

United States House of Representatives
Judiciary Committee Task Force on Antitrust
Hearing on the findings and recommendations of the Antitrust Modernization
Commission, as established by the Antitrust Modernization Commission Act of 2002
May 8, 2007¹

In an effort to provide a more timely report, the Section has not verified the information against the transcript of the hearing, which was not available when this summary was prepared.

Rep. John Conyers, Chairman of the House Judiciary Committee and the Task Force on Antitrust, called the meeting to order at 2:21 p.m. He apologized for the delay in beginning the hearing. Representatives Conyers (D-MI), Lamar Smith (R-TX), Steve Chabot (R-OH), Howard Berman (D-CA), Ric Keller (F-FL), Sheila Jackson-Lee (D-TX) and Darrell Issa (R-CA) were present. Antitrust Modernization Commission Chair Deborah Garza and Vice-Chair Jon Yarowsky were the only witnesses.

Congressman Conyers expressed his appreciation for the incredible hard work of the Commission, and commended their report generally. He stated that he does not agree with the Commission's conclusions on Robinson-Patman, because, although he thinks it is not a good law, he wants to fix it, not jettison it. It serves an important purpose in leveling the playing field between Mom & Pop stores and Wal-Mart. He also has concerns about the AMC's "ambiguous" conclusions on indirect purchasers. He agrees that *Illinois Brick* should be overruled, but is concerned about the effect of the repeal of *Hanover Shoe* on the overall enforcement of antitrust law. He also stated that although he agrees that the antitrust laws are basically sound, enforcement of those laws is vital. The fact that the U.S. Department of Justice hasn't brought any merger actions is troubling.

Rep. Steve Chabot also made opening remarks, in which he mentioned that he had spoken at the recent ABA Antitrust Section meeting and had discussed the report with Commissioner Valentine. He is delighted to hear the Commission's conclusion that the antitrust laws are fundamentally sound, but wants them to continue to protect competition and consumers and avoid too much unhelpful regulation.

Chairman Garza said that the report is an endorsement of free market enterprise. The state of U.S. antitrust law is essentially sound. Our antitrust laws are fostering competition, protecting competition and consumer welfare, and punishing cartel activity without unduly discouraging potentially pro-competitive behavior. She also noted that the Commission

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

concluded that the United States does not need new rules to address “New Economy” issues.

Vice-Chairman Jon Yarowsky noted the many areas in which the AMC recommended no change—including the relationship between state and federal enforcement. Much of the good part of the nation’s antitrust laws is due to the work of Congress, he believes. Congressional oversight has led to continuity in enforcement over many administrations. He urged the Committee to make sure that Congress is not left behind, but instead stays deeply involved in these issues. He believes that we need an active Judiciary Committee, which, as in the past, will engage in the bi-partisan defense of the antitrust laws.

Chairman Conyers opened his questions by giving credit to Rep. James Sensenbrenner for creating the AMC. He then congratulated the witnesses on their template for narrowing exemptions. He also commended the recommendations for the efficient division of labor between the Department of Justice and the Federal Trade Commission. He also favors the transparency recommendations from the Commission. However, he does not favor Robinson-Patman repeal. He asked the panelists to address any of these points.

Chairman Garza addressed exemptions first. She noted that she had just been meeting with a delegation from the Republic of China, and that the United States always urges other countries not to rely on antitrust exemptions. In the 1960s and 1970s, there seemed to be a concern that some industries just were not fit for competition, but that concern no longer holds sway. There are few if any industries that are not suitable for competition. There needs to be a showing of net benefits from an antitrust exemption. Vice-Chairman Yarowsky: stated that many of those exemptions didn’t come from the Judiciary Committee. He noted that this reinforces the point that the Judiciary Committee should vigorously assert its jurisdiction in this area.

Rep. Chabot asked the witnesses about gasoline pricing, noting the ever-increasing prices and calls for Congress to increase regulation of the industry. What are the implications of these recommendations for increased regulation? Chairman Garza stated that the Commission specifically found that there should not be separate standard for evaluating mergers in different industries. In regulated industries, the Commission recommended that antitrust agencies should have the primary role of assessing the competitive aspects of mergers. If there are other non-competition goals that can’t be addressed by antitrust analysis, then the agency should address those goals.

Rep. Chabot next asked about the implications of globalization, especially with regard to shipping and the Robinson-Patman Act. Vice-Chairman Yarowsky stated that there is clearly a convergence in antitrust standards. In some ways, it would be a good thing to have such convergence, for example, in the procedures for merger review throughout the world. Why should there be different time frames for merger review? Substantive antitrust law convergence is more difficult. Do we want a system like GATT, where all would agree on a uniform global antitrust law? He believes we should be cautious in imposing a substantive standard across the

board. Chairman Garza specifically addressed Rep. Chabot's point about shipping. She noted that the Commissioners did feel that the fact that the United States is the only developed nation with an exemption for ocean shipping is embarrassing, and that the U.S. should move in the direction that the European Union just took. The Robinson-Patman Act is difficult to explain to non-US competition authorities, and she believes it operates in a way that is antithetical to the antitrust laws. Generally, the United States would discourage other countries from enacting this type of law.

Rep. Howard Berman focused on antitrust and patents. He asked the witnesses to expand on idea that while there's a tension between the regimes, we can have both patent and antitrust, we can provide incentives for innovation and avoid most anticompetitive behavior. He asked the witnesses to discuss which of the recommendations of the FTC and the National Academy of Science are most important? Vice Chairman Yarowsky stated that if too many patents are issued, there could be a devastating effect on competition, because they are monopolies. Patents should be defined very carefully and precisely. Taking a look at the Patent Office, applications are up 15 percent, and there is a 5,000-6,000 patent backlog. If they are of poor quality, their effects spill over into the courts. The patent system in and of itself becomes the problem. Chairman Garza stated that the Commission did recognize that a patent doesn't necessarily signify antitrust monopoly, but the patent system can be abused in an anticompetitive way. That is why the Commission recommended that Congress take up the recommendations of the FTC and NAS. The Supreme Court also seems to be taking some of this up. If the patent system gets "out of whack," there could be a competitive impact. Both systems should have, as their common goal, stimulating innovation.

Rep. Keller asked the witnesses for three reasons why they recommend repeal of Robinson-Patman, although he noted that he did not necessarily disagree with that recommendation. Neither witness provided three reasons. Chairman Garza stated that the Robinson-Patman Act does arguably prohibit the types of discounting that the antitrust laws are supposed to encourage. Rep. Keller gave as an example a car dealer who sells thousands of cars per year and gets cars for the same price as a dealer who sells only hundreds. Similarly, he asked whether Wal-Mart and the little corner grocery store pay the same amount for a can of soup. Neither witness was willing to say that they necessarily did. Vice-Chairman Yarowsky stated that there is a volume-discount exemption from the Robinson-Patman Act, but its interpretation is the problem. He stated that Congress should revisit the Robinson-Patman Act, perhaps downsize it and make it less convoluted. Because it is so complicated now, Congress has created mini-Robinson-Patman structures, for example, program access rules for cable and satellite providers. Repeal of the Robinson-Patman Act will lead to a proliferation of mini-price discrimination regimes, which is not desirable.

Rep. Darrell Issa also asked about patent reform. He stated that the major thrust of patent reform is to get better patents. There is a high failure rate for patents now. However, assuming the patent is valid and should be enforced, it constitutes a right to a monopoly, and a right to dominate an industry. He stated that the FTC "doesn't like that." Chairman Garza stated that a

validly issued patent does constitute a monopoly in that particular patent, but that doesn't necessarily equal market power. Rep. Issa stated that when Congress looks at pharmaceuticals, many Committees are trying to make them provide medicine cheaper and are determined to break down their ability to command profits during the life of their patent. He asked whether it wasn't fair to apply the same standards to all patents, including pharmaceuticals? Chairman Garza said that antitrust policy says that if you have valid patent, you can recover whatever profit you can from that patent. She noted that the percentage of success is low in the pharmaceutical industry, and we need to preserve incentives to innovate. However, that is only where there are no other signs of patent abuse. Rep. Issa asked if there were an open and transparent process where people could make their views known, if that would improve the patent process. Vice-Chairman Yarowsky stated that a post-grant process could help crystallize validity questions more quickly.

Rep. Sheila Jackson-Lee: thanked the Commission for its hard work. She agrees with the general principles enunciated, e.g., free-market competition remains the touchstone of antitrust policy, and new or different rules aren't needed for new or innovative industries. She asked the witnesses for their thoughts on the oil and gas industries. In particular, what do we get out of these large conglomerates? They are certainly no longer price-sensitive. She has not seen dramatic new technology from these conglomerates, just large size. She also stated that she does not favor repeal of Robinson-Patman, but would like to hear thoughts on how price-discrimination can be addressed through other laws. Vice-Chairman Yarowsky noted that many oil and gas merger are vertical mergers, integrating production and distribution. Those can have powerful effects on innovation. He believes there is a need to revisit merger guidelines on this issue. With respect to the Robinson-Patman Act, the antitrust laws have certain meanings, in particular the phrase "antitrust injury." The Robinson-Patman Act used different words than are in the Sherman Act, etc. It will be difficult to revise Robinson-Patman, but this Committee can do it. He urged the Committee to harmonize its meaning with those of the other antitrust laws, and get the federal agencies to enforce the revised law. Chairman Garza noted that the Commission did not think it was appropriate to have a separate standard for different industries, such as oil and gas. The proper question to ask is always "What effect does this transaction have on output and price?" She does think that it erodes public confidence if there's no explanation of why a case is or is not brought. The FTC and DOJ have done a good job of explaining, but they need to go further.

Chairman Conyers closed the hearing by saying that the Antitrust Task Force was formed in part to address the enormous number of mergers taking place. The Committee will keep five legislative days open for other questions from members.

The hearing ended at 3:30 p.m.