

U.S. Antitrust Modernization: A Preview

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After many months of hearings and deliberations, the Antitrust Modernization Commission is about to issue its long-awaited report to Congress and the President. Although the final report is not yet available, the Commission's proceedings have been open to the public.¹ As a result, it is unlikely that many of the Commission's recommendations will come as a surprise to those who have followed the public hearings.² There will, however, likely be some surprises in terms of the details of the Commission's recommendations—how specific they are, to whom they are directed, and the extent to which they are supported by the members of the Commission.³

The Commission's report is likely to be comprehensive, covering more than 15 topic areas, with recommendations directed to Congress, state and federal antitrust enforcement agencies, and even the courts. In a nutshell, based on what is publicly available, here is what to expect:

- The Commission is unlikely to recommend any substantive statutory changes, except with respect to the Robinson-Patman Act, where the Commission is likely to recommend repeal.
- The Commission is likely to recommend major statutory changes to overrule *Illinois Brick* to allow indirect purchasers to sue for damages in federal court. The Commission may also recommend limitations to *Hanover Shoe* and the pass-on defense to those cases where only direct purchasers sue in federal court, and to allow removal of all state indirect purchaser actions to federal court to the extent constitutionally permissible.
- The Commission is likely to recommend legislation that would provide for claim reduction before trebling, and a right of contribution among co-conspirators.
- There is likely to be a recommendation from the Commission, possibly including legislation, concerning the clearance process between the Federal Trade Commission and the Department of Justice (collectively, the Agencies), and at least suggestions, if not requirements, for reducing the burden of Second Requests in transactions filed under the Hart-Scott-Rodino Act.

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¹ This article is based on a variety of publicly available materials, including (1) the Potential Recommendations for Review [POTENTIAL RECOMMENDATIONS] made available by the Commission's staff in July 2006, available at <http://www.amc.gov/pdf/meetings/ReportOutline060720circ.pdf>, (2) the American Bar Association (ABA) Antitrust Section's Summary of AMC Meeting, July 25–26 [JULY SUMMARY], available at http://www.abanet.org/antitrust/at-links/pdf/at-mod/07-25_26-06.pdf, (3) the ABA Antitrust Section's Summary of AMC Meeting, November 14, 2006 [NOVEMBER SUMMARY], available at <http://www.abanet.org/antitrust/at-links/pdf/at-mod/CHIDMS1-2478915-v1-11-14-06.pdf>; (4) the ABA Antitrust Section's Summary of AMC meeting, December 5, 2006 [DECEMBER SUMMARY]; and (5) the public hearings that have been held by the Commission over the past few years and which are available on the Commission's Web site at http://www.amc.gov/commission_hearings.htm. The Commission's final report is due in April 2007.

² The ABA Antitrust Section contributed approximately 25 submissions to the Commission on a wide variety of topics. The Section also published summaries of all of the Commission's hearings. These materials are available on the Section's Web site at <http://www.abanet.org/antitrust/>.

³ Although the preliminary views and votes of the Commissioners have been noted, these positions could change, and some may dissent on certain positions advanced by the majority. At least one more hearing has been scheduled in 2007.

With the exception of the Robinson-Patman Act, the Commission is unlikely to propose any legislative change to substantive U.S. antitrust law.

- Although there are likely to be recommendations by the Commission for studies regarding merger enforcement, no major proposed changes to the Horizontal Merger Guidelines are expected, except possibly recognition that the Guidelines more explicitly need to take into account efficiencies, including innovation. There may also be a recommendation that the Agencies revise their vertical merger guidelines.
- Although the Commission is not likely to recommend statutory changes with respect to state antitrust enforcement, there are likely to be recommendations concerning federal and state coordination and cooperation in merger investigations, including convergence on the Horizontal Merger Guidelines and greater consistency in data requests from state and federal agencies and confidentiality agreements from the states.
- There is likely to be a call for legislative review of all antitrust exemptions, with the McCarran Ferguson Act and the Shipping Act as possible starting points.
- Finally, with respect to international matters, the Commission will likely recommend (1) increased coordination, comity, and harmonization through statutory modification to the International Antitrust Enforcement Assistance Act to clarify that non-antitrust uses of information are not required for an Antitrust Mutual Assistance Agreement, (2) increased authority and budgetary assistance to the Agencies to provide technical antitrust assistance, (3) mechanisms to allow respondents to request greater coordination in multijurisdictional investigations, (4) greater deference to jurisdictions where the alleged conduct has a direct and foreseeable effect in such jurisdictions and, possibly, (5) an international centralized, premerger notification system.

Of these recommendations, the most controversial are likely to be any indirect purchaser legislation, claim reduction and the right to contribution, repeal of the Robinson-Patman Act, and Congressional review of statutory exemptions and immunities. There may also be considerable opposition if the Commission recommends an international, centralized premerger notification system. If the Commission were to advocate any limitation upon state enforcement, which appears unlikely, this would also be highly controversial.

No Substantive Legislative Reform Except with Respect to the Robinson-Patman Act

With the exception of the Robinson-Patman Act, the Commission is unlikely to propose any legislative change to substantive U.S. antitrust law. For the most part, the Commissioners agree that it is better to continue to rely on the courts to develop the law on a case-by-case basis rather than propose statutory changes, many of which could be quite complex. This reflects the view that one of the strengths of the U.S. system is the ability of the courts and those who counsel or enforce the U.S. antitrust laws to adapt their rulings or their advice to the particular facts and circumstances.

In the few areas (other than the Robinson-Patman Act) where the Commission sees a need for clarity or reform, the Commission is more likely to recommend Agency involvement through enforcement actions, guidelines, amicus briefs and the like to guide the courts in analyzing the issues. At the top of this list is exclusionary conduct—in particular, bundling—where the Commissioners generally disagree with the holding in *LePage's*,⁴ but are unlikely to recommend any statutory fix.⁵ Nevertheless, it will be important to see to what extent the Commission considers or comments in its report upon the various tests (such as profit sacrifice, no economic sense,

⁴ *Le Page's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 2932 (2004).

⁵ POTENTIAL RECOMMENDATIONS at 19–20.

equally efficient competitor, structured rule of reason) that have been advocated and debated in submissions and hearings before the Commission and to see whether the Commission supports the use of any of these tests in any particular factual setting.

Another area where the Commission might have considered recommending substantive legislative reform, but is unlikely to do so, is new technology. One of the reasons the Commission was formed was to address the issues presented by rapidly changing technology. The view of the Commission seems to be that the U.S. antitrust laws are flexible enough to apply even in a rapidly changing marketplace.⁶

Repeal of the Robinson-Patman Act

The one area where the Commission is likely to recommend substantive legislative change is with respect to the Robinson-Patman Act, and here the Commission's recommendation is likely to be outright repeal.⁷ From the Commission's perspective, the purpose of the Robinson-Patman Act, which is to protect competitors rather than competition, is antithetical to all other antitrust laws. In addition, compliance with the Act imposes a regulatory cost—both in terms of legal expense and business strategy—that is indefensible from an antitrust point of view.

Whether total repeal of the Robinson-Patman Act is politically feasible is not known, but the Commission seems less concerned with this practicality and more intent on taking a strong stand against continued compliance with and enforcement of the Act, even though less radical measures were proposed to the Commission.⁸ In making this recommendation, the Commission is undoubtedly aware that repeal of this federal law would not prevent states from further enacting “baby” Robinson-Patman Acts, which could create a patchwork of state laws akin to the state indirect purchaser “repealers” that are generally viewed as worse than the problem they were intended to correct. It will be important to see whether the Commission comments on this possibility and whether it advocates any action short of repeal, in the event that repeal becomes politically infeasible.

Standing to Sue: New Rights of Indirect Purchasers

The Commission considered a number of issues relating to standing to sue. One of the more important is the right of indirect purchasers to sue. Under *Illinois Brick*,⁹ an indirect purchaser currently is barred from suing for damages under federal law; however, approximately 30 states allow indirect purchasers to sue under state antitrust laws. Under *Illinois Brick*, these cases are not removable to federal court. The notion that a company could be sued simultaneously by direct purchasers in federal court and by indirect purchasers in as many as 30 state courts led the Commission to consider whether *Illinois Brick* should be overturned by legislation. There appears to be considerable support among the Commissioners for overruling *Illinois Brick*, and by statute (1) allowing indirect purchasers to sue for damages in federal court, (2) permitting removal of any

⁶ *Id.* at 14–16; DECEMBER SUMMARY at 8–10.

⁷ POTENTIAL RECOMMENDATIONS at 21. Ten of the twelve Commissioners are likely to advocate total repeal of the Robinson-Patman Act. The remaining two may only advocate repeal of the criminal provisions of the Act.

⁸ See, e.g., ABA Antitrust Section, Comments Regarding the Robinson-Patman Act (Apr. 10, 2006), available at <http://www.abanet.org/antitrust/at-comments/2006/04-06/amc-rp.shtml>.

⁹ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1997).

indirect purchaser claims from state court to federal court, and (3) consolidating any indirect claims with any claims by direct purchasers for both discovery and trial in federal court.¹⁰

Although most of the Commissioners view this as preferable to the current system, the proposed solution is not a magic bullet. There will continue to be issues relating to antitrust injury, class certification, and the passing-on defense. There was also a significant issue with respect to preemption of indirect purchaser suits in state court, but a majority of the Commission does not appear to favor preemption.¹¹ The Commission has also expressed reservations about entirely overruling *Hanover Shoe*,¹² which bars the use of the pass-on defense (except for preexisting cost-plus contracts), as that might have the unintended effect of defeating class certification, or making it more difficult. This in turn might provide an unintended disincentive for direct purchaser suits. At least some have argued that it may be more difficult to show that common questions of fact predominate where direct and indirect purchasers sue in a single suit. The current recommendation is to modify the rule in *Hanover Shoe* where both direct and indirect purchasers sue, and to limit the amount of the defendants' damages to direct purchasers, which would then be apportioned among all purchaser classes in full satisfaction of their claims. Where only direct purchasers bring claims, *Hanover Shoe* would remain a bar to the pass-on defense.¹³ As this bears directly on both private and state enforcement, it will be important to see how the Commission ultimately resolves these issues and whether it actually proposes draft legislation overruling *Illinois Brick* and limiting *Hanover Shoe*.

Standing to Sue: Rights of Foreign Parties Under FTAIA

Standing to sue was also considered by the Commission in the context of the Foreign Trade Antitrust Improvements Act (FTAIA).¹⁴ Here the question was not indirect purchasers but indirect harm. Should a foreign buyer purchasing a product that is the subject of a global conspiracy be allowed to sue a foreign seller for violation of the U.S. antitrust laws in U.S. courts? This question is purportedly answered by the FTAIA, which requires that an antitrust violation have a direct, substantial, and reasonably foreseeable effect on U.S. commerce if it is to be actionable in the United States.

In addition to jurisdictional questions, this also raises issues with respect to restitution. Many in the United States believe that every injured party should be entitled to some form of restitution and redress. But this view is not shared by many other jurisdictions. Private rights of action are rarely found except in the United States, although a number of other jurisdictions are beginning to enact laws authorizing private litigation. In the meantime, the question of standing to sue presents a dilemma. Should we ignore the right of injured parties to sue when to do so may encourage companies to participate in conspiracies on a global basis, with minimal fear of detection or penalty in the rest of the world?

¹⁰ JULY SUMMARY at 9–10. This may also require some modification to *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

¹¹ The Commissioners' vote on this was very close, with six Commissioners advocating preemption of indirect purchaser suits in state court.

¹² *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

¹³ JULY SUMMARY at 9.

¹⁴ 15 U.S.C. § 6a.

The current focus of the law is the Supreme Court's decision in *Empagran*,¹⁵ where a class of foreign purchasers of vitamins brought suit in the United States for damages allegedly suffered outside the United States as a result of a worldwide cartel involving the major vitamin manufacturers. In construing the FTAIA, the court held that the plaintiffs' claim would be barred if based solely on foreign effects that were independent of anticompetitive effects in the United States. On remand, the D.C. Circuit held that the statutory language requires a direct causal relationship that is proximate rather than just a "but for" nexus.¹⁶

Although most of the Commissioners seem to agree that *Empagran*, or at least decisions interpreting it, are correct, the confusion caused by the FTAIA and the issues presented by it are difficult to ignore. It is unclear at this juncture whether the Commission will recommend that the courts continue to decipher this poorly worded statute or recommend new legislation to replace it.¹⁷ In the meantime, the problem of under-deterrence will remain unresolved so long as other jurisdictions do not prosecute and penalize those who engage in international cartels.

Although the Commission undertook to consider the entire remedial antitrust scheme, including treble damages, prejudgment interest, and attorneys' fees, it is unlikely to recommend any significant statutory change in these areas.

Civil Remedies: Right to Claim Reduction and Contribution¹⁸

Another area where the Commission is likely to propose an important legislative change is with respect to claim reduction in civil cases. The Commission is likely to recommend legislation which provides that the amount claimed against the non-settling defendants will be reduced, before trebling, by the amount of the settling defendant's allocated share of liability based on market share (the preferred measure) or gain from the violation. There also appears to be sufficient support by the Commission for a statutory amendment to allow claims for contribution against other non-settling conspirators. To the extent that these legislative changes to contribution and claim reduction are recommended, each defendant's allocated share of liability should be equal to its market share or gain from the violation. As with the right of indirect purchasers to sue, it will be important to see the Commission's specific proposal and whether any draft legislation is proposed.

Although the Commission undertook to consider the entire remedial antitrust scheme, including treble damages, prejudgment interest, and attorneys' fees, it is unlikely to recommend any significant statutory change in these areas. The Commission may recommend that, in considering an award of attorneys' fees, a court should consider whether, among other factors, the principal development of the underlying evidence was in a government investigation,¹⁹ in which case the award would be reduced.

Although it was considered, the Commission is unlikely to recommend that any additional authority be given to either of the Agencies to obtain civil fines for substantive antitrust violations.²⁰ The Commission is also likely to endorse the FTC's current policy governing the circumstances under which it will seek equitable monetary relief.²¹

¹⁵ *Hoffmann-La Roche, Ltd v. Empagran S.A.*, 542 U.S. 155 (2004).

¹⁶ *Empagran S.A. v. F. Hoffmann-La Roche Ltd*, 417 F.3d 1267 (D.C. Cir. 2005), *cert. denied*, 126 S. Ct. 1043 (2006). *See also* *Sniado v. Bank Austria AG*, 378 F.3d 210, 213 (2d Cir. 2004) (plaintiffs failed to show injury in Europe was dependent on conspiracy's effect in United States). *But see In re Monosodium Glutamate Antitrust Litig.*, 2005-1 Trade Cas. (CCH) ¶ 74,781 (D. Minn. 2005) (motion to dismiss denied because plaintiff showed causal nexus between domestic effects and foreign injury).

¹⁷ JULY SUMMARY at 23–26; NOVEMBER SUMMARY at 12; DECEMBER SUMMARY at 6–8.

¹⁸ JULY SUMMARY at 15–16.

¹⁹ *Id.* at 12–14.

²⁰ *Id.* at 7.

²¹ *Id.* at 8.

Criminal Remedies: Modification to the Sentencing Guidelines' 20 Percent Proxy

The Commission is unlikely to recommend any changes to the applicability of the alternative fines provision²² to Sherman Act offenses or to current Sherman Act fines. The Commission is likely to recommend that the U.S. Sentencing Commission explain that gain or loss under the alternative fines provision applies to the entire conspiracy, whereas individual sentences under the Sentencing Guidelines are determined by each defendant's individual sales.²³

The Commission is also likely to recommend that the Sentencing Commission reevaluate the 20 percent proxy that is used in establishing the harm caused by the violation in the Sentencing Guidelines. Under the existing statutory structure for sentencing of antitrust violations, the base fine is determined by the harm caused by the violation. For antitrust violations, the Sentencing Guidelines simplify the proof required by establishing a proxy for the economic impact of the conduct—20 percent of the volume of commerce attributable to the defendant that was affected by the violation.²⁴ As a result, the government must prove the affected volume of commerce but not the actual harm resulting from the violation as required in sentencing most other federal economic crimes. Particularly in light of recent Supreme Court cases where the Court has indicated that the government is required to prove harm to a jury beyond a reasonable doubt to establish an alternative maximum fine, the Commission is likely to recommend reconsideration of the presumed harm of 20 percent of the defendant's affected volume of commerce.²⁵ The Commission is also likely to recommend that the Sentencing Guidelines be amended to make explicit that the 20 percent proxy may be rebutted by proof by a preponderance of the evidence that the overcharge was higher or lower.²⁶

The Commission is considering recommending legislation that would require the Agencies to clear a transaction to one Agency or the other within nine calendar days or face the consequences of a tiebreaker mechanism.

Merger Enforcement: Improvements to Clearance Between the Agencies and Second Requests

Of the many issues considered with respect to merger enforcement, the two areas that are likely to see recommended changes are the clearance process between the two Agencies²⁷ and the Second Request issued by either agency.²⁸ Based upon the occasional report that a transaction has not been cleared between the Agencies within a reasonable time, the Commission is considering recommending legislation that would require the Agencies to clear a transaction to one Agency or the other within nine calendar days or face the consequences of a tiebreaker mechanism. Although the Commission appears unwilling to impose a particular tiebreaker mechanism, two possible approaches considered by the Commission were arbitration or assignment by case number, with even numbers assigned to one Agency and odd numbers to the other. The alternative would be to have the Agencies agree upon a mechanism that will resolve clearance issues once and for all. The Agencies had worked out a clearance procedure in 2002, but Congress intervened to stop it, and the clearance issue has remained unresolved ever since. Thus, it will be

²² 18 U.S.C. § 3571 (d).

²³ POTENTIAL RECOMMENDATIONS at 3; JULY SUMMARY at 3.

²⁴ *Id.* at 7. U.S.S.G. § 8C2.4(b) and § 2R1.1 (d). *See also* U.S.S.G. § 2R.1 (individual firms are set at 1–5 percent of the volume of the affected commerce).

²⁵ *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004).

²⁶ JULY SUMMARY at 2.

²⁷ JULY SUMMARY at 17–18.

²⁸ POTENTIAL RECOMMENDATIONS at 11–13.

important to see whether the Commission's proposed solution is by direction to the Agencies or by statute, and whether a particular tie breaker mechanism is advocated or left to Congress or the Agencies to determine.

With respect to Second Requests, a number of the proposed recommendations merely advocate that the DOJ adopt the procedural reforms that have already been adopted by the FTC, such as limiting back-up tape retention or the time period or number of custodians to be searched. Others relate to reducing the burden of translating foreign language documents or providing the parties' economists with improved access to the Agencies' staff economists' models and data. There is also some support for amending the Hart-Scott-Rodino Act to permit the parties to appeal directly to a federal district court magistrate judge any claims of unreasonable burden caused by a Second Request.

One of the more novel provisions is to recommend that the Agencies adopt a procedure by which the parties and the Agency could agree to terminate a Second Request investigation and proceed directly to litigation in district court. It will be important to see whether this option has sufficient support to be included in the Commission's recommendations.

Merger Enforcement: Modification to FTC Act 13(b)²⁹

In response to at least a perceived difference in the legal standard for obtaining a preliminary injunction in merger cases by the FTC and the DOJ, there appears to be majority support among the Commissioners for recommending a statutory modification to Section 13(b) of the FTC Act to ensure that the traditional equitable standard for obtaining such relief is the same for both Agencies. The Commission is also likely to recommend that the Agencies consolidate proceedings for preliminary and permanent relief in merger cases.

The Commission may also recommend statutory modification to 13(b) that would prohibit the FTC from pursuing administrative litigation if it fails to obtain an injunction in a case for which a filing under the Hart-Scott-Rodino Act was required. However, the FTC would not be barred from administrative litigation post-closing based on evidence that a consummated merger has actually had anticompetitive effects.

Merger Review: Efficiencies and Innovation and More Studies of the Effects of Mergers

The Commission is likely to find that the basic framework for analyzing mergers, including the Horizontal Merger Guidelines, as followed by the Agencies and the courts, is sound and will not recommend any statutory change to Section 7 of the Clayton Act or any significant modification to the Guidelines. There is support among the Commissioners for recommending to the Agencies that they continue to consider or give substantial weight to efficiencies, and that they explain the impact of innovation in their competitive analysis.³⁰ However, it is unclear to what extent the Commission's report will elaborate on these factors.

There is strong support among the Commissioners for further study, including retrospective study or internal review by the Agencies (or others designated by the Agencies), with respect to

²⁹ *Id.* at 10.

³⁰ *Id.* at 14, 16–17.

Agency merger enforcement activity, the economic basis for enforcement decisions, and market performance and concentration.³¹

Role of the States: Merger and Non-Merger Enforcement³²

After taking a close look at the role of state antitrust enforcement, the Commission is unlikely to recommend any statutory change with respect to civil non-merger or merger antitrust enforcement. Instead, it is likely to recommend increased harmonization between state and federal enforcement and, in the case of merger enforcement, it is likely to recommend substantive convergence on the Horizontal Merger Guidelines and greater consistency in data requests by the federal and state agencies and in confidentiality agreements by the states. The role of state enforcement in merger review was one of the more closely watched and highly contested topics. Although ultimately not endorsed by a majority of the Commissioners, there was considerable support for limiting the states' merger enforcement authority by giving the federal agencies a right of first refusal with respect to merger review.³³

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Statutory Immunities and Exemptions: A Framework for Analysis and Congressional Review³⁴

As one of the first topics identified for study, the Commission's recommendations with respect to statutory immunities and exemptions are likely to demonstrate concern with respect to the growing number of statutory immunities and exemptions and the lack of a disciplined approach to their adoption.

In general, the Commission is likely to express disfavor with antitrust immunities and exemptions, advocate narrow construction of these provisions, and propose a framework for Congress to use in their adoption and review. That approach is likely to provide for a narrow immunity taking into account the immunity's likely impact on consumers and the extent to which a particular social, political, or other goal trumps antitrust goals. It would also require consultation with the FTC and DOJ, and empirical evidence to show that competition is of less value than the justification for the proposed immunity. The Commission is also likely to recommend that Congress direct the FTC to study the competitive effects of, and justifications for, all immunities and exemptions in light of the above framework. A majority of the Commissioners also favor a sunset provision, possibly within seven years, pursuant to which an immunity would terminate unless specifically renewed.

Because the Commission held separate hearings on the McCarran-Ferguson Act and the Shipping Act, it will be interesting to see whether specific recommendations concerning their review or repeal are included in the Commission's report.

Regulated Industries: Defining the Role of the Antitrust Agencies

The Commission has also considered the role of the Agencies in reviewing mergers in regulated industries. Although the final position of the Commission is somewhat unclear, it appears that a majority of Commissioners believe that any competitive analysis should lie principally, if not exclusively, with the Agencies even if another regulatory agency also has an obligation to review a

³¹ *Id.* at 15–16.

³² *Id.* at 7–8; NOVEMBER SUMMARY at 5–6.

³³ NOVEMBER SUMMARY at 6.

³⁴ POTENTIAL RECOMMENDATIONS at 26–28.

merger to determine if it is in the public interest.³⁵ Because this is one of the last areas to be considered by the Commission, it will be important to see how the Commissioners' views crystallize in the final report and whether it recommends that the Agencies have exclusive merger enforcement authority.

International Issues: Increased Coordination, Comity, and Harmonization³⁶

On the issue of comity, the Commission is likely to recommend that the Agencies continue to pursue additional comity agreements with foreign jurisdictions and make greater use of existing agreements. The Commission is likely to recommend that the International Antitrust Enforcement Assistance Act (IAEAA)³⁷ be amended to clarify that Section 12(2)(E)(ii) does not require inclusion of a provision allowing for non-antitrust uses of information exchanged in accordance with an Antitrust Mutual Assistance Agreement (AAMA) for an AAMA to be entered into with the United States. Section 12(2) of the IAEAA provides that the United States may enter into AMAAs with foreign jurisdictions "for the purpose of . . . providing antitrust evidence, on a reciprocal basis." However, there is a perception that Section 12(2)(E)(ii) requires that foreign antitrust enforcement authorities grant their U.S. counterparts the authority to use information provided under an AAMA for law enforcement purposes other than antitrust.

Because there is a concern by the Commission that inconsistent and conflicting enforcement by multiple agencies impedes trade, discourages investment, and harms consumers, the Commission is likely to recommend that the Agencies conduct ongoing benchmarking reviews of matters investigated by multiple jurisdictions that impose divergent decrees to ensure that future remedies are consistent across borders. It is also likely to recommend that Congress provide budget authority and appropriations directly to the FTC and DOJ to provide international antitrust technical assistance.

The Commission is also likely to recommend a mechanism to allow any respondent subject to investigation in multiple jurisdictions the right to request, or possibly demand, that the investigating jurisdictions coordinate their investigations and fashion any remedies jointly. Similarly, the Commission is likely to recommend a presumptive deferral to any investigating country by any other country where the alleged conduct does not have a direct and reasonably foreseeable effect on such other country. The Commission has also considered the development of an international, centralized, pre-merger notification system and is likely to recommend that the Agencies pursue this, or study this, and report to Congress. The Commission also strongly endorses the Agencies continuing to pursue procedural and substantive convergence to the extent possible through the International Competition Network and the Organization for Economic Cooperation and Development. It will be important to see the specific language with respect to all of these recommendations and how strong they are in terms of directives to the Agencies.

Conclusion

All indications are that the long-awaited report from the Antitrust Modernization Commission will include specific recommendations to Congress and the federal and state enforcement agencies and will explain the reasons for such recommendations. Some of the recommendations are likely

³⁵ NOVEMBER SUMMARY at 9–10; DECEMBER SUMMARY at 1–6.

³⁶ POTENTIAL RECOMMENDATIONS at 32–34.

³⁷ 15 U.S.C. 6201 *et seq.*

to be particularly bold and require legislative action. Others will be more suggestive and in the spirit of best practices where the hope is that they will be seriously reviewed and then implemented appropriately.

Regardless of how one feels about the particular recommendations, the Commission's report should be given careful review and due consideration, particularly in light of the openness of the Commission's proceedings, the time and effort of the individuals serving on the Commission, and their intent to improve upon laws that are of such vital importance to our economy. With the theme of "modernization" being heard round the world, this Commission's contribution to U.S. antitrust modernization should be noteworthy and important, both in terms of what it recommends and what it does not. ●