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SMALL BUSINESS BEFORE THE FEDERAL TRADE COMMISSION

One of the most persistent criticisms of the Federal Trade Commission¹ concerns its antitrust activities against small businesses.² This criticism³ has issued from Congress,⁴ courts,⁵ independent commissions,⁶ and persons both within and without the Commission itself.⁷ Small firms are more often pursued by the Commission, the critics allege, because the Commission fears the political consequences of proceeding

1. The FTC was created by the Federal Trade Commission Act, 38 Stat. 717 (1914), 15 U.S.C. §§ 41-58 (1964).

2. The Commission has been subject to criticism on several other grounds. See, e.g., BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 86, 104 (1955) (concerning Commission's inflexible bureaucracy). *Contra*, Kintner, *The Federal Trade Commission in 1960—Apologia Pro Vita Nostra*, *ANTITRUST LAW SYMPOSIUM* 21, 24-25 (1961); H.R. REP. No. 3236, 81st Cong., 2d Sess. (1951); *Hearings before the Subcommittee No. 1 of the Select Committee on Small Business of the House of Representatives*, 84th Cong., 1st Sess., pt. 1, at 214-15 (1956) (concerning inadequacies of Commission staff); *contra*, Elias, *Administrative Discretion—No Solution in Sight*, 45 *MARQ. L. REV.* 313, 332 (1962).

3. See, e.g., *Books*: HENDERSON, *THE FEDERAL TRADE COMMISSION* 337 (1924) (charges the Commission avoids major cases); ROWE, *PRICE DISCRIMINATION AND THE ROBINSON PATMAN ACT* 536 (1962) (charges the Commission seeks easy cases to build a record); *Articles*: Rockefeller & Wald, *Antitrust Enforcement by the Federal Trade Commission and the Department of Justice: A Primer for Small Business*, 66 *DICK. L. REV.* 251, 256 (1962) (failure of parties to know their rights causes ill effects); Simon, *The Case Against the Federal Trade Commission*, 19 *U. CHI. L. REV.* 297, 320-26 (adverse effect on small firms of policy decisions by Commission); *contra*, Wallace & Douglas, *Antitrust Policies and the New Attack on the Federal Trade Commission*, 19 *U. CHI. L. REV.* 684 (1952); Herring, *Politics, Personalities, and the Federal Trade Commission*, 28 *AM. POL. SCI. REV.* 1016, 1020-21 (1934) (political pressures direct Commission to prosecution of small firms). *Congressional Comment*: UNITED STATES COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, *TASK FORCE REPORT ON REGULATORY COMMISSIONS* 122, 127, 128 (1949) (charges the Commission has its major effect on small firms); ADMINISTRATIVE CONFERENCE OF THE UNITED STATES COMMITTEE ON INTERNAL ORGANIZATION AND PROCEDURES OF THE FEDERAL TRADE COMMISSION, 21 (1962) (claims the Commission has little effect on national economic problems); H.R. REP. No. 3236, 81st Cong., 2d Sess., 17 (1951) (claims the Commission fails to select cases properly).

For statistical evidence showing a definite trend in FTC activities towards prosecutions of small businesses, see STAFF OF HOUSE SELECT COMMITTEE ON SMALL BUSINESS, 84TH CONG., 1ST SESS., *REPORT ON ANTITRUST COMPLAINTS* (Comm. Print 1956) 2.

4. See, e.g., *ibid.*; H.R. REP. No. 2238, 86th Cong., 2d Sess. (1961).

5. See *Sandura Co. v. FTC*, 339 F.2d 847 (6th Cir. 1964).

6. See, e.g., ATTORNEY GENERAL'S COMMITTEE ON ADMINISTRATIVE PROCEDURE, *FINAL REPORT* (1941); PRESIDENT'S COMMITTEE ON ADMINISTRATIVE MANAGEMENT (1937); UNITED STATES COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, *TASK FORCE REPORT ON LEGAL SERVICES AND PROCEDURES* (1955).

7. See, e.g., MASON, *THE LANGUAGE OF DISSENT*, 68, 85 (1959).

against large firms⁸ and desires to build a good record by litigating against firms less able to defend themselves.⁹ In response the Commission could deny the existence of any adverse effects upon small businesses, claim its inability to change these effects, or admit and justify them on policy grounds. Whatever the appropriate response, the Commission has never dealt with its critics in any systematic or convincing way, perhaps out of a desire not to give credence to their criticisms. But this silence seems unwise and improper. If the FTC can disprove the factual basis of the criticism, it is impolitic not to do so. If a policy decision has led the Commission to concentrate on small business the decision should be made explicit so that Congress and the courts can review the decision and so that small businesses can accommodate themselves to the policy.

In order to assess the factual basis of the criticism the *Journal* surveyed all the firms with which the FTC had reached settlement or concluded litigation in antitrust cases from January, 1963 through June, 1965. The survey concentrated on three operations of the Commission, (1) selection of cases, (2) investigation, and (3) pre-hearing settlement. Of the approximately 500 firms questioned, 170 replied. Ninety-eight questions were asked concerning the firm and its relations with the Federal Trade Commission (the questionnaire itself is set forth in Appendix A). Some possible defects in the survey should be noted. The responses received may not represent a cross section of the firms polled. Perhaps a disproportionate number of small firms answered. Or perhaps only firms biased against the Commission responded. And, factual inaccuracies, whether innocent or intentional, may have been reported. Some of these possibilities could not be minimized. Since the FTC provided no figures about the size of the firms which did not answer, we could not be sure of the sample we received.¹⁰ And, of course, it is extremely difficult to detect inaccuracies, although questionnaires which were internally inconsistent or which seemed excessively biased were excluded from the count. In spite of these possible difficulties the survey seemed useful. It lends some support to the claims of

8. See *House Hearings op. cit. supra* (concerning charges that Goodyear Tire and Rubber was not prosecuted by the Commission because the White House had packed the Commission); Herring, *Politics, Personalities and the Federal Trade Commission*, 28 AM. POL. SCI. REV. 1016, 1023-25 (1934).

9. Connor, *FTC Procedure Revisions: A Critique*, 7 VILL. L. REV. 359, 361 (1962); MASON, *op. cit. supra* note 7 at 305.

10. The Commission has some information on the cases it is concerned with as to sales, assets, etc. This information, however, is not compiled in a readily usable form. Letter to author from Paul Rand Dixon, Chairman of the Federal Trade Commission, Dec. 1, 1965, on file at office of Yale Law Journal.

the Commission's critics; the responses revealed that the FTC may be having a disproportionate impact on smaller firms and may be treating them unfairly. If a more comprehensive study refutes the accuracy of these conclusions, then, of course, the critics will be silenced. But only the Commission has information or the means of obtaining information enough to refute the possible inferences drawn from the data.

SELECTION OF CASES FOR INVESTIGATION

To choose cases for investigation the Commission relies very heavily¹¹ on private letters of complaint.¹² These letters are informal, signed charges that the complainant believes someone—usually a customer, supplier or competitor—has committed an antitrust violation.¹³ From the large weekly batch of letters, which are encouraged by the Commission's refusal to disclose the name of the complainant,¹⁴ "private controversies"¹⁵ and obvious non-violations are eliminated. After this step¹⁶ the procedure for further selection rests upon an unclear standard—the "public interest."¹⁷

11. Cases for investigation can also arise through recommendations by the Commission's Bureau of Economics. 16 C.F.R. § 1.11 (Supp. 1965). See Dixon, *Practice and Procedure before the Federal Trade Commission*, 9 N.Y.L.F. 31, 45-47 (1963). Suggestions for subjects of study are made to the Bureau by Congress, the Executive, or other branches of the Commission. See 1962 FTC ANN. REP. 75. These investigations have, at times, significantly advanced national antitrust policy or led to other major legislation; for example, the Securities Act of 1933, 48 Stat. 74 (1933), 15 U.S.C. § 77a-77aa (1964) and the Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C. § 77b-78hh (1964). See UNITED STATES COMMISSION ON THE ORGANIZATION OF THE EXECUTIVE BRANCH *op. cit. supra* note 3, at 123. But recent investigations demonstrate a tendency for the Bureau to be primarily concerned with small business problems. For some of the less significant investigations begun by the Bureau of Economics, such as ones of insignia manufacturers and calcium arsenate manufacturers, see 1962 FTC ANN. REP. 138, 158. Other relatively minor concerns have been, for example, the steel furniture industry—dividing \$35,000,000 sales between forty firms—and the machine embroidery industry—dividing \$14,000,000 sales between some 400 firms. H.R. REP. No. 3236, 81st Cong., 2d Sess., 88 (1951). For the recent decline in the proportion of FTC resources devoted to the Bureau of Economics compare 1930 FTC ANN. REP. 25 with 1964 FTC ANN. REP. 41.

12. 16 C.F.R. § 1.12 (Supp. 1965). Authority to issue rules arises from Federal Trade Commission Act, 38 Stat. 721 (1914), 15 U.S.C. § 46 (1964).

13. 16 C.F.R. § 1.12(a), (b) (Supp. 1965).

14. 16 C.F.R. § 1.12(d), 28 Fed. Reg. 7081 (1963). 1366 complaints were received in 1964. 1964 FTC ANN. REP. 19.

15. 16 C.F.R. § 1.13 (Supp. 1965).

16. The courts have given the Commission wide discretion in the selection of the cases it wishes to prosecute. See, *Moog Industries v. FTC*, 355 U.S. 411, 413 (1958); *FTC v. National Lead Co.*, 352 U.S. 419, 428 (1957).

17. Address by Philip Elman, Federal Trade Commissioner, before the Federal Bar Assn., Sept. 11, 1964. See *FTC v. Klesner*, 280 U.S. 19 (1929); *FTC v. Winsted Hosiery Co.*, 258 U.S. 483 (1922).

The survey indicated that a firm with gross sales of \$2,000,000 or less was twice as likely as a firm with gross sales of more than \$2,000,000 to send letters of complaint.¹⁸ Since firms in the former group constitute more than 90% of the business units in the United States, these smaller firms must account for a vast majority of complaints received by the FTC.¹⁹ Further, at least two-thirds of the complaints lodged by firms with less than \$2,000,000 in gross sales are directed against other firms of similar size.²⁰ Inevitably, reliance on private letters of complaint

18. The question asked was "Have you ever written a letter to the Commission complaining of the activities of a supplier, competitor or customer?"

Quarter	Yes	No
1.	30	2
2.	24	1
3.	15	10
4.	11	19

} below \$2,000,000
} annual sales
} above \$2,000,000
} annual sales

In the above table, and in subsequent tables contained in succeeding notes, the numbers on the left represent the firms answering the survey divided into quarters. Of all firms responding, the smallest quarter in annual sales is subsumed under #1; of the responding firms, the quarter with the next highest gross sales is subsumed under #2, and so on. The annual sales dividing line between groups #2 and #3 is \$2,000,000. The number of responses in each quarter does not always equal the number in every other quarter. This results from the fact that though the firms responding were broken down into four equal groups not all firms in each group answered all the questions.

19. U.S. DEPT. OF TREAS., INTERNAL REVENUE SERVICE, 1961-1962 U.S. BUSINESS TAX RETURNS, 166, 178.

20. The question asked was "How many complaints have you written?"

Quarter	None	One	Two or More
1.	2	6	10
2.	2	4	6
3.	9	4	0
4.	11	4	0

} below \$2,000,000
} annual sales
} above \$2,000,000
} annual sales

"What size was your competitor? Was the firm you complained about a direct competitor of the same size as your firm? Considerably larger? Smaller?"

Quarter	Same Size	Larger	Smaller
1.	12	7	11
2.	10	9	10
3.	8	10	7
4.	8	10	6

} below \$2,000,000
} annual sales
} above \$2,000,000
} annual sales

Many firms, in a single letter of complaint, reported activities of more than one firm. As a result, for example, the four complaints by the largest quarter of firms implicated twenty-four individual firms.

See also, WILCOX, PUBLIC POLICIES TOWARDS SMALL BUSINESS, 252 (1955).

directs the Commission against a large number of smaller businesses.²¹ In fact, of the 170 reporting firms, all of which were objects of action by the Commission, half had gross sales of \$2,000,000 or less. These small firms account for only 25% of total gross sales of all firms in the United States.²² Assuming that our figures can be extrapolated, and that approximately half the firms before the Commission have gross sales of less than \$2,000,000, there is at least some support for the complaint of the critics that the FTC is devoting too much time to the investigation of these small firms and is having a disproportionate impact upon them.

Several explanations might be advanced by the Commission to account for its concern with small firms: The Commission might allege that small firms commit half of all antitrust violations and thus should constitute half the caseload. Alternatively, the FTC could argue that small firms take less time to prosecute, and therefore the Commission is applying its resources efficiently by prosecuting a large number of them. These justifications would be sound only if all antitrust violations, no matter what the size of the violator, were considered to be of equal importance. This view of antitrust violations sees antitrust law as a code of business ethics and disregards completely the impact of the violation on the economy. But it is quite likely that this conception of antitrust law is not shared by Congress or the courts.²³

One important function of antitrust law is to promote efficient allocation of resources in the economy.²⁴ Even if this function is not

21. Baum, *Antitrust Functions of the Federal Trade Commission: Area Discrimination and Product Differentiation*, 24 FED. B.J. 579 (1964). One firm recently prosecuted had net assets of \$16,000 and net profits of \$460. STAFF REPORT *op. cit. supra* note 3, at 3, 17. See Note, 38 IND. L.J. 377, 383 (1963).

22. U.S. DEPT. OF TREAS., INTERNAL REVENUE SERVICE, 1961-1962 U.S. BUSINESS TAX RETURNS, 166-78.

23. Of course, the Commission's function is, at least in part, to police immoral conduct. The view of the Commission as a regulator of fair play and ethics is especially strong in the fields of false labeling, e.g., the Flamable Products Act of 1953, 67 Stat. 111-15 (1953), 15 U.S.C. §§ 1191-1200 (1964), and false advertising, Federal Trade Commission Act, 52 Stat. 111-14 (1938), 15 U.S.C. §§ 52-54 (1964). In dealing with these practices the Commission need not concern itself with their impact on the national economy. Instead, the Commission's role is to protect individual citizens. Since the injured citizen is the best source of information, the letter of complaint procedure is an appropriate device for aiding the Commission in its policeman's role.

But in the antitrust field, many hold the view that the Commission was meant to be something other than a "policeman." In that field "the task of the Commission [was] not to punish the wicked, but rather to . . . free competitive forces." Herring, *supra* note 3, at 1016, 1019. It was meant to deal with industrial structure in a manner foreclosed to the courts by the nature of the judicial process.

24. See, KAYSSEN & TURNER, ANTITRUST POLICY 11-14 (1959).

the only one, the Commission should not ignore it. The economic impact of a particular antitrust violation should be considered when the Commission decides to prosecute. Using this consideration the Commission's present caseload could be justified only if small firms committed many more violations or took much less time to prosecute than larger firms. For example, a violation committed by a firm with annual sales of \$200,000,000 might have one hundred times the economic impact of a similar violation committed by a firm with annual sales of \$2,000,000. The Commission could legitimately prosecute the smaller firm only if the larger firm took more than one hundred times as long to prosecute as the smaller firm, or if the smaller firm were one hundred times more likely to commit the violation than the larger firm.

If the present case distribution is inadvertent, the Commission should correct itself by reviewing more closely the letters of complaint and choosing subjects of Commission action according to their economic impact. If, on the other hand, the Commission distributes its cases consciously, and if Congress rejects one of the proffered rationales, remedial legislation should be passed.²⁵

The most effective way to restrain the Commission from convicting a disproportionate number of small firms would be to establish a minimum size (sales, income, assets, or some other measure) as a condition of the Commission's jurisdiction.²⁶ This minimum would insure that the firms and practices with which the Commission concerned itself were important to the economy.²⁷ And perhaps the decreased number

25. There is another possible reason for the Commission's present distribution of cases. Perhaps unique factual situations involving small firms provide the best opportunities for developing and clarifying the legal position of the Commission. If this is the case the high incidence of small firms before the Commission would result from legal strategy decisions rather than policy choices.

26. It is beyond the purpose of the note to suggest such an amount. Its exact level is best set by experts. Such a change need not be politically impossible given the continuous criticism by Congress the Commission has undergone. See, HOUSE SELECT COMMITTEE ON SMALL BUSINESS, CONGRESS AND THE MONOPOLY PROBLEM, 1900-1956, 84th Cong., 2d Sess. (1956).

27. Such a jurisdictional limitation has been used to deal with the caseload of other administrative agencies. The National Labor Relations Board adopted such a jurisdictional minimum in 1954. The reasoning that motivated the National Labor Relations Board to adopt a jurisdictional minimum is applicable to congressional supervision of the FTC:

In making these modifications, we have given due consideration to all of the criteria . . . including (1) the problem of bringing the caseload of the Board down to a manageable size, (2) the desirability of reducing an extraordinarily large caseload in order that we may give adequate attention to more important cases, (3) the relative importance to the national economy of essentially local enterprises, as against those

of individual complaints would create pressures within the Commission to develop comprehensive studies which would help the FTC fulfill its policy making role.²⁸

An important criticism of the proposed legislation may be suggested. A minimum jurisdictional requirement would remove a large number of firms from the FTC's control. However, firms below the jurisdictional minimum would not be left completely unregulated. Their intrastate transactions would be subject to the regulation of state commissions which, in many respects, are similar to the FTC.²⁹ Moreover, effective antitrust violation may cause a firm to grow enough to bring it within the Commission's jurisdiction. And small firms which join together to violate the antitrust laws could be treated together for purposes of the jurisdictional amount.³⁰

INVESTIGATION OF CASES

Following the selection of a case for investigation, FTC personnel visit the party under investigation to ask preliminary questions and to look at relevant documents.³¹ If this visit does not yield all the information the Commission desires, it can subpoena questionnaires, documentary evidence, and testimony.³² But the courts have held that

having a truly substantial impact on our economy, and (4) overall budgeting policy and limitations.

Breeding Transfer Co., 110 N.L.R.B. 493, 497 (1954). Their decision was subsequently affirmed by the Supreme Court, *Guss v. Utah Labor Relations Board*, 353 U.S. 1 (1957). Congress limited the Board's power to raise its jurisdictional minimum beyond the level set in 1954, but did not seek to reverse the Board. 73 Stat. 541 (1959), 29 U.S.C. § 164(c)(1) (1964).

Similar jurisdictional limits have been imposed by the Securities and Exchange Commission. Securities and Exchange Act, 48 Stat. 75 (1933), 15 U.S.C. § 77c(b) (1958); 1 FED. SEC. L. REP. ¶ 2359. See HERWITZ, *CASES AND MATERIALS ON BUSINESS PLANNING*, Part I, 158 (Temp. ed. 1964). A final example is from the antitrust field. The Clayton Act has a minimum jurisdictional amount in cases involving interlocking directorships. 38 Stat. 732 (1914), 15 U.S.C. § 19 (1958).

28. Presumably, the Bureau of Economics would fill this role of developing comprehensive studies. See note 11, *supra*.

29. See 4 TRADE REG. REP. ¶ 35002-40508. The pre-emption problem could be dealt with by national legislation. It should be noted in addition that the Justice Department would have jurisdiction in these areas, even if the Commission instituted a jurisdictional minimum. For general problems of federal-state overlap jurisdiction in the antitrust field see *1961 Antitrust Law Symposium*, N.Y.S. BAR ASS'N, SECTION ON ANTITRUST 18-20; Mantzoros, *Federal-State Antitrust Jurisdiction*, 9 N.Y.L.F. 74 (1963).

30. Presumably this qualification would cover those firms engaging in illicit practices which split off "independent" firms in order to remain outside the jurisdictional minimum.

31. Dixon, *Practice and Procedure before the Federal Trade Commission*, 9 N.Y.L.F. 31, 47 (1963).

32. 16 C.F.R. §§ 1.34, 1.35, 1.37, 1.38, 1.39 (Supp. 1965).

investigators must notify parties under investigation before they have any obligation to give information.³³ And subsequent to such notice the investigators from the Commission may look only at relevant documents.³⁴

The survey revealed, however, that FTC investigators have ignored these limitations with a frequency that increases as the size of the firm under investigation decreases.³⁵ For example, for firms with gross sales less than \$2,000,000 the following pattern was not uncommon:³⁶ on several occasions the investigator either arrived at the firm after normal business hours or went to an officer's home without prior notice; often no specific charges were announced, or if announced, they were addressed only to officers or employees, such as accountants or secretaries, whose familiarity with the legal aspects of an investigation was negligible; the investigator rarely mentioned that the firms had

33. As to the general protection afforded all corporations against unreasonable searches and seizures etc. by any governmental branch or agency see *United States v. Morton Salt Co.*, 338 U.S. 632 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1945); *Tractor Training Service v. FTC*, 227 F.2d 420 (9th Cir. 1955).

34. See, *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1945); *FTC v. American Tobacco Co.*, 264 U.S. 298, 306 (1924).

35. For criticisms of FTC investigations see, Pollock, *Precomplaint Investigations by the Federal Trade Commission*, 9 ANTITRUST BULL. 1, 10, 14 (1964); Rockefeller and Wald, *supra* note 3, at 257, 267; Connelly, *The Commission's Power to Conduct Field Investigations*, 14 A.B.A. ANTITRUST SECTION 18, 22 (1959).

36. The profile of Commission investigation procedures described here is a composite of several questions asked in the survey. The questions asked were "What sorts of information have they (investigators) asked for (when they came to the company offices)?" Most small firms replied "all," "everything" or the like. Some other questions asked were "How much advance warning (of the investigator's visit) did you have?"

Quarter	None	24 hours	A week or more	
1.	10	7	6	} below \$2,000,000 annual sales
2.	11	4	6	
3.	2	1	17	} above \$2,000,000 annual sales
4.	1	1	16	

"Did the notice tell you specifically what you were being investigated for and what information the FTC wanted from you?"

Quarter	Yes	No	
1.	3	13	} below \$2,000,000 annual sales
2.	3	15	
3.	9	3	} above \$2,000,000 annual sales
4.	13	4	

a right to wait for a subpoena. As a result the Commission gained access to all files.

In contrast to the procedures used in investigating these firms, in three quarters of the cases involving larger firms, the investigator notified the firm's legal officer that he was interested in a particular alleged offense and wanted to see specific documents; upon arrival the investigator reported to the legal officer and requested information which was usually limited to that which could be obtained by subpoena.

There is little indication that the treatment of small firms was intentionally different from the treatment of other firms. Since many small firms have no legal officer, it may be that investigators had to question accountants and secretaries who could supply the necessary information. And the request to look through all company files may have been justified by the company's size or by its filing system.

Perhaps the Commission is unaware of the treatment accorded small firms under investigation. If so, the Commission should adopt and follow uniform investigative procedures. For example, investigators should give adequate notice to all parties of the Commission's intent to investigate. This notice should contain a description of the complaint that has been filed against the party, a summary of the information desired, and a statement that such information cannot be compelled by the Commission without a subpoena. The adoption of this procedure would insure that small firms would not be easier to prosecute merely because they were unaware of their rights.³⁷

Another aspect of the FTC's investigative procedures has an unduly harmful effect on small firms. After the field investigation the Commission may hold an investigative hearing. This hearing can relate to any subject of interest to the FTC³⁸ and need not be based upon a specified complaint.³⁹ The hearing itself can cover all aspects of a firm's finance and management,⁴⁰ exposing information such as price

37. There is some precedent for such a requirement. The Federal Food, Drug, and Cosmetic Act now contains such provisions. Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 67 Stat. 476 (1953), 21 U.S.C. § 374(a), (b) (1964). Their addition to the original act was due in part to one Supreme Court decision finding fault with the vague wording of the act, *United States v. Cardiff*, 344 U.S. 174 (1952), and to abuses, such as have occurred by Commission inspectors seeking violations of the act. 1953 U.S. Code Cong. & Ad. News 2198. See *United States v. Maryland Baking Co.*, 81 F. Supp. 560 (N.D. Ga. 1948).

38. 16 C.F.R. § 1.35(b) (Supp. 1965).

39. 16 C.F.R. § 1.35 (Supp. 1965).

40. See *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953); *Claire Furnace Co. v. FTC*, 274 U.S. 160 (1927); *FTC v. Tuttle*, 244 F.2d 605 (2d Cir. 1957), *cert. denied*, 354 U.S. 925

lists, invoices, purchase orders, and dollar and unit sales figures.⁴¹ Although an investigated party has a right to hired counsel,⁴² he is given few other procedural safeguards.⁴³ For example, the Commission limits his right to challenge either specific questions or the general scope of the hearing.⁴⁴ Until 1961 these hearings were conducted in private⁴⁵ to prevent competitors from using information gathered against the company under investigation and to avoid tainting the reputation of any innocent party.⁴⁶ In that year the Commission held its first public investigation.⁴⁷ Others have followed. The Commission, however, continues to hold many of its investigative hearings in private and appears to decide on an ad hoc basis which kind of hearing to hold. Only 20% of the firms investigated publicly are later prosecuted.⁴⁸

The survey revealed that small businesses are subjected to public investigation more often than large ones, and that small firms appear to suffer more from the adverse publicity that sometimes follows the hearing.⁴⁹ For example, small firms reported more injury than did large firms resulting from public accusations against officers.⁵⁰ This result

(1957); *Menzies v. FTC*, 242 F.2d 81 (4th Cir. 1957), *cert. denied*, 353 U.S. (1951); *FTC v. Hallmark Inc.*, 265 F.2d 433 (7th Cir. 1959).

41. See *FTC v. Hallmark Inc.*, *supra*; *FTC v. Bowman*, 248 F.2d 456 (7th Cir. 1957); *FTC v. Tuttle*, *supra*.

42. See 16 C.F.R. § 1.36(b) (Supp. 1965).

43. 16 C.F.R. § 1.36 (Supp. 1965). There is no right to cross examine, to produce evidence, etc.

44. 16 C.F.R. § 1.36(b)(4) (Supp. 1965). See Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. § 1001 (1964).

45. See, 16 C.F.R. § 1.41 (Supp. 1964); 24 ANTITRUST & TRADE REG. REP. A-9, 10 (1961).

46. 5 TRADE REG. REP. ¶ 50,117 (1963). Adequate publicity results, of course, if and when the wrongdoer is brought before the Commission for an adjudicatory hearing. Baum and Baker, *Enforcement, Voluntary Compliance and the FTC*, 38 IND. L.J. 32 (1960).

47. 5 TRADE REG. REP. ¶ 50,117 (1963).

48. Compare 3 TRADE REG. REP. ¶ 10,367 (FTC investigations) with 3 TRADE REG. REP. ¶ 25,021-25,502 (dockets of complaint). The survey substantiated what a careful examination of the Trade Regulation Reporter shows—many are investigated but few are prosecuted.

49. The Commission puts out releases on all cases and investigations. Baum and Baker, *supra* note 47, at 340.

50. The question was, "Did officers of your firm suffer personally from bad publicity?"

Quarter	Yes	No	
1.	5	20	} below \$2,000,000 } annual sales
2.	4	18	
3.	10	15	} above \$2,000,000 } annual sales
4.	10	15	

"Did the personal accusations hurt your sales?"

seems natural since large firms often have institutional images unrelated to any particular officer. Moreover, small firms could not repair their images as easily by firing the officer since he was more probably a substantial owner.⁵¹ In highly fragmented industries many small firms complained that their competitors used these public accusations to seek business.⁵² Large firms did not make similar complaints, apparently because their markets are more stable and because their customers would have considered such tactics bad form. The public hearing also exposes information which is normally guarded closely by small firms. The disclosure of this information could change a small firm's profit to a loss.

Quarter	Yes	No	
1.	21	1	} below \$2,000,000 annual sales
2.	25	2	
3.	4	15	} above \$2,000,000 annual sales
4.	2	15	

See, *What Makes the Trust-Busters Run: Where Are They Going*, 59 NEWSWEEK Ap. 23, 1962, pp. 76, 77.

51. The question asked was, "Were officers later proven involved in the illegal activity fired?"

Quarter	Yes	No	
1.	25	3	} below \$2,000,000 annual sales
2.	26	5	
3.	4	19	} above \$2,000,000 annual sales
4.	4	17	

"If not, why not? Were they major stockholders?"

Quarter	Yes	No	
1.	16	3	} below \$2,000,000 annual sales
2.	10	8	
3.	10	6	} above \$2,000,000 annual sales
4.	9	6	

52. The question asked was, "Did your competitors take advantage of that publicity (derived from the hearings) against you?"

Quarter	Yes	No	
1.	20	2	} below \$2,000,000 annual sales
2.	15	4	
3.	6	14	} above \$2,000,000 annual sales
4.	4	20	

The Commission has justified public hearings on the grounds that they enlighten the public, uncover "information of value," and reveal violations.⁵³ However, only the first ground justifies a public, rather than a private, hearing. And the public, it would seem, can be adequately enlightened by adjudicatory hearings, which are held after a complaint is issued.⁵⁴ In one case⁵⁵ in which the Commission's power to hold public hearings was questioned in court, the Commission revealed a lack of confidence in its justifications. There the Commission terminated proceedings⁵⁶ rather than respond to charges that the hearing violated constitutional rights of the investigated party.⁵⁷ The Commission should follow its better instincts and discontinue the use of public hearings.

SETTLEMENT OF THE CASE

Following a determination that a violation has occurred, a case may be settled or litigated. One method of settlement is "on an informal nonadjudicatory basis."⁵⁸ This informal settlement might be merely an oral understanding. It is not made public since, officially, only an investigation of facts has been made, and there exists no Commission complaint to settle.⁵⁹ In making such determinations to settle, the Commission claims that it:

will consider (a) the nature and gravity of the alleged violation; (b) the prior record and good faith of the parties involved; and (c) other factors, including, where appropriate, adequate assurances that the practice has been discontinued and will not be resumed.⁶⁰

53. See 3 TRADE REG. REP. ¶ 10,114; *Hall v. Lemke*, 1962 TRADE CAS. ¶ 70,338 (N.D. Ill.).

54. 16 C.F.R. § 3.15-3.20 (Supp. 1965).

55. 3 TRADE REG. REP. ¶ 10,114; 1962 TRADE CAS. ¶ 70,338 (N.D. Ill.).

56. 3 TRADE REG. REP. ¶ 10,114.

57. *Archer v. Lemke*, 1962 TRADE CAS. ¶ 70,417, *Archer v. Lemke* (N.D. Ill.); *Hall v. Lemke*, 1962 TRADE CAS. ¶ 70,338 (N.D. Ill.). Respondents in these cases contended they had full right to counsel similar to those granted in private hearings. See *Wanderer v. Kaplan*, 1962 TRADE CAS. ¶ 70,535 (D.D.C.), in which the court ruled that the procedural safeguards of the Administrative Procedure Act, 60 Stat. 240 (1946), 5 U.S.C. § 1005, applied equally to investigative as well as adjudicative proceedings. See *Hannah v. Larche*, 363 U.S. 420 (1960), for some of the limits to this right, and *FCC v. Schreiber*, 201 F. Supp. 421 (S.D. Cal. 1962). See Note, 72 YALE L.J. 1227 (1963).

58. 16 C.F.R. § 1.21 (Supp. 1965).

59. 3 TRADE REG. REP. ¶ 9733. See 1952 FTC ANN. REP. 53.

60. 16 C.F.R. § 1.21 (Supp. 1965). Though this regulation was first promulgated in 1963, the 1961 FTC ANN. REP. states at 25:

The Commission closed 892 investigations [during the year]. Most of those were closed because the investigations disclosed no basis for corrective action. However, 216 were closed upon receipt of assurances of discontinuance of the questioned practices, and 67 were closed because the practice had been abandoned before the investigation got underway and it did not appear that the practice would be resumed.

There exist a second, more formal, method of settlement. Prior to the issuance of a formal complaint, the Commission sends to the party a proposed consent order.⁶¹ If, within ten days,⁶² the party notifies the Commission of its willingness to agree to a consent order, it then has thirty days in which to attempt to negotiate different terms for the order.⁶³ The Commission, however, never agrees to partial settlements; the party may not choose to admit some violations and to litigate others. If the party finally agrees to an order, it is released to the public. By agreeing he waives his right to question the Commission's jurisdiction⁶⁴ or to seek appeal in the courts,⁶⁵ and he promises to cease performance of the acts specified in the order. If the party later breaks the promise, he is subject to the same sanctions which the Commission could employ if a respondent violated a cease and desist order filed after an adjudicatory hearing.⁶⁶ If the party does not consent, a formal complaint is filed and an adjudicatory hearing is begun.⁶⁷

The survey demonstrated that the more favorable, informal and private method of settlement is used with large firms more often than with smaller firms.⁶⁸ In fact, 90% of the firms with less than \$2,000,000

61. 16 C.F.R. § 2.1 (Supp. 1965).

62. 16 C.F.R. § 2.2(a) (Supp. 1965).

63. 16 C.F.R. § 2.4(a) (Supp. 1965).

64. 16 C.F.R. § 2.3 (Supp. 1965).

65. *Ibid.*

66. Even after the consent order is negotiated, the Commission has the option of accepting or rejecting the order, or taking "such other action as it may deem appropriate." 16 C.F.R. § 2.4(b)(3) (Supp. 1965). Presumably, this includes sending both parties back to the bargaining table to get an order more agreeable to the Commission. The Commission itself might suggest modifications which would make the order more acceptable to it. If the Division of Consent Orders feels agreement is unlikely between the respondent and itself on what it considers proper terms it can turn the matter over to the Commission which can "take such action as may be appropriate." 16 C.F.R. § 2.4(c) (Supp. 1965). Again, this would presumably allow further negotiations whether or not the thirty days had run. There is no indication, however, that the Commission has used this wide latitude afforded it; rather, it appears, they have stuck fairly rigidly to the thirty day restriction.

67. 16 C.F.R. § 2.2(b) (Supp. 1965).

68. The question asked was, "When threatened with prosecution by the FTC did you settle with the Commission?"

Quarter	Yes	No	
1.	5	26	} below \$2,000,000 annual sales
2.	5	25	
3.	9	16	} above \$2,000,000 annual sales
4.	15	16	

in gross sales did not realize that informal settlement procedures existed.⁶⁹

There are several reasons why the Commission might deal with large firms more informally: The Commission may find it easier to supervise informal settlements with large firms since they are often more visible than small firms. Or it may be that large firms more faithfully honor their informal settlements. Or the Commission might consider the relative likelihood that the firm will litigate aggressively. For example, the study found 90% of the firms with gross sales of more than \$2,000,000 were unconcerned about the cost of litigation when they felt they had a good case. In marked contrast, 90% of the firms with gross sales less than \$2,000,000 feared the cost of litigation even when they felt they had a good case.⁷⁰ Only the first two justifications would be legitimate. The last, based on the litigating ability of the firm, would confer substantial advantage to firms solely on the basis of financial capacity. If there are real explanations of the present procedures, the Commission should articulate them and apply them on a non-discriminatory basis.

APPENDIX A

The following were the questions asked on the questionnaire. Statistical breakdown of the answers appears in the footnotes where the

69. The question asked was, "Did you know this option (informal settlement) was open to you?"

Quarter	Yes	No	
1.	3	28	} below \$2,000,000 annual sales
2.	3	27	
3.	17	16	} above \$2,000,000 annual sales
4.	25	7	

70. The question asked was, "Did you fear high costs of litigation (when deciding on what legal action to take in relation to the FTC proposed complaint)?"

Quarter	Yes	No	
1.	29	3	} below \$2,000,000 annual sales
2.	30	2	
3.	4	33	} above \$2,000,000 annual sales
4.	3	30	

The costs of litigation are extremely high. One figure suggested as the cost for litigation before the Commission is \$175,000. (Dixon, *supra* note 32, at 49 n.64.) Even if this figure were halved it would make litigation burdensome for any firm with sales less than \$2,000,000. In one case ten million dollars was spent by several firms over three years for a defense. Anderson, *Effective Antitrust Compliance Programs and Procedures*, 18 BUS. LAWYER 739 (1963).

questions are discussed in the text and where the answers are easily presentable statistically.

Name of firm.

Address.

At the time of FTC action what were your

assets

net profits

total sales

What is the nature of your business?

How would you characterize your industry? A few large firms which dominate the market? A mixture of large and small firms or many small firms in a highly competitive market?

Additional comments?

Have you ever written a letter to the Commission complaining of the activities of a supplier? competitor? or customer?

What was the nature of the complaint?

How many complaints have you written?

Did increases of the number of complaints coincide with a downturn in business?

Did you write often about one firm or did you complain about the activities of many firms?

Did the Commission ask for further details by a visit or letter?

If not, did they give any explanation for their action or lack of action?

Was the violation a grave and obvious one or did you merely suspect some violation might have occurred?

Were you ever reluctant to complain to the Commission about the activities of another firm because you felt that they would retaliate in the course of business?

Was this firm larger or smaller than yours?

What reasons were you given for the FTC's refusal to follow-up a complaint? The firm complained about was too small? The activity was not illegal? The case against the firm was too difficult to prove and win? Was the firm you complained about a direct competitor of the same size as your firm? Considerably larger? Smaller?

How did your firm first learn it was under investigation by the FTC due to a complaint of another? Letter? or did a FTC investigator just drop by your offices?

How much advance warning did you have?

Did the notice tell you specifically what you were being investigated for and what information the FTC wanted from you?

Did you know that you had a legal right not to answer any questions or give up any documents until subpoenaed?

Did your own counsel or the FTC investigator tell you of this right?

Who did the FTC investigator first see in the firm?

How often has your firm been investigated by the FTC?

Did FTC investigators change their approach with each successive investigation? How?

Has a subpoena been used to get information from you?

What sorts of information have been required?

Have you ever been involved in a public investigation by the Commission?

Did a prosecution of your firm arise from that investigation?

What sort of information was required from you for the public hearing?

Were your competitors also questioned at this hearing?

Was the same sort of information required from them?

Wid you find the information brought up in the hearing about your competitors useful to you?

Do you think your competitors found information gotten by them about you in the public hearings useful in their competition against you?

Can you substantiate this belief?

Did bad publicity result from the hearings? for you? for your competitor?

Were unwarranted accusations against your firm made?

Was the information asked in the form of direct testimony, documents, or answers to questionnaires?

Did officers of your firm suffer personally from bad publicity?

Did the personal accusations hurt your sales?

Were officers later proven involved in the illegal activity fired?

If not, why not? Were they stockholders?

Did the Commission use the publicity as a form of punishment against you?

When threatened with prosecution by the FTC did you settle informally with the Commission? Did you know this option was open to you?

If you tried and failed why did you fail?

What were your total legal fees for this type of settlement if you used it?

Why did you choose this method of action? Did you know you had violated the law? Did you fear high costs of litigation?

If you used this method of settlement and your competitors were not prosecuted for engaging in the same acts did the failure of the FTC to prosecute your competitors hurt your sales?

Did you settle by the use of a consent decree? Did you know this method was available to you? Who told you, the FTC or your own counsel?

Did the settlement by the use of consent decree actually involve some negotiations with the FTC or did they demand acceptance of terms on their grounds?

Why did you use the consent decree procedure? High cost of litigation? Possibility of bad publicity if you litigated? Knew you had violated the law? Fear of the triple damage suit if you litigated and lost?

Did you know no consent decree could be negotiated after a complaint issued? Who informed you of this? Your counsel or the FTC?

Would you have begun litigation if consent decrees were available

- after a complaint issued? Why? Would you like this procedure better?
Why?
- What were legal costs as a result of settlement this way?
- Were your competitors engaged in the same activities?
- Did the FTC fail to prosecute them for this?
- Was your business injured as a result?
- Did you litigate? What were legal costs? Did you win?
- Were your competitors engaged in similar practices?
- Were they prosecuted by the Commission? If not, was your firm injured
because your competitors could carry on the same activity?
- What other criticisms of the FTC do you have?

The materials collected in this survey are deposited at the Yale Law Library.