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UNLOCKING THE FEDERAL TRADE COMMISSION'S ADVISORY OPINIONS

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April 2025

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Abstract: In this paper, I study the U.S. Federal Trade Commission's Advisory Opinions and discuss how such procedure can be better used by the Commission itself and businesses to promote competition in the U.S. economy. Previous research demonstrates that other non-litigation mechanisms by the Commission, such as guidelines, have been powerful tools to the agency's competition mandate. However, with a few exceptions, Advisory Opinions have been largely underused. I analyze examples of similar tools adopted by foreign antitrust agencies, including Australia's Competition and Consumer Commission, and Brazil's Administrative Council for Economic Defense, and how they have become important for such countries' competition policy system. I conclude with takeaways and recommendations on how the Federal Trade Commission's Advisory Opinions could benefit from procedural and scope changes, unlocking its full potential to promote competition in U.S. markets.

Keywords: Federal Trade Commission; competition law; advisory opinions; guidance; procedural recommendations

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I. INTRODUCTION

The Federal Trade Commission ("FTC"), and the Antitrust Division of the Department of Justice ("DOJ") are the federal agencies responsible for enforcing the United States federal antitrust laws. The FTC and the DOJ execute their competition policy mandate notably by (i) investigating mergers, and, if required, enjoining merging parties from implementing transactions; (ii) investigating and seeking to punish anticompetitive conducts; and (iii) promoting competition through their advocacy role. In connection with their duties, the FTC and DOJ provide guidance to the public on how the agencies apply antitrust laws with the goal of ensuring transparency, legal certainty and assisting businesses to comply with the law.

A notable example of such guidance consists of the agencies' joint guidelines, such as the (i) 2000 Antitrust Guidelines for Collaborations Among Competitors;[1] (ii) 2017 Antitrust Guidelines for International Enforcement and Cooperation;[2] (iii) 2017 Antitrust Guidelines or the Licensing of Intellectual Property;[3] and (iv) 2023 Merger Guidelines.[4-5] While these documents do not intend to solve specific cases, but rather to guide society in general terms on how the agencies assess these types of business practices and how they interpret the antitrust laws, the importance of such guidelines is noteworthy. For instance, in addition to providing guidance to companies pursuing mergers, the 2023 Merger Guidelines are often seen as a persuasive source for courts when ruling on merger cases. The recent attempts by the FTC to block the mergers involving Kroger and Albertsons,[6] and the merger involving Tapestry and Capri,[7] are illustrative examples. The former consisted of the proposed acquisition of Albertsons by Kroger, a deal that would combine two of the largest grocery store chains in the United States. Following a complaint brought by the FTC, the U.S. District Court for the District of Oregon granted the agency's motion for preliminary injunction on December 10, 2024, and enjoined the merger.[8] The decision by the court referred to the 2023 Merger Guidelines to reach a finding on a number of important elements related to the merger's review, including to (i) define the relevant markets, using the hypothetical monopolist test ("HMT"); (ii) measure market concentration, using the Herfindahl-Hirschman Index ("HHI") thresholds mentioned by the Merger Guidelines; (iii) assess efficiencies defense; (iv) evaluate the remedies proposed by the merging parties; and (v) acknowledge that anticompetitive harm to labor markets are under the scope of the FTC's mandate.[9]

Similarly, the U.S. District Court for the Southern District of New York granted the FTC's motion to preliminary enjoin the proposed acquisition of Capri by Tapestry. The companies are two relevant players

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1 United States Department of Justice and United States Federal Trade Commission, "Antitrust Guidelines for Collaborations Among Competitors", (April 2000), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

2 United States Department of Justice and United States Federal Trade Commission, "Antitrust Guidelines for International Enforcement and Cooperation", (January 13, 2017), https://www.ftc.gov/legal-library/browse/antitrust-guidelines-international-enforcement-cooperation-issued-us-department-justice-federal.

3 United States Department of Justice and United States Federal Trade Commission, "Antitrust Guidelines for the Licensing of Intellectual Property", (January 12, 2017), https://www.justice.gov/atr/IPguidelines/dl.

4 United States Department of Justice and United States Federal Trade Commission, "Merger Guidelines", (December 18, 2023), https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf.

5 The agencies have also issued other types of joint guidance documents, including policy statements. See, for instance, United States Federal Trade Commission, Competition Guidance, (accessed on December 9, 2024), https://www.ftc.gov/advice-guidance/competition-guidance, and United States Department of Justice, Guidelines and Policy Statements, (December 10, 2024), https://www.justice.gov/atr/guidelines-and-policy-statements-0.

6 Fed. Trade Comm'n v. Kroger Co. (D. Or. Dec. 10, 2024).

7 Fed. Trade Comm'n v. Tapestry, Inc. (S.D.N.Y. Nov. 1, 2024).

8 The District Court ruled that the proposed merger is enjoined pending the outcome of the administrative proceeding conducted by the FTC within its internal adjudication system. However, subsequently, on December 13, 2024, the merging parties notified the FTC that they were abandoning the merger, pursuant to 16 C.F.R. § 803.12. See Kroger Company/Albertsons Companies, Inc., In the Matter of, Joint Motion to Dismiss the Complaint, (December 16, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/612381.2024.12.16_joint_motion_to_dismiss_the_complaint_public.pdf.

9 See, for instance, the following excerpt of U.S. District Judge Adrienne Nelson's opinion: "Although the Merger Guidelines are 'not binding on the courts,' . . . they 'are often used as persuasive authority.' (...) In the short time in which the 2023 Merger Guidelines have been in effect, multiple courts have cited them as persuasive authority without weighing their relative merits vis-a-vis the 2010 Merger Guidelines." Fed. Trade Comm'n v. Kroger Co. (D. Or. Dec. 10, 2024).

of the fashion industry and compete against each other in certain market segments, including the market for "accessible luxury" handbags.[10] The court's opinion, issued by the U.S. District Judge Jennifer Rochon, also relied on the 2023 Merger Guidelines "to the extent that the Court finds them persuasive."[11] The decision followed the Guidelines' framework with respect to (i) relevant market definition, including the HMT; (ii) HHI parameters for considering a market as "concentrated" or "highly concentrated"; (iii) criteria for deeming an efficiencies argument as cognizable; (iv) considering loss of head-to-head competition as additional evidence of the merger's anticompetitive effects.[12]

Pursuant to Title 16, § 1.1-1.4, of the Code of Federal Regulation, individuals and companies may request advice from the FTC regarding "a course of action which the requesting party proposes to pursue."[13] Different from other types of guidance, such as the abovementioned guidelines, these "Advisory Opinions" are targeted to deliver advice about a specific practice that is already planned, but yet to be implemented, brought by the filing company (or person), rather than a hypothetical question or ongoing conduct.[14] Advisory Opinions are meant to provide information and education to the public, in addition to providing a clear answer to the requester about a specific conduct.

However, with exception to the healthcare sector, the use of the FTC's Advisory Opinions in the U.S. competition regime has been largely underexplored. In this paper, I explore how such opinions can be further used, by discussing the main challenges that have prevented this tool from unleashing its full potential. After this introduction, in the second chapter, I present the state of the art of FTC's Advisory Opinions, including a discussion of the applicable legal framework, and some of the most notorious cases. In the third chapter, I analyze similar tools adopted by two foreign competition agencies, the Australian Competition and Consumer Commission ("ACCC"), and the Brazilian *Conselho Administrativo de Defesa Econômica* ("CADE") – Administrative Council for Economic Defense –. By analyzing the U.S. experience with Advisory Opinions, as well as the international experience of foreign antitrust agencies, I make the case that some pitfalls should be overcome so that the U.S. competition policy system can truly benefit from the FTC's Advisory Opinions.

II. THE STATE OF THE ART OF THE FTC'S ADVISORY OPINIONS

a. Legal Framework

The importance of the FTC providing guidance to businesses was acknowledged even before the creation of the agency in 1914. The predecessor of the FTC, the Bureau of Corporations in the Department of Commerce, did not have power to prosecute, but rather only to investigate companies and advise. Policymakers understood that in most cases public disclosure of anticompetitive practices would by itself be sufficient to make business correct such conduct.[15] Whenever this strategy did not work out, then the DOJ could bring a lawsuit, pursuant to the Sherman Act of 1890.

When enacting the FTC Act in 1914, which created the Commission, Congress understood that the agency should have an investigatory, regulatory, and advisory body.[16] However, in the following years, the FTC relied

10 Fed. Trade Comm'n v. Tapestry, Inc. (S.D.N.Y. Nov. 1, 2024).
11 Id.
12 Id.
13 16 CFR Part 1 Subpart A - Advisory Opinions.
14 The DOJ has a similar instrument, namely, the Antitrust Division's "Business Review". In this paper, I do not explore in detail such procedure. For more information, see United States Department of Justice, Business Reviews, (December 16, 2024), https://www.justice.gov/atr/business-reviews.
15 Paul Dixon, "The Federal Trade Commission: Its Fact-Finding Responsibilities and Powers", 46 Marquette Law Review 1, (Summer 1962), https://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=2771&context=mulr.
16 George Rublee, "The Original Plan and Early History of the Federal Trade Commission", 11 Proceedings of the Academy of Political Science in the City of New York 4, (1926), pp.115.

on its repressive functions to indirectly show companies how to behave, assuming private agents would infer from the agency's enforcement activity and findings by the courts which behavior is permissible and which is not. The lack of more concrete guidance to businesses with a more preventive nature remained a concern to policymakers that impaired the effectiveness of the competition system in the country.[17]

It was only in the 1960s that the agency faced this long-standing concern and took more direct action to "guide businessmen away from illegal methods of competition, rather than simply to exert the menace of the law against transgressors."[18] On June 1, 1962, the FTC implemented new rules of practice prescribing specific procedures that would help inform the general public about the illegality of business practices, and that would encourage the public to request formal advice from the FTC. In particular, the agency introduced two additional procedures to its toolkit, the Commission's (i) Trade Regulation Rules; and (ii) Advisory Opinions. Both tools were created to prevent, rather than halt, illegal business practices.[19] As the former Commissioner Everette Macintyre stated, these procedures aimed to address the fact that "businessmen desired guidance from the Commission before, rather than after, illegal practices had grown to such proportions that they could be dealt with only through adversary proceedings in case by case litigation."[20]

Trade Regulation Rules are designed to inform the public about "substantive requirements" of the antitrust laws.[21] The FTC issues such rules to inform about specific business practices that the FTC considers illegal.[22] They may apply nationwide or cover only specific geographies, or industries. Whenever litigation is unavoidable, the existence of a rule simplifies the proceeding, given that there is no need for presenting evidence that the conduct itself violates the law, but rather that the challenged conduct violates the rule. Examples include the FTC's rule on unfair or deceptive fees proposed on November 9, 2023,[23] and, most recently, on April 23, 2024, the rule banning non-compete clauses between employers and workers, which has raised controversy among antitrust practitioners.[24]

Through Advisory Opinions, in turn, the FTC answers requests by persons or companies on whether a proposed action (e.g., business practice to be implemented) is illegal or not, and, thus, would entail enforcement by the agency. According to Title 16, § 1.1, of CFR, the FTC will only issue an Advisory Opinion, where practicable, if the matter subject of the request involves: (i) "a substantial or novel question of fact or law and there is no clear Commission or court precedent"; or (ii) "significant public interest".[25] This provision

17 United States Federal Trade Commission, "Annual Report of the Federal Trade Commission for the Fiscal Year Ended June 30, 1962", (1962), pp.2, https://www.ftc.gov/sites/default/files/documents/reports_annual/annual-report-1962/ar1962_0.pdf.

18 Id, pp.1-2.

19 Id. It is worth noting that before the creation of the Advisory Opinions and the Trade Regulation Rules, the FTC had already put in practice other kinds of guiding mechanisms, in connection to its competition policy or consumer protection mandates. Examples include Trade Practice Rules and Guides. Trade Practice Rules are designed by the Commission jointly with members of a given industry for that industry. Trade Practice Rules often comprise definitions that help standard-setting, and prevent misrepresentation of products, geographical origins, among other specifications. See Emily Bremer, "FTC Rulemaking and the Attorney General's Committee on Administrative Procedure", Yale Journal on Regulation, (April 24, 2024), https://www.yalejreg.com/nc/ftc-rulemaking-and-the-attorney-generals-committee-on-administrative-procedure/. Guides aim to inform the public about how the Commission applies the law, according to its former decisions and courts' case law. They usually apply industrywide (e.g., Cigarette Advertising Guides) or apply to business practices that are common to some industries, such as the Deceptive Pricing Guides. Hence, these mechanisms differ from Advisory Opinions and its advice-seeking approach, which are the focus of this paper.

20 Everett Macintyre, "Statement by Everette Macintyre, Member of the Federal Trade Commission, Before a Meeting of the Salesmen's Association of the Paper Industry", (May 16, 1962), https://www.ftc.gov/system/files/documents/public_statements/683491/19620516_macintyre_statement.salesmens_association_of_the_paper_industry.pdf.

21 United States Federal Trade Commission, *supra* note 16, pp.35.

22 For more information about the scope of rules at the time and FTC's modern rulemaking authority, see J. Howard Beales and Timothy Muris, "Foreword", *in Concurrences*, "Rulemaking Authority of the US Federal Trade Commission", (2022), pp.vi.

23 88 FR 77420, pp.77420-77485. See Mary Sullivan, "On the FTC's Trade Regulation on Unfair or Deceptive Fees Proposed Rule", (January 8, 2024), https://regulatorystudies.columbian.gwu.edu/ftcs-trade-regulation-unfair-or-deceptive-fees-proposed-rule.

24 16 CFR Part 910. For commentary, see Sarah Lam, Thomas Lenard, and Scott Wallsten, "Economist Comments in the Matter of the FTC's Proposed Non-Compete Clause Rule", (April 19, 2023), https://ssrn.com/abstract=4425577; and Jared Yaggie, "An Unfair Method of Rulemaking: An Application of Constitutional Doctrines that Oppose the FTC Rule Banning Non-Competition Agreements", 92 University of Cincinnati Law Review 3, (March 2024), https://scholarship.law.uc.edu/cgi/viewcontent.cgi?article=1523&context=uclr.

25 16 CFR 1.1(a).

limits the possibilities for requesters, by narrowing the scope of the Advisory Opinion mechanism, as it will be examined in detail later in this paper. Moreover, the lack of a more precise definition of "significant public interest" may give the agency a lot of discretion when deciding whether to accept or reject a request. These two issues might undermine companies' incentives for requesting the agency's advice.

In addition to advice from the Commission itself, the legal framework clarifies that the Commission's staff is allowed to render advice, where practicable, in those circumstances in which the Commission would not give an opinion.[26] However, even in this case, staff will ordinarily only give advice if: (i) the subject matter does not consist of an hypothetical question; (ii) the subject matter is not already under investigation or has been the subject of a proceeding involving the Commission or another governmental agency; and (iii) it can render an informed opinion without undertaking an "extensive investigation", including clinical study, testing, or collateral inquiry.[27] Regardless of whether the request is analyzed by the Commission or by its staff, the requester must cite the applicable provision of law, and state all relevant facts to the agency.[28] Given its non-litigatory nature, the FTC must be able to provide advice based on the information provided by the requester, without relying on an independent investigation or undertaking an extensive market or technical analysis.[29] Anyhow, the FTC reserves the opportunity to request additional facts before rendering its advice, if necessary, as well as relying on other available information.[30] As it will be further detailed, the possibility of seeking additional information distinguishes the Advisory Opinion from some of its similar counterparts from abroad. Similarly, the FTC reveals that its staff usually does not "request information from third parties, although the staff may occasionally ask third parties to provide information on a voluntary basis."[31] This is because the agency does not have legal powers to order third parties to cooperate by providing additional information within advisory opinions, differently from mergers and conduct investigations.[32] The possibility of obtaining information from third parties is also a difference between Advisory Opinions and other tools adopted by foreign competition authorities.

With respect to the effects of the Advisory Opinion, it should be noted that the law does not specify what kind of decision the FTC may render. Differing from some foreign competition systems, the law does not prescribe whether the FTC may declare that the subject matter is lawful – and, thus, can be implemented by the requester – or not. Nevertheless, the FTC clarifies that the Advisory Opinion normally does not result in a declaration about the legality of the proposed conduct. Instead, a typical Advisory Opinion mentions the agency's intentions towards the proposed conduct (e.g., whether staff will recommend the Commission to initiate an investigation or not).[33]

The law mentions that the Commission has the right to "reconsider the questions involved and, where the public interest requires, to rescind or revoke the action", including launching an enforcement proceeding.[34] Nevertheless, the requester shall not be punished retroactively with respect to any action taken in good faith and in compliance with the FTC's Advisory Opinion, as long as all relevant facts were "fully, completely, and accurately presented."[35]

All Advisory Opinions are published, subject to limitations regarding the disclosure of certain types of confidential information.[36] The publicity of the opinions is of the utmost importance for ensuring that the goals of maximizing public awareness and encouraging compliance with the law are achieved.

26 16 CFR 1.1(b).
27 Id.
28 16 CFR 1.2(a).
29 United States Federal Trade Commission, "Guidance From the Bureau of Competition on Requesting and Obtaining an Advisory Opinion", (accessed on December 7, 2024), https://www.ftc.gov/system/files/attachments/competition-advisory-opinions/advisoryopinionguidance-bctextjune2011_update_links_oct_2015.pdf.
30 16 CFR 1.2(a) and 1.3(a).
31 United States Federal Trade Commission, *supra* note 29, pp.4.
32 Id.
33 Id, pp.10.
34 16 CFR 1.3(b) and 1.3(c).
35 16 CFR 1.3(b).
36 16 CFR 1.4.

b. Advisory Opinions in Practice

According to the FTC's website, the agency has issued a total of 134 publicly-available Advisory Opinions.[37-38] Out of this total, 119 opinions involved healthcare, while only 15 involved other sectors.[39] The advice provided by the Commission or its staff usually comes in the form of a letter directed to the companies' representatives. As stated earlier, the FTC explicitly clarifies that its opinion does not bind the agency, which retains the right to rescind its opinion at a later time.[40] Moreover, the agency informs the requester that the FTC can reconsider the questions involved and, with due notice to the requesting party, rescind or revoke the opinion "if implementation of the proposed program results in substantial anticompetitive effects, if the program is used for improper purposes, if facts change significantly, or if it otherwise would be in the public interest to do so."[41]

The FTC's public database shows that companies from the healthcare industry often seek advice from the agency regarding whether a proposed practice falls within the scope of the Non-Profit Institutions Act ("NPIA").[42] The NPIA grants exemption from the Robinson-Patman Act of 1936 – which forbids anticompetitive types of price discrimination – to purchases made by some entities directed to their own use (e.g., schools; churches; hospitals; charitable institutions not operated for profit).[43] In many cases, Advisory Opinions had different subjects, such as creating a network of physicians to engage in joint-contracting with payers (e.g., insurance companies). This was the central issue of *the Norman PHO Advisory Opinion*.[44] The FTC rendered a relatively long opinion, whereby it compared Norman PHO's proposed activities with case law, and discussed its potential impacts on competition, including horizontal, and vertical effects. The agency also reflected on the efficiencies that the proposed conduct could generate. The FTC staff concluded that it "had no present intention to recommend that the Commission bring an enforcement action against Norman PHO or its participating providers."[45]

Curiously, the number of Advisory Opinions involving other sectors is somewhat limited. The 15 opinions that are publicly available date from 1984 to 2013, and cover a number of different industries, from money transmission[46] to petroleum exploration[47] to online advertising[48]. Requesters sought clarification about the legality of different conducts, such as information exchange[49]. In *The Money Services Round Table*,[50] the FTC

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37 According to the agency's 1962 Annual Report, the FTC received a large number of requests for Advisory Opinions, notably concerning the legality of proposed quantity discounts, exclusive dealing contracts, payments of brokerage, potential restraints of trade pursuant to Section 5 of the FTC Act. See United States Federal Trade Commission, *supra* note 17, pp.37. However, the agency's website mentions a total of 134 Advisory Opinions only, and the oldest opinion mentioned on the website is from 1982. See United States Federal Trade Commission, Advisory Opinions: Other Antitrust Issues, (accessed on December 24, 2024), https://www.ftc.gov/antitrustcompetition/other-antitrust-issues?type=advisory_opinion&mission=All; and United States Federal Trade Commission, Advisory Opinions: Healthcare, (accessed on December 24, 2024), https://www.ftc.gov/antitrustcompetition/health-care-antitrust-issues?type=advisory_opinion&mission=All. This is paper is based on such 134 Advisory Opinions that are made publicly available on the agency's website.

38 Other Advisory Opinions regarded the agency's consumer protection mandate. These opinions are outside the scope of this paper, focused only on competition policy Advisory Opinions.

39 United States Federal Trade Commission, *supra* note 37.

40 See, for instance, United States Federal Trade Commission, "Yakima Valley Memorial Hospital Advisory Opinion", (August 16, 2010), https://www.ftc.gov/sites/default/files/documents/advisory_opinions/yakima-valley-memorial-hospital/100819yakimavalleyletter.pdf.

41 Id.

42 Id. See also United States Federal Trade Commission, "Alpena Public Schools Advisory Opinion", (June 16, 2006), https://www.ftc.gov/sites/default/files/documents/advisory-opinions/alpena-public-schools/061606alpena.pdf.

43 15 U.S.C. § 13c.

44 United States Federal Trade Commission, "Norman PHO Advisory Opinion", (February 13, 2013), https://www.ftc.gov/sites/default/files/documents/advisory-opinions/norman-physician-hospital-organization/130213normanphoadvltr_0.pdf.

45 Id.

46 United States Federal Trade Commission, Advisory Opinion about The Money Services Round Table, (September 4, 2013) https://www.ftc.gov/sites/default/files/documents/advisory_opinions/independent-connecticut-petroleum-association/120702petroleumstaffletter.pdf.

47 United States Federal Trade Commission, Advisory Opinion for the Independent Connecticut Petroleum Association, (July 2, 2012) https://www.ftc.gov/sites/default/files/documents/advisory_opinions/independent-connecticut-petroleum-association/120702petroleumstaffletter.pdf.

48 United States Federal Trade Commission, Advisory Opinion about the Council of Better Business Bureau Accountability Program, (August 15, 2011), https://www.ftc.gov/sites/default/files/documents/advisory_opinions/council-better-business-bureaus-inc./100815cbbbletter.pdf.

49 United States Federal Trade Commission, *supra* note 47.

50 Id.

staff evaluated whether a trade association of money transmitters would infringe antitrust law by creating a database that would compile information regarding former American sending and receiving agents whose contractual relationships were terminated due to failure to comply with federal or state laws, or money transmitting contract terms or policies.[51] The agency's staff concluded that it would hardly seek enforcement against the practice, having considered it was not an unreasonable restraint of trade. The staff reasoned that information exchanges are usually assessed through the "rule of reason", and the agency considers as relevant factors (i) the nature of the information; (ii) the quantity of information; (iii) the parties' intent in sharing the information; (iv) how the exchange is structured; and (v) how the exchange is controlled. The FTC found that the case at hand involved safeguards that mitigated antitrust concerns, notably the facts that (i) the database would be maintained and secured by a third party; (ii) participation in the information exchange was voluntary; and (ii) each participant would, by using the information, conduct its own risk assessment, and make its own judgement whether to appoint or not an agent whose name was on the database.

In another interesting case, the FTC assessed antitrust concerns related to the adoption of three standards by which the Accrediting Commission on Career Schools and Colleges of Technology ("ACCSCT") would assess schools' tuition and fees to obtain recognition from the Department of Education ("DOE").[52] The first standard aimed to measure whether the tuition and fees charged by its accredited schools were too high. If so, the ACCSCT would withdraw its accreditation from the school. The FTC compared the conduct with price-fixing arrangements observed in landmark antitrust cases, such as *Arizona v. Maricopa County Medical Society* (1982). The agency also referred to *National Society of Professional Engineers v. United States* (1978) to reject the proposed regulation of tuition levels, not accepting the argument that the proposed standard would protect consumers because "unfettered competition over tuition levels is unwise or dangerous." Similarly, the agency rejected the second proposed standard, whereby the ACCSCT would require schools to justify to students why tuition fees were supposedly high, rather than withdrawing the accreditation from the school. The staff concluded that the two proposed standards were not reasonably necessary. The third standard involved ACCSCT gathering public information about tuition fees and disclosing them to students. The FTC accepted this standard, having considered that the information was public, and already readily available, mitigating antitrust concerns.

III. LEARNING FROM INTERNATIONAL EXPERIENCE

a. Australia

In Australia, the country's Competition and Consumer Commission ("ACCC") is the federal entity in charge of enforcing Australian antitrust laws. Companies can seek ACCC's authorization to obtain an "exemption from competition law", receiving a green light to implement a business practice.[53] The agency gives clearance to activities that (i) although could be anticompetitive in theory, do not actually harm competition; or (ii) have a net public benefit.[54]

There are different types of exemption procedures, namely: (i) authorization; (ii) notification; (iii) class exemption; (iv) export agreements; and (v) trade mark certifications. The authorization mechanism applies, in general, when the requester seeks clarification about agreements between competitors, concerted practices, or misuse

51 Id. As the opinion explains, money transmissions typically involve four parties: the sender, the money transmitter's sending agent, the money transmitter's receiving agent, and the recipient.
52 United States Federal Trade Commission, Advisory Opinion to the Accrediting Commission on Career Schools and Colleges of Technology, (January 19, 1995), https://www.ftc.gov/system/files/documents/advisory_opinions/advisory-opinion-concluding-proposal-adopt-enforce-certain-accrediting-standards-tuition-fees-would/letter_to_accrediting_commission_on_career_schools_and_colleges_of_technology_-_decisions_volume_119.pdf.
53 Australia, ACCC, About Exemptions, (accessed on August 28, 2024), https://www.accc.gov.au/business/competition-and-exemptions/exemptions-from-competition-law/about-exemption.
54 Id.

of market power, including industry codes and levies, joint ventures, and joint coordination of a logistics chain.[55] This tool is the one that most resembles the Advisory Opinions by the FTC. Notifications are used for certain types of collective bargaining, exclusive dealing, and resale price maintenance ("RPM") agreements.[56] Class exemptions comprise certain collective agreements that may benefit from protection against antitrust enforcement. Examples include certain forms of small business collective bargaining.[57] Export agreements may benefit from an automatic exemption from certain competition law provisions, as long as they meet certain qualifications (e.g., notifying the ACCC 14 days prior to their implementation; not involving RPM; not relating to supply or pricing in the domestic, Australian market).[58] Trade mark certification must be approved by the ACCC. Their purpose is to show consumers that a product meets a specific standard.[59] As discussed earlier, the FTC's guidance function is an important resource for standard-setting in the United States.

Australia's "exemptions" mechanism, including its "authorization" tool, are different from the Advisory Opinions issued by the FTC on a number of issues. An important one is that such exemptions give businesses protection from legal action over the subject matter. This binding effect gives companies an incentive that requesters of Advisory Opinions do not get in the United States. Another relevant distinction relates to allowing the agency to gather additional information, including third parties – something that the FTC, and CADE hardly do –. The ACCC, not only has powers to request more information from applicants and third parties in its authorization proceedings, but it also welcomes written submissions commenting on the draft decision. The impossibility of doing this type of evidence-gathering, and consultation with third parties impairs the Advisory Opinion mechanism in the United States.

Moreover, the ACCC must abide with a time-limit of six-months – similar to CADE, in Brazil –, in general, for concluding its review over the request. However, the Australian system is open to flexibility, allowing six-month extensions as long as (i) the ACCC has made a draft decision by the initial review period; and (ii) the extension is agreed on with the requester. This kind of flexibility, which accommodates both the requester and the agency's needs could make the Advisory Opinions more attractive in the United States.

b. Brazil

CADE is the federal antitrust agency of Brazil.[60] To fulfill its competition policy mandate, CADE deploys, among other tools, the query proceeding.[61] This mechanism allows companies to submit – on a voluntary basis – queries seeking clarifications and guidance concerning the legality of commercial practices and contracts. Akin to the phenomenon observed with the FTC, the importance of CADE's advisory function has been emphasized in many forums in Brazil, including the agency itself, and the Brazilian Congress. During the discussions of the bill that led to the enactment of Brazil's current Competition Act – i.e., Law No. 12,529/2011 – the House of Representatives acknowledged that the tool had not been successful until that time, and that legislative reforms were required.[62]

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55 Australia, ACCC, Authorization, (accessed on September 9, 2024), https://www.accc.gov.au/business/competition-and-exemptions/exemptions-from-competition-law/authorisation.

56 Australia, ACCC, Notification, (accessed on September 9, 2024), https://www.accc.gov.au/business/competition-and-exemptions/exemptions-from-competition-law/notification.

57 Australia, ACCC, Collective Bargaining and Collective Boycotts, (accessed on September 9, 2024), https://www.accc.gov.au/business/competition-and-exemptions/collective-bargaining-and-collective-boycotts.

58 Australia, ACCC, Export Agreement Exemption, (accessed on September 9, 2024), https://www.accc.gov.au/business/competition-and-exemptions/exemptions-from-competition-law/export-agreement-exemption.

59 Australia, ACCC, Certification Trade Marks, (accessed on December 8, 2024), https://www.accc.gov.au/business/competition-and-exemptions/exemptions-from-competition-law/certification-trade-marks.

60 In Brazil, there are no state antitrust laws. All antitrust laws are federal, and CADE is the sole entity in charge of enforcing them. The most notable antitrust statute in Brazil is Law No. 12,529/2011, enacted in 2011. In addition, sectorial regulatory agencies also have powers to promote competition within its respective sector. See Luiz Hoffmann, Gabriel Brito, and Rafael Parisi, "Competition Enforcement and Regulatory Alternatives: Note by Brazil", Written contribution from Brazil submitted for the 71st OECD Working Party 2 Meeting, (June 7, 2021), https://cdn.cade.gov.br/Relatoriorios%20de%20gestao/2021/Cap%201/Competition%20Enforcement%20and%20Regulatory%20Alternatives.pdf.

61 Established under Article 9, § 4 and § 5 of Law No. 12,529/2011, and further regulated by CADE's Resolution No. 12/2015.

62 Brazil, House of Representatives, "Report by the Rapporteur, Congressman Ciro Gomes (PSB-Ceará), on Bill No. 3,937/2004", (September, 2007), https://www.camara.leg.br/proposicoesWeb/prop_mostrarintegra?codteor=518696&filename=Tramitacao-PL%203937/2004.

The query proceeding in Brazil has some similarities and differences with the Advisory Opinions that FTC may issue in the United States. Similar to FTC's Advisory Opinions, the Brazilian legal framework establishes that queries must be answered according to the information provided by the requester, in addition to public information.[63] CADE does not conduct an extensive inquiry, including gathering evidence, and contacting third parties within a query proceeding. Moreover, CADE's practice shows that the agency does not usually ask for additional information from the requester, even if CADE considers that the request is missing further clarifications. Thus, in practice, a requester may not have the opportunity to supplement its filing with additional information. If CADE concludes that relevant information is missing, the agency may reject the query, by denying its "admissibility."[64] The lack of an opportunity for requesters to provide additional information, and the strict prohibition on the use of CADE's evidence-gathering powers, including its power to seek information from third parties, are among the most controversial topics regarding the query procedure.[65] Only queries that satisfy the admissibility requirements prescribed in the law receive a review of their merits. A significant number of queries do not overcome the admissibility test, and, thus, are not analyzed on their merits. From January to June 2024, only 37,1% of the total queries filed before CADE passed such test.[66] Research shows that the (i) lack of sufficient facts; and (ii) impossibility of CADE rendering an informed ruling based on the information provided by the requester; were the reasons verified most often in the cases that failed the admissibility test.

Differently from the FTC's Advisory Opinions, businesses in Brazil can submit queries to the agency that are not only related to non-initiated conducts or intended mergers, but that also include practices that have already been initiated. However, as one can expect, in the majority of cases, businesses file queries concerning practices yet to be implemented. This is because, if CADE reaches a finding that an ongoing practice generates anticompetitive concerns, it may initiate an investigation to condemn and punish the company. With respect to mergers, it should be noted that CADE does not conduct an assessment of the mergers' effects, nor issues a decision clearing or deeming the merger unlawful. This type of complete assessment is not allowed in a query procedure, where no evidence-gathering, nor consulting with third parties is permitted. Instead, in merger control, queries usually relate to ancillary aspects of the analysis, such as whether a merger is notifiable or not (e.g., which companies belong to the merging parties' economic group for the purposes of the Brazilian antitrust law; if an intragroup transaction should be notified; if a joint venture or other form of non-merger arrangement should be notified). Another difference between the mechanisms adopted in the United States and Brazil is that CADE faces a specific, 120-day deadline for completing its review of the query.

The difference between the FTC's Advisory Opinions and CADE's queries related to their binding effects is of the utmost importance. In an improvement compared to previous law, the current Brazilian legal framework establishes that CADE's opinions in queries do have binding effects. That is to say, the law prescribes that CADE is committed to its ruling, which is a twofold feature. For businesses, it is a major incentive to seek queries. For the authority, having binding effects puts the agency in a delicate position. This is because the agency must issue a decision within a tight deadline and without the possibility of gathering additional information. The fear of committing type 1 (falsely convicting pro-competitive behavior) and type 2 (wrongly acquitting anti-competitive behavior) errors is arguably one the major causes that has made CADE more skeptical in admitting queries, and in issuing decisions that fully authorize business practices. However, despite this troublesome appearance, the law gives CADE some comfort by specifying and limiting the scope of such binding effects. CADE's decisions regarding queries have binding effects that don´t last more than five

63 Article 7 of CADE's Resolution No. 12/2015.
64 Pursuant to Articles 3 and 4 of CADE's Resolution No. 12/2015.
65 Rafael Parisi, "Ten Years of CADE's Resolution No. 12/2015: How Can Both the Antitrust Authority and Civil Society Make Better Use of the Query Proceeding?", Revista do IBRAC No. 2/2024, (to be published. Sent for publication in November, 2024).
66 Id.

years – CADE has discretion to set this duration –, and only to the company that filed the query – *inter partes* effect –. Furthermore, akin to the FTC, CADE has discretion to revisit its opinion if new circumstances arise. The law also gives the agency broad powers to reconsider its decision due to "new motives", an undefined term that reinforces CADE's discretion, and mitigates the agency's apprehensions in using this tool.[67]

Like the FTC's Advisory Opinions, the queries of the Brazilian competition system can enhance the effectiveness of the country's competition policy. The relevance of the proceeding is demonstrated by its ability to serve as jurisprudence, having influenced how CADE rules in future non-query cases, and final decisions on mergers and anticompetitive conduct investigations.[68] For instance, CADE set in a query procedure[69] the analytical framework for assessing companies' joint-risk and profit-sharing efforts, in order to decide whether a joint venture[70] could be considered a merger according to Brazilian law. In another groundbreaking contribution, queries[71] involving RPM and related practices have served as the forum where CADE has set forth the legal rules and methodology to analyze such conducts.[72]

For the system as a whole, such queries improve transparency, legal certainty, and promote a culture of compliance with antitrust laws.[73] For businesses in particular, queries offer an opportunity to adopt a preventive and collaborative approach with the agency, enabling them to receive guidance about the legality of business practices, generally before implementing them. Unfortunately, like the Advisory Opinions, the query proceeding has also been underused.[74]

IV. CONCLUSION

The FTC's Advisory Opinions consist of a powerful, yet underutilized tool of the U.S. antitrust framework. By offering tailored guidance on proposed business practices, these opinions could enhance legal certainty and foster compliance with antitrust laws, enabling a more competitive economy. As discussed, Advisory Opinions have already been the forum of meaningful discussions, such as whether a practice should be assessed via the rule of reason vis-à-vis per se presumptions, and how a proposed practice compares to the agency's case law. However, the current procedural and substantive limitations restrict the effectiveness of such opinions.

One significant challenge lies in the narrow scope of issues that qualify for advisory opinions under 16 CFR § 1.1. The regulation's requirement that requests involve "novel or complex" legal questions significantly reduce the accessibility of this mechanism for businesses. Moreover, the FTC retains substantial discretion to accept or reject requests, which, coupled with the broad and ambiguous concept of "public interest", creates further unpredictability. These limitations undermine the incentives for businesses to seek Advisory Opinions, hindering the outreach of the tool.

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67 Article 9 of CADE's Resolution No. 12/2015.

68 See Rafael Parisi, *supra* note 45. In that paper, I note that CADE reviewed only 35 queries from January 2015 to June 2024 (an average of roughly three queries per year). I argue that the query proceeding could benefit from procedural changes that would increase incentives for businesses, while addressing CADE's potential concerns related to issuing founded, accurate decisions with time constraints.

69 Brazil, CADE, Query No. 08700.006858/2016-78 (applicant: Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG; and Hapag-Lloyd Aktiengesellschaft).

70 Brazil, CADE, General-Superintendency's Opinion No. 374/2021 in Merger No. 08700.004247/2021-52 (applicants: Ford Motor Company; and Volkswagen AG).

71 Brazil, CADE, Query No. 08700.004594/2018-80 (applicant: Continental do Brasil Produtos Automotivos Ltda.).

72 In *Grid Pneus v. Bellenzier Pneus (2024)*, the Rapporteur's vote cited *Continental (2018)* and *Michelin (2021)* to find that RPM should be subject to the rule of reason, rather than receiving a per se illegality treatment. See Administrative Proceeding No. 08700.003266/2022-42 (claimant: Grid Pneus e Serviços Automotivos Ltda.; defendant: Bellenzier Pneus, Campneus Comercial e Importadora de Pneus Ltda.; among others).

73 For a more comprehensive analysis of CADE's query proceeding, see Rafael Parisi, *supra* note 41.

74 See Rafael Parisi, *supra* note 45. In that paper, I note that CADE reviewed only 35 queries from January 2015 to June 2024 (an average of roughly three queries per year). I argue that the query proceeding could benefit from procedural changes that would increase incentives for businesses, while addressing CADE's potential concerns related to issuing founded, accurate decisions with time constraints.

A comparative law analysis that analyzes similar procedures in other jurisdictions reveals opportunities for reform. One such opportunity consists of gathering more information about the requester and third parties, if required. While this is not forbidden in Advisory Opinions, the ACCC's authorization procedure offers a more inclusive and flexible framework for requesters, and encourages the competition authority to request additional information from both applicants and third parties. This is a feature that would allow the FTC to reduce the risk of type 1 and type 2 errors and deliver more informed opinions. While the FTC does not have legal powers to force third parties to cooperate with the agency, increasing the attractiveness of the Advisory Opinion tool could nurture a collaborative approach between the agency and private parties. Furthermore, following the examples of CADE's query procedure and ACCC's authorization process, the FTC could provide a more detailed timeline for its procedure, and also increase transparency by making all previous cases publicly available. This would create a more reliable framework for businesses.

The binding nature of such instruments is another critical consideration. The current lack of binding effects in the FTC's Advisory Opinions significantly reduces their utility, as businesses may remain hesitant to rely on guidance that could be revisited or reconsidered in enforcement actions. A procedural reform could introduce binding effects with appropriate safeguards to limit the duration of such effects, and to account for potential changes in a case's facts or circumstances, akin to what occurs in Brazil.

Unlocking the potential of Advisory Opinions is particularly important at a time in which complying with the law is becoming increasingly complex for business. Advisory Opinions could provide much-needed guidance on the application of antitrust principles in dynamic and evolving markets. Expanding the scope of eligible requests, increasing procedural transparency, and adopting a more binding and collaborative framework would not only benefit businesses seeking guidance but also enhance the FTC's ability to promote competition and protect consumers in U.S. markets.

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Cite this:
Rafael Parisi, "Unlocking the Federal Trade Commission's Advisory Opinions", *Investigaciones CeCo* (april, 2024),
http://www.centrocompetencia.com/category/investigaciones

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