Antitrust Modernization Commission Meeting
February 22, 2007[1]

In an effort to provide a more timely report, the Section has not sought confirmation from the Antitrust Modernization Commission of the information reported in this summary; nor has the Section verified the information against the transcript of the meeting, which was not available when this summary was prepared.

The Antitrust Modernization Commission met on February 22, 2007 beginning at 9:38 p.m. Commissioners Carlton and Delrahim were not present. The meeting ended at approximately noon.

Chairman Garza opened the meeting by stating that the purpose of this meeting is to clarify the Commission's position on a few items where there has been a difference of opinion on the part of the Commissioners or where the staff needs additional guidance in order to finalize the report. The eight items to be discussed had already been circulated to the Commissioners (available at www.amc.gov). She also took the opportunity to thank the staff for its very fine work on the Commission's report. She noted that they had done a terrific job and she is very happy with it.

This memorandum will provide the specific language being considered in different typeface, note any changes made at the meeting, and summarize the Commission's discussion of each item.

Item 1

CHAPTER I.C: EXCLUSIONARY CONDUCT

Current Recommendation

Additional clarity and improvement in Section 2 legal standards is desirable, particularly with respect to areas where there is currently a lack of clear and consistent standards, such as bundling and whether, and under what circumstances (if any), a monopolist has a duty to deal with rivals.

Proposed Revised Recommendation

[*In addition, include in text discussion of the following point:*]

- Serious consideration should be given to the possibility that no one test can suffice for all types of exclusionary conduct, given the wide variety of conduct that may be challenged under Section 2.

Discussion

Susan DeSanti, Senior Counsel at the AMC, stated that she had been working on this section of the report, and that in summarizing the Commission's recommendations, she believed that

[1] This summary was prepared by Emily Myers, Antitrust Counsel at the National Association of Attorneys General. This summary was made from notes taken at the meeting and is intended to provide a general overview, rather than a transcription. The AMC will make available a transcript of the meeting at a later date.

there was support for the proposition that "no one test suffices" to cover all the conduct covered by Section 2. Although this language will appear only in the text, not in the Recommendations, she wanted to make sure that the Commissioners had an opportunity to discuss it.

Commissioner Yarowsky stated that this language should not be included in a Recommendation, but could possibly be included in the text. Susan DeSanti agreed, but said that she wanted to make sure the Commissioners agreed to it, even if it was in the text. Commissioner Shenefield objected to the circularity of "Serious consideration should be given to..." He suggested a more direct wording, "No one test can suffice.. ." Commissioner Jacobson said he was comfortable with that wording, but thought the Commission should include some hedge, since this is a common law area and the Commission can't predict what will happen 15 years from now. Commissioner Garza suggested that the Commission should state some principles or standards, and note that no one test has captured those principles for all conduct under section 2. She suggested that "long-run consumer welfare" should be the principle. Commissioner Burchfield agreed that long run consumer welfare should be the touchstone. Some outlier decisions have lost sight of this. Several commissioners suggested language to the effect that although courts should apply section 2 with careful attention to the effects on long run consumer welfare, none of the tests yet identified has applied effectively to all forms of conduct that might be challenged under section 2. Commissioner Burchfield suggested language reflecting that long run consumer welfare should be the North Star, but no one test has yet applied to all of the types of conduct challenged under section 2.

Susan de Santi expressed concern that the Commission is expressing the "consumer welfare" standard in terms of long-run consumer welfare here, which is different from the use of it in the rest of the report. She noted that there is currently a footnote that says there are various views and when the Commission says "consumer welfare" it is not specifically defining it. Commissioner Yarowsky stated that in this area, all Commissioners agree that long-run consumer welfare is the key. Commissioner Litvack suggested dropping "long run" and addressing it in the text. Commissioner Burchfield suggested that the first point to capture is that courts have failed to appreciate that the market will generally correct itself in monopoly situations, with new entry or some other way. Commissioners Jacobson and Valentine disagreed with the view that monopoly is self-correcting. Commissioner Warden stated that even if all agreed that "consumer welfare" is the standard, this does not provide guidance to any business people, but rather, should be something that guides courts in developing standards that will eventually guide business. Chairman Garza suggested that the staff state the common principles discussed here, and state that no one standard has been identified as best. The Commission is not endorsing any of the several tests discussed in the text.

Item 2

CHAPTER I.C: EXCLUSIONARY CONDUCT

Current Recommendation

In particular, the lack of clear standards regarding bundling, as reflected in cases such as

LePage's, may deter conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare.[1]

Proposed Revised Recommendation

[*In addition, include in text discussion of the following points (a or b, and/or c:*]

a. **Courts should give** Serious consideration to a safe harbor for above-cost pricing, such as that provided by the Supreme Court in *Brooke Group.*

b. **Courts should give** Serious consideration to a test that examines the relationship between incremental revenues and incremental costs. [J. Jacobson to present]

c. Serious consideration should be given to the establishment of clear safe harbors for refusals to deal that do not involve either the unilateral termination of an ongoing relationship between the plaintiff and defendant or the refusal to deal with a rival on the same terms currently offered to other customers. Further exploration of the "consumer welfare" and "no economic sense" tests should also be undertaken.

Discussion

Susan De Santi asked whether the Commissioners wanted to remove the specific reference to *LePage's*. The Commissioner all said no. Chairman Garza asked whether there were other cases "such as *LePage's.*" Commissioner Jacobson cited Smith Kline. Turning to item 2(a), Commissioner Jacobson asked what was meant by "above-cost." Does this mean the whole bundle? Is the Commission saying that the tying aspects of this conduct are per se legal? Chairman Garza asked, under Commissioner Jacobson's way of thinking, what would happen if the extra product was essentially no cost. Commissioner Jacobson said that the pricing would be legal. He stated that all panelists except Tim Muris, who was representing a telecommunications client, supported the Will Tom/Ortho approach, under which the discount is carried to the bundle. If the pricing fails that test, then the analysis goes on to see if there is harm to competition, etc. Commissioner Kemp suggested that the Commission support a test that examines whether incremental revenues exceed incremental costs, and if so, it would be a safe harbor. If not, then the analysis moves to recoupment, etc. Commissioner Burchfield asked whether this was not just a multi-step test, rather than a safe harbor. After some further discussion of the differences between a test for liability and a safe harbor, Commissioner Jacobson formulated the analytical steps as 1) below cost; 2) recoupment; and 3) actual harm to competition.

Turning to subsection (c), Andrew Heimert stated that this is a stand-alone part that doesn't go with (a) and (b). It will be in the part of the text dealing with refusals to deal. Commissioner Jacobson stated that there are two types of refusals to deal: 1) refusing to deal with a rival; and 2) refusing to deal with a rival's suppliers or customers. Therefore, he's not comfortable with this as drafted. Commissioner Valentine asked whether this implied that all other conduct that was not specified was legal. Commissioner Burchfield noted that the courts should divine some safe harbors that the Commission is not specifying. Susan DeSanti stated that the report is only referring to refusal to deal with rivals. Commissioner Jacobson stated that he is more

[1] Commissioner Shenefield does not join

comfortable with the formulation if that is the case. Chairman Garza suggested that the Commission endorse the principle that in the ordinary course of business, there is no requirement to deal with rivals. Commissioner Litvack suggested that the Commission state that in general, refusals to deal with rivals are legal. Commissioner Kempf stated that subsection (c), as drafted, implies that the conduct specified is illegal, although there may be times when it is not. Chairman Garza stated that this is important for the Commission to express, because outside the U.S., this is not the rule.

Item 3

CHAPTER II.B: HART-SCOTT-RODINO ACT

SECOND REQUEST PROCESS

Proposed Revised Recommendation

[*Include among specific reforms the following:*]

> Adopt a standardized agreement or procedure by which the parties and the investigating agency could agree to terminate a second request investigation before the parties certify substantial compliance, and proceed to litigation in district court within thirty days.

Discussion

Commissioner Litvack opened the discussion of Item 3 by expressing his concern with this provision as worded. He believes that the parties (i.e., the merging parties and the government) will never agree on this issue. If the government thinks it's not getting the documents it needs, it will not agree. On the other hand, under this provision, the government would have to file a complaint and obtain the documents under the Federal Rules of Civil Procedure. This is unfair to the government and inconsistent with the purposes of the HSR Act. Commissioner Litvack stated that he had been considering a procedure whereby either party can go and get a magistrate's ruling on the appropriateness of the second request. In that case, either the merger can't go forward until the "discovery" issue is resolved, or the government has to get a TRO.

Commissioner Warden stated that he has no problem with requiring the government to go to court and operate under the Federal Rules of Civil Procedure. The government can file an amended complaint after getting more information. This is the only way to short circuit the delays. The Litvack proposal would just result in more delays. Commissioner Kempf stated that he agreed with Commissioner Warden's proposal, but not there needs to be an exception for situations where the party doesn't produce anything. He does not believe Congress thought the HSR process would be a substitute for full proceedings, but rather, that it would just give enough information to facilitate enforcement decisions or preliminary injunctions. Commissioner Valentine said that Commissioner Warden's proposal would undo the HSR Act. Chairman Garza stated that the parties wouldn't do this often, because they don't want to go to court.

Commissioner Kempf stated that parties can do this now. He does not believe the government should be able to more evidence through HSR-they need to do that under the Federal Rules of Civil Procedure. Commissioner Jacobson stated that any process that allows parties not to comply with the HSR requirements will change all incentives in the system. The government

wouldn't be able to vote out a complaint because they don't have sufficient evidence. Commissioner Shenefield stated that the cure here is much worse than the disease. He believes this provision should be eliminated. Commissioners Valentine and Jacobson agree. Commissioner Valentine stated that she has more faith in the agencies. There are a few "bad apples" there, but this is too much. Commissioner Warden disagrees, and believes the process is very burdensome.

Commissioners Burchfield, Cannon, Jacobson, Litvack, Shenefield, Valentine, Warden and Yarowsky voted to eliminate Item 3. After further discussion, Andrew Heimert suggested that the text indicate that the agencies should take steps to reduce burden and delay, that there should be Congressional oversight, and that to facilitate that oversight, the agencies should keep data on the time it takes to resolve transactions.

Item 4

CHAPTER II.B: HART-SCOTT-RODINO ACT

SECOND REQUEST PROCESS

Proposed Revised Recommendation

[*Include among specific reforms the following:*]

Adopt tiered limits on the number of custodians whose files must be searched pursuant to a second request. [In accordance with the following process:] [J. Jacobson to present]

HSR Custodial Limit

1. The HSR Report Form will be modified to include a box labeled "Optional custodian limitation for potential additional request for information." If the notifying party checks this box, the procedures set forth below will apply. If, however, the box is not checked, any additional request for information may proceed without the limitations set forth below, consistent with current practice.

2. A party electing the custodian limitation option must (a) provide or create, and submit with the form, complete and accurate organization charts (or equivalent materials that allow staff to identify the party's employees and their positions), and (b) provide the name, and make available for interview, a responsible officer to explain the organization charts, the roles of the listed personnel, and the location of company records. The officer designated should be the senior person within the organization most familiar with these issues. If necessary, more than one such person should be made available.

3. If the notifying party has complied with paragraph 2 above, then, depending on the dollar size of the transaction, the reviewing agency will be limited to requiring a search of documents in the files of 15 employees (at the low end) to 35 employees (at the high end).

4. If the agency staff believed that the files of custodians in excess of the numbers set forth in paragraph 3 are required to pursues their investigation, staff should first notify the affected

party of the total number of custodians whose files it seeks and request the party's consent. If consent is not provided within two business days, staff may seek materials from additional custodians only upon the personal approval and certification of the **good faith belief that there is a** need for such materials by, as the case may be, the Chair (or Acting Chair) of the Federal Trade Commission or the Assistant Attorney General (or Acting Assistant Attorney General) in charge of the Antitrust Division of the Department of Justice.

Discussion

Commissioner Jacobson noted that this proposal now drops the ability of the parties to go to court as part of this process. Commissioner Shenefield suggested inclusion of "good faith" language (see above) in the certification by the AAG for Antitrust or the FTC Chair. Commissioners Cannon, Jacobson, Kempf, Litvack, Shenefield, Valentine, Warden and Yarowsky voted for this Item. Commissioners Burchfield and Garza did not support this recommendation, believing it was too "granular" and interventionist.

Item 5

CHAPTER II.B: HART-SCOTT-RODINO ACT
SECOND REQUEST PROCESS

Current Recommendation

In all cases, provide the merging parties with access to the agencies' economists' analysis and sufficient underlying data to permit a response to the agencies' concerns.[2]

Proposed Revised Recommendation:

[*Include among specific reforms one of the following:*]

[a] The agencies should provide the merging parties with access to the agencies' economists so that the merging parties may, through discussion, better understand the theoretical and empirical bases for the economists' conclusions. [D. Carlton to present]

[b] To enable merging companies to understand and respond to the bases for any agency concern, the agencies should inform the parties of the theoretical and empirical bases for the agencies' economic analysis and facilitate dialogue, including with the agency economists. [D. Garza to present]

Discussion

Chairman Garza stated that (a) and (b) were drafted after Commissioner Carlton expressed concern that the original formulation of this recommendation could be read to require the turning over of work product. After a brief discussion, the Commissioners present unanimously voted for subsection (b) with the wording changes reflected above.

Item 6

[2] Six Commissioners join: Delrahim, Garza, Kempf, Shenefield, Warden and Yarowsky. Four Commissioners do not join: Cannon, Carlton, Jacobson, and Litvack. Commissioners Burchfield and Valentine are undecided..

CHAPTER II.C: STATE ENFORCEMENT MERGERS

Current and Revised Recommendation

No statutory change is recommended to the current roles of federal and state antitrust enforcement agencies with respect to reviewing mergers.[3] However, federal and state antitrust enforcers are encouraged to coordinate their activities and to **seek to avoid** subjecting companies to multiple, and possibly inconsistent, proceedings. Federal and state antitrust enforcers should consider the following actions to achieve further coordination and cooperation and thereby improve the consistency and predictability of outcomes in such investigations:

- o The states and federal antitrust agencies should work to harmonize their application of substantive antitrust law, particularly with respect to mergers.[4]
- o [other actions omitted, but to be included in report]

Discussion

Chairman Garza stated that the changes to this item are to remove the concept of comity, which she believes applies only to nation/nation relationships, and to broaden the application to things other than the Horizontal Merger Guidelines to cover enforcement policy. The Commissioners voted as they had previously.

Item 7

CHAPTER III.B: INDIRECT PURCHASER LITIGATION

Proposed Revised Recommendation

Direct and indirect purchaser litigation would be more efficient and fairer if it took place in one federal court for all purposes, including trial, and did not result in duplicative recoveries, denial of recoveries to persons who suffered injury, or windfall recoveries to persons who did not suffer injury.[5] To facilitate this, Congress should enact a comprehensive statute with the following elements:[6]

- Overrule *Illinois Brick* and *Hanover Shoe* to the extent necessary to allow both direct and indirect purchasers to sue to recover for actual damages from violations of the federal antitrust laws. Damages in such actions could not exceed the overcharges (trebled) incurred by direct purchasers. Damages should be apportioned among all purchaser

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[3] Commissioners Delrahim, Garza, Shenefield and Warden do not join.

[4] Commissioners Carlton, Garza and Valentine join to the extent such convergence is towards the federal Merger Guidelines.

[5] *To be noted in Report:* Commissioners Carlton, Garza, Jacobson, Litvack, Valentine and Warden would recommend a rule prohibiting recoveries by indirect purchasers, if writing on a clean slate. Commissioners Burchfield, Cannon, Delrahim, Kempf, Shenefield and Yarowsky would allow suits by both direct and indirect purchasers.

[6] Commissioners Cannon, Carlton, and Garza do not join this recommendation in any respect.

plaintiffs-both direct and indirect-in full satisfaction of their claims in accordance with the evidence as to the extent of the actual damages they suffered.

- Allow removal of direct and indirect purchaser actions brought under state antitrust law to federal court to the full extent permitted under Article III.[7]

- Allow consolidation of all purchaser actions in a single federal forum for both pretrial and trial proceedings.

- Allow for certification of classes of direct purchasers, consistent with current practice, without regard to whether the injury alleged was passed on to customers of the direct purchasers.

Discussion

Commissioner Burchfield summarized the revision of this item. The goal is to make the treatment of Illinois Brick and Hanover Shoe consistent. Direct and indirect purchasers would be able to file actions in federal court. Hanover Shoe is overruled to the extent that the seller can argue a pass-on defense. This will allow removal to the full extent of Article III. Removal is based on the Commerce Clause, not on diversity. This is not intended to affect class action certification. He noted, in response to a question from Commissioner Shenefield, that "allow" is designed to mean an MDL type process, without the *Lexecon* requirement that the cases be sent back to the original courts. Commissioner Kempf stated that he would like preemption, rather than removal, but does not support it here because it would galvanize opposition by state Attorneys General. Susan DeSanti noted that the report makes it clear that only this aspect of *Lexecon* is a problem. The Commission expresses no other opinion on the decision. Commissioner Yarowsky commended the staff for its good work on this recommendation, which he characterized as a "big deal."

Item 8

CHAPTER IV.A: ROBINSON-PATMAN ACT

Current Recommendation:

Congress should repeal the Robinson-Patman Act in its entirety.[8]

Until Congress repeals the Robinson-Patman Act, courts should interpret the Act to require plaintiffs to make a showing of injury to competition similar to that required under the Sherman Act.[9]

Proposed Revised Recommendation

Congress should repeal the Robinson-Patman Act in its entirety.[10]

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[7] Commissioners Delrahim does not join this aspect of the recommendation. Commissioners Litvack, Shenefield and Warden join this aspect of the recommendation, but would prefer preemption of state laws.

[8] Commissioners Shenefield and Yarowsky do not join.

[9] Commissioners Garza, Shenefield, and Yarowsky do not join.

[Omit bulleted point and associated discussion from Report.]

Discussion

Commissioner Jacobson supported the revised recommendation because he was concerned about telling courts to ignore the current law. Commissioner Kempf supported the revised recommendation because he believes that the bulleted point looks like a "fall-back" position.

The Commission meeting concluded at 12:00 noon.

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[10] Commissioners Shenefield and Yarowsky do not join.