THE NATIONAL LAW JOURNAL

AMC Tackles Tough Issues

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The Antitrust Modernization Commission (AMC) has now held hearings on virtually all of the issues that it agreed to study. The hearings provided an opportunity for commissioners to observe various and often conflicting views on some critical issues in antitrust law. Interested parties have submitted comments and participated in public hearings to advocate or share their expertise on issues of interest. The AMC is now charged with writing a report for Congress (due in April 2007) on its findings and proposals with respect to modernization of the antitrust laws. In some cases, the AMC will likely be able to recommend solutions to existing problems that Congress can then influence through legislation. On other issues, the AMC is likely to conclude that modernization of the law must occur organically through the evolution of court doctrine. In still other instances, it may recommend that the antitrust agencies improve their processes and procedures.

Merger-review process was a big focus of concern

Some of the most frequently repeated concerns and discussion centered around agency processes for merger reviews, demonstrating the importance of these issues to the business community and antitrust bar. The recent hearings on merger process and policy provided a forum for both praise and criticism.

With respect to the Hart-Scott-Rodino second-request process, panelists and public comments cited dramatic increases in the size of document productions and the agencies' desire for more transactional data to be used in constructing economic models that serve as the basis for much of today's merger analyses. Susan Creighton, former director of the Federal Trade Commission (FTC) Bureau of Competition, said that 10 years ago, a custodian likely would have produced four boxes of documents, but now is likely to produce 140 boxes. This explosion in the size of productions has affected both the agencies and the parties. It is likely that two reforms will be recommended: limitations on the number of custodians to be searched and narrower time limits on the scope of the investigation. Despite agreement among panelists on the need for these reforms, several witnesses expressed concerns about imposing them without some flexibility.

As the AMC considers problems with, and potential solutions to, the merger-review process, its recommendation will be informed by the work of the FTC's Merger Process Task Force, announced by Chairwoman Deborah Platt Majoras, which has been working to evaluate potential reforms to the second-request process at the FTC. Creighton explained the FTC's efforts to meet the reform goals laid out by

Majoras, but it was less clear that the Antitrust Division of the U.S. Department of Justice (DOJ) is pursuing reforms as aggressively as the FTC. The division explained that it has focused on improving the merger-review process by enhancing communications between parties and its staff.

One topic that featured prominently was the FTC-DOJ clearance process - i.e., the way the agencies allocate investigations. The hearings focused on a proposed 2002 FTC-DOJ agreement to solve the problem, which was rescinded because of congressional pressure. AMC panelists explained the need to solve the clearance problem, citing the undue time wasted, the conflict between the agencies, and the uncertainty for the parties as to which agency would investigate a matter. The AMC is likely to recommend a solution that would benefit both parties and agencies by providing greater predictability, improving party- agency relations and allowing more specialization in the agencies with respect to particular industries.

The AMC also considered substantive merger policy. All of the panelists agreed that the 1992 merger guidelines have a positive effect on merger policy by providing a predictable analytical framework. But concerns were raised about the lack of transparency in the agencies' economic analyses and decision-making processes. Although no specific recommendations were made as to how to improve transparency, the AMC will consider the issue in addressing potential merger-enforcement reforms.

With regard to the role of efficiencies in merger analysis, many of the panelists believe that no new legislation is necessary, but both panelists and commissioners questioned whether efficiencies should be based on a "consumer welfare" or "total welfare" standard. The representatives from the agencies explained that they primarily evaluate efficiencies using the consumer-welfare standard, but that they also consider efficiencies that benefit total welfare. Although there were few additional recommendations, one panelist suggested that it may be best to allow efficiencies analysis to develop through the courts. Doing so could provide the added predictability that many parties would like to see incorporated into merger analysis at the agencies.

The AMC has also considered reforms in other areas. The commission considered whether the Robinson-Patman Act is consistent with modern views of the purpose of the antitrust laws - i.e., to protect competition-given that it was enacted to protect small retailers. Some panelists urged full repeal, while others advocated clarifications in the law. Supporters of the act spoke about the need to consider broadening the concept of what is pro-competitive to include benefits to consumer welfare that result from protecting smaller retailers and preserving a diverse shopping experience. Opponents cited the contradiction in maintaining a law that does not promote economic efficiency.

In formulating its report to Congress, the AMC will need to consider these conflicting opinions as well as the recent decision of the U.S. Supreme Court in *Volvo Trucks North America Inc. v. Reeder-Simco GMC Inc.*, 163 L. Ed. 2d 663 (2006). The court addressed the concern of Robinson-Patman Act opponents, saying: "Interbrand competition . . . is the primary concern of the antitrust laws . . . .[W]e would resist interpretation [of the act] geared more to the protection of existing competitors than to the stimulation of competition." Id. at 678-79. In accord with this statement, the court held that a Robinson-Patman Act plaintiff must prove actual harm to competition.

Another topic studied is the issue of indirect-purchaser actions. Through two panels of hearings on the issue, it was clear that business interests favored repeal and pre-emption of state indirect-purchaser actions, while the state attorneys general and some plaintiffs' attorneys strongly favored maintaining the right to bring such actions in state courts. Opponents of the current system, which prohibits indirect-purchaser actions in federal courts but allows such suits in more than 30 states, cited a variety of reasons for their position, including risk of multiple liability, threat of inconsistent judgments and undue burdens on the judicial system. Advocates of the current system asserted the importance of protecting the rights of consumers harmed by anti-competitive conduct, and argued that the inefficiencies in the courts will be resolved by the Class Action Fairness Act, which allows for joint discovery in multidistrict litigation.

The AMC worked to create a consensus among the panelists as to an acceptable recommendation for Congress. Using the American Bar Association Antitrust Section's proposal as a model, the AMC polled each of the panelists as to the acceptability of this position. The ABA proposal calls for Congress to overturn *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), eliminate duplicative recoveries by allowing the pass-on defense, consolidate actions for both discovery and trial and allow plaintiffs to recover prejudgment interest. The ABA position does not call for pre-emption of state indirect-purchaser statutes, but aims to resolve the inefficiency created by multidistrict litigation through consolidated discovery and trials. Most panelists seemed to find the ABA proposal to be an acceptable compromise. The AMC may recommend a similar approach in its report to Congress on this issue.

Panelists debated status quo on civil remedies

On the topic of civil remedies, the AMC considered several issues, including whether current law that applies joint and several liability to antitrust defendants without contribution or claims reduction is fair and efficient. Proponents of the current system maintained that it deters antitrust violations, encourages private enforcement, encourages settlements over litigation and protects a victim's right to compensation. Other panelists advocated changes to the current law because it forces defendants to settle rather than risk being held responsible for treble

damages from the conduct of all alleged co-conspirators. The commissioners probed the panelists, who offered several solutions. Most opponents of the current system recommended that the AMC urge Congress to repeal joint and several liability, allow for claims reduction or contribution in proportion to the harm caused by each defendant, or both.

The AMC will now work to digest the information received through the hearing process and public comments. Each AMC study group will prepare findings and recommendations by this spring for the full commission. The AMC is scheduled to formulate a draft report by the end of the year.

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