

The 2007 Report and Recommendations of the Antitrust Modernization Commission

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In April of 2007, the Antitrust Modernization Commission released its final report and recommendations.¹ The bipartisan commission was created, pursuant to the Antitrust Modernization Commission Act of 2002,² to examine the need to modernize antitrust laws. Although four other commissions have been convened to issue reports on the antitrust laws since Congress passed the Sherman Act, this year's findings represent the first such report in thirty years.³

The Commission, in recognizing that the antitrust laws are working well, recommends that the substantive provisions of Sections 1 and 2 of the Sherman Act, Sections 3 and 7 of the Clayton Act, and Section 5 of the FTC Act remain unchanged. However, the Commission does recognize that major changes in antitrust analysis have occurred over the last three decades, and in response the 2007 Report does recommend many significant changes. This comment will focus on three of those recommendations: the repeal of the Robinson-Patman Act, the streamlining of the merger review process under the Hart-Scott-Rodino Act, and the overruling of the Supreme Court's decisions in *Illinois Brick* and *Hanover Shoe*.

Repeal of the Robinson-Patman Act

The Commission recommends that Congress repeal the Robinson-Patman Act (Robinson-Patman),⁴ which prohibits sellers from offering different prices to different sellers. This provision, enacted in 1936, was intended to protect small "mom and pop" retailers who were being forced out of the market by larger operations. At the time,

¹ Antitrust Modernization Commission, Report and Recommendations (April, 2007) [hereafter 2007 Report], available at http://www.amc.gov/report_recommendation/toc.htm.

² Pub. L. No. 107-273, §§11051-60, 116 Stat. 1856.

³ See Stephen Calkins, *Antitrust Modernization: Looking Backwards*, 31 J. CORP. L. 421, 425 (2006). The other modernization reports include the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws (Attorney General's Report), the 1968 Report of the White House Task Force on Antitrust Policy (Neal Report), the 1969 Report of the Task Force on Productivity and Competition (Stigler Report), and the 1977 Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures (Shenefield Report). *Id.*

⁴ 15 U.S.C. § 13.

Congress considered a large buyer's ability to secure a competitive advantage over a smaller buyer merely because of greater purchasing power to be anticompetitive.⁵

Although this problem persists in today's economy, it is widely accepted that Robinson-Patman has the effect of limiting discounting generally, and is thus considered antithetical to competition law. The Commission echoes this sentiment, and finds the Act to be fundamentally inconsistent with the antitrust laws and harmful to consumers.⁶ The Commission even suggests that the Act can harm the small firms it was meant to protect. If, in an attempt to avoid liability, manufacturers chose to sell only to large firms, smaller firms may be cut out of the market entirely.⁷

This Commission's recommendation hardly comes as a surprise—three previous reports, in 1955, 1969, and 1977, have recommended the repeal or substantial overhaul of Robinson-Patman.⁸ Today, enforcement of Robinson-Patman is virtually nonexistent. The DOJ has not enforced the criminal provisions of the Act since the 1960s, and the FTC has issued only one Robinson-Patman complaint since the 1992. The amount of private litigation under the Act has also fallen, and plaintiffs' success is very limited.⁹ However, despite the widespread disapproval and repeated calls for its repeal, it is unlikely that there are enough votes in Congress to heed the Commission's recommendation to repeal Robinson-Patman.

Streamline Merger Review Under Hart-Scott-Rodino

The Commission's next significant recommendation involves the streamlining of the merger review process under the Hart-Scott-Rodino Act (HSR Act).¹⁰ The Commission begins by focusing on the panoply of state and federal enforcement agencies. While recognizing the importance of federalism and state sovereignty, the Commission emphasizes the burdens placed on companies by multiple enforcement proceedings and the additional costs that are passed on to consumers.¹¹ Thus, the Commission recommends a merger clearance agreement aimed at assigning all proposed transactions to only one agency.¹²

The Commission recommends further reforms to the HSR Act aimed at protecting the effectiveness of enforcement while reducing the burdens imposed on merging parties.

⁵ See *FTC v. Morton Salt Co.*, 334 U.S. 37, 43 (1948).

⁶ 2007 Report at 317.

⁷ *Id.* at 322.

⁸ 2007 Report at 312.

⁹ *Id.* at 316.

¹⁰ 15 U.S.C. § 18a.

¹¹ 2007 Report at 127.

¹² *Id.* at 134. The recommendation is based on the principles of the 2002 Clearance Agreement between the FTC and the Department of Justice. The 2002 Agreement was in effect for only 2 months, at which point the Antitrust Division withdrew at the direction of the Attorney General. *Id.* at 133.

One recommendation is to de-link funding for the Antitrust Division of the Department of Justice and the Federal Trade Commission from HSR Act filing fee revenues. The Commission fears that linked funding leads to the risk that a decline in merger activities may lead to under-funding of the enforcement agencies.¹³

A further recommendation is that the HSR Act should be reformed to reduce the burdens imposed by second requests. While the Commission recognizes the agencies' need for documentation in second requests, it emphasizes the burden caused by production of documents, especially in light of the ever-expanding volume of electronic documents in today's economy. The Commission therefore recommends a continuing effort to avoid over-inclusive document requests at the HSR review stage.¹⁴

Overrule *Illinois Brick* and *Hanover Shoe*

A third major recommendation of the Commission is the overruling of the Supreme Court's decisions in *Illinois Brick*¹⁵ and *Hanover Shoe*.¹⁶ These decisions made the distinction between direct purchasers – those who purchase directly from a manufacturer – and indirect purchasers who purchase goods further down the distribution chain. In *Hanover Shoe*, the Court held that an antitrust defendant could not avoid liability to a direct purchaser simply because the direct purchaser had “passed on” the overcharges to indirect purchasers.¹⁷ In keeping with that decision to overlook indirect purchasers, the Court held in *Illinois Brick* that only direct purchasers may sue under federal antitrust law.¹⁸

Although the indirect purchaser who suffers an antitrust damage is left without a remedy in the federal courts, the states have taken a different approach. In many states, both direct and indirect purchasers have a remedy under local antitrust laws. Thus, a single antitrust violation may result in direct purchasers suing in the federal courts and indirect purchasers suing in one or more state courts.¹⁹

With the goal of managing direct and indirect purchaser actions both efficiently and fairly, the Commissions recommends that *Illinois Brick* and *Hanover Shoe* be legislatively overruled. Federal law should allow direct and indirect purchasers to recover the actual damages (trebled) suffered as a result of antitrust violations. By overruling *Illinois Brick*, all indirect purchasers, not just those in states allowing such actions, could recover treble damages in federal court for antitrust injuries. In order to promote fairness, *Hanover Shoe* would also have to be overruled. This would limit the

¹³ 2007 Report at 161.

¹⁴ *Id.* at 162.

¹⁵ *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹⁶ *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

¹⁷ *Id.* at 494.

¹⁸ *Illinois Brick*, 431 U.S. at 728-29.

¹⁹ 2007 Report at 266.

recovery of direct purchasers to treble their actual damages, thus preventing windfall recovery of the full overcharge, regardless of pass-on, that might otherwise be possible.²⁰

After three years of dedicated work, the Antitrust Modernization Commission delivered its report to the President and a Congress of a drastically different makeup than the one which initially authorized the Commission and appointed its members. It is too early to tell which, if any, of its recommendations will be enacted. We can only hope that the new Congress will enact those recommendations which, in keeping with the spirit of the antitrust laws, encourage competition by keeping markets free of anticompetitive restraints.

²⁰ *Id.* at 275.