The Sentencing Commission has mandated greatly increased penalties for certain antitrust offenders, which went into effect on

[8]According to the Deputy for Litigation, the change does not appear earlier because: (1) The Antitrust Procedures and Penalties Act (Public Law 93-528), enacted in late 1974, changed the status of antitrust violations from being misdemeanors to felonies. The Division filed companion civil suits against misdemeanor violations. (2) The statute of limitations for antitrust violations is 5 years. That is, the Division cannot file cases against conduct that occurred more than 5 years previously. Thus, any case filed by the Division in 1980 must involve behavior that occurred no earlier than 1975, after the act raised the penalty to felony status. (3) The staff may not bring a case for several years because they may not discover the alleged anticompetitive conduct until well after it occurred and because the investigation may take a year to complete.

[9]Public Law 98-596.

[10]Public Law 100-185.

[11]28 U.S.C. sections 991-998.

Table 3.3: The Division Has Investigated a Decreasing Percentage of Mergers

Fiscal year	Premerger notifications	Investigations initiated	Investigations as a percent of notifications	Cases filed	Cases filed as a percent of investigations
1978	147	20	13.6	7	50.0
1979	859	101	11.8	11	10.9
1980	824	56	6.8	10	17.9
1981	993	67	6.7	4	6.0
1982	1,204	55	4.6	8	14.5
1983	1,101	62	5.6	4	6.5
1984	1,339	79	5.9	5	6.3
1985	1,604	106	6.6	7	6.6
1986	1,949	85	4.4	6	7.1
1987	2,533	89	3.5	6	6.7
1988	2,747	56	2.0	6	10.7
1989	2,883	64	2.2	5	7.8

Source: Antitrust Division.

Except in 1980 and 1983, the number of premerger notifications to be reviewed rose every year since 1978, the first year such filings were required by the Hart-Scott-Rodino Act. Premerger notifications increased from 859 in fiscal year 1979 to 2,883 in fiscal year 1989, an increase of 236 percent. The percent of mergers investigated by the Division, however, has dropped from nearly 12 percent in 1979 to 2 percent in 1989.

To put this decrease in enforcement action in perspective, three factors should be considered. First, because of its increasing resource constraints in recent years, the Division cleared a growing number of merger transactions to the FTC for investigation that it might otherwise have investigated itself. ("Cleared" means that after both the Division and the FTC made a preliminary examination of the merger, the Division allowed the FTC to run the investigation.) Figure 3.2 shows the number of merger clearances between the two agencies since fiscal year 1982 and illustrates the growth in clearances to the FTC since fiscal year 1986.

about the transaction and will restructure or abandon the merger even before the Division adopts a firm position on the merger.

For example, in fiscal year 1985, the Division's opposition to proposed mergers led to nine transactions (five involving depository institutions) being abandoned or restructured and consent decrees being filed in another five cases. Similarly, in fiscal year 1987, the Division settled four merger cases by consent decree. Further, at least 4 of 57 other proposed transactions were abandoned or withdrawn in 1987 after the Division announced its intention to request additional information or to initiate legal action to enjoin the merger.

Third, and perhaps most importantly, the Division altered its policies toward merger enforcement. During the early 1980s, the Division issued two revisions to its original 1968 Merger Guidelines. In 1981, then AAG Baxter testified that the 1968 Guidelines were substantially at variance with the state of the law, current economic knowledge, and the Department's actual enforcement practices. To avoid confusion and uncertainty in the business community, the Department issued revised Guidelines in 1982 and again in 1984.

The 1968, 1982, and 1984 Merger Guidelines are alike in their basic elements. The central concern with each is their attempt to measure the effect that a proposed merger may exert on market power—the ability of one or more firms to maintain prices above competitive levels, which results in a transfer of wealth from buyers to sellers in the form of monopoly profits, and in a misallocation of resources. (Increasing market power puts upward pressure on the prices of goods and services supplied in those markets.) Each set of Guidelines requires the Division to undertake certain fundamental steps: defining the relevant market (or markets), measuring market concentration, and analyzing the potential change in market power. Each of the Guidelines also includes other factors to be considered in the analyses.

Beyond those similarities, however, the Guidelines differ significantly in the focus of the Division's merger enforcement policies. The 1968 Guidelines included specific standards for analyzing and challenging not only

According to the Guidelines, by incorporating such factors into its evaluation, the Department makes appropriate adjustments in its analysis to reflect a proposed merger's actual competitive concerns more accurately.

The Division's Merger Enforcement Actions Appear to Comply With Its Guidelines

The Division provided us with summary information on 156 mergers proposed between calendar years 1982 and 1987 that it investigated. Of those 156 cases, the Division

- filed legal complaints in 35 cases,
- announced its intention to file in 16 cases, or
- requested additional information from the merging parties but decided against challenging in another 105 cases.

We reviewed the Division's summaries of these 156 proposed mergers and found the following:

- Of the 156 proposed mergers, 103 produced estimated market concentration[14] exceeding the standards set in the Guidelines.[15] Of those 103 cases, the Division filed a legal complaint in 31 cases, announced its intention to file in 14 cases, or cited mitigating factors permitted by the Guidelines in its decision not to challenge in 58 cases.
- In the other 53 cases, the Division concluded that the estimated market concentration was either irrelevant or below its standards, or it did not calculate market concentration estimates. Nevertheless, the Division filed challenges against four mergers and announced its intention to challenge two others.

In the 105 cases in which it made a second request for information but decided not to contest the merger, the Division cited numerous mitigating factors for not challenging the merger. Table 3.4 summarizes the mitigating factors cited in those transactions. It indicates that 17 of the transactions were dropped, abandoned, or altered by the merging parties; and 11 had post-merger indexes within the standards cited by the Guidelines. The most frequently cited mitigating factors were the ease of

[14]The revised Guidelines measure market concentration using the Herfindahl-Hirschman Index (index), calculated by summing the squared values of the market share of each supplier in the market. The index gives greater emphasis to firms with larger market shares.

[15]The Guidelines state the conditions under which the Division may challenge a merger. They indicate that the Division would generally challenge mergers of certain sizes (as measured by the index), depending upon the amount of concentration in the particular market. The more highly concentrated the market, the smaller the increases in concentration resulting from proposed mergers allowed.

The Division Has Actively Advocated Changes to the Antitrust Laws

Throughout the 1980s, the Division's leadership said that its enforcement policies followed changes in the judicial interpretation of existing law. The Division also did more than follow changes in the law—it actively advocated many changes in the language and interpretation of the antitrust laws.

The Division proposes changes to the antitrust laws in two ways. First, the Division expresses its legal views by participating in federal court cases as an amicus curiae. The Division files amicus briefs both at the request of the courts and on its own initiative. In addition, the Division supports the administration's legislative efforts to revise the antitrust laws.

The Division Intervenes in Private Antitrust Cases

Because a large part of antitrust precedent is established in private antitrust cases, former AAG William Baxter made participation as amicus curiae in certain private cases a high priority starting in 1981. Subsequently, the Division nearly tripled the average number of amicus briefs it filed each year with the U.S. Supreme Court and the Courts of Appeals, as compared with the average number filed each year in the 1970s.

According to its manual, the Division uses its amicus program to clarify, strengthen, or advance the law in areas affecting the Division's policy goals. The Division attempts to identify and review private antitrust cases. In general, the Division will consider involvement as amicus when

- the issue before the court is one of significance to the development of antitrust jurisprudence,
- precedent is lacking or raises barriers to the efficient operation of firms or markets, and
- the essential facts are not in dispute.

Division officials said that in its amicus program, its interest is to assist the courts in analyzing the issues and to present the government's views on them.

Historically, the Division filed amicus briefs at the request of the Supreme Court. The Supreme Court often asks the Justice Department to provide the views of the federal government on legal issues and interpretations. The Solicitor General refers antitrust-related issues to the Division. In lower courts, the Division usually files its briefs on its own

Table 4.1: The Division Filed Amicus Briefs in a Majority of Cases on Its Own Initiative

			Courts of Appeals		Supreme Court	
Fiscal year	Staff hours charged[a]	Total cases in which the Division filed briefs	Cases in which briefs filed	Cases in which the Division participated on its own initiative	Cases in which briefs filed	Cases in which the Division participated on its own initiative
1980	452	12	8	7	4	2
1981	3,059	16	6	6	10	2
1982	6,021	14	5	5	9	5
1983	7,009	15	8	7	7	2
1984	4,300	12	3	3	9	3
1985	3,770	7	1	1	6	1
1986	2,237	8	1	1	7	2
1987	1,990	9	6	5	3	0
1988	1,256	6	2	2	4	2
1989	1,154	3	1	0	2	1
Total	**31,248**	**102**	**41**	**37**	**61**	**20**

[a]The table understates the total number of hours the Division devotes to amicus work. The Appellate Section is responsible for drafting amicus briefs. Although the section's chief and two assistant chiefs review draft briefs, they do not charge any time to amicus work. Rather, they charge their time to administrative activities.

Source: Antitrust Division.

Focus of Amicus Filings

Mr. Baxter initially focused on cases involving vertical restraints, including various distribution and marketing practices, RPM, and tying arrangements. He testified in 1982 that he regarded most vertical restraints not only as lacking anticompetitive effects, but as contributing to general consumer welfare. Consequently, he hoped to persuade the Supreme Court to abandon the rule of per se illegality that applied to RPM and to subject all vertical arrangements instead to a rule of reason test.

Subsequent AAGs continued the amicus program although staff hours charged to the amicus effort later decreased. Some of the Division's amicus filings represented attempts to express the policy views of those AAGs. For example, in 1985, then AAG Ginsburg said that some private antitrust cases were filed for directly anticompetitive purposes. He said it was important for judges to scrutinize carefully each plaintiff's standing to sue, particularly if a claim was filed by a market rival. Consequently, the Division filed an amicus brief addressing that issue in Cargill, Inc. v. Monfort of Colorado, Inc..[3] In that case, however, the

[3]479 U.S. 104 (1986).

- In National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma,[5] the Division's brief argued that contracts that the NCAA had entered into with the television networks as the sole seller of televised in-season collegiate football games were not illegal per se price fixing but should be analyzed under a rule of reason standard. The Division claimed that this form of conduct, while facially suspect, required additional scrutiny to determine if the purported economic justifications outweighed the potential for competitive harm. The Division argued that the conduct at issue should be found illegal under the rule of reason test. The Supreme Court held that the conduct was illegal under a rule of reason test but was not per se illegal.

Using economic principles, the Division urged the courts to move away from broad theories of per se antitrust liability and towards a more case-by-case approach.

2. The Division also filed amicus briefs encouraging the Court to increase the level of evidence that plaintiffs in civil cases must present to move beyond the summary judgment stage, at which a judge may dispose of a case, to a jury trial. (Upon motion, summary judgment may be granted by a judge prior to trial if there is no genuine issue as to any material fact.) For example:

- In the case of Matsushita Electric Industrial Co. v. Zenith Radio Corp.,[6] Zenith and National Union Electric Corporation brought an action against 21 Japanese corporations alleging that the companies, over a 20-year period, had illegally conspired to drive American firms from the American consumer electronics market by engaging in a scheme to fix and maintain artificially high prices for television sets sold in Japan and, at the same time, to fix and maintain low prices for the sets exported to the United States. Zenith primarily alleged that this was a conspiracy in restraint of trade under section 1 of the Sherman Act.

  The District Court granted summary judgment on behalf of the defendants, finding that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy. The Court of Appeals reversed, holding that a reasonable factfinder could find a

[5] 468 U.S. 85 (1984).

[6] 475 U.S. 574 (1986).

It is difficult, however, to attribute changes in the Supreme Court's position directly to the Division. Where the Division urged the Court to make dramatic changes in the interpretation of the law, the Division was generally not successful. Although the Division argued for it, the Supreme Court refused to adopt a blanket rule denying standing to certain litigants in the Cargill case, discussed earlier. The Division was also not successful in its attempt to persuade the Court to alter the legal test that applied to RPM. In its brief filed in Monsanto Co. v. Spray-Rite Service Corp.,[8] the Division argued that RPM should be subject to a rule of reason test rather than be regarded as illegal per se, but the Supreme Court rejected that position.

However, the Division successfully argued in a number of cases that a certain conduct did not fall within a per se category because of the particular facts of the case. For example, in the case of Jefferson Parish Hospital District No. 2 v. Hyde,[9] the Supreme Court generally agreed with the Division that a contract for a single group of anesthesiologists to provide exclusive anesthesia services to a hospital was not a "tie-in" of surgical and anesthesia services, which would be per se illegal under the Sherman Act. The Division argued, and the Court agreed, that this practice was an exclusive contract to be judged under the rule of reason test.

In addition, as previously discussed, it does appear that some changes resulting from recent Court decisions, many of which were similar to positions that the Division advocated before the Court, may have inhibited the number of private cases being filed. As shown in table 1.1, the number of private cases filed in U.S. district courts has fallen substantially since 1980. According to one federal appellate judge, private challenges have decreased over time because those cases are now too difficult to win. Moreover, he said that in most areas, rule of reason analysis has replaced per se rules, and "rule of reason cases" are very expensive to try. Further, plaintiffs must meet more difficult evidentiary standards and toughened standing requirements. The Division supported many of those substantive and procedural changes through its amicus efforts. Former AAG Litvack agreed that these changes have combined to create greater obstacles for private antitrust plaintiffs.

[8]465 U.S. 752 (1984).

[9]466 U.S. 2 (1984).

The Division Has Supported Legislative Reforms of the Antitrust Laws

The Division has also developed and supported administration legislative proposals to reform the antitrust laws.

The Division supported three bills that became law during the 1980s. The Export Trading Company Act of 1982[10] expands the eligibility of export trade organizations for exemptions from the antitrust laws. According to one Division official, this act had originally been developed during the Carter administration. The National Cooperative Research Act of 1984[11] is designed to stimulate innovative joint research and development by, among other things, clarifying the application of the antitrust rule of reason to joint research and development ventures. The Local Government Antitrust Act of 1984[12] provides an antitrust immunity for local government officials and employees acting in an official capacity. This act basically extends antitrust immunity afforded to state government officials under the "state action doctrine" to local government officials.

During the 1980s, the Division also supported several other administration proposals that Congress did not pass. In 1983, the administration supported S. 1841, the National Productivity and Innovation Act of 1983. This bill contained amendments to the antitrust laws as they relate to joint research and development ventures and to the licensing of intellectual property (i.e., amendments to the patent and copyright laws). While S. 1841 did not pass, the National Cooperative Research Act of 1984 was taken from Title II of that bill.

In 1986, Assistant Attorney General Ginsburg supported more far-reaching legislative reform. Legislative initiatives that he supported included, for example, proposals to reduce the damages that a plaintiff could win in a private antitrust action (except in price fixing and bid rigging cases). He said that the availability of treble damages to prevailing plaintiffs in antitrust cases chilled competition as well as collusion and invited plaintiffs to pursue doubtful claims. He also supported legislation to revise Section 7 of the Clayton Act. These proposed revisions focused on the language in the Clayton Act that proscribed mergers that may substantially lessen competition or tend to create a

[10]Public Law 97-290, 96 Stat. 1233.

[11]Public Law 98-462, 98 Stat. 1815.

[12]Public Law 98-544, 98 Stat. 2750.

monopoly. The Reagan administration proposed narrowing that language to prohibit only mergers that would have a "significant probability" of increasing prices to consumers.

In 1987, the administration reintroduced all but one of the proposals it had submitted to the previous Congress. These proposals were known as the "Antitrust Equal Enforcement Act of 1987" and the "Antitrust Remedies Improvements Act of 1987." As before, Congress did not pass these proposals.

Division officials point out that their work in support of an administration's legislative initiatives represents a relatively small part of the Division's efforts to contribute to sound antitrust law. They said that Division staff spend more time working to counter legislative efforts that would extend antitrust immunities to specific industries. According to these officials, the Division consistently opposes such exemptions to the antitrust laws and supports efforts to deregulate industries. Once the protection of regulation is removed, the antitrust laws take effect. For example, the Division generally supports ending the insurance industry antitrust exemption afforded by the McCarran-Ferguson Act.

Conclusion

Under the Reagan administration, the Division not only looked to revise its civil and merger enforcement of the antitrust laws, but also tried to have the laws changed. It did this through amicus briefs, in which it tried to influence the outcome of cases before the courts, and through legislation it supported. Generally, its efforts sought to narrow the application of the antitrust laws. While the Division has had some success, the courts and Congress have not always agreed with its position.

Division Investigation and Review Processes

The following is a general description of the processes[1] through which the Antitrust Division investigates possible criminal and civil violations and reviews proposed mergers. As noted in chapter 1, the Division's criminal and civil investigation processes are similar. After becoming aware of a possible violation of the antitrust laws or an anticompetitive merger, the Division may open a preliminary inquiry (PI). Occasionally the Division may bypass the PI stage and proceed directly to a criminal grand jury investigation or initiate a civil investigation. In a civil investigation, staff attorneys obtain information from parties subject to the investigation and from third parties with relevant information by issuing civil investigative demands (CIDs). CIDs require individuals or companies to produce documents, answer written interrogatories, or give oral testimony. If an investigation of conduct proceeds beyond the PI stage, it becomes either a criminal or civil investigation. Investigations of proposed mergers are civil investigations from their inception.

The major differences between criminal, civil, and merger investigations are (1) the use of a grand jury to investigate possible criminal antitrust violations, (2) the extensive involvement of staff economists in civil and merger investigations, and (3) the nature of the conduct under investigation. Otherwise, the following basic elements are the same in all three types of investigations:

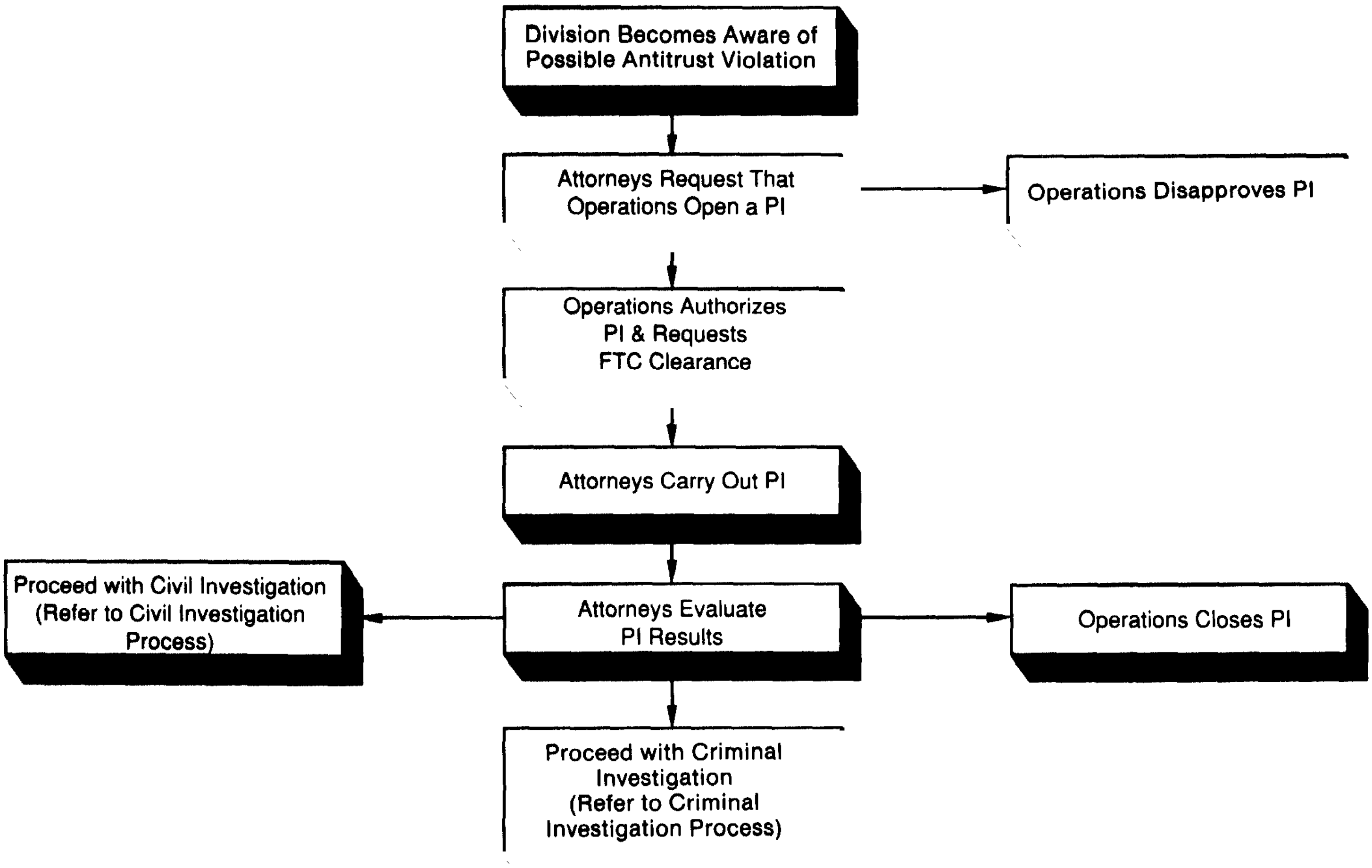
- Approval from operations is necessary for all requests from the Division's legal sections or field offices to open a PI.
- Staff attorneys in the Division's field offices or the litigating or regulatory sections are responsible for investigating possible antitrust violations.
- Staff economists participate in all civil investigations and merger reviews to provide economic analysis. Economists are not involved in many criminal investigations, except when needed as expert witnesses during a trial.
- At the conclusion of their investigation, Division staff recommend that Operations close the investigation or that the Division proceed with litigation.
- The AAG makes the final decision on whether or not to litigate a case.
- Operations supervises all criminal and civil litigation and carries out the Division's liaison and clearance process with the FTC.

[1] We developed the descriptions of the processes from discussions with Antitrust Division officials. We did not verify the descriptions.

I. Initial Investigation Process

Figure I.1 illustrates the key decision points in the initial investigation process, which leads to either a criminal or civil investigation process (discussed in secs. II and III of this app. The investigation process for mergers has some differences and therefore is discussed separately in sec. IV.) The Division becomes aware of a possible violation through a number of ways, such as (1) receiving information or a complaint about the matter from a confidential informant, an injured party, or an anonymous tip; (2) discovering suspicious bidding or pricing patterns; or (3) gathering information from newspapers, public reports, and trade publications. New investigations may also begin with information the Division gains in other grand jury proceedings. Economists from one of the Economic Analysis Group sections may also discover a possible anticompetitive activity, which they will then discuss with an attorney in one of the Division's legal sections.

Figure I.1: Initial Investigation Process



If information that the Division obtains shows that the antitrust laws may have been violated, a staff attorney from one of the legal sections or a field office prepares a memorandum requesting that Operations open a PI to investigate the matter. The attorney's memorandum describes the conduct involved and the possible violation. If appropriate, the memorandum also includes the views of the economist. When an economist discovers possible anticompetitive activity, the Economic Analysis Group section requests one of the legal sections to prepare a PI memorandum to open an investigation.[2]

[2]An Economic Analysis Group section will sometimes submit a PI request. It does so, however, only after consulting with the appropriate legal section. If a PI is opened under such a situation, it is always assigned to a legal section.

The Deputy Director of Operations is to approve or disapprove the PI request on the basis of four standards: (1) the facts presented must support a legal theory of an antitrust violation, (2) the amount of commerce affected must be substantial, (3) Division resources must be available for the investigation, and (4) the investigation should not duplicate other state or federal agency efforts.

Because both the FTC and the Division have antitrust jurisdiction, they must agree on which agency is to conduct the investigation. This helps ensure that both agencies are not investigating the same conduct. The Director of Operations obtains FTC clearance to go ahead.[3]

Following approval of the PI request and FTC's clearance, the staff determines the type of conduct involved, analyzes the affected market, reviews public documents, and requests information and assistance from other agencies. They interview complainants, potential witnesses, and victims and sometimes seek to obtain documentary information by voluntary requests from the potential subjects of the investigation and third parties who have knowledge and views of the industry. The staff meets periodically with Operations and either the Deputy for Litigation or the Deputy for Regulatory Affairs to report on their progress.

After the staff evaluates the results of the PI, the attorneys recommend either closing the PI, proceeding with a criminal investigation, or proceeding with a civil investigation. In making this decision, the staff consults with their section or field office chief on the results of the investigation.

To terminate a PI, staff attorneys and economists (if assigned) must prepare a closing memorandum. Operations reviews the memorandum and consults with the appropriate Deputy and the AAG if the matter involves significant policy questions. Operations then notifies the cognizant section or field office chief of the decision to close the investigation.

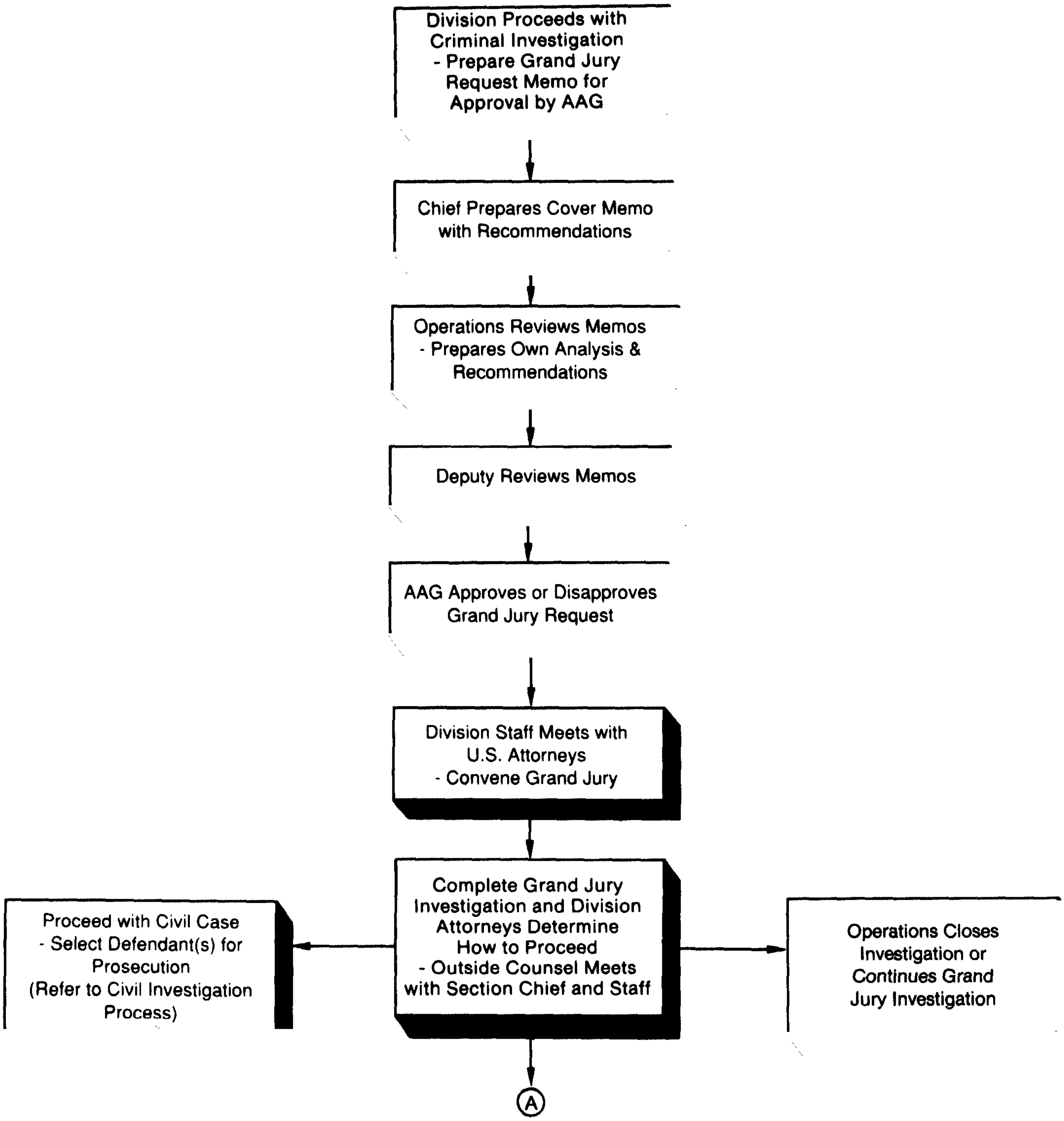
[3]In the event either the FTC or the Division objects to the clearance of a proposed investigation to the other, the staffs of the two agencies negotiate who will proceed with the investigation. They describe to each other the respective agency's interest in the investigation and are usually able to resolve any clearance problem. If the conflict cannot be resolved at the lower levels, the Deputy for Litigation or AAG may enter into negotiations with the FTC's Director or Deputy Director of the Bureau of Competition or the Chairman. After they decide which agency will proceed with the investigation, that agency is given access to all relevant information in the other agency's files. Because the FTC does not have jurisdiction to enforce the Sherman Act, which is the basis for the Division's criminal enforcement activities, matters that are likely to be investigated by grand jury are routinely cleared to the Division.

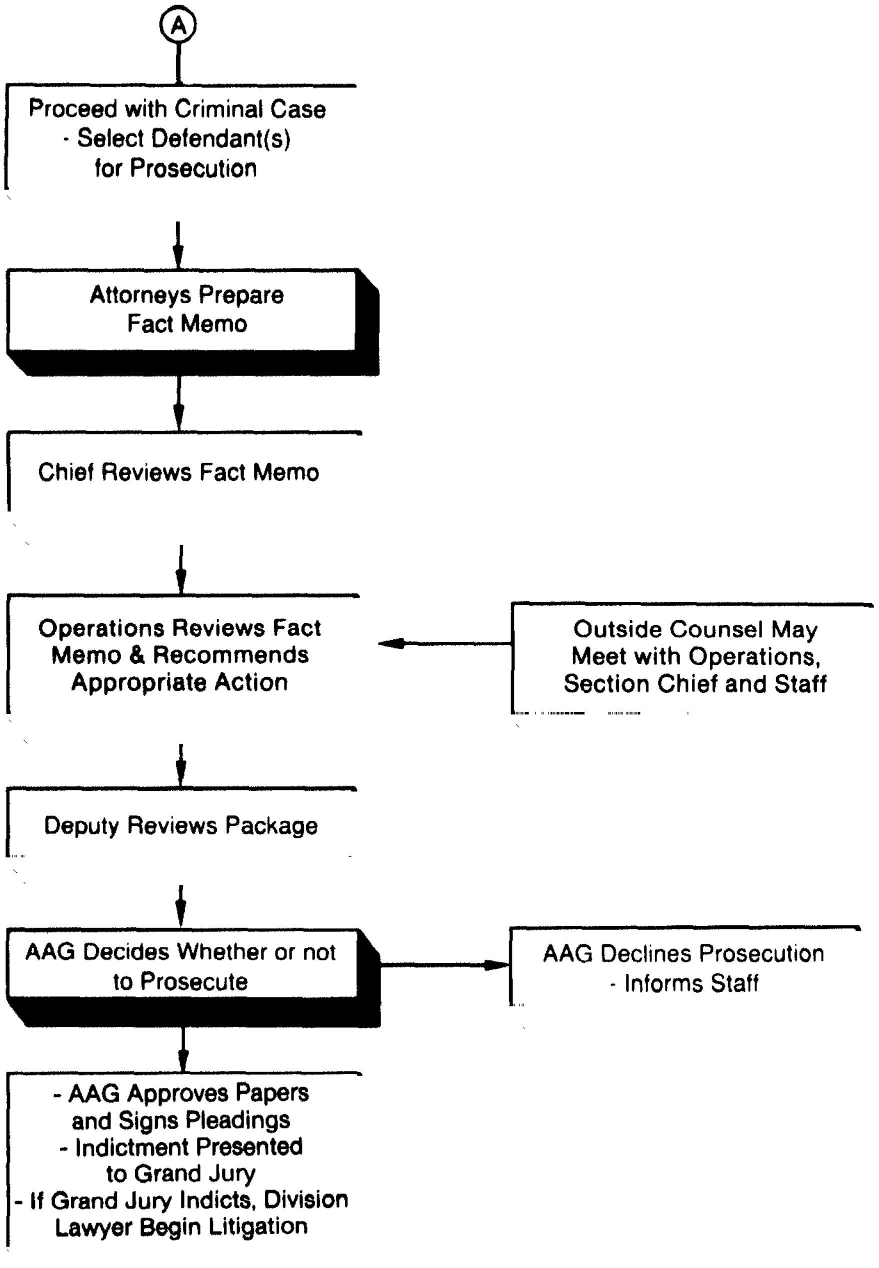
The economists are to prepare a separate memorandum if they disagree with the attorney's position or to describe the economic analysis that they employed. Operations reviews the memoranda. On significant policy questions, Operations consults with the appropriate Deputy and the AAG.

II. Criminal Investigation Process

Figure I.2 illustrates the key decision points in the criminal investigation process. As a result of the PI conducted in the initial investigation (see sec. I), the staff attorneys will recommend that the Division either close the investigation or proceed with a criminal investigation. To proceed, the PI would show that there is reason to believe a violation did occur and the violation is criminal in nature (e.g., bid rigging or price fixing). The staff attorneys prepare a memorandum requesting that the matter be presented to a grand jury. This memorandum contains the results of the PI. The chief prepares a cover memorandum that includes his or her views and recommendations. Operations reviews the grand jury request memoranda, summarizes the information, and prepares its own analysis and recommendations supporting or opposing the grand jury investigation. It may request input from the Division's economists.

Figure I.2: Criminal Investigation Process




A
Proceed with Criminal Case
- Select Defendant(s)
for Prosecution
Attorneys Prepare
Fact Memo
Chief Reviews Fact Memo
Operations Reviews Fact
Memo & Recommends
Appropriate Action
Outside Counsel May
Meet with Operations,
Section Chief and Staff
Deputy Reviews Package
AAG Decides Whether or not
to Prosecute
AAG Declines Prosecution
- Informs Staff
- AAG Approves Papers
and Signs Pleadings
- Indictment Presented
to Grand Jury
- If Grand Jury Indicts, Division
Lawyer Begin Litigation

If the Division obtains substantial evidence of a criminal violation from an informant, a victim, or another grand jury investigation and therefore does not believe the PI process is necessary, it may commence a grand jury investigation. In such a situation, the staff requests in a memorandum that the Division initiate a grand jury investigation. The Division still obtains FTC clearance if it opens a grand jury investigation without first opening a PI and conducting an initial investigation.

The Deputy for either Litigation or Regulatory Affairs reviews the memoranda and provides comments to the AAG, who then either approves or disapproves the grand jury investigation request. If the request is disapproved, the case is closed. If the AAG approves the grand jury investigation request, the Division attorneys meet with the U.S. Attorneys and arrange to convene a grand jury and issue subpoenas.

After completing the grand jury investigation, the attorneys recommend either closing the investigation, proceeding with a criminal case and prosecuting the defendants, or continuing the case as a civil matter. The staff and the chief will often afford counsel for the parties under investigation an opportunity to present their clients' views.

If they decide not to proceed after the grand jury investigation, the staff and the chief prepare memoranda recommending that the Division close the investigation. Operations can authorize either closing the investigation or returning the matter for further grand jury investigation.

If the staff recommends proceeding with a criminal case, it prepares a memorandum containing a full statement of the factual and legal bases of their investigation. Their chief prepares a cover memorandum with his or her own views and recommendations. Accompanying the staff's fact memorandum to Operations are the chief's cover memorandum, all pleadings in the matter, a proposed public press release announcing the Division's initiation of a criminal case, and other papers relevant to the consideration of the case.

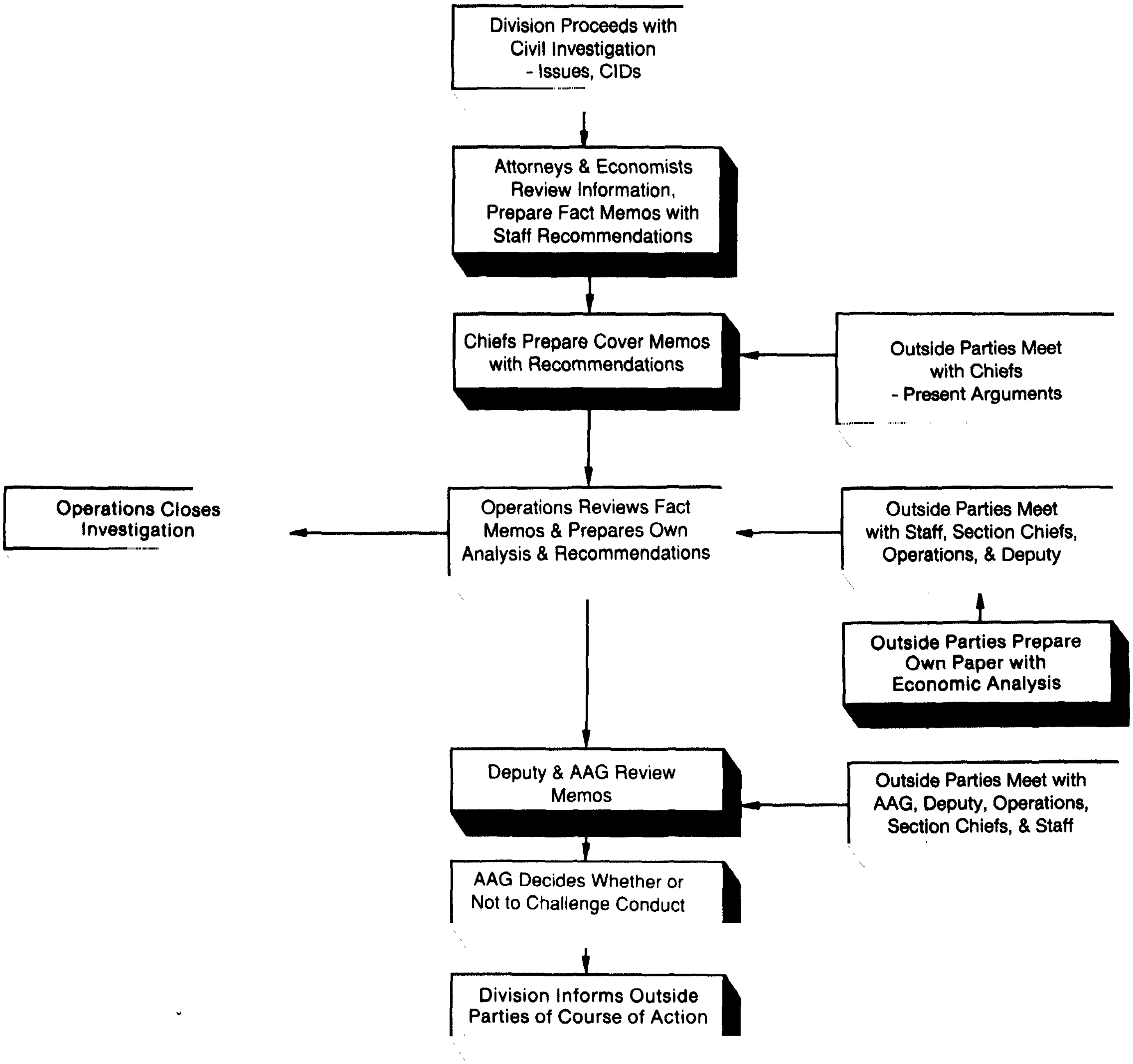
The Director of Operations analyzes all the related documents, assesses the merits of the case, and recommends what action, if any, to bring against the proposed defendant(s). The Director of Operations generally offers an opportunity to counsel for the parties under investigation to present their arguments against indictment. The chief and staff would be present.

After the Deputy reviews and comments on the entire package, the AAG decides whether to bring legal action or decline prosecution. The Division's legal staff is informed of the AAG's decision. If the AAG approves criminal prosecution, the Division presents the indictment to the grand jury. If the grand jury returns an indictment, the Division begins litigation.

III. Civil Investigation Process

When conduct is not appropriate for prosecution as a criminal matter but unreasonably restrains trade, the Division initiates a civil investigation. The Division may bypass the PI process and issue CIDs to persons who have information relevant to the investigation. Civil investigations differ from criminal investigations largely in the extensive involvement of the Division's economists and in the Division's greater interaction with the parties under investigation. Figure I.3 shows the major steps in the nonmerger civil investigation process, which resembles the criminal investigation process. After the Division decides to proceed, the attorneys and economists continue with the investigation. They obtain information through interviews, voluntary requests for documents, and CIDs issued to the parties subject to the investigation and to third parties who have knowledge and views of the industry. The AAG must approve all CIDs before the Division issues them.

Figure I.3: Civil Investigation Process



After completing their investigation, the staff attorneys and economists review the information and prepare separate comprehensive fact memoranda. The memoranda include a description of the conduct and market involved in the violation, an analysis of competitive problems, a development of the facts and law, and recommendations.

The section chiefs and staff meet with the parties subject to the investigation and reach preliminary conclusions about the matter. The section chiefs prepare cover memoranda with their views and recommendations.

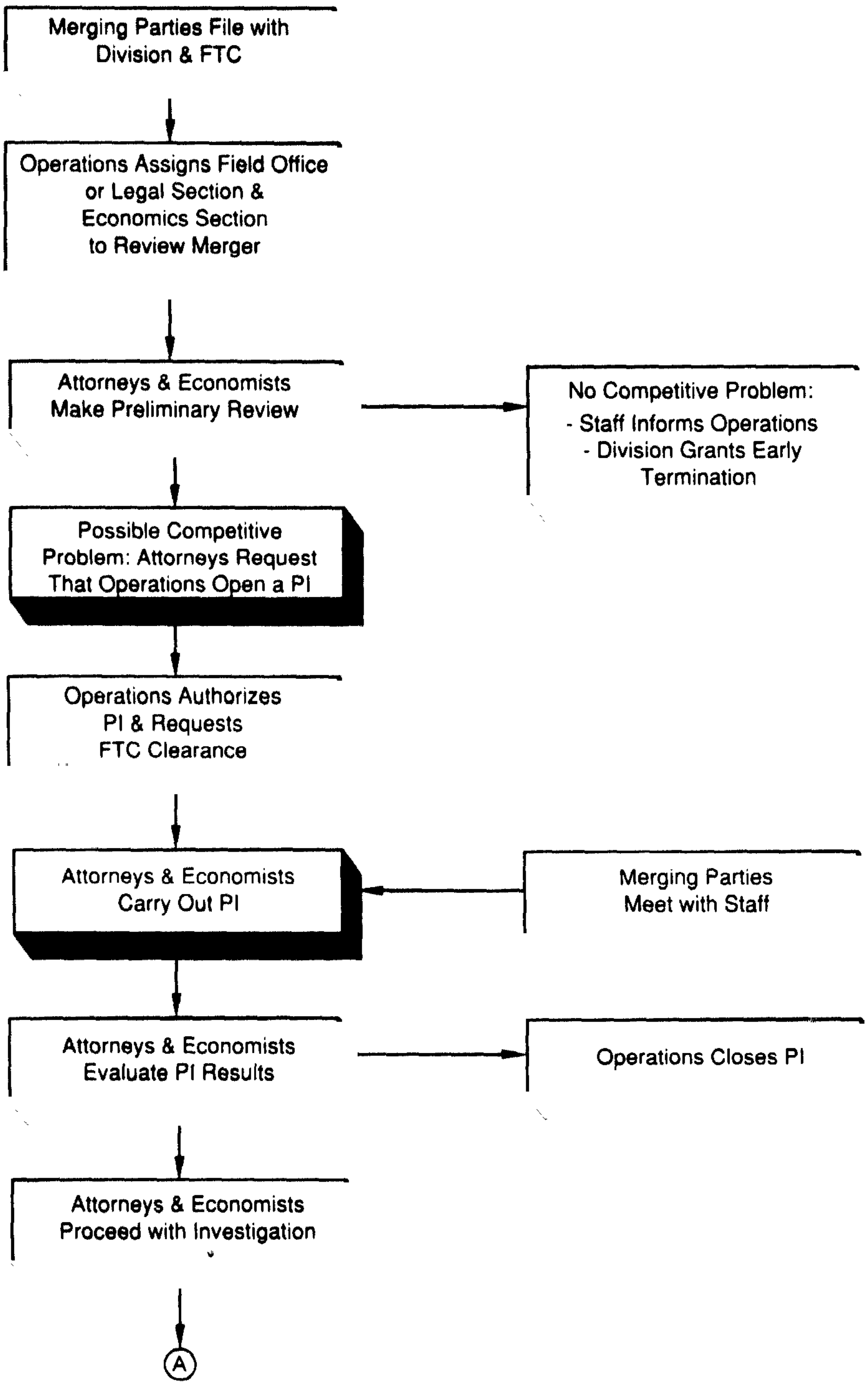
Next, Operations reviews, analyzes, and summarizes the sections' memoranda. The investigation is closed if the legal and economic sections recommend closing the investigation and Operations agrees. If one or more of the sections recommends an enforcement action, Operations and the Deputy again meet with the parties subject to the investigation to hear their arguments. The parties usually prepare their own position paper, including an economic analysis, and submit it to the Division. Afterwards, Operations recommends what action to bring against the parties.

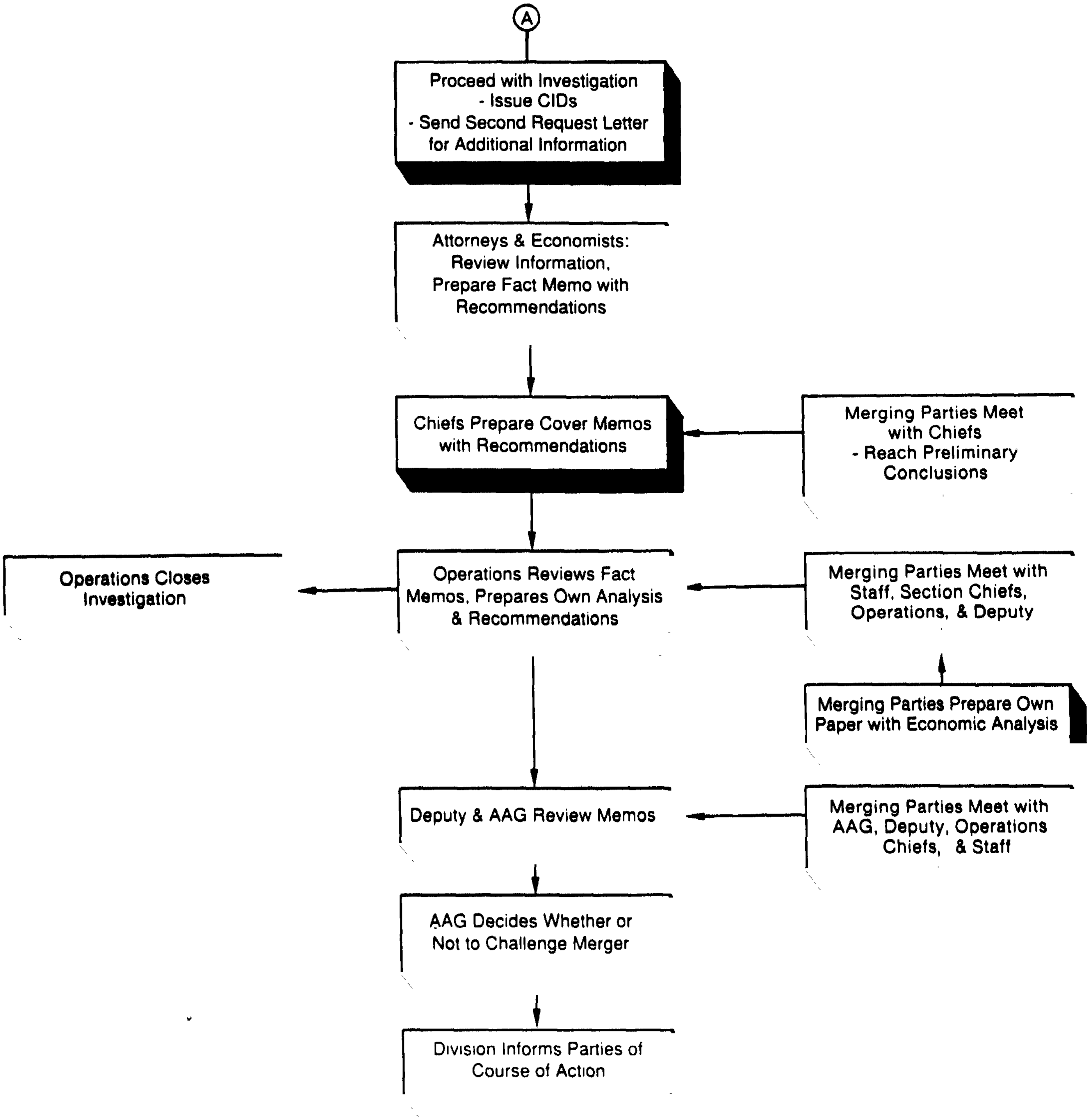
After the Deputy reviews and comments on the entire package, the AAG decides whether or not to challenge the conduct. The Division then informs the parties subject to the investigation of the course of action. If the AAG approves filing the case, he signs the pleadings and other documents, and the Division begins litigation.

IV. Hart-Scott-Rodino Merger Review Process

In the Hart-Scott-Rodino merger review process, the economists and attorneys cooperate in studying the premerger notification material filed by the merging parties, and formulating the investigation. The merging parties, along with their counsel and economists, meet with Division staff at different stages throughout the process to discuss their proposal. Figure I.4 shows the major steps in the Division's Hart-Scott-Rodino merger review process.

Figure I.4: Hart-Scott-Rodino Merger Review Process




A
Proceed with Investigation
- Issue CIDs
- Send Second Request Letter for Additional Information
Attorneys & Economists: Review Information, Prepare Fact Memo with Recommendations
Chiefs Prepare Cover Memos with Recommendations
Merging Parties Meet with Chiefs
- Reach Preliminary Conclusions
Operations Closes Investigation
Operations Reviews Fact Memos, Prepares Own Analysis & Recommendations
Merging Parties Meet with Staff, Section Chiefs, Operations, & Deputy
Merging Parties Prepare Own Paper with Economic Analysis
Deputy & AAG Review Memos
Merging Parties Meet with AAG, Deputy, Operations Chiefs, & Staff
AAG Decides Whether or Not to Challenge Merger
Division Informs Parties of Course of Action

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (15 U.S.C. sec. 18a) requires certain firms merging or entering into acquisition transactions to notify both the FTC and the Division and submit certain information to both agencies. After notification, the parties must wait a specified time[4] before the transaction can be consummated. The act also allows the Division and the FTC to request additional information (commonly referred to as a "second request") from the merging parties. The second request extends the waiting period.[5] The Office of Operations assigns one of the legal sections or a field office and an Economic Analysis Group section to make a preliminary review of the merger filing. A staff attorney initially prescreens the merger and prepares an informal summary of the merger. An economist also reviews the filing and consults with the legal staff on the filing.

After the preliminary review, the Division and FTC may allow a merger to proceed if the applicant requests early termination of the statutory waiting period. If the staff believes that the proposed transaction presents no competitive problem that would merit further investigation, and if the staff and the chiefs agree that early termination of the waiting period is appropriate, the legal section notifies Operations, which relays the Division's response to the request to the FTC. All early terminations must be cleared through the FTC and published in the Federal Register. If FTC concurs, the applicant is immediately advised that the merger can go forward.

If the information received from the filing suggests that the merger presents an antitrust problem, Division lawyers and economists recommend to Operations that the Division open a PI.

The Deputy Director of Operations approves or disapproves opening a PI into a merger. If a PI is approved, Operations must obtain clearance from the FTC to go ahead with the investigation. After doing so, Operations notifies the legal staff to proceed.

Once the PI is opened, the legal and economic staffs contact individuals outside of the merging companies for information on the product or on competition in the market. They obtain this information by voluntary means. At this point, the merging parties begin to meet with Division

[4]Fifteen days for cash tender offers, 30 days for other acquisitions, and 10 days in the case of a bankruptcy filing.

[5]The parties must first provide the materials requested, then wait 10 days for cash tender offers and 20 days for other acquisitions before consummating the transaction.

staff to discuss any problems the Division has with the proposal and to provide their own analysis of the transaction.

If the legal and economic staffs decide that their concerns are unwarranted, they recommend that Operations close the PI. The attorneys prepare closing memoranda with this recommendation. If the economists feel it is warranted, they will also write a closing memorandum.

If the staffs believe that the Division should look further into the premerger filing as a result of their investigation, they recommend that the Division issue a second request letter for additional information from the merging parties. The economists assist the attorneys in deciding what information to request and in preparing the second request. As provided in the act, the second request must be issued within 30 days of the filing notification. The recommendation to issue a second request is forwarded to Operations and sent to either the Deputy for Litigation or the Deputy for Regulation, who signs the letter. In addition, the Division usually issues CIDs to individuals or companies who have information about the industry.

After completing their investigation, the attorneys and economists prepare separate memoranda containing their analyses and recommendations. The legal section's fact memorandum contains a description of the transaction and markets involved, all the relevant facts, and an analysis of the competitive problems. The economists' memorandum fully describes the economic analysis employed and usually has a shorter discussion of the relevant facts, since they are detailed in the legal section's memorandum. The attorneys and economists independently recommend that the Division either close the investigation or bring a case to enjoin the merger. If the economists' recommendation does not concur with the attorneys', their memorandum should detail the basis of the disagreement.

The staffs and their chiefs meet with the parties and reach preliminary conclusions about the transaction. The chiefs then prepare cover memoranda to the staffs' fact memoranda that explain their views and recommendations.

Operations reviews the fact memoranda and prepares its own summary analysis and recommendations. As with other types of investigations described above, if there is agreement that the investigation should be closed, Operations will authorize closing, after briefing the Deputy or the AAG. If there are recommendations to challenge the merger, the Division again meets with the parties. The parties will often prepare their own economic analysis of the transaction and submit it to the Division for its consideration.

The Deputies and the AAG review their staffs' analyses and recommendations. The AAG considers the views of the economists as well as attorneys in deciding whether to initiate action. Following another meeting with the parties, the AAG decides whether or not to challenge the merger and informs the parties of his decision. The parties may propose to dispose of those assets that present problems to the Division. If the Division accepts this proposal as a means to eliminate its concerns, the Division then files a consent decree with the court that binds the parties to the arrangement. In the absence of such a settlement agreement, the Division files a complaint and motions for a preliminary injunction and a temporary restraining order with the court. The preliminary injunction prevents consummation of the transaction before the court can determine its legality.

Turnover of Division and Justice Attorneys Greater Than Elsewhere in Government

In response to the Chairman's request about retention of attorneys, GAO examined data from the Division and the Office of Personnel Management on federal attorneys in all departments and agencies on board as of December 31, 1986. We then determined the number of attorneys that separated from their jobs between December 31, 1986, and December 31, 1988. (The "separation rate" indicates the percent of employees who left their positions for reasons of retirement, transfers to another agency, transfers to a nonpay status, quits from the government, and other miscellaneous reasons. The "quit rate" represents only the percent of employees who left the government entirely, but not for reasons of retirement, health, or death.) We also identified the attorneys employed in the Antitrust Division over the same period and compared their separation rates with attorneys governmentwide. Table II.1 summarizes the results of this comparison.[1]

Table II.1: Comparison of Attorneys Leaving the Antitrust Division, the Justice Department, and Federal Employment

Figures in percent

Employee category	Separation rate	Quit rate
Government attorneys	19.5	11.0
Justice attorneys	22.7	16.2
Division attorneys	19.8	12.8

Note: For purposes of calculating the separation and quit rates, the employee categories are mutually exclusive. That is, we removed all Justice Department attorneys from all other government agencies. Similarly, we subtracted out the Division attorneys from the rest of the Justice Department.

Source: GAO analysis of Office of Personnel Management and Division data.

Turnover of attorneys in the Justice Department is greater than that of attorneys governmentwide. Of the 1,749 Justice Department attorneys in the cohort, more than 22 percent separated during the period of the study. Over 16 percent left government. Relatively fewer of the 257 Division attorneys changed jobs or left government employment than other Justice attorneys. But compared to all government attorneys, relatively more Division attorneys separated and left government employment.

Additional Division data on attorneys who separated during fiscal years 1985 through 1988 showed that many Division attorneys left within a few years for the private sector. Over 170 attorneys left the Division during those fiscal years. Their median tenure with the Division was

[1]While the Division and most Justice organizations, including the Division, hire attorneys from the Attorney General's Honor Program, we do not know the method other agencies use to hire their attorneys. Therefore, such comparisons should only be used to provide indications of differences in separation and quit rates.

less than 4 years. Information available on some of those who separated reveals that about half left for the private sector or teaching. About one-third remained with the government, either in another agency or elsewhere in Justice. Departmental officials primarily attribute Justice's problems in retaining experienced attorneys to relatively low federal salaries.

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Glossary

Amicus Curiae	(Latin, meaning "friend of the court"). A bystander—usually a counsellor—who interposes and volunteers information to remind the court of some legal matter, often to protect his or her interests.
Bid Rigging	An agreement between independent competitors as to the level of bids they would submit for work, or an agreement between independent competitors not to bid on work.
Cartel	Cartels occur when firms in a market seek to maximize their profits by agreeing to raise prices and restrict output.
Civil Investigative Demand (CID)	A CID is similar to a grand jury subpoena. The Division uses it to obtain documents and/or oral testimony from individuals or companies when the suspected antitrust violation appears to be a civil violation. CID materials may be used in a court, grand jury, or federal administrative proceeding.
Herfindahl-Hirschman Index	A measure of market concentration used in the 1982 and 1984 Merger Guidelines. It is calculated by summing the squared values of the market share (usually measured in terms of sales or capacity) of each of the merging parties in the relevant market.
Market Power	The ability of one or more firms to maintain prices above competitive levels, which results in a transfer of wealth from buyers to sellers in the form of monopoly profits, and in a misallocation of societal resources. Increasing market power puts upward pressure on prices of goods and services supplied in particular markets.
Mitigating Factor	Factors included in the Division's Merger Guidelines that the staff is to consider before concluding that the Division should challenge a merger. Mitigating factors include recent trends in market concentration in the relevant industry, the presence of a proposed merger party that is failing financially, and the possibility that production efficiency can be enhanced by a proposed merger.

Per Se Antitrust Violation

Certain conduct, such as price fixing or bid rigging, is illegal per se, which means that the proof of the existence of the conduct establishes the defendant's illegal purpose. Per se rules in antitrust law are designed to outlaw conduct that is clearly anticompetitive in nearly all situations.

The Division's Vertical Restraint Guidelines define a practice as per se illegal "...if it appears highly likely that it will restrict the output of the collaborators or increase their price and there is no plausible procompetitive justification for the practice (i.e., there is no plausible argument that the practice actually increases efficiency and consumer welfare)."

Predatory Pricing

Generally defined as a sustained strategic price cut below a firm's own costs that would not be profitable unless it eliminated or disciplined competitors and resulted in future market power. The Supreme Court has noted, however, that there is little consensus on the proper definition of predatory pricing in the antitrust context. (Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 17-18, n. 12 (1986).)

Price Fixing

An agreement between independent competitors to set the price, or any element of the price, that they will charge to consumers.

Rule of Reason Test

Under a rule of reason test, the factfinder weighs all of the relevant circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition, i.e., whether its anticompetitive effects outweigh its procompetitive effects.

Second Request Letter

A request for additional information or documentary materials issued by either the Division or the FTC to parties planning a merger or acquisition. The parties must comply with the request, which also extends the statutory waiting period before which the proposed transaction may be consummated.

Summary Judgment

Upon motion, a judge may grant summary judgment prior to a civil trial if the evidence presents no genuine issue of material fact and one party is entitled to prevail as a matter of law.

Vertical Restraints

Arrangements between firms operating at different levels of the manufacturing or distribution chain (e.g., between a manufacturer and a wholesaler) that restrict the conditions under which firms may purchase, sell, or resell. Vertical restraints may or may not be related directly to prices. An agreement between a supplier and its distributors on resale prices is known as a vertical price restraint and is commonly referred to as resale price maintenance (RPM).

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