September 30, 2004

REPORT OF THE SECTION OF ANTITRUST LAW OF THE AMERICAN BAR ASSOCIATION TO THE ANTITRUST MODERNIZATION COMMISSION

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INTRODUCTION

The Antitrust Section welcomes this opportunity to respond to the Request for Topics from the Antitrust Modernization Commission (the "Commission"). The Antitrust Section supports strong, effective antitrust enforcement and believes that antitrust law has contributed substantially to preventing restraints on competition that interfere with "the best allocation of economic resources, the lowest prices, the highest quality and the greatest material progress." *Northern Pacific Railway v. United States,* 356 U.S. 1, 4 (1958).

The Antitrust Section recognizes that some people are concerned with any Congressional tinkering with existing antitrust statutes and judicial precedent, while others believe that there are areas worthy of study in which changes may be desirable. In this Report, the Antitrust Section does not endorse any specific Congressional action, but instead identifies certain topics for consideration by the Antitrust Modernization Commission that have been the subject of debate within the antitrust bar for many years.[1] In doing so, the Antitrust Section recognizes that some people have urged the antitrust laws of the United States should be changed to take into account the following developments: (1) an increasingly interdependent global economy; (2) significant technological advances that provide new products and services, expand the use of intellectual property, and offer new ways and methods of doing business; (3) continuing evolution of the economic principles relevant to the antitrust laws; and (4) an increased potential for multiple governmental and private enforcement at the federal, state, and international level. While the Section does not necessarily endorse those views, it recognizes that these subjects should provoke robust discussion.

The topics for discussion fall into the following broad categories: (1) the antitrust enforcers and the remedies they seek; (2) ways to improve antitrust enforcement; (3) antitrust exemptions; and (4) issues of substantive antitrust law. The topics have been submitted in this fashion to facilitate an organized presentation; the order in which they are presented is not intended, however, to suggest

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[1] Unless specifically indicated, the Section has not taken positions on topics (and related issues) offered for potential study. All reports and letters of the ABA Antitrust Section from 1997 to the present that are cited in this report are available online by year at www.abanet.org/antitrust/comments.

any priority of importance.

A. Antitrust Enforcers and the Remedies They Seek

(1) Indirect purchasers under *Illinois Brick*
(2) State enforcement
(3) Industry regulators
(4) Foreign Trade Antitrust Improvements Act
(5) Nature, scope and efficacy of remedies
(6) The Federal Sentencing Guidelines
(7) Criminal anomalies

B. Ways to Improve Antitrust Enforcement

(1) Criteria for appointment of FTC administrative law judges
(2) Application of Sunshine Act to FTC deliberations
(3) Overlapping antitrust responsibility by the Antitrust Division and FTC for merger review and other enforcement
(4) Dividing responsibility between the FTC and Antitrust Division by industry
(5) The burdens of the Hart-Scott-Rodino Act and multijurisdictional merger review

C. Antitrust Exemptions

(1) Antitrust and the public sector
  (a) State action doctrine
  (b) Noerr-Pennington doctrine
  (c) Governmental restrictions on competition
(2) Statutory exemptions affecting United States commerce
(3) Webb-Pomerene and Export Trade Company Acts

D. Issues of Substantive Antitrust Law

(1) Repeal or amendment of the Robinson-Patman Act
(2) Further consideration of the intellectual property/antitrust "interface"
(3) Antitrust laws in the "new economy"

PROPOSED ISSUES

A. Antitrust Enforcers and the Remedies They Seek

(1) Issue for study: **Indirect purchasers under *Illinois Brick***

In light of increasing multi-party and multi-forum antitrust litigation, few antitrust issues have attracted as much interest within the antitrust community in recent years as remedies. The

Antitrust Section has considered this issue extensively,[2] especially with respect to the challenges of federal and state direct and indirect purchaser litigation, which is a consequence of the Supreme Court's decisions in *United Shoe Mach. Corp. v. Hanover Shoe, Inc.*, 392 U.S. 481 (1968), *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and *California v. ARC America Corp.*, 490 U.S. 93 (1989). In 2002, the Antitrust Section established a Remedies Task Force to consider this subject in more depth with a report expected by year-end 2004.

Therefore, the Antitrust Section encourages the Commission to give serious consideration to the following issues:

- Should federal law preempt state laws that allow indirect purchaser litigation despite *Illinois Brick*, or should *Illinois Brick* and *Hanover Shoe* be legislatively overturned?

- Should new rules be adopted to expand the authority to remove, transfer and consolidate for trial related civil antitrust cases in federal court, taking into account, among other things, the Supreme Court's decision in *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), limiting multidistrict transfer only for pretrial coordination? [3]

- Should new rules be adopted to provide coordination of criminal and civil proceedings involving the same conduct?

(2) Issue for study: The role of state enforcement

Antitrust practitioners continue to debate the role of state antitrust enforcement. Critics of state enforcement have labeled state enforcers as "free riders" that should be stripped of their antitrust enforcement rights and as a force that is unfocused and causes duplication and increased costs. Supporters of state enforcement believe that state enforcers are an important, if not essential, part of the antitrust enforcement network, a force pushing complicated problems toward workable solutions, and are advocates achieving just results and securing significant monetary relief for consumers and state purchasers.

The debate is premised on two aspects of contemporary antitrust federalism. First, state

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[2] *See, e.g.*, ABA Section of Antitrust Law, The State of Federal Antitrust Enforcement – 2001, Report of the Task Force on the Federal Agencies ("2001 Transition Report") at 24; Report of the Indirect Purchaser Task Force, 63 Antitrust L.J. 993 (1995); Report of the ABA Section of Antitrust Law Task Force to Review the Supreme Court's Decision in *California v. ARC America Corp.*, 59 Antitrust L.J. 273 (1990); Report of the ABA Section of Antitrust Law Task Force to Review Proposed Legislation to Repeal or Modify *Illinois Brick*, 52 Antitrust L.J. 841 (1984); Report of the ABA Antitrust Law Section Task Force on Legislative Alternatives Concerning *Illinois Brick*, 46 Antitrust L.J. 1137 (1978).

[3] The Antitrust Section supported the Multidistrict Litigation Act of 1999 (H.R. 2112) insofar as it would reverse the Supreme Court's decision in *Lexecon*. *See* Joint Report of the ABA Antitrust and Litigation Sections on H.R. 2112 (Nov. 2, 1999).

attorneys general, like any other party asserting a federal antitrust claim, make separate strategic decisions. States have taken enforcement action when federal enforcers have expressly declined to do so, or have expressly limited the scope of their enforcement action (including action in matters not generally pursued by private plaintiffs, such as alleged anticompetitive mergers and illegal monopolies).

Second, in addition to having different views on questions of federal antitrust laws, state attorneys general have asserted antitrust or quasi-antitrust claims under state laws. The most notable illustration of states pursuing state claims concerns cases on behalf of "indirect purchasers" under state law, despite the federal rule in *Illinois Brick* limiting the remedies available to "indirect" purchasers, as discussed above. This increasing reliance by state attorneys general and other claimants on state law has significantly complicated contemporary antitrust litigation.

Thus, state enforcement raises many important issues that the Commission may wish to address:

- What is or should be the role of state enforcement?
- How should differing merger enforcement regimes at the state and federal level or among states be reconciled?
- Should informal efforts to improve coordination among states or with federal enforcers with respect to mergers or other non-merger investigations be codified?
- Should state attorneys general be given the authority to sue under the FTC Act, thereby increasing the likelihood that actions currently brought under various state consumer protection statutes could be removed to federal court and consolidated?
- Should the system be modified to take into account the multiplicity of remedies that multiple, different plaintiffs seek?
- Is our judicial system adequate to reconcile and address the diversity and complexity that can arise with separate decision makers and separate bodies of laws?

(3) Issue for study: Antitrust enforcement and industry regulators

Some sectors of the economy are subject to federal or state regulation by industry-specific agencies but are not exempt from the antitrust laws. Under such circumstances, competition policy questions may be addressed by the industry regulator.

Some regulatory agencies choose to consider competition issues as part of a broad "public interest" mandate. These include the Federal Communications Commission (FCC) with respect to broadcasting, cable television and telephony; the Federal Energy Regulatory Commission (FERC) with respect to natural gas and electric power; and the Department of Transportation (DOT) with respect to competition among airlines. The federal antitrust agencies generally have concurrent

authority to consider competition questions arising in these industries, and private enforcement of the antitrust statutes also may be available. Similarly, banking regulators, including the Federal Reserve Board, review bank mergers, as does the Justice Department.

Other regulatory agencies consider competition issues in response to express statutory requirements vesting the evaluation of antitrust issues in the industry regulator rather than the Justice Department or FTC. For example, the Surface Transportation Board (STB) was given exclusive jurisdiction to review competition issues arising out of rail mergers, and DOT can confer antitrust immunity upon international airline alliances. The FCC reviews competition issues that arise from entry of regulated local telephone providers into long distance, subject to the requirement that it consult with the Justice Department.

These varying arrangements often share a common purpose of facilitating a transition from regulation to competition and raise issues that the Antitrust Modernization Commission could consider.

- When competition enforcement currently is vested exclusively with the industry regulator, should the antitrust agencies be given concurrent enforcement authority?

- Should exclusive enforcement authority be assigned to the antitrust agencies?

- What are the best ways to clarify the language, scope, and meaning of antitrust savings clauses in legislation establishing regulatory regimes?

Analysis of these issues, and especially the issue of whether to shift exclusive jurisdiction to the antitrust agencies, could involve probing the uniformity of governmental enforcement standards across industries. The Commission might propose to bring to bear the competition expertise of the antitrust agencies to help manage the transition from regulation to competition. Moreover, to the extent that single-industry regulators are more prey to "capture" by regulated industries than economy-wide regulators like the antitrust agencies, both approaches would protect against regulatory inaction. On the other hand, these issues, and especially whether to shift exclusive jurisdiction to the antitrust agencies, raise the question whether the industry regulator can and should harmonize competition concerns with other regulatory policies.

Similar questions arise under state regulatory regimes, including:

- Should state authority with respect to competitive issues also be vested exclusively or concurrently with the state and federal antitrust enforcement agencies?

(4) Issue for study: The Foreign Trade Antitrust Improvements Act

The Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, was enacted in 1982 to define the scope of the Sherman Act over international commerce. Congress appeared to intend to bar antitrust claims not involving domestic United States commerce or imports unless that activity produced a direct, substantial, and reasonably foreseeable effect on the United States

economy. The language of the statute has been a source of confusion for courts and commentators ever since its enactment. Open questions include:

- What constitutes a direct, substantial and reasonably foreseeable effect on the United States as a result of exporting or purely foreign commerce?

- Is proof of this effect jurisdictional or part of the cause of action itself?

- Under what circumstances can foreign plaintiffs bring suit in the United States for harm suffered abroad from allegedly global cartels?

The Supreme Court's recent decision in *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, 542 U.S. ____, 2004-1 Trade Cas. (CCH) ¶ 74,448 (June 14, 2004), left unresolved many of the outstanding questions under the FTAIA.

The Commission may wish to consider whether the FTAIA is achieving the goals intended by Congress and, if not, whether the statute should be clarified through further legislation or through additional judicial interpretation.

(5) Issue for study: Nature, scope and efficacy of antitrust remedies

In addition to considering the advisability of the rule of *Illinois Brick* and other issues pertaining to antitrust enforcement, the Commission may wish to consider the nature, scope, and efficacy of antitrust remedies in both public and private enforcement actions.

Remedies traditionally were intended to accomplish a number of interrelated goals. Most obviously, remedies are designed to deter and prevent anticompetitive conduct, to punish offenders, and to secure compensation for the victims of antitrust violations. Injunctive relief, such as behavioral and structural remedies, also can serve to restore competitive conditions and deprive the violator of the fruits of its illegal conduct. At the same time, however, the cumulative effect of the available antitrust remedies should not result in over-deterrence, which could tend to distort competitive forces.

Yet any evaluation of deterrence, compensation, and restoration must consider the broader enforcement system within which antitrust remedies operate: (1) the substantive antitrust prohibitions, the scope of which today are greatly influenced by economic thinking; (2) antitrust injury and standing rules; (3) the enforcement policies of the federal and state governments, and the allocation of their respective spheres of authority; and (4) procedural norms, e.g., current standards for class action certification, summary judgment, and expert witness admissibility. Adjusting one factor – remedies -- without taking into account the impact of that change on the overall balance of the enforcement system as a whole may result in errors of over or under-deterrence.

For the last generation, antitrust has become more complex, making it far more difficult today to mount and then prevail in an antitrust prosecution, public or private, and far more costly and risky to defend against one. Achieving the right level of compensation, deterrence, and correction

has never been a more challenging undertaking. Yet achieving and maintaining that level is a central concern for antitrust and might warrant some adjustments in the current remedial scheme.

With that cautionary note as preface, here are a number of specific areas that might warrant study by the Antitrust Modernization Commission:

- Whether to limit the scope of criminal antitrust prohibitions to hard core, *per se* violations;[4]
- Whether to clarify the extent to which or under what circumstances the FTC has authority to seek disgorgement;[5]
- Whether to grant the DOJ the authority to seek civil fines;
- Whether to better define standards for the judicial award of structural relief;
- Whether to give greater discretion for judicial or enforcement authorities to seek de-trebled treatment for more minor offenses or penalties in excess of trebling for the most serious offenses;[6]
- Whether or to what extent to authorize the award of pre-judgment interest; and
- Whether to provide clearer guidance with respect to the award of attorneys' fees in antitrust cases.

(6) Issue for study: Antitrust and the Federal Sentencing Guidelines

A number of concerns have been voiced about the Federal Sentencing Guidelines.[7] Some concerns relate to the Guidelines' impact on antitrust criminal penalties and fines. Other concerns pertain to recently proposed Guideline amendments that delineate the circumstances under which an effective compliance program or cooperation (including, among other things, waiver of the attorney-client privilege) may constitute mitigation.[8]

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[4] *Cf.* Antitrust Section Comments on the Proposed Canadian Competition Act Amendments (Sept. 2003).

[5] *See* FTC Policy Statement on Use of Monetary Remedies in Competition Cases (July 25, 2003), available at www.ftc.gov/os/2003/07/disgorgementfrn.htm. *See also* ABA Section of Antitrust Law, Comments on Remedial Use of Disgorgement (March 11, 2002).

[6] *See* Comments of the ABA Section of Antitrust Law on H.R. 1086: Increased Criminal Penalties, Leniency Detrebling and the Tunney Act Amendment (Jan. 2004).

[7] *See* ABA Resolution #121A, submitted by the Justice Kennedy Commission, 2004 ABA Annual Meeting.

[8] *See* ABA Resolution #303, submitted by the Section of Antitrust Law, 2004 ABA Annual Meeting.

The Supreme Court's recent decision about the constitutionality of the penalty enhancement provisions of the Federal Sentencing Guidelines,[9] and its acceptance of two cases that may help to resolve that uncertainty,[10] suggest that the Commission may wish to study the effect of the Sentencing Guidelines on antitrust criminal enforcement. If so, the Antitrust Section recommends that consideration of these issues be addressed after the Supreme Court has decided the pending cases affecting the application of the Guidelines.

(7) Issue for study: Criminal Anomalies

Criminal enforcement of Sherman Act Section 1's ban on hard core cartels, bid rigging, and market division is well established. Conversely, the antitrust community well understands that criminal penalties are reserved only for the most egregious violations.

Section 3 of the Robinson Patman Act, 15 U.S.C. § 13a provides that certain price discrimination shall be punished by, among other things, imprisonment for up to a year. The statute has not been enforced since the early 1960s. For various reasons, the chance of any future criminal enforcement activity under the statute is highly implausible and, in any event, criminal treatment of such conduct is probably inadvisable.[11]

Similarly, Sherman Act Section 2 declares that every person who monopolizes or attempts or conspires to monopolize "shall be deemed guilty of a felony . . . ." Yet, typically monopolization and attempted monopolization are only charged as civil offenses. Although there is no evidence of misuse, given the paucity of criminal Section 2 cases, the Commission may wish to consider adjusting this statute as well as any other antitrust statutes with criminal penalties that have not been used in the modern era.

B. Ways to Improve Antitrust Enforcement

(1) Issue for study: Criteria for the appointment of FTC Administrative Law Judges

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[9] *See Blakely v. Washington*, 542 U.S. ____, 72 USLW 4546 (June 24, 2004) (casting doubt on the constitutionality of the sentence enhancement provisions of the Sentencing Guidelines).

[10] *United States v. Booker* (No. 04-104); *United States v. Fanfan* (No. 04-105).

[11] In this regard, the American Bar Association has supported enactment of legislation that would repeal Section 3 of the Robinson-Patman Act. ABA Resolution #105, submitted by the Antitrust Section, 1987 ABA Annual Meeting. *Cf.* Antitrust Section Comments on the Proposed Canadian Competition Act Amendments, 2 (Sept. 2003) (supporting modification to the Canadian competition law where criminal sanctions "on an exceptionally broad range of conduct, much of which is likely to have ambiguous competitive effects").

The FTC is designed to be an expert adjudicative body for trying complex antitrust and consumer protection cases.[12] Consistent with that design, the FTC recently has been filing significant numbers of administrative antitrust cases. Yet, at least when appointed, some Administrative Law Judges have not had the expertise in antitrust and consumer law needed to assist in making the FTC the adjudicative body that Congress intended. Therefore, the Commission may wish to consider the criteria by which ALJs are appointed to the FTC, including:

- Whether the public and the FTC would be better served if the FTC could specify to the Office of Personnel Management ("OPM") some credentials and experience to include as part of the process of ranking candidates submitted to the FTC;

- Whether the public and the FTC would be better served by eliminating or reducing the veteran's preference (e.g., the requirement of military service) or adjusting how OPM applies it so that it is not used to discriminate against women or others who have not served in the military; and

- Whether special training in antitrust and consumer protection for those ALJs who have no or little experience in these areas would be helpful in addressing this issue.

(2) Issue for study: Appropriateness of the application of the Sunshine Act to the Federal Trade Commission

The Sunshine Act, 5 U.S.C. § 552b, impacts the Federal Trade Commission in its roles as adjudicator and as prosecutor. *See* Prepared Statement of the Federal Trade Commission Before the Special Committee to Review the Government in the Sunshine Act (Sept. 12, 1995), available at http://www.ftc.gov/speeches/other/suntest.htm. The Antitrust Modernization Commission may wish to consider whether small changes in the application of this law could improve the functioning of this important antitrust agency.

One example concerns a cautious approach to the definition of a "meeting." This matters because a "meeting" can be held only with notice. The result is that whereas two or three federal appellate judges freely can meet to thrash out differences in a draft opinion, three FTC Commissioners cannot have any such discussions. Similarly, whereas the top officials at the Antitrust Division freely can meet to discuss whether to accept a complicated consent order or to file a suit seeking massive penalties, three FTC Commissioners can have no such discussions. Closed meetings can be held on these topics, of course, but the cautious view is that this can occur only with advance public notice. The result is that the meetings simply are not held. The agency thus functions with fewer communications between the Commissioners than there should be and by letting power devolve to Commissioner attorney-advisors, who are not subject to the Sunshine Act.

Another issue concerns Exemption 10, which allows a closed meeting only to discuss agency

[12] *See* Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission ("Kirkpatrick II") (1989).

action regarding "a" civil action or proceeding or "a particular" case of formal adjudication. 5 U.S.C. 552b(c)(10). This can be read to suggest that the FTC Commissioners may not meet privately to discuss general litigation issues, such as when to charge individuals who may have control over wrongdoing, or when to seek consumer redress or disgorgement. The result is that either the Commissioners awkwardly shoe-horn such discussions into the context of a specific proceeding or that they proceed without meeting (again perhaps leaving meetings to attorney advisors).

The FTC has made great strides in increasing transparency by releasing statements that describe Commissioner thinking. But transparency has not been increased by the Sunshine Act. In the three calendar years 2000-02, the FTC held 72 closed meetings and a single open meeting. Annual Reports for 2000-2002. A governmental committee concluded that the Sunshine Act imposes costs on agency functioning without yielding any benefits. *See generally* Administrative Conference of the United States, Special Committee to Review the Government in the Sunshine Act, Public Notice of Hearing (with suggested changes to be considered), 60 Fed. Reg. 40342 (Aug. 8, 1995). Therefore, the Antitrust Modernization Commission may wish to consider the effect of the Sunshine Act on the ability of the FTC to function effectively and whether the Act should be revised at least as it applies to the FTC.

(3) Issue for study: Overlapping antitrust enforcement by the Antitrust Division of the Department of Justice and the Federal Trade Commission for mergers

So long as merger enforcement authority by two agencies (the Antitrust Division of the Department of Justice and the Federal Trade Commission) overlaps,[13] the Antitrust Modernization Commission may wish to consider whether steps should be taken to eliminate any possibility of different substantive outcomes arising from a difference in the legal standard under which the two agencies seek preliminary injunctions.

Two agencies with the same legal mandate, but with one reviewing each specific matter, may raise concerns if the outcome of agency action can differ depending on which agency reviews the matter. Some lawyers believe outcomes often differ in merger reviews depending on which agency is involved, although we are not aware of any empirical studies supporting that belief. In this regard, DOJ has to meet the regular district court standards when seeking preliminary injunctive relief and recently has simultaneously litigated requests for preliminary relief and permanent injunctive relief, subjecting itself to a full hearing on the merits and a higher standard of proof. In contrast, the FTC typically seeks only preliminary injunctive relief from the district court and does so under a standard that, as written, appears to be less demanding than that facing other litigants (including the DOJ), reserving trial on the merits for agency adjudication. Most transactions are abandoned if an injunction under any standard is granted. Thus, some lawyers believe that the apparently lower burden for the FTC could lead to different outcomes.

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[13] Report of the ABA Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission (1989) (expressing views on balance in favor of maintaining dual enforcement).

Accordingly, the Commission may wish to consider whether to propose legislation to lessen or eliminate the possibility that a different legal standard for granting an injunction could affect an outcome (and, if the legal standard should be identical, what that standard should be).

(4) Issue for study: Dividing responsibility between the Federal Trade Commission and the Antitrust Division by industry

The Antitrust Modernization Commission may wish to study whether it is appropriate to permit or encourage the Federal Trade Commission and the Antitrust Division of the Department of Justice to allocate between themselves by industry the primary responsibility for review of mergers and other enforcement matters through advance agreement.

When a transaction or nonmerger matter is subject to review by both agencies, the agencies undertake a "clearance" process to determine which one will conduct that review. The process of clearance can take considerable time when, for example, both agencies express an interest in reviewing the matter. A protracted clearance process imposes burdens on the parties seeking to merge, particularly if the delay caused by the clearance process consumes much of the initial waiting period under the HSR Act applicable to mergers, and requires parties to refile their HSR forms or face a second request.

This issue also arises in civil conduct investigations. A clearance dispute over which agency would investigate on-line music joint ventures went unresolved for more than twelve months and was ultimately resolved by an outside arbitrator.

While the current clearance process provides that matters will be assigned based on agency expertise in prior investigations, the current arrangement is inefficient and also introduces substantial uncertainty for the business community and the public.

Recognizing that "the clearance system needed to be overhauled to arrest the trend toward more frequent and time-consuming clearance disputes that delay the initiation of investigations, and to allow the agencies to concentrate expertise and resources to investigate more effectively" (DOJ/FTC Press Release dated March 5, 2002), the Antitrust Division and the FTC in 2002 announced an agreement that would allocate primary responsibility between the agencies according to industry type.[14] This agreement sparked opposition in Congress which led the agencies to scrap the agreement several months later. The Commission's consideration of this issue could therefore contribute to Congress further developing its views.

[14] The Antitrust Section supported the concept of a clearance agreement between the FTC and DOJ. *See* Letter of Roxane Busey to Charles A. James and Timothy J. Muris (January 23, 2002).

(5) Issue for study: The burdens of the Hart-Scott-Rodino Act and multijurisdictional merger review

The Antitrust Modernization Commission may wish to consider whether the merger review process created by the Hart-Scott-Rodino Antitrust Improvements Act of 1976 should be modified to be more efficient, less burdensome to the business community, and more timely, while at the same time ensuring effective merger enforcement.

The HSR Act requires parties of a certain size engaging in certain types of transactions to file reports regarding the prospective transaction and to delay consummation of the transactions until the required waiting period expires or is terminated. Originally intended to apply to only the largest transactions, the HSR Act now requires a significant number of filings every year even after its size of transaction filing thresholds were raised in 2001. Although no filing fee was originally imposed, filing fees are now an important component of Antitrust Division and FTC funding, with fees determined by the size of the transaction even though larger transactions may not impose any additional work load on reviewing staff.

The cost, burden, and delay of merger investigations can be significant for the parties and the investigators. Federal merger investigations often involve broad Second Requests, millions of pages of documents, huge quantities of data and information (particularly with the onset of electronic discovery), interviews and statements, all within the time limits imposed by the Act. In some cases, state attorneys general conduct their own premerger reviews with or without coordination with the federal agency reviewing the transaction under the HSR Act requirements. A growing number of mergers and acquisitions are also subject to notification to, and review by, multiple foreign antitrust authorities. The costs and delays of the present international system and the risks of inconsistent decisions and remedies have substantially increased the burden on transacting parties, as noted in the Final Report of the International Competition Policy Advisory Committee ("ICPAC") and the work of various working groups of the International Competition Network ("ICN").[15]

Some areas of amendment that the Commission may wish to consider include:

- Should the agencies' funding be tied to HSR fees?[16]

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[15] The Final Report of the International Competition Policy Advisory Committee can be found at www.usdoj.gov/atr/icpac/icpac.htm. Information about the activities of the merger working group of the ICN can be found at http://www.internationalcompetitionnetwork.org/mergers.html.

[16] The Antitrust Section has consistently advocated adequate funding for the FTC and DOJ, but has been opposed to using HSR fees to fund the agencies' budgets. *See* Letter from Roxane Busey to Fritz Hollings and Judd Gregg on Funding for Federal Trade Commission and Antitrust Division of the Department of Justice (April 18, 2002); ABA Section of Antitrust Law, 2001 Transition Report, 3-4. *See also* ABA Section of Antitrust Law, *Report on Adequate Funding for the Enforcement Agencies*, 1 (May 1999) ("In order to enforce the antitrust laws effectively, the FTC and Antitrust Division require funding and resources adequate to meet the workload they face."); ABA Section of Antitrust Law, *Report on Proposed Hart-Scott-Rodino Antitrust Improvements Act Amendments*, 3 & n. 3 (April 11, 2000) (opposing use of HSR filing fees to fund the agencies).

- Should the merger review process be revised to be more efficient and less burdensome? For example, should HSR review procedures be revised by "stopping the clock," streamlining the Second Request, or in some other way?

- Should coordination of state premerger review with HSR Act filing requirements be required? For example, should private parties be obligated to disclose their HSR filings to state agencies requesting them?[17] Should state agencies engaging in premerger review be subject to the same timetable and other requirements as the federal enforcement agencies? and

- Should other steps be taken to further harmonize at least the procedural aspects of multijurisdictional merger review to ensure an effective, timely, and less burdensome system in the United States and abroad?

C. Antitrust Exemptions and Special Considerations

(1) Issue for study: Antitrust and the public sector

One of the principal differences between United States antitrust policy and competition policy in the European Union and elsewhere relates to the application of competition rules to the public sector. United States antitrust rules typically do not apply to the public sector at the federal or state level through notions of sovereign immunity, implied immunity, the state action doctrine, and the *Noerr-Pennington* doctrine. However, the federal pre-emption of state regulation and the operation of the "dormant" commerce clause can inhibit some potentially anticompetitive acts by states. In contrast, most competition systems outside the United States apply competition rules (with certain specified exceptions) to public enterprise and most governmental decisions that unduly restrict competition. In addition, government grants of aid and other targeted spending that distort competition are frequently prohibited under foreign competition rules. As part of the task of learning from sophisticated foreign competition systems, the Commission may wish to examine whether and how the United States can better incorporate prohibiting anticompetitive conduct in the public sector into our antitrust laws.

(a) Issue for study: Clarification of the State Action Doctrine

The State Action doctrine was first articulated in *Parker v. Brown*, 343 U.S. 341 (1943), where the Supreme Court in recognizing basic principles of federalism held that the Sherman Act did not apply to regulations adopted by a state government. Over the years, it has been explained and amplified in a series of later Supreme Court decisions, ultimately leading to the formulations that the federal antitrust laws do not apply to actions (1) undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation, and (2) with

[17] *But see Lieberman v. FTC*, 771 F.2d 32 (2d Cir. 1985) (states' access to HSR materials directly from FTC denied).

respect to private parties, that their conduct be "actively supervised" by the state. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

Some commentators have criticized the decisions in the lower courts for interpreting the State Action doctrine to exempt conduct that does not meet the *Midcal* criteria. Therefore, the Commission may wish to study judicial interpretations of the State Action doctrine and consider:

- Whether to provide any clarification of the doctrine; and
- Whether to recommend enactment of a "market participant" exception that would ensure that, if a municipality or other state actor engages in commercial activities without state regulatory supervision, it would be subject to the antitrust laws.[18]

In 2003 the FTC prepared a detailed report on the State Action doctrine that should be of considerable assistance to the Commission if it elects to study this issue. *See Report of the State Action Task Force: Recommendations to Clarify and Reaffirm the Original Purposes of the State Action Doctrine to Help Ensure Robust Competition Continues to Protect Consumers* (Sept. 2003).

(b) *Issue for study: Clarification of the Noerr-Pennington Doctrine*

The *Noerr-Pennington* doctrine is a judicially created exemption to the antitrust laws for conduct involving petitioning the government (including legislatures, executive branch, independent agencies, and courts—and in some cases elections and referenda) to take or authorize anticompetitive actions. *Eastern R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508 (1972). The doctrine is rooted in the statutory interpretation of the Sherman Act in light of the First Amendment rights of association, free speech, and to petition the government, as the FTC recently explained in *In the Matter of Union Oil Co.*, Docket No. 9305 (2004). The doctrine does not apply if the petitioning was not genuinely aimed at securing government action, but rather was a sham. *California Motor Transport; City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) (sham involves the use of "process -- as opposed to the outcome of that process as an anticompetitive weapon"); *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus*., 508 U.S. 49 (1993) (sham exception applied to litigation requires that the lawsuit be "objectively baseless"). The fact that misrepresentations are involved does not

[18] Analysis of state action immunity with respect to the activities of a state has been complicated by the Supreme Court's sovereign immunity decisions since *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). *Seminole Tribe* held that Congress lacks the authority under the commerce clause to abrogate state sovereign immunity under the Eleventh Amendment. Because the Sherman Act is commerce clause legislation, it is now arguable that *Parker*'s reliance on legislative intent and concerns of federalism has been superseded by *Seminole Tribe*'s reliance on sovereign immunity. That in turn may lead to different criteria for evaluating the scope of state action immunity, ones that more closely align the antitrust state action cases with the Supreme Court's sovereign immunity decisions, a factor that the Commission may need to consider. *See generally* ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 987-89 (2002).

necessarily result in an exception to the doctrine—it depends on the forum (*e.g.*, misrepresentations in a political context are not sham, while they may be in an adjudicatory or agency process).

Like the State Action doctrine, the *Noerr-Pennington* doctrine has been criticized as too routinely and widely applied. Therefore, the Commission may wish to consider judicial interpretations of this doctrine in order to determine:

- Whether to provide any clarification of the doctrine; and
- Whether to recommend clearer guidance with respect to any exceptions to the doctrine (*e.g.*, whether misrepresentations should constitute an exception, the number of proceedings necessary for a pattern or series of baseless proceedings).

(c) Issue for study: Governmental restrictions of competition

The Antitrust Modernization Commission may also wish to study an important source of constraints on competition: governments. *See State Intervention/State Action – A U.S. Perspective*, Remarks of FTC Chairman Timothy J. Muris Before the Fordham Annual Conference on International Antitrust Law & Policy (Oct. 24, 2003), available at http://www.ftc.gov/speeches/muris/fordham031024.pdf (hereafter *"Muris"*).

Balancing competition with other values is not easy. Promoting vigorous competition must be weighed against other federal, state and local interests. For example, zoning laws both prevent entry and preserve neighborhood character. Yet, governmental restraints are a critically important source of potential harm to competition that cannot be ignored.

Health care offers a prime example. Some economists believe that Medicaid's "most favored nation" requirement prevents pharmaceutical purchasers from jockeying to receive discounts below prices offered to the federal government, and thereby substantially interferes with competition.[19] Just recently the FTC and Department of Justice issued a report that chronicled extensive interference with health care competition: government-administered pricing distorts competition, Certificate of Need and licensing programs can prevent entry (especially by telemedicine), and state and federal mandating of insurance benefits can prevent competition from working to maximize consumer welfare. *See Improving Health Care: A Dose of Competition, A Report by the Federal Trade Commission and the Department of Justice* (July 2004), at 16, 22–24 (executive summary).

In addition to policies that overtly protect industry at the expense of consumers, many other

[19] F.S. Morton, "The Interaction between a Most-Favored-Customer Clause and Price Dispersion: An Empirical Examination of the Medicaid Rebate Rules of 1990," Journal of Economics and Management Strategy (Spring 1997): 151-174; F.S. Morton, "The Strategic Response by Pharmaceutical Firms to the Medicaid Most-Favored-Customer Rules," RAND Journal of Economics (Summer 1997): 269-290. *See also* GAO, "Changes in Drug Prices Paid by VA and DOD since Enactment of Rebate Provisions", Pub. No. GAO/HRD 91-139 (Washington: GAO, 1993); CBO, "How the Medicaid Rebate on Prescription Drugs Affects Pricing in the Pharmaceutical Industry" (Washington: CBO, 1996).

anticompetitive governmental regulations exist. The FTC has filed comments with the EPA on boutique fuel regulations, with the FDA on advertising regulations, and with FERC on revisions to market-based rate tariffs and authorizations. *Muris, supra*, at 13. The Commission also has tried to address restrictions on e-commerce.[20] *Id.* at 11–12.

While the Commission cannot embark on a study of every governmental interference with and distortion of competition, the Commission may wish to examine selected ways in which the federal and state governments restrain competition, highlight some particularly egregious problems, and recommend to Congress and the regulatory agencies policies and other measures that would reduce the extent to which such distortion of competition occurs in the future.

(2) Issue for study: Statutory exemptions affecting United States commerce

The Antitrust Section has long expressed concern about exemptions from the antitrust laws because exemptions are inconsistent with our fundamental national economic policy favoring free competition.[21] The Section recently established an Exemptions and Immunities Task Force to consider this subject in more depth and expects a report by year-end 2004 and a monograph on exemptions in 2005.[22] The Commission may wish to consider a systematic review of statutory exemptions[23] and ask whether each exemption is justified.

(3) Issue for study: The future of the Webb-Pomerene and Export Trading Company Acts

Two antitrust exemptions that specifically pertain to foreign trade are the 1918 Webb-Pomerene Act, 15 U.S.C. §§ 61-66, and the 1982 Export Trading Company Act, 15 U.S.C. §§ 4011-21. Each permits United States companies to obtain antitrust immunity in the United States for

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[20] *See* Antitrust Section Comments to FTC Workshop on Possible Anticompetitive Efforts to Restrict Competition on the Internet (Nov. 7, 2002); *see also* Public and Panelist Comments at FTC Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet, at http://www.ftc.gov/opp/ecommerce/anticompeetitive/comments/index.html (issues raised regarding auctions, automobiles, caskets/funerals, contact lenses, cyber-charter schools, on-line legal services, real estate/mortgages/financial services, retailing, telemedicine, and wine).

[21] *See, e.g.*, Reports of the Section of Antitrust Law on the Quality Health-Care Coalition Act of 1999, Antitrust Health Care Advancement Act of 1997, the Television Improvement Act of 1997, the Major League Baseball Antitrust Reform Act of 1997, the Curt Flood Act of 1997, the Major League Baseball Antitrust Reform Act of 1995, the Petroleum Pricing Legislation of 1992, the proposed modification of the McCarran-Ferguson Act in 1989, the Malt Beverage Interbrand Competition Act of 1985, and the Shipping Act of 1916.

[22] *See also* Department of Justice, Report of the Task Group on Antitrust Immunities (1977).

[23] Statutory exemptions include: the Shipping Act of 1916, 46 U.S.C. § 813; the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015; the Capper-Volstead Act, 7 U.S.C. § 291; the Newspaper Preservation Act, 15 U.S.C. §§ 1801-04; the Anti-Hog Cholera Screen Act, 7 U.S.C. § 852; the Defense Production Act, 50 U.S.C. § 2061; the Merchant Marine Act of 1920, 46 U.S.C. § 876. For a more complete list, *see* ABA Section of Antitrust Law, Antitrust Law Developments (Fifth), "Regulated Industries," 1245-1431 (2002).

export activity as long as certain administrative steps are followed and the United States economy or competing exporters are not harmed. The Export Trading Company Act broadened the exemptions available under the Webb Pomerene Act and provided significant procedural protection if the certified conduct was challenged in private antitrust litigation (single damages, a presumption of lawfulness, and attorneys fees to a prevailing defendant).

These two overlapping exemptions may be an appropriate topic for Commission review. However, if the Commission does choose to review these statutes, there are important ramifications to United States international trade policy that the Commission should consider in considering the future of these provisions. Opponents of these provisions suggest that both statutes are used less today than in the past and appear to have had limited effect in promoting United States exports, and that most Webb-Pomerene associations and certified Export Trading Companies do not engage in conduct that raises serious United States antitrust issues because anticompetitive activity that only affects foreign markets is not subject to United States antitrust law, under the FTAIA as discussed above. Opponents contend further that maintaining such export exemptions, while punishing similar conduct in foreign countries when aimed at the United States, creates at least the appearance of inconsistency, promotes friction rather than cooperation with our trading partners, and impedes further harmonization of antitrust rules in the global trading system. Conversely, proponents believe that because these statutes are used by a number of successful export sectors of the United States economy (including agriculture, manufacturing and services), any suggested changes to them could have an impact on United States export trade[24] and could impact the extent to which United States exporters are able to operate successfully in certain markets. In addition, proponents observe that many other OECD economies have similar policies in place, at least implicitly.[25]

The Commission may wish to consider whether these statutes achieve their goals and whether they are inconsistent with the policy goals of United States antitrust law. Should the Commission decide to study these laws, however, it should consult with a full range of appropriate constituencies to assure proper consideration of the study's impact on the policy goals of United States trade law.

D. Issues of Substantive Antitrust Law

(1) Issue for study: Repeal or amendment of the Robinson-Patman Act

The Commission may wish to study (a) whether a separate federal price discrimination statute (*i.e.*, the Robinson-Patman Act) is necessary or desirable, and (b) whether all or part of the Act should be amended or repealed.

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[24] According to an article on the Office of Export Trading Company Affairs website, approximately 5,000 U.S. firms handling over $30 billion in exports use these laws. Available at http://www.ita.doc.gov/td/oetca/shippingsecurity.html (last visited Sept. 13, 2004).

[25] *See, e.g.*, Aditya Bhattacharjea, *Export Cartels-A Developing Country Perspective*, 38 J. World Trade, No. 2, at 331 (2004).

The Act is controversial. Supporters have argued that the Robinson-Patman Act is necessary to ensure equal competitive opportunity to small business firms, to control predatory pricing practices, and to prevent encroaching monopoly in distribution. On the other hand, many government and bar association task forces, legal scholars, economists and businessmen consider the Robinson-Patman Act to be inconsistent with basic competition policy, distributive efficiencies, and marketplace realities, and to be a protectionist measure that has no place in the antitrust laws developed to ensure consumer welfare.

To be sure, significant developments in Robinson-Patman Act enforcement policies and jurisprudence have mitigated some adverse effects of the earlier judicial decisions. Robinson-Patman issues consume substantial litigation and legal counseling resources and management time. Moreover, arguments that secondary-line (buyer) injury should involve either proof of injury to competition (instead of merely to plaintiff) and/or injury to the competitive process, have had limited success.[26]

Criticisms have frequently been accompanied by calls for repeal or reform.[27] Previous proposals have met the unswerving support of the Act by small businesses, many of whom regard the Act as essential to their survival. By addressing this debate and conflict, the Commission may be able to offer some guidance towards reconciling these points of view.

(2) Issue for study: The interface of intellectual property and antitrust

If it decides to consider the interface of intellectual property and antitrust, the Commission may wish to give careful consideration to the FTC's report *To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy* (Oct. 2003) at http//www.ftc.gov/reports/index.htm. As noted in this report and other commentaries,[28] many of the issues that are presented by intellectual property and antitrust considerations are policy-oriented and are best developed in the open fora of academia, the agencies and the courts rather than by legislation. The principal question is how to stimulate innovation without unduly burdening competition. Legislation could end the discussion or result in the wrong balance being struck.

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[26] *See* ABA Section of Antitrust Law, Antitrust Law Developments, 479 and fn. 154-155 (5th ed. 2002).

[27] In this regard, the American Bar Association has supported enactment of legislation that would amend the Act as follows: (a) add to Sections 2(d) and 2(e), which deal with provision to customers of advertising and promotional allowances, the same competitive injury test as that contained in Section 2(a) of the Act; (2) repeal Section 2(c) of the Act, which prohibits certain brokerage payments, or discounts in lieu thereof, except for services rendered; and (as noted earlier) (3) repeal Section 3 of the Act, which authorizes criminal suits, *inter alia*, attacking predatory sales below cost or at unreasonably low prices. ABA Resolution #105, submitted by Antitrust Section, 1987 ABA Annual Meeting.

[28] *See* Comments of the Section of Antitrust Law to the U.S. Department of Justice Antitrust Division and Federal Trade Commission Hearings on Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy (June 28, 2002).

Nonetheless, the Commission might consider the recommendations in the FTC report as a means to stimulate competition and innovation:

- Should legislation be enacted to create a new administrative procedure to allow post-grant review of and opposition to patents?

- Should more funding be given to the Patent Office?

- Should the appropriate decisionmakers consider possible harm to competition -- along with other possible benefits and costs – before extending the definition of patentable subject matter?

(3) Issue for study: The antitrust laws and the 'New Economy'

The economy has changed radically since the Sherman Act was enacted. A number of industries important today were unimaginable in 1890. As a result of technological changes in transportation and distribution, moreover, many once local markets are now regional, national, or global.[29]

The increasing prevalence of networks in the modern economy (including banking networks, mobile telecommunications, digital databases) has generated debate about antitrust. With networks, consumers or other buyers may reap significant advantages that flow from many consumers utilizing the same provider or platform. These advantages are termed "network effects," "network externalities," or "demand-side scale economies." As a consequence, competition in industries in which network effects are important and in which competing networks are not interoperable may be "winner-take-all" (or "winner-take-most"). In addition, once one firm (or standard) starts to look as though it may become the winner, the market can quickly "tip" to favor it, as buyers in search of the advantages of network effects jump on the bandwagon of the likely winner. Under such circumstances, exclusionary conduct by one competitor, even if it lasts only a short while, may give that firm a substantial long-term marketplace advantage over its rivals – even if those competitors offer superior products or services.

Some view this possibility as a reason for heightened antitrust scrutiny of allegations by rivals that a firm has engaged in anticompetitive exclusionary conduct. Their concern is that the harm to competition cannot practically be remedied after the fact, once a winner has been selected.

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[29] To the extent that the Antitrust Modernization Commission considers whether the antitrust laws still function adequately to protect competition and consumers in an economic environment characterized by innovation and globalization, it may wish to review the FTC Report on Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace (May 1996), available at www.ftc.gov/opp/global/report/gc-v.1.pdf.

Others worry that any remedy for such conduct could be worse than the disease. They believe that antitrust should move cautiously to avoid impeding innovation by firms developing network platforms that are achieving marketplace success. If the antitrust complaint is brought by buyers rather than excluded competitors, a similar debate may arise over whether to remedy an anticompetitive problem through mandatory access to the upstream infrastructure.

The Commission may wish to identify the considerations that would be appropriate in addressing this debate and whether any changes in the antitrust laws would be warranted in light of these considerations.

CONCLUSION

The Antitrust Section recognizes that the Antitrust Modernization Commission may not have the time or the resources to study all of the topics identified for study in this report. Nonetheless, it believes that the topics discussed above merit consideration as candidates for inquiry and analysis. The Section looks forward to working with the Commission as it undertakes its Congressional mandate.

Sincerely,

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Chair, Section of Antitrust Law 2004-05

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