Monday, October 19
11:00 am–12:30 pm

202 New Governments- New Antitrust Laws: The Reinvigoration of North American Antitrust Enforcement

Brian Facey
Partner
Blake, Cassels & Graydon LLP

Deborah Majoras
Vice President & General Counsel
The Procter & Gamble Company

François Ramsay
Senior Vice President, General Counsel & Secretary
Yellow Pages Group

Peter Wexler
Senior Vice President & General Counsel
Schneider Electric

Copyright © 2009 Association of Corporate Counsel (ACC) and contributing authors.
Reproduction permission requests should be directed to legalresources@acc.com or +1 202.293.4103, ext. 342.

The information in this ACC Annual Meeting material should not be construed as legal advice or legal opinion on specific facts and should not be considered representative of the views of its authors, its sponsors, and/or the ACC. This ACC Annual Meeting material is not intended as a definitive statement on the subject addressed. Rather, it is intended to serve as a tool providing practical advice and references.

Faculty Biographies

Brian Facey

Brian Facey is a partner at Blake, Cassels & Graydon LLP in Toronto. He is also the relationship partner for a number of the firms' national and international clients. Mr. Facey has advised clients in hundreds of legal matters, including merger transactions, criminal cartel cases, and distribution and advertising matters under the Competition Act. He has represented many foreign investors, including state-owned investors and foreign governments, under the provisions of the Investment Canada Act and the new State-Owned-Enterprise Guidelines.

Mr. Facey is co-author of a leading treatise on Canadian competition law entitled "Competition and Antitrust Law: Canada and the United States." He has testified before the Canadian Senate and Parliamentary Committees on proposed amendments to the Competition Act. He was appointed by the Commissioner of Competition as an external consultant to the Competition Bureau in relation to the recent amendments to Canada's competition laws. Mr. Facey is on the executive committee of the Canadian Bar Association's national competition law section. He is active in the ABA - antitrust section and the International Bar Association. Mr. Facey is an adjunct professor of competition law at one of Canada's leading law schools, where he teaches competition law. He is also a private sector adviser to the International Competition Network.

He holds a BA (Hons.) from the University of Toronto, an LLM from Georgetown University, and an LLB from the University of British Columbia.

Deborah Majoras

Deborah Platt Majoras is a vice president and general counsel for The Procter & Gamble Company, in Cincinnati, where she focuses on global litigation, antitrust, and compliance.

Before joining Proctor & Gamble, she served as chairman of the Federal Trade Commission, where she focused on ensuring data security and protecting consumers from emerging frauds, such as identity theft and spyware and served as co-chair of the President's Identity Theft Task Force. She also worked to implement sound antitrust policy regarding intellectual property, increase the efficiency and transparency of the merger review process, and strengthen cooperation among antitrust agencies around the world. Prior to the FTC, she served as principal deputy assistant attorney general at the Department of Justice Antitrust Division. She began her career at the international law firm, Jones Day, where she ultimately became a partner in the firm's antitrust practice.

She continues to pursue her strong interest in sound competition and consumer policy as co-chair of the U.S. Chamber of Commerce International Competition Policy Working Group, as a member of the governing council of the ABA's antitrust section, and as an

Copyright © 2009 Association of Corporate Counsel

advisor to the International Competition Network. She also serves on the boards of the Cincinnati Legal Aid Society and the Georgetown Law Corporate Counsel Institute.

She earned her BA from Westminster College, where she now sits on the board, and her JD from the University of Virginia.

François Ramsay

François D. Ramsay is senior vice president, general counsel and secretary of Yellow Pages Group. Mr. Ramsay has been involved in a variety of matters affecting the companies where he worked, including mergers and acquisitions, debt and equity financings, corporate governance, as well as complex litigation matters.

Prior to joining Yellow Pages Group, Mr. Ramsay was general counsel at Gildan Activewear Inc. (a leading Canadian manufacturer and marketer of high-quality activewear) and Le Groupe Vidéotron Ltée. (one of Canada's largest integrated communications companies).

Mr. Ramsay graduated from the Université de Montréal.

Peter Wexler

Peter Wexler is senior vice president and general counsel for Schneider Electric SA the world's leading energy management company. He was promoted to Schneider Electric's general counsel, after having served as vice president and general counsel of Schneider Electric's critical power and cooling services division formerly American Power Conversion Corporation.

Prior to Schneider Electric, Mr. Wexler served as the vice president, associate general counsel, and assistant secretary for American Power Conversion Corporation. Before joining American Power Conversion, Mr. Wexler was corporate counsel for Stone and Webster Engineering Corporation in Boston.

He received his bachelor's from the University of Vermont and his JD from American University's Washington College of Law.

Copyright © 2009 Association of Corporate Counsel

ASSOCIATION OF CORPORATE COUNSEL'S 2009 ANNUAL GENERAL MEETING

"NEW GOVERNMENTS – NEW ANTITRUST LAWS: THE REINVIGORATION OF NORTH AMERICAN ANTITRUST ENFORCEMENT"

COURSE MATERIALS

INDEX

Tab	*Document*
1.	PowerPoint Presentation: "New Governments – New Antitrust Laws: The Reinvigoration of North American Antitrust Enforcement"
2.	B. Facey and E. Kriaris, "Canada's New Competition Regime: Compliance Guidance for General Counsel", October 19, 2009
3.	Remarks of Jon Leibowitz – 2009 Center for Democracy and Technology Gala, March 10, 2009
4.	Remarks of Christine A. Varney, "Vigorous Antitrust Enforcement in this Challenging Era" – United States Chamber of Commerce, May 12, 2009
5.	Remarks of Carl Shapiro, "Competition Policy in Distressed Industries" – ABA Antitrust Symposium, May 13, 2009
6.	Speech of Thomas Rosch, "Thoughts on the Withdrawal of the DOJ Section 2 Report" – IBA/ABA Conference on Antitrust in a Global Economy, June 25, 2009
7.	"Significant Amendments to Canada's Competition Act and Investment Canada Act Now in Force", March 2009
8.	Speaking Notes for Melanie Aitken – Canadian Bar Association, Competition Law Section, 2009, May 12, 2009
9.	Speaking Notes for Melanie Aitken – The Senate Banking, Trade and Commerce Committee Hearings Regarding Competition Act Amendments, May 13, 2009

Copyright © 2009 Association of Corporate Counsel

Challenges For Corporate Counsel

- Changing regimes in tough economic times
- Globalization of antitrust
- Increased vigilance
- Balance compliance and cost

Copyright © 2009 Association of Corporate Counsel

Overview of Developments in Antitrust Enforcement

- Changing of the guard
- New heads appointed at the U.S. Department of Justice Antitrust Division and the Federal Trade Commission
- Appointment of new Canadian Commissioner of Competition
- European Commissioner's term expires fall 2009

Copyright © 2009 Association of Corporate Counsel

Overview of Developments in Antitrust Enforcement

- Newly appointed regulators stress increased emphasis on antitrust enforcement
- Particular emphasis placed on enforcement in the healthcare/pharmaceutical and high-tech/internet sectors
- Amendments to Canada's *Competition Act* result in significant changes to most areas of competition law

Copyright © 2009 Association of Corporate Counsel

Effect of the Financial and Economic Crisis on Antitrust Enforcement

- Onset of financial and economic crisis has not dampened antitrust enforcement
  - “The current economic challenges raise unique issues for antitrust authorities and private sectors…passive monitoring of market participants is not an option…Antitrust must be among the frontline issues in the Government's broader response to the distressed economy.” – Christine Varney
  - “Clear rules protecting consumers and promoting innovation are all the more important in times of economic difficulty such as these.” – Neelie Kroes
  - “Canadians need to see that there is a vigilant cop on the beat…a recession is no excuse for an economic crime.” – Melanie Aitken

Copyright © 2009 Association of Corporate Counsel

Key Areas of Change

- **Mergers**
- Emphasis placed on merger review
- Regulators not willing to apply "failing firm" or "flailing firm" defenses unless circumstances merit
- Greater co-operation between agencies in arriving at merger remedies

Copyright © 2009 Association of Corporate Counsel

Key Areas of Change

- **Monopolization/Abuse of Dominance**
- Increased emphasis on enforcement of unilateral conduct provisions
  - U.S. DOJ withdraws September 2008 Report on Section 2 of the *Sherman Act*
  - Canada amends laws to impose significant penalties for breaches of the abuse of dominance provisions

Copyright © 2009 Association of Corporate Counsel

Key Areas of Change

- **Criminal Offences/Conspiracy**
- More criminalization of antitrust violations around the world
- Focus on enforcement of criminal provisions relating to cartels
- Increasing criminal fines and longer jail sentences imposed in the U.S. for parties engaged in domestic and international cartels
- Introduction of *per se* criminal offences in Canada

Copyright © 2009 Association of Corporate Counsel

Key Pointers/Recommendations for In-House Counsel

- Keep abreast of changes in the law
- Update antitrust compliance program to reflect changes in the law
- Conduct regulatory audits
- If possible violations of antitrust provisions are detected, quickly determine what these are and take appropriate steps

Copyright © 2009 Association of Corporate Counsel

Appendix A

Compliance Checklist

- Five key requirements for compliance programs:
  1) Senior Management Involvement and Support
  2) Antitrust Compliance Policies and Procedures
  3) Training and Education
  4) Monitoring, Auditing and Reporting Mechanisms
  5) Consistent Disciplinary Procedures and Incentives

Copyright © 2009 Association of Corporate Counsel

Appendix B

What to do When the Regulator Calls

- If antitrust authorities attend at your offices with search warrants:
  - advise them that you intend to co-operate with the search, but would like to contact outside legal counsel, who will want to attend to review the search warrant, etc.
  - if regulators are not willing to wait, do not obstruct their search in any way; call counsel immediately
  - no documents that could possibly be relevant to the regulator’s search should be removed from the premises or destroyed during the search
  - keep an accurate record of all documents seized
  - direct all questions to your outside legal counsel
  - claim privilege over any documents that are privileged and ask that these be sealed

Copyright © 2009 Association of Corporate Counsel

CANADA'S NEW COMPETITION REGIME: COMPLIANCE GUIDANCE FOR GENERAL COUNSEL

by

Brian A. Facey and Evangelia Litsa Kriaris

Association of Corporate Counsel's 2009 Annual Meeting

"New Governments – New Antitrust Laws: The Reinvigoration of North American Antitrust Enforcement"

October 19, 2009

Boston, Massachusetts

Brian A. Facey is a partner in Blake, Cassels & Graydon LLP. Evangelia Litsa Kriaris is an associate at Blake, Cassels & Graydon LLP. The views herein are those of the authors and not necessarily those of Blakes or any of its clients.

Copyright © 2009 Association of Corporate Counsel

CANADA'S NEW COMPETITION REGIME:

COMPLIANCE GUIDANCE FOR GENERAL COUNSEL[1]

1. Overview

Managing regulatory compliance and keeping within legal budgets has never been more challenging than it is today. On the one hand, a company's legal budget is one area that is often hit as part of cost-cutting measures. On the other hand, it is often during economic downturns that employees may start to cut corners, which may expose the company to antitrust risk, and so increased vigilance by corporate counsel and a focus on compliance become increasingly important.

To add to this tension, Canada has in the last five months conducted a major overhaul of its legislation and on August 5, 2009 appointed a new Commissioner of Competition (the "**Commissioner**") to office with an enforcement agenda.[2]

The changes to Canada's legislation were set out in the *Budget Implementation Act* which was proclaimed into force on March 12, 2009. This statute included far-reaching amendments to Canada's *Competition Act* (the "**Act**") which included:

- the establishment of a dual-track approach to agreements between competitors, with a criminal anti-conspiracy provision aimed at price-fixing, market allocation, and similar hardcore conduct, and a civil provision to address other agreements that substantially prevent or lessen competition;

- the repeal of the criminal provisions dealing with price discrimination, promotional allowances, and predatory pricing, thereby leaving them under the civil provisions of the Act (i.e., abuse of dominance);

- the replacement of the criminal resale price maintenance provision with a new civil provision that will address situations where price maintenance is having an adverse effect on competition;

- the introduction of administrative monetary penalties for abuse of dominance;

---

[1] This paper is largely based on a paper by Brian A. Facey and Gregory Sullivan entitled "The New Competition Act: An Ounce of Prevention…" presented at the 2009 CCCA National Spring Conference, April 5-7, 2009, Montréal, Québec.

[2] See "Melanie Aitken Appointed to the Competition Bureau Canada", Competition Bureau Press Release dated August 5, 2009. See also E. Gray "Aitken appointed Canadian competition commissioner", Global Competition Review, August 6, 2009 and "Aitken named competition watchdog", Financial Post, August 6, 2009 (http://www.nationalpost.com/story.html?id=1863786).

Copyright © 2009 Association of Corporate Counsel

- increased potential fines and terms of imprisonment for, among other things, conspiracies, bid-rigging, obstruction, and failure to comply with a prohibition order;
- the introduction of a U.S.-style second-request process for mergers;
- increased thresholds for pre-merger notification; and
- the Commissioner's right to challenge a merger before the Competition Tribunal will be limited to a period of up to one year after closing, as opposed to the previous three years.

From a compliance perspective, the amendments to the Act will require corporate counsel to consider a number of questions:

- How will the legislation affect my company?
- Which business segments of the company will be most affected?
- What steps do I need to take?

With respect to the last question, corporate counsel will need to think about:

- updating the company's compliance programs;
- educating key managers and the board of directors; and
- reviewing key agreements to ensure compliance.

2. Competition Law Compliance Programs

From a competition law perspective, ongoing compliance is important for a number of reasons:

- contravention of the Act can expose a company to significant fines or administrative monetary penalties, as well as the possibility of damages under a private civil action (including a class action);
- non-compliance can result in harm to the company's reputation, loss of productive management time, and significant legal costs; and
- individuals convicted of criminal offences under the Act may be sentenced to a term of imprisonment.

A key element of competition law compliance is the development of a formal compliance program. In this regard, the Competition Bureau (the "**Bureau**") published an updated version of its *Corporate Compliance Programs Bulletin* (the "**Bulletin**"), dated September 10, 2008. The Bulletin provides guidance on measures that companies should consider in order to prevent or minimize their risk of contravening the Act and to detect contraventions, should they occur.

Copyright © 2009 Association of Corporate Counsel

The Bulletin identifies five elements that the Bureau considers "fundamental" to a proper compliance program:

- *Senior Management Involvement and Support*. Senior management must play an active and visible role in promoting the company's compliance program.

- *Corporate Compliance Policies and Procedures*. The substantive content of the compliance program should be described in a company publication, which should be updated when required to reflect changes in the law.

- *Training and Education*. The compliance program should include ongoing training for staff at all levels who are in a position to potentially engage in, or be exposed to, conduct in breach of the Act.

- *Monitoring, Auditing, and Reporting Mechanisms*. Monitoring, auditing, and reporting mechanisms help prevent and detect misconduct, educate staff, and assess the effectiveness of the compliance program.

- *Consistent Disciplinary Procedures and Incentives*. The compliance program should explicitly state that disciplinary action may be taken if an employee contravenes the Act.

While the Bulletin notes that the existence of a compliance program does not immunize a company from enforcement action by the Commissioner or from prosecution by the Director of Public Prosecutions (the "**DPP**"), the Commissioner and the DPP may give weight to the existence of a credible and effective program. In this regard, the Bulletin notes the following:

- a compliance program may assist a company in detecting a violation under the criminal provisions of the Act and, as a result, may enable it to be the first-in immunity applicant or it may receive a greater degree of leniency under the Bureau's Immunity Program;

- for criminal offences, where the exercise of due diligence is a consideration, a compliance program may be seen as a mitigating factor warranting a reduction in the penalty that the Commissioner would otherwise recommend to the DPP for submission to the court;

- the Bureau's decision of whether to pursue a matter under the criminal or civil provisions of the Act may take into account the existence of a compliance program; and

- in certain circumstances, the Commissioner may be more inclined to consider an alternative form of resolution to litigation (e.g., a consent agreement) where the company can demonstrate that, among other things, the conduct was contrary to the policy in place at the time of the contravention.

3. What Should You Do if the Competition Bureau Calls?

A powerful tool in the Commissioner's investigative arsenal is that of search and seizure. Under subsection 15(1) of the Act, the Commissioner may apply *ex parte* to a judge of a superior

Copyright © 2009 Association of Corporate Counsel

or county court of a province to obtain a warrant to search premises and seize any records[3] or things. In order to obtain a search warrant, the Commissioner must satisfy a judge that there exists a basis for an inquiry and that there are reasonable grounds to believe that the relevant evidence is on the premises to be searched.[4] Subsection 16(1) of the Act further allows for computer searches and the reproduction and seizure of any records or data found.

In the event that the Bureau obtains a search warrant and attends at your offices, you should note the following:

- The commerce officers must provide a person in charge of the premises (they intend to search) with a search warrant that indicates on its face that the named commerce officers are authorized to search those premises for specific documents at that time.

- Upon receipt of the search warrant and after the commerce officers have identified themselves, you should indicate to them that while you intend to co-operate with the search, you wish to contact your external legal counsel, who will want to attend to review the search warrant and meet with the commerce officers at the outset of their search.

- Usually the commerce officers will wait for a reasonable time (i.e., an hour or so) for external legal counsel to arrive at your office or to otherwise contact them before proceeding with the search, on the understanding that no documents will be removed from the premises.

- If the commerce officers are not prepared to wait for external legal counsel, you should not obstruct their search in any way and do not take it upon yourself to decide what the scope of their search ought to be. Call external legal counsel immediately.

- Identify facilities that may be used by the commerce officers during their search. These facilities should include one or more offices (that are located well away from the executive offices if possible) and one or more photocopiers.

- No documents that could possibly be relevant to the inquiry should be removed from the premises during the course of the search without conferring with external legal counsel who will then confer with the commerce officers.

- No documents that could possibly be relevant should be destroyed during the search.

- The CEO should immediately circulate a memorandum to all employees in the affected premises instructing them to comply with the preceding two paragraphs. Once sent, a copy of this memorandum should be given to the commerce officer in charge.

- To the extent that the commerce officers commence their search before external legal counsel arrives on the premises, suggest that the commerce officers direct all their

---

[3] The term "record" is broadly defined under subsection 2(1) of the Act to include not only paper documents (such as correspondence and memoranda), but also photographs, films, sound recordings, and videotapes.

[4] Act, subsection 15(1).

Copyright © 2009 Association of Corporate Counsel

questions to a single person. This will allow you to monitor the requests made and will minimize the disruptive effect of the search.

- Try to keep an accurate record of all documents seized. Ask the officers to agree to allow you to make a photocopy of every document taken. While they may not agree, it is worth asking since it may be weeks or months before you can get copies of the documents once they have been seized.

- While you will want to be courteous during the search, do not engage in any conversations with any commerce officers during the course of the search apart from indicating where certain offices may be located at your premises.

- In particular, if you are asked any questions by the commerce officers about your operations or about any documents, please refer the officers to your external legal counsel.

- Do not consent to commerce officers searching beyond the terms of the warrant. If you believe that the search is extending too broadly, do not get into an argument with the commerce officers. Indicate that while you believe that the search is outside of the terms of the warrant, you will not obstruct the officers from completing the search if they insist. Bring this matter to your external legal counsel's attention as soon as possible.

- You can also ask the commerce officers to agree to seal any documents disputed as being outside of the terms of the warrant. These documents would be held by an independent party pending judicial resolution of the dispute. The commerce officers may or may not agree to this request.

- You should appreciate that your external legal counsel will claim solicitor-client privilege on any documents that contain communications between legal counsel (either in-house counsel or counsel from any law firms retained to act for you). If you are asked by a commerce officer for any file material that may contain such privileged documents, you should inform the commerce officer of your claim for privilege, as described in the next paragraph.

- Where the commerce officers are about to examine, copy, or seize any documents where a claim of solicitor-client privilege may be made, you should tell the commerce officers that you are making a claim of solicitor-client privilege and are requesting that the documents be sealed. The commerce officers are then required to place the document, any copies made, and any relevant notes into a package and seal it without doing anything else with it. This package is then held in secure custody (e.g., with a sheriff or registrar) until the claim of privilege can be evaluated.

Copyright © 2009 Association of Corporate Counsel

4. Conclusion

Corporate counsel face the demanding task of managing regulatory compliance, while keeping within legal budgets. Given the current economic climate, this may become an especially challenging endeavour. However, it is during economic downturns that compliance becomes particularly important.

Adding to the challenges facing corporate counsel, from a competition law perspective, are the far-reaching amendments to the Act, which came into force on March 12, 2009. These amendments include the establishment of a dual-track approach to agreements between competitors, the introduction of administrative monetary penalties for abuse of dominance, and increased potential fines and terms of imprisonment for, among other things, conspiracies, bid-rigging, obstruction, and failure to comply with a prohibition order.

From a compliance perspective, these amendments to the Act will require corporate counsel to consider how the legislation will affect their companies and what steps they need to take to ensure continued compliance. In this regard, corporate counsel are encouraged to update their companies' compliance programs, educate key managers and the board of directors, and review key agreements to ensure compliance. Given the increased potential fines and terms of imprisonment now set out in the Act, an ounce of prevention in these circumstances may be worth a pound of cure.

Copyright © 2009 Association of Corporate Counsel

Remarks of Jon Leibowitz, Chairman of the Federal Trade Commission

2009 Center for Democracy and Technology Gala, March 10, 2009

Remarks for CDT Dinner (March 10, 2009)

It is an honor for me to share the dais with Chairman Rick Boucher. As you know, he was a strong and early supporter of the development of e-commerce, and has fought to ensure that everyone has access to the Internet's benefits, whether by encouraging municipal broadband initiatives or by expanding broadband to rural areas.

Making sure technology works for people is also a critical part of the Center for Democracy & Technology's mission. I'd like to thank CDT for inviting me to speak tonight. Many of you know that I have strong feelings, many unprintable, about the spyware and nuisance adware foisted on unsuspecting consumers without notice or consent. I'm proud to say that the Commission developed an active anti-spyware program and brought more than a dozen cases, including two against major nuisance adware purveyors Zango and Direct Revenue.

Now that iniquitous business model has been mostly eradicated – with help from CDT. CDT was very effective both in prodding the Commission to do more and in its own efforts – via the Anti-Spyware Coalition – to get the "good guys" working together on the problem. Spyware is just one of many areas where CDT's thoughtful guidance on privacy issues has had an impact, but one that's very close to my heart.

Turning to the Commission, this is my first speaking engagement since being appointed Chairman by President Obama. After Tim Muris took over as FTC Chairman in 2001, he said something to the effect that he agreed with 95 percent of former Chairman Bob Pitofsky's agenda and initiatives. I can say the same thing about my two predecessors, Debbie Majoras and Bill Kovacic.

I marvel at President Obama's commitment to change and his fearlessness in tackling so many needed reforms. In our own small way, we also will be looking for fresh ideas about how we can accomplish our mission most effectively. But when you think about it, the Commission has already embraced change in a number of core areas. So at the Commission – our agenda for helping consumers in the upcoming years is going to be, I believe, about both change and continuity.

First, on the competition side, we will continue to be unanimous in opposing collusive pay-for-delay settlements between brand and generic pharmaceutical companies – in which the brand literally pays the generic to delay entry into the market. These deals cost billions of dollars for consumers – and ultimately for the government, which makes almost a third of all drug purchases. Stopping these unconscionable deals – and vigorously enforcing the antitrust laws – are going to be top priorities.

Second, on the consumer protection side, nobody who has picked up a newspaper in the last year or so – I know I'm dating myself with that "dead tree" reference – will be surprised that one of our biggest issues is going to be stopping predatory financial practices, particularly schemes directed at lower-income and financially distressed borrowers. We're going to examine every stage of the lending process, from broker solicitations to mortgage servicers to foreclosure rescue scams.

The sad truth is that we'll likely see more and more frauds as the economy struggles. Just last week we had a press conference to warn people about scam websites that promised folks they could get a direct handout from the stimulus package, like one that offered a $12,000 government payout, supposedly, for a small fee. Hey, I want that deal too! Unfortunately, many malefactors are taking full advantage of the broad reach and relative anonymity offered by the Internet. Senator Dorgan and Chairman Rockefeller deserve our utmost thanks for inserting a provision in the omnibus that would allow us to do a rulemaking to address abuses in the financial services area.

Copyright © 2009 Association of Corporate Counsel

Moreover, Internet privacy has been and will remain a foremost area of focus. On behavioral marketing, there are obviously benefits that targeting can bring to consumers in the form of more relevant advertising and the additional revenue that targeting can provide. This revenue may be vital to the survival of some industries.

But we have to face the fact that the current model is not working. Staff recently issued guidelines identifying key components that a robust self-regulatory approach could be built around, and I'm hopeful that industry will respond with concrete improvements to the existing approach.

Self-regulation, if it works, can be the fastest and best way to change the status quo. We will continue to monitor and report on developments and, if there isn't an appropriately vigorous response, my sense is that Congress and the Commission may move toward a more regulatory model.

To be clear, we know our work in this area is not done or even near it. Online privacy is broader than behavioral targeting, and we will not neglect issues presented by data collection and its use for other purposes.

Third, on the legislative side, we hope to work with Congress to make the agency more effective. For example, getting the resources to better accomplish our mission is a major priority. In the past decade, our agency has been charged with enforcing a variety of new statutes, including Gramm Leach Bliley, FACTA, COPPA, and CANSPAM, not to mention the new health privacy requirements in this year's stimulus bill. And we're doing it with about 1100 employees instead of the 1800 we had in 1980 – when the American population was one-third smaller. Simply put, the quality of our work is being strained by the quantity of demands placed upon us. We need to grow the agency to tackle the pressing issues facing the American public.

By the way, if you combine all the consumer redress, disgorgement, and fines we collect with our Hart-Scott-Rodino and Do Not Call fees, our agency actually brings in more money than it costs. We may not be a profit center but we are not running any deficits, either.

Finally, the Commission is most effective when it works closely with other agencies that share our mission, particularly the FCC and DoJ. I am looking forward to partnering with two people who could not be here tonight – Julius Genachowski, who will be the next Chairman at the FCC; and Christine Varney, a great friend and former Commissioner, who will head the Antitrust Division of DoJ. They both are incredibly talented, smart, and dedicated – and working together, I'm hopeful we will be able to accomplish remarkable things for consumers.

Let me close by saying that it is personally a tremendous honor for me to lead the FTC. Commissioners are just temporary custodians of a wonderful agency with a great staff and a critical mission. That's really why I come into the office each day, well, "fired up and ready to go."

Copyright © 2009 Association of Corporate Counsel

DEPARTMENT OF JUSTICE

VIGOROUS ANTITRUST ENFORCEMENT IN THIS CHALLENGING ERA

CHRISTINE A. VARNEY
Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Remarks as Prepared for the
United States Chamber of Commerce

May 12, 2009

I. Introduction

Good afternoon and on behalf of the Antitrust Division, I want to thank you for the opportunity to speak today about the importance of antitrust enforcement in a distressed economy. I am especially pleased to give remarks here at the Chamber of Commerce, which represents businesses of all sizes, sectors, and regions, and has focused the attention of its Antitrust Council and International Competition Working Group on domestic and international competition policy. I look forward to working with the business community and the Chamber throughout my tenure as AAG.

I have had a wonderful first month on the job. As I begin each day with the Division, I pass the photographs of all of the former AAGs for Antitrust. Among those photographs are former AAGs who faced the challenges posed by tumultuous economic conditions. Thurman Arnold is one. He served as the AAG for Antitrust just after the Great Depression, and the Antitrust Division played a very active role in bringing competition back to the market

Copyright © 2009 Association of Corporate Counsel

during his tenure. I keep such luminaries in mind as I consider the great challenges that lie ahead of us.

I want to talk with you today about three issues. First, I want to address the role of antitrust enforcement in a distressed economy. Second, I want to discuss the Antitrust Division's approach to enforcement regarding single-firm conduct under Section 2 of the Sherman Act. Finally, I want to share my thoughts on the challenges we face going forward.

II. Lessons Learned From Prior Economic Crises: National Industrial Recovery Act and Industrial Codes

The question on every American's mind is: "*What can the Government do to help ease consumers' burden in these troubled economic times*?" This question is particularly pressing for the Antitrust Division, which in the past has come forward to play a significant role in response to economic crises. It is time for the Antitrust Division to step forward again. I believe this country's prior experience in responding to economic crises must be considered in evaluating our response to current market conditions. As Shakespeare once put it – "what's past is prologue." In particular, I have considered the Government's response to the market conditions that followed the Great Depression, and I believe there are important lessons we can learn from that era.

At the turn of the century, after the passage of the Sherman Act, our country faced catastrophic events: the Panic of 1907 and World War I. The latter event brought a close to the Government's previous commitments to trust-busting. This lack of interest in antitrust enforcement continued through the 1920s. Significantly, the onset of the Great Depression did not cause the nation to reconsider the damaging effects of cartelization on economic performance. Instead of reinvigorating antitrust enforcement, the Government took the opposite tack. Legislation was passed in the 1930s that effectively foreclosed competition. The National Industrial Recovery Act ("NIRA"), which created the National Recovery Administration ("NRA"), allowed industries to create a set of industrial codes. These "codes of fair competition" set industries' prices and wages, established production quotas, and imposed restrictions on entry.

At the core of the NIRA was the idea that low profits in the industrial sectors contributed to the economic instability of those times. The purpose of the industrial codes was to create "stability" – *i.e.*, higher profits – by fostering coordinated action in the markets. The codes developed following the passage of the NIRA governed many of America's major industrial sectors: lumber, steel, oil, mining, and automobiles. Under this legislation, the Government assisted in the enforcement of the codes if firms contributed to a coordinated effort by permitting unionization and engaging in collective bargaining.

What was the result of these industrial codes? Competition was relegated to the sidelines, as the welfare of firms took priority over the welfare of consumers. It is not surprising that the industrial codes resulted in restricted output, higher prices, and reduced consumer purchasing power.

It was not until 1937, during the second Roosevelt Administration, that the country saw a revival of antitrust enforcement. From 1937-1939, the number of antitrust cases initiated by the Antitrust Division jumped to 48 cases, a significant up-tick from the 15 cases filed in the preceding three years. Under the leadership of Thurman Arnold, who served as the AAG for Antitrust from 1938 until 1943, the Department continued its enforcement efforts. As Thurman Arnold later commented, the Roosevelt Administration "was responsible for the

Copyright © 2009 Association of Corporate Counsel

first sustained program of antitrust enforcement on a nationwide scale" that the country had ever had. The cases brought by the Antitrust Division during this era represented the beginning of a strengthened competition policy. Thurman Arnold's legacy of vigorous antitrust enforcement was thus a cornerstone of the New Deal's economic agenda and a part of that era's legacy for modern economic policy.

The lessons learned from this historical example are twofold. First, there is no adequate substitute for a competitive market, particularly during times of economic distress. Second, vigorous antitrust enforcement must play a significant role in the Government's response to economic crises to ensure that markets remain competitive.

This country's prior experience raises the question of whether current economic challenges reflect a "failure of antitrust." In other words, could United States antitrust authorities have done more? As many observers agree, in past years, with the exception of cartel enforcement, the pendulum swung too far from Thurman Arnold's legacy of vigorous enforcement.

Americans have seen firms given room to run with the idea that markets "self-police," and that enforcement authorities should wait for the markets to "self-correct." It is clear to anyone who picks up a newspaper or watches the evening news that the country has been waiting for this "self-correction," spurred innovation, and enhanced consumer welfare. But these developments have not occurred. Instead, we now see numerous markets distorted. We are also seeing some firms fail and take American consumers with them. It appears that a combination of factors, including ineffective government regulation, ill-considered deregulatory measures, and inadequate antitrust oversight contributed to the current conditions. I believe that these extreme conditions require a recalibration of economic and legal analysis and theories, and a clearer plan for action. As antitrust enforcers, we cannot sit on the sidelines any longer – both in terms of enforcing the antitrust laws and contributing to sound competition policy as part of our nation's economic strategy.

III. Actions Ahead: Enforcement Priorities

Section 2 Enforcement

The Antitrust Division must step forward and take a leading role in the development of the Government's multi-faceted response to the current market conditions. Vigorous antitrust enforcement action under Section 2 of the Sherman Act will be part of the Division's critical contribution to this response.

Just as I do, my predecessors in the Antitrust Division saw the need for a clear Department policy regarding enforcement under Section 2 of the Sherman Act. Starting in June 2006, the Department of Justice, with the aid of the Federal Trade Commission, embarked on a year-long series of joint hearings to study issues relating to enforcement of Section 2 against single-firm conduct. The goal of these efforts was to clarify the analytical framework for assessing the legality of single-firm conduct and to provide guidance to the courts, antitrust counselors, and the business community. In September 2008, after review and analysis of the extensive hearing record, the Department of Justice issued its report, entitled "*Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*."[(1)] The Section 2 Report reflected a significant effort by my predecessors and the FTC in collecting and evaluating the opinions and expertise of antitrust enforcement officials from the United States and abroad, leading economists and legal scholars, antitrust practitioners, and representatives of the business community. To its credit, the Report provided a

Copyright © 2009 Association of Corporate Counsel

comprehensive evaluation of the history of single-firm enforcement and careful consideration of the risks and benefits of particular enforcement strategies. The Report's ultimate conclusions, however, missed the mark. In my view, the greatest weakness of the Section 2 Report is that it raised many hurdles to Government antitrust enforcement.

At the core of the Section 2 Report were several critiques of 1960s antitrust enforcement policy, which, taken to their extremes, counseled in favor of a significant limitation of Section 2 enforcement. The Report sounded a call of great skepticism regarding the ability of antitrust enforcers – as well as antitrust courts – to distinguish between anticompetitive acts and lawful conduct, and raised the related concern that the failure to make proper distinctions may lead to "over-deterrence" with regard to potentially procompetitive conduct.(2) I do not share these concerns. I strongly believe that antitrust enforcers are able to separate the wheat from the chaff in identifying exclusionary and predatory acts. As Judge Posner explained, "antitrust doctrine is supple enough...to take in stride the competitive issues presented by the new economy."(3)

The Section 2 Report also characterized a dominant firm's ability to act efficiently as a core concern in evaluating any possible anticompetitive impact of its conduct.(4) There is no dispute that the evaluation of potential economic efficiencies is an important aspect of the analysis of firm conduct. The Report, however, went too far in evaluating the importance of preserving possible efficiencies and understated the importance of redressing exclusionary and predatory acts that result in harm to competition, distort markets, and increase barriers to entry. The ultimate result is that consumers are harmed through higher prices, reduced product variety, and slower innovation.(5) Accordingly, I believe the Section 2 Report lost sight of an ultimate goal of antitrust laws – the protection of consumer welfare.

With its twin bases for skepticism, the Report counseled in favor of the exercise of extreme caution in enforcing Section 2 and called for the adoption of a number of safe harbors for certain conduct within its reach. While there is no question that Section 2 cases present unique challenges (for example, in the fashioning of injunctive remedies), the Report advocated extreme hesitancy in the face of potential abuses by monopoly firms.(6) We must change course and take a new tack.

For these reasons, I have withdrawn the Section 2 Report by the Department of Justice. Effective May 11, 2009, the Section 2 Report no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act. The Report and its conclusions should not be used as guidance by courts, antitrust practitioners, and the business community.

In withdrawing the Section 2 Report, I made specific reference to the Report's conclusions. In particular, Chapter 3 of the Section 2 Report concluded that where conduct-specific tests are not applicable, "the disproportionality test is likely to be the most appropriate test[.]"(7) With this baseline, conduct is only considered anticompetitive where it results in harm to competition that is disproportionate to consumer benefits and to the economic benefits to the defendant. In other words, the anticompetitive harm must substantially outweigh procompetitive benefits to be actionable. The Report's adoption of the disproportionality test reflected an excessive concern with the risks of over-deterrence and a resulting preference for an overly lenient approach to enforcement. The failing of this approach is that it effectively straightjacketed antitrust enforcers and courts from redressing monopolistic abuses, thereby allowing all but the most bold and predatory conduct to go unpunished and undeterred.

Copyright © 2009 Association of Corporate Counsel

While the Department is not proposing any one specific test to govern all Section 2 matters at this time, I believe the balanced analyses reflected in the leading cases interpreting the reaches of the Sherman Act provide important guidance in this regard. In particular, leading Section 2 cases – from *Lorain Journal v. United States*(8) to *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*(9) to *United States v. Microsoft*(10) – highlight a common concern regarding the harmful effects of a monopolist's exclusionary or predatory conduct on competition and, ultimately, consumers. Reinvigorated Section 2 enforcement will thus require the Division to go "back to the basics" and evaluate single-firm conduct against these tried and true standards that set forth clear limitations on how monopoly firms are permitted to behave. There can be no better charter for our return to fundamental principles of antitrust enforcement.

In 1951, the Supreme Court laid down a marker for Section 2 enforcement in its decision in *Lorain Journal*.(11) In that case, the Court made a clear step forward in identifying single firm conduct that crossed the line separating lawful, fair competition from exclusionary, anticompetitive acts.(12)

The Court addressed the conduct of a newspaper publisher, which was the only business disseminating news and advertising in an Ohio town until a small radio station began broadcasting in a neighboring community.(13) The publisher, perceiving a threat posed by the radio station, took action to destroy this competitor.(14) The publisher refused to sell advertising space to any parties that also used the radio station for local advertising.(15) This practice forced numerous advertisers to refrain from using the radio station for advertising.(16) The publisher's actions also threatened to deprive surrounding communities of their only nearby radio station.(17) The Court found that the publisher's conduct violated Section 2 because its acts were plainly exclusionary in their ultimate effect, were not justified by any legitimate reason, and were aimed at the "complete destruction and elimination" of the radio station.(18)

In light of the publisher's purpose to create or maintain a monopoly and the plainly anticompetitive impact of its conduct, the *Lorain Journal* decision expressly rejected the claim that the publisher had a "right as a private business concern to select its customers and to refuse to accept advertisements from whomever it pleases."(19) As the Court explained its critical point: "*We do not dispute the general right. But the word 'right' is one of the most deceptive of pitfallsMost rights are qualified.*"(20) Consequently, the Court called for an injunction restraining the publisher from refusing to accept advertising from entities that also advertised in other media.(21)

The decisions that followed *Lorain Journal* echoed the Supreme Court's admonition to dominant firms regarding exclusionary and predatory conduct, and filled out the roadmap for Section 2 enforcement. In *Aspen Skiing Co.*,(22) the Court again considered whether a monopolist can refuse to deal with its competitors, and reaffirmed that any such right is not unqualified.(23) In that case, the Court considered the conduct of Ski Co., the owner of three of the four major downhill skiing facilities in Aspen, Colorado.(24) After several years of cooperating with Highlands, the owner of the fourth Aspen skiing facility, to issue interchangeable ski passes that could be used at all four facilities, Ski Co. discontinued the practice. Ski Co. offered to reinstate the 4-area pass only if Highlands would accept a fixed percentage of the revenue, which was considerably below Highlands's historical average

Copyright © 2009 Association of Corporate Counsel

revenue.[25] After Highlands refused to accept Ski Co.'s offer to reinstate the 4-area pass, Ski Co. embarked upon a national advertising campaign that strongly implied to visitors that there were only three ski mountains in the area.[26] Ski Co. also made efforts to frustrate Highlands's ability to market its own multi-area package by refusing to accept Highlands's vouchers, each equal to the price of a daily lift ticket at a Ski Co. mountain, which were guaranteed by an Aspen bank and could be redeemed for face value.[27]

Echoing its previous decision in *Lorain Journal*, the Supreme Court noted that "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified."[28] The critical question before the Court was therefore whether Ski Co.'s decision to make "an important change in the pattern of distribution that had originated in a competitive market" was unlawfully exclusionary.[29] In finding that Ski Co. had violated Section 2, the Court considered not only Highlands's steady decline in market share, but significantly, considered the impact of Ski Co.'s conduct on consumers.[30] Expert testimony and anecdotal evidence indicated that the elimination of the 4-area pass deprived skiers of a desired choice; many wanted to ski all four mountains, but would not because their ticket would not permit it.[31] Finally, the Court identified indicia of Ski Co.'s anticompetitive motivation to discourage skiers from doing business with Highlands. In particular, Ski Co. was unwilling to accept Highlands's vouchers, even though it entailed no cost to itself and would have satisfied potential customers. In other words, Ski Co. appeared willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on Highlands's business.[32] Moreover, Ski Co. acted markedly different in Aspen than it did in another Colorado ski area, where it owned only one mountain and continued to cooperate in providing access to a four mountain pass.[33] Thus, as Judge Posner put it, *Aspen Skiing* stands for the proposition that dominant firms can be expected to deal with their rivals where "cooperation is indispensable to effective competition."[34]

Following these Supreme Court cases, the Government and private parties have successfully challenged unlawful exclusionary conduct that harms consumers and competitors. *United States v. Dentsply International, Inc.*,[35] *United States v. Microsoft*,[36] and *Conwood Co. v. United States Tobacco Co.*[37] are strong examples of successful challenges to exclusionary conduct and the Department will look to them in establishing its Section 2 enforcement priorities. In particular, following the D.C. Circuit's decision in *United States v. Microsoft*, we will need to look closely at both the perceived procompetitive and anticompetitive aspects of a dominant firm's conduct, weigh these factors, and determine whether on balance the net effect of this conduct harms competition and consumers. Going forward, the Department is committed to aggressively pursuing enforcement of Section 2 of the Sherman Act in furtherance of the principles embodied in these cases.

We did not lightly withdraw the Report. In this instance, however, we concluded that the message sent by the doctrinal implications of this Report was too problematic to let stand. In short, while preserving the right of firms with market power to continue to compete, we cannot allow them a free pass to undertake predatory or unjustified exclusionary acts.

Section 1 Enforcement

Continued criminal and civil enforcement under Section 1 of the Sherman Act will also be an important part of the Antitrust Division's response to the distressed economy.

Copyright © 2009 Association of Corporate Counsel

Criminal Enforcement

The Antitrust Division's criminal enforcement program in recent years has obtained unprecedented success in cracking large domestic and international cartels, resulting in increasingly higher criminal fines and longer jail sentences for offenders. In the first six months of the current fiscal year, nearly $1 billion in criminal fines were obtained against corporate defendants, and the longest jail sentence for a one-count Sherman Act offense was imposed. In the last three years, over $2 billion in criminal fines and more than 162 years in jail time have been imposed in cases prosecuted by the Division.

With the higher levels of concentration and economic instability, markets are increasingly vulnerable to collusion and other fraudulent activity. We are especially concerned that the recent infusion of vast amounts of federal funding to distressed industries and stimulus money to federal, state, and local governments may lead to increased collusion and fraudulent activity. Outreach and cooperation with those involved in the public procurement process are important parts of preventing and identifying such illegal conduct.

I am pleased to report that the Antitrust Division is pioneering new territory in its efforts to reach at-risk public sectors. We have launched the Antitrust Division Recovery Initiative, a program developed in response to the enactment of the American Recovery and Reinvestment Act ("ARRA"), an act that provides for significant appropriations to stimulate the country's economic recovery. Recognizing the substantial risk that ARRA funded agencies will be vulnerable to collusion and other fraudulent activity, the Antitrust Division has dedicated significant resources to assist agencies receiving ARRA funds in detecting and deterring criminal antitrust offenses. As part of this Initiative, the Division is providing training to the investigative arms of agencies receiving ARRA funds, as well as the procurement officials from those agencies responsible for the expenditure of such funds. By the end of this month, Division attorneys will have provided training to over 8,000 agents, auditors, grant recipients, and other procurement professionals. Through this Initiative, the Antitrust Division hopes to make a significant impact on the overall prevention of fraud, waste, and abuse relating to the use of ARRA funds.

We will work hard to enable the Antitrust Division program to establish direct lines of communication with agency Inspector Generals ("IGs") and state investigative authorities to assist these officers in preventing – as well as detecting – fraud and abuse. Consequently, in the event that preventive efforts fail, we will be there to investigate and swiftly prosecute individuals and entities responsible for criminal antitrust violations.

Civil Merger and Non-Merger Enforcement

On the civil front, the Antitrust Division will continue its push forward with merger and non-merger investigations. In particular, it is my hope that the Antitrust Division, drawing upon the significant expertise of my new leadership team, will have the opportunity to explore vertical theories and other new areas of civil enforcement, such as those arising in high-tech and Internet-based markets. Increasingly, Americans are relying on high-tech solutions in the home and the workplace and enjoying the fruits of innovation in those markets that have been spurred on by competition between rival firms. We thus plan to devote attention to understanding the unique competition-related issues posed by these markets. In the past, the Antitrust Division was a leader in its enforcement efforts in technology industries, and I believe we will take this mantle again. In so doing, I am cognizant that we must find the right balance to ensure that when intellectual property is at issue, competition is not thwarted through its misuse or illegal extension.

Copyright © 2009 Association of Corporate Counsel

IV. Thinking Ahead: New Ideas

Antitrust authorities must continue to look forward in order to remain at the forefront of the dialogue, economic learning, and the development of legal doctrine. While our most pressing challenges relate to enforcement in the distressed economy, there are other important issues awaiting our attention.

Not only is the Antitrust Division charged with enforcing the antitrust laws, but it also supports the development of competition policy more broadly. In my view, we cannot develop sound antitrust policy merely on a case-by-case basis. Instead, as I have charged the Division's staff, we must consider the overall state of competition in the industries in which we are reviewing potentially anticompetitive conduct or mergers, or providing guidance to regulatory agencies charged with industry oversight. We thus must consider market trends and dynamics, and not lose sight of the broader impacts of antitrust enforcement.

Rigorous economic analysis has been, and will continue to be, at the foundation of the Division's antitrust policy. The focus of this fundamental analysis needs to be on the power of competition in the market to ensure the American consumer's access to the best products at the lowest prices. We need to bring the focus of the economic discourse back to the basic and practical principle: when markets are competitive, the consumer "wins."

Beyond recalibrating our economic analysis, another important and pragmatic aspect of sound antitrust policy is an understanding of the regulatory frameworks governing the industries that are subject to antitrust enforcement. The Antitrust Division cannot operate in a vacuum, nor can it only focus on the case before it. Antitrust policy and enforcement undoubtedly have a significant impact on affected industries. For this reason, we must bring to our antitrust analysis a comprehensive knowledge of the economic and regulatory environments in which industries operate. This broader understanding of the playing field is particularly critical now, in light of our distressed economy and the new administration's pledge of broad-reaching reforms across numerous industries.

Another challenge we will face is how to pursue effective enforcement in an era of change and reform. The Obama Administration has pledged broad reforms across numerous industries, including banking, healthcare, energy, telecommunications, and transportation. The Antitrust Division will need to contribute our experience and expertise to these reform efforts. Indeed, part of our efforts will be to foster inter-agency discussions regarding the competition-related issues posed by existing and proposed regulations and policies, and to play an active role in competition advocacy. Our review of these industries may reveal that antitrust enforcement is but one of the necessary elements of a broader approach requiring the expertise of other agencies and potential legislative solutions. If that is the case, the Antitrust Division will be at the table with other key decision-makers to make the case for competition policy, underscore the importance of antitrust enforcement, and advocate for America's consumers.

Finally, I want to address the issue of collaboration with other antitrust authorities, which I know is an issue of significant concern with the Chamber and its members in the business community. I am in search of ways to renew enforcement collaboration between the Antitrust Division and the FTC. Unfortunately, our policies and processes have diverged too frequently in recent years. While we are sister agencies with certain differences in terms of our operations, we have many shared enforcement goals. We will be even closer to reaching those goals if we can collaborate in pursuing our shared concerns regarding threats to competition. We will focus our efforts on working through our previously divergent policies

Copyright © 2009 Association of Corporate Counsel

regarding single-firm conduct and pursuing vigorous enforcement on the Section 2 front. We will also look at whether there is common ground between the two agencies in Section 1 enforcement, and in particular, with regard to vertical arrangements and in the review of mergers and acquisitions. In addition, I am focused on merger clearance with the hope of smoothing that process over time.

In the same spirit, I would like the Division to continue its fruitful collaboration with international antitrust enforcement authorities. I want to assure you that the withdrawal of the Section 2 Report does not mean that we are abandoning our efforts to work with our international colleagues. To the contrary, I believe that as targets of antitrust enforcement have expanded their operations worldwide, there is a greater need for U.S. authorities to reach out to other antitrust agencies.

We will therefore need to continue the efforts described in Chapter 10 of the Section 2 Report, and also find new ways to encourage collaboration in the international antitrust community. The Division is an unparalleled resource for other nations that are developing their own antitrust policies, and we will continue to play a leading role as an international advocate for competition policy. Although differing international legal frameworks pose certain hurdles to the convergence in substantive laws, we can still explore ways in which antitrust authorities around the world can pursue shared enforcement goals. We will therefore remain active participants in the International Competition Network and the Organization for Economic Cooperation and Development. We will provide continued support to emerging antitrust regimes around the world through technical cooperation with young antitrust agencies. We will also be looking for additional opportunities for bilateral cooperation with our sister antitrust authorities abroad.

In short, I believe that greater coordination with the FTC and foreign antitrust authorities is in the best interests of America's business community and consumers. Cooperation between antitrust agencies will not only contribute to the development of clearer legal standards around the world, but also may assist in improving cartel, merger, and non-merger enforcement in our respective jurisdictions.

V. Conclusion

The current economic challenges raise unique issues for antitrust authorities and private sectors. We are faced with market conditions that force us to engage in a critical analysis of previous enforcement approaches. That analysis makes clear that passive monitoring of market participants is not an option. Antitrust must be among the frontline issues in the Government's broader response to the distressed economy. Antitrust authorities – as key members of the Government's economic recovery team – will therefore need to be prepared to take action. The Antitrust Division will be ready to take a lead role in this effort.

Thank you for the opportunity to speak to you this morning. I am happy to answer any questions you may have at this time.

FOOTNOTES

1. *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*, United States Department of Justice (2008) ("Section 2 Report" or the "Report").

Copyright © 2009 Association of Corporate Counsel

2. This sentiment was expressed by a majority of FTC Commissioners upon the publication of the Section 2 Report in September 2008. Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice, Federal Trade Commission, at 3-4 (Sept. 8, 2008).

3. Richard A. Posner, *Antitrust in the New Economy*, 69 Antitrust L.J. 925, 925 (2001).

4. For a thoughtful development of the basis for this concern, see William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 1, 35-38.

5. Harvey J. Goldschmidt, *Comment on Herbert Hovenkamp and the Dominant Firm: The Chicago School Has Made Us Too Cautious About False Positives and the Use of Section 2 of the Sherman Act*, in How the Chicago School Overshot the Mark 123 (Robert Pitofsky ed., 2008).

6. *See* note 2 *supra*.

7. Section 2 Report at 45-46.

8. 342 U.S. 143 (1951).

9. 472 U.S. 585 (1985).

10. 253 F.3d 34 (D.C. Cir. 2001) (en banc).

11. 342 U.S. at 155.

12. Indeed, in his seminal work, *Antitrust Paradox*, Judge Bork points to *Lorain Journal* as a touchstone for Section 2 enforcement. *See* Robert H. Bork, Antitrust Paradox: A Policy At War with Itself 344-46 (1978); *see also* Robert H. Bork, Letter to the Editor, Wall Street Journal (May 15, 1998).

13. *Lorain Journal*, at 146-47.

14. *Id.* at 148-50.

15. *Id.* at 149-50.

16. *Id.*

17. *Id.* at 150.

18. *Id.*

19. *Id.* at 153, 155 (internal citations omitted).

20. *Id.* (internal citations omitted).

21. *Id.* at 156-58.

Copyright © 2009 Association of Corporate Counsel

22. 472 U.S. 585 (1985). While commentators have debated the implications of the Supreme Court's decisions in *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, – U.S. –, 129 S. Ct. 1109 (2009), and *Verizon Communications Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398 (2004), on the scope of the Section 2 analysis set forth in *Aspen Skiing*, particularly as it applies in limited, specific sectors subject to significant and specialized regulatory overlay, there is no question that these decisions reaffirmed *Aspen Skiing*'s limits on a monopolist's ability to engage in exclusionary or predatory conduct.

23. 472 U.S. at 609-10.

24. *Id.* at 587-90.

25. *Id.* at 592-93.

26. *Id.* at 593.

27. *Id.* at 593-94.

28. *Id.* at 601.

29. *Id.* at 603-05.

30. *Id.* at 605-10.

31. *Id.* at 605-06.

32. *Id.* at 610-11.

33. *Id.* at 603 n.30.

34. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 377–78 (7th Cir. 1986). Carl Shapiro, Deputy Assistant Attorney General for Economics, elaborated on this principle as to network industries, explaining that the strategic denial of access to a network facility controlled by a dominant firm can deny "consumers the full benefits of technological progress that a dynamically competitive market would offer." Carl Shapiro, *Exclusivity in Network Industries*, 7 Geo. Mason L. Rev. 673, 674 (1999).

35. 399 F.3d 181 (3d Cir. 2005).

36. 253 F.3d 34 (D.C. Cir. 2001) (en banc).

37. 290 F.3d 768 (6th Cir. 2002).

DEPARTMENT OF JUSTICE

COMPETITION POLICY IN DISTRESSED INDUSTRIES

CARL SHAPIRO ‡
Deputy Assistant Attorney General for Economics
Antitrust Division
U.S. Department of Justice

Remarks as Prepared For Delivery to

ABA Antitrust Symposium:
Competition as Public Policy

May 13, 2009

1. Introduction

I am delighted to have the opportunity to speak at the American Bar Association's Antitrust Symposium on Competition as Public Policy. In sponsoring this symposium, the ABA Antitrust Section indicates that "capitalism as we know it is under attack" and worries that "heavier government regulation is being touted as the solution." Tomorrow we will continue our discussion of the central question posed in this symposium: "whether competition will continue to serve as the foundation for economic policy and legislation."

This is no small question in these difficult economic times. But it is one I am eager to address here, in my first speech since rejoining the Antitrust Division as Deputy Assistant Attorney General for Economics. The Antitrust Division's short answer is this: keeping markets competitive is no less important during times of economic hardship than during normal times.

Copyright © 2009 Association of Corporate Counsel

As we map the course ahead for regulatory reform and competition policy, the first step is to diagnose the public policy failures that *caused* the current crisis so we can correct past errors and avoid repeating them. In this regard, it seems clear to me that the crisis in the financial sector primarily reflects a failure of government *regulation*, not any underlying failure in the ability of well-regulated competitive markets to serve consumers and promote economic growth.

Many vigorous supporters of free market capitalism have had their faith shaken in the past year. In testimony before Congress last Fall, Alan Greenspan, former Chairman of the Federal Reserve, confessed that he was "shocked" to have "found a flaw" in the model underlying his free market ideology.(1) Even more recently, Richard Posner has published a book entitled "A Failure of Capitalism: The Crisis of '08 and the Descent into Depression." Need I say more?

While the current crisis has caused many to lose faith in the market, that is not at all my reaction. As an industrial organization economist who has devoted much of his research career to studying the interaction between government and business, I regret to say that the recent problems in the financial sector do not fundamentally surprise me. One hundred years ago, food safety regulation was put into place in response to problems with the food supply that the unfettered market was not able to solve. Forty years ago, environmental regulations were put in place in response to problems with air and water pollution that the unfettered market was not able to solve. And, of course, we have had a heavy overlay of financial regulations going back at least to the Great Depression, again in response to a crisis that the unfettered market was not able to solve, and arguably exacerbated.

Nor does the current crisis call into question the basic utility of neoclassical microeconomics for understanding how firms behave and how markets perform. In particular, notwithstanding great advances in the field of behavioral economics, I have seen nothing in the past year that would cause me to depart from the tried and true working assumption in antitrust economics that for-profit firms generally seek to maximize profits and that this quest usually benefits the public in a myriad of ways. Adam Smith's teaching in this respect remains as valid as ever. But I hasten to add that this does not by any means imply profit-maximizing firms are *always* acting in the public interest, Adam Smith's famous invisible hand notwithstanding. Indeed, much of industrial organization economics involves the study of markets in which firms have market power, where Adam Smith understood full well that business interests often depart from those of the public. Recall his famous statement: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."(2)

As my mentor, Nobel laureate Joseph Stiglitz, is fond of saying, the Fundamental Theorem of Welfare Economics, which establishes conditions under which free markets lead to efficient outcomes, only applies under extremely restrictive conditions that are never even approximated in the real world. As we teach every first-year Ph.D. student in economics, there are three main reasons why markets fail to achieve efficiency (much less equity): externalities and public goods (such as pollution and climate change), imperfect information (which underlies the need for health and safety and financial regulations), and market power.

Which brings us to antitrust. Antitrust policy and enforcement is sometimes described as a form of "government regulation." But it is a fundamentally different exercise.(3) Unlike health and safety, environmental, and financial regulation, antitrust enforcement is *not* about steering the market in any particular direction other than the direction indicated by consumer

Copyright © 2009 Association of Corporate Counsel

preferences. The goal of antitrust is to ensure that firms compete to serve the needs of consumers, as reflected by their market demand for goods and services, even when vigorous competition is contrary to the interests of powerful and entrenched suppliers. In terms of the classic categories of market failure from the Fundamental Theorem of Welfare Economics, most regulations including environmental regulations, health and safety regulations, and consumer protection regulations primarily address problems of externalities, public goods, and imperfect information. Competition policy primarily addresses the problem of market power. (4)

While antitrust analysis needs to take account of all applicable regulations, it unabashedly embraces the virtues of competition as a method of allocating resources, given those regulations. The current crisis provides no basis for wavering from this core principle, which has enjoyed bipartisan support since the Sherman Act was passed in 1890. Happily, unlike during the Great Depression (see below), there have been no calls of late for the wholesale abandonment of antitrust principles.

But the current crisis *does* force us to reconsider how competition policy should be fashioned during a time of economic distress. I use the term "competition policy" broadly, encompassing competition advocacy as well as enforcement of the antitrust laws. As Assistant Attorney General Varney stated in her speech earlier this week:

> The Obama Administration has pledged broad reforms across numerous industries, including banking, healthcare, energy, telecommunications, and transportation. The Antitrust Division will need to contribute our experience and expertise to these reform efforts. Indeed, part of our efforts will be to foster inter-agency discussions regarding the competition-related issues posed by existing and proposed regulations and policies, and to play an active role in competition advocacy.(5)

The Antitrust Division will be playing an active role to ensure that government policies do not unnecessarily create or enhance market power and that they harness the beneficial power of competition wherever possible.

The remainder of my remarks are devoted to the narrower but very important question of how best to enforce the antitrust laws in distressed industries and as they impact financially weak companies in any industry. Antitrust analysis must always reflect market realities, including financial distress at the industry and/or firm level. Macroeconomic conditions are also relevant, but only inasmuch as they affect the specific industries or firms being studied in predictable ways.

2. Lessons from the Great Depression(6)

History teaches us that suppliers, hurting during a sharp economic downturn, will look for ways to avoid competing and thereby trim their losses or boost their profits. In this quest, they are likely to find some sympathetic ears in high places.(7) Teddy Roosevelt was a vigorous trustbuster until the Panic of 1907, when he pressured his Attorney General not to challenge U.S. Steel's acquisition of a rival but potentially failing steel firm. This acquisition might have passed muster under something like the modern standard for the failing firm defense, but broader economic and political concerns were evidently at work.(8)

We can learn a great deal about competition policy during tough times by studying

competition and industrial policy during the Great Depression.(9) While the federal government was not an enthusiastic trustbuster during the 1920s, the advent of the Great Depression made the Hoover administration even less interested in enforcing the antitrust laws, although to Hoover's credit he did at least resist the calls for a wholesale repeal of the antitrust laws.(10) As Secretary of Commerce, and later as President during the worsening depression, Herbert Hoover "urged businesses to cooperate through trade associations to exchange information and curb the wasteful features of competition."(11)

When Franklin Roosevelt took office in 1933, he put into place officials who were openly hostile to industrial competition.(12) On June 16, 1933, Roosevelt signed into law the National Industrial Recovery Act (NIRA), which Ellis Hawley (1966) describes in his Chapter 3 as "The Triumph of Industrial Self-Government." This act created the National Recovery Administration (NRA), which helped industries create and enforce so-called industry codes.(13) These were effectively industry agreements to limit price competition and restrict production, investment in plant and equipment, and the workweek. The *quid pro quo* was that part of the resulting higher profits would be shared with labor through higher wages: the NIRA provided antitrust exemptions to industries that accepted collective bargaining with labor unions. Indeed, shocking though it may seem today, the newly created Antirust Division at the Department of Justice was involved in enforcing these collusive agreements. (14) During the same time period, the Supreme Court, greatly influenced by the grim economic times, significantly weakened the Sherman Act's prohibition on agreements in restraint of trade.(15)

The danger of having the government organize the economy into cartels did not go unnoticed. Chapter 4, "The Association Idea in Retreat," in Hawley (1966) describes how consumer groups and "antitrusters" fought many of the provisions of the NIRA, initially in vain. In 1936, the highly distinguished economist Harold Hotelling, whose work is fundamental to the theory of unilateral effects now commonly used in merger analysis, outlined the pernicious effects of cartelization throughout the broader economy. Hotelling's perspective is nicely reflected in the title of his article: "Curtailing Production is Anti-Social." Responding to a government decision to allow a domestic oil cartel to form, Hotelling wrote:

> [T]he government assisted the oil companies in their successful attempt to curtail the flow of oil and the output of refined products, with the consequence that motorists must drive fewer miles and pay more for their gasoline. Not only has the reduction in output resulted in much loss of employment for labor in the oil fields and refineries, and the closing of many services stations which formerly prospered along the highways but since less gasoline means less driving, production control measures cannot but diminish the use [of] motor vehicles.(16)

Hotelling's unheeded warning proved prescient. Some of the most influential work on the Great Depression has been done by my Berkeley colleague Christina Romer, who is now serving as Chair of the President's Council of Economic Advisors. As part of her overall study of the Great Depression, Romer has examined the impact of the NIRA, concluding:

> The more important effect of the NIRA was to diminish the responsiveness of price changes to the deviation of output from trend. By preventing the large negative deviations of output from trend in the mid-1930s from exerting

> deflationary pressure, it prevented the economy's self-correction mechanism from working. Thus, the NIRA can be best thought of as a force holding back recovery, rather than as one actively depressing output.(17)

Romer's conclusions are supported by more recent work by Harold Cole and Lee Ohanian, who compare prices, wages and employment in industries covered by NRA codes with industries not covered.(18) They find that the NRA was an important factor in slowing the recovery, explaining why GNP, consumption, investment and hours worked remained significantly *below* trend during the Great Depression even though productivity quickly returned to trend and the real wage was significant *above* trend.(19)

At the industry level, the conclusions of the National Recovery Review Board, created in response to widespread complaints about price fixing and collusion under the NRA, could not be clearer:

> Our investigations have shown that in the instances mentioned the codes do not only permit but foster monopolistic practices and nothing has been done to remove or even to restrain them. If monopolistic business combinations in this country could have anything ordered to their wish, they could not order any thing better than to have the antitrust laws suspended.(20)

The NIRA was challenged on several grounds and found to be an unconstitutional delegation of legislative power.(21) Between the Supreme Court's ruling that the NIRA unconstitutional, the passage of the National Labor Relations act, and a growing realization that the cartels sponsored by the NRA were causing significant harm and extending the economic downturn, Roosevelt, by the beginning of his second term, reconsidered his opposition to a strong competition policy.(22) The clearest indication of this change was his appointment in 1938 of Thurman Arnold to lead the Antitrust Division.

Thurman Arnold quickly made his views known, stating: "If, through the application of the Antitrust Laws , we can restore price competition, we will have gone a long way toward solving one of the major problems of the recession."(23) Under Arnold, the Antitrust Division opened a large number of investigations and brought a large number of cases. The number of antitrust cases initiated by the Antitrust Division jumped to 48 during the 1937 to 1939 time period; only 15 cases were filed in the previous three-year time period. The Division filed 182 cases during the 1940 to 1942 time period, approximately 70% of which were criminal cases.(24)

The primary lesson to be drawn from this experience is that keeping markets competitive is no less important during times of economic hardship than during normal economic times.(25) Fortunately, this is a lesson that President Franklin Roosevelt also appears to have drawn, albeit belatedly. The actions of the Roosevelt administration, and subsequent research by historians and economists, support the conclusion that the expansion in output resulting from competition is part of the *solution* to tough economic times, not one of the causes of economic downturns. Put differently, restriction of output at the industry level, which is the hallmark of a cartel as well as the consequence of the artificial shortage associated with monopoly prices, exacerbates the fundamental economic problem in a recession, namely that production in the overall economy is well below capacity.

These lessons regarding *microeconomic* policies operating at the industry level should not be

Copyright © 2009 Association of Corporate Counsel

confused with lessons regarding *macroeconomic* policies, namely fiscal and monetary policy. The microeconomic lesson from the NRA experience is that competitive markets are superior to monopolized or cartelized markets for economic growth and recovery. The high-level macroeconomic lesson from the Great Depression was that of Keynes: facing a sharp economic downturn, the government needs to increase spending, i.e., engage in expansionary fiscal policy, to increase aggregate demand.(26)

3. Economic Analysis of Distressed Industries and Companies

A. General Principles

While there is no theoretical or empirical basis for departing from the basic principles of competition policy during general economic downturns, financial distress at the industry or company level is certainly *relevant* to antitrust analysis. This point should not be controversial; it is merely an application of the general principle that antitrust enforcement should take account of real-world economic conditions. I now explain, in broad terms, how we at the Antitrust Division will account for economic weakness at the industry and company level as we enforce the antitrust laws. Overall macroeconomic conditions are relevant only inasmuch as they affect current and expected future conditions at the industry or company levels.

First and foremost, I must stress that the same basic principles of antitrust economics apply during a recession as apply during an economic expansion. Stating this proposition reminds me of delivering a similar message before, during, and after the dot-com boom and crash: the same basic principles of economics apply to high-tech industries, and to the information economy, as to all other industries.(27) It also reminds me of a central principle articulated in §2.1 of the *Antitrust Guidelines for the Licensing of Intellectual Property* issued by the DOJ and FTC in 1995: "The Agencies apply the same general antitrust principles to conduct involving intellectual property that they apply to conduct involving any other form of tangible or intangible property." Are these principles boring to those looking for the latest fad? Perhaps. But nevertheless correct. Basic economics does not change during a recession, any more than it changes with the advent of new technologies. Nor do the ultimate goals of the antitrust laws protecting competition and consumers change during an economic downturn.

Next, it is worth bearing in mind that antitrust cases involving distressed industries and companies arise during economic expansions as well as during economic downturns. Even in good times, some firms make financial mistakes, operate in shrinking markets (due to technological advances or changing tastes), suffer losses, and file for bankruptcy. During the 2000-2008 time period, about 35,000 firms filed for bankruptcy each year.(28)

Naturally, more industries and firms are distressed during a recession than during boom times. The number of bankruptcies rose from about 26,000 in 2007 to about 39,000 in 2008, a 50% increase.(29) Inevitably, there are more antitrust cases involving firms in financial distress during hard times than during good times. Plus, to the extent the current downturn is expected to persist, unfavorable projections for future industry conditions are relevant to the forward-looking analysis needed in antitrust cases. The bottom line: since antitrust analysis takes place at the industry and company level, while antitrust authorities are likely to see more cases involving financially troubled firms during a recession than in better times, the issues raised are not unique to a recession and do not require special rules for financial distress arising during a recession.

Copyright © 2009 Association of Corporate Counsel

B. Transitory Distress vs. Longer-Term Decline

When performing antitrust analysis in a distressed industry, it is important to distinguish between a declining industry and one "merely" facing a cyclical downturn. To illustrate, revenues in the newspaper industry have been declining for some time, in large part due to changes in technology. The current recession no doubt has accelerated this decline. However even before the recession began, the newspaper industry was in the process of making some painful adjustments, with newspapers looking at creative ways to grow their revenues and cut their costs through collaboration and the use of creative business models.

Another major industry that has been in trouble of late is the U.S. automobile industry. In this case, while there has been no long-term decline in the demand for cars, U.S. manufacturers have increasingly faced pressure from foreign rivals. And the recent sharp downturn in demand for automobiles has vividly exposed pre-existing weaknesses, especially at Chrysler and General Motors. Traditional antitrust principles are fully capable of accounting for foreign competition. And the recent cyclical decline in the demand for automobiles provides no reason to depart from those principles.

The U.S. airline industry presents yet another variation: while the airline industry is hurting from the current recession, as it did after the attacks of September 11, 2001, it is not facing a long-term decline in demand. The overall trend in passenger-miles is upward. The distinction between secular decline and cyclical decline is important in antitrust because so much antitrust analysis, especially merger analysis, is forward looking.

C. Financial Distress vs. Underlying Lack of Competitiveness

Turning to the individual firm level, one must distinguish between a firm "merely" facing financial distress and a firm whose fundamental ability to compete effectively in the future is in doubt. The classic case of the former is a firm that has important, valuable assets that should allow it to be an efficient competitor, yet is having difficulty meeting its financial obligations. Perhaps this firm took on too much debt when times were better, either related to an acquisition or to fund an overly aggressive growth strategy. Such a firm may well need to engage in a financial restructuring, and perhaps even file for bankruptcy under Chapter 11. Such a firm may need to enlist new management to set and execute a new strategy. But there are, as a general matter, good economic reasons to expect firms with valuable, industry-specific assets to emerge from their current financial difficulties as effective competitors. Reorganization through bankruptcy does not mean the removal of a competitor from the market. Hopefully, these propositions are not controversial. From my perspective, they reflect and dovetail nicely with the asset-based view of the firm from the field of business strategy.

D. Immediate Impact vs. Long-Term Industry Structure

We also should bear in mind that financial crises and recessions do end. Wise public policy involves looking ahead to the conditions likely to be present in any industry in the medium- and long-term, and not focus exclusively on short-term conditions or effects. This is especially true regarding mergers, which can permanently eliminate competitors in concentrated markets. Recessions are temporary, but mergers are forever.

E. The Financial Sector

The financial industry has experienced a massive failure of regulation that only recently

Copyright © 2009 Association of Corporate Counsel

became apparent. As noted above, the problems arising in the financial sector, which have spread to the rest of the economy, provide no basis for departing from long-standing principles of competition policy. Properly regulated, competitive markets are still the best way to organize most economic activity and achieve economic growth. Including in the financial sector itself. If anything, the recent dramatic problems in the financial sector, and especially the dreaded concept that a financial institution is "too big to fail" and thus will qualify for government support, counsel for tougher antitrust enforcement, especially merger control, in that sector.(30) They also convince me of the value and importance of insuring that competition policy principles are fully respected and included as the government restructures the financial sector and establishes a new set of financial regulations that reflect what we have learned from the recent debacle and are suitable for the global financial markets of the 21st century.

4. Implications for Antitrust Enforcement

Fortunately, antitrust principles are very well established in the U.S., with broad, bipartisan support. Unlike during the Great Depression, we are not hearing calls for widespread abandonment of antitrust, even though the U.S. is experiencing the sharpest downturn in its economy since the 1930s. However, we do see some nibbling around the edges of antitrust.

Some of this nibbling comes in the form of calls for antitrust exemptions. I recently testified on antitrust enforcement in the newspaper industry.(31) Some industry witnesses, noting the very tough economic conditions currently facing many newspapers, were calling for antitrust immunity with regard to mergers and joint ventures. I explained why the Antitrust Division does not support further antitrust immunities for the newspaper industry.(32) I stressed that antitrust law is sufficiently flexible to permit a wide range of business practices and creative business models that newspapers might employ as they seek to develop new sources of revenues and to cut costs to survive. I also noted that the failing firm defense may be applicable in some cases where two competing newspapers seek to merge and have assets that would otherwise exit the industry.

A. Alleviating Financial Stress by Reducing Competition

More of the nibbling is likely to come as companies assert that their conduct is necessary for their financial stability or ability to survive, even if it might otherwise be seen as anti-competitive. Put bluntly, some companies are sure to ask antitrust enforcers, and the courts, to cut them some slack during tough times. What will be the response to such pleas?

In broad terms, our answer at the Antitrust Division is that we will continue to apply the tried and true methods of antitrust analysis that have served Americans well for over a century. The Antitrust Division cannot and should not look the other way when faced with practices or proposed combinations that will harm competition and consumers in the long run. Antitrust law, and enforcement of that law by the Antitrust Division, is sufficiently flexible to handle a wide range of industries and economic circumstances, including the present state of the economy. That said, we can give some more specific guidance regarding issues that are likely to come up with increased frequency during a recession.

The ultimate goal of antitrust law is to protect the competitive process so consumers are well served. The competitive process frequently leads to discounting, a common source of some annoyance to suppliers, especially during tough times. But consumers clearly benefit from vigorous price competition, including the enhanced discounting that tends to arise in

Copyright © 2009 Association of Corporate Counsel

industries with excess capacity. This principle remains generally valid even if that price competition puts some suppliers under increased financial stress. Indeed, the norm in a well-functioning market economy is for competition to put some suppliers under financial stress. "Antitrust law also does not protect the survival of firms for their own sake; as often stated, it seeks to protect competition, not competitors."(33)

One of the virtues of the competitive process is that it weeds out inefficient firms, or firms that fail to adjust to changing tastes or technology, and rewards firms that are most effective at serving consumers. As pointed out by John Fingleton, the CEO of the U.K. Office of Fair Trading, the evolutionary process, whereby some firms survive and others fail, can be especially intense, and especially valuable, during tough economic times.(34) But these are exactly the times when suppliers may be most likely to seek some relaxation of the antitrust laws and most tempted to collude.(35)

Financial distress, in and of itself, is not an antitrust defense. As we enforce the antitrust laws, we will consistently protect the interests of consumers. Anyone who seeks to limit competition and pleads financial distress as a justification must make a convincing case that *consumers* will not be harmed by the proposed limitation on competition. The mere assertion that continued competition will leave the suppliers weakened and thus less effective competitors in the future is unlikely to meet this burden. For example, a showing that ongoing competition will reduce profits and thereby lead to a higher cost of capital for the merged entity will not be sufficient to show that competition harms consumers.(36)

B. "Ruinous Competition"

During an economic downtown, some industries will inevitably have substantial excess capacity. Under these circumstances, the prices resulting from competition may fail to provide many of the suppliers in the industry with a normal, risk-adjusted rate of return on capital. This may be true even for firms that are relatively efficient and have done a good job anticipating the needs of customers. The risk that a general economic downturn will reduce the rate of return on invested capital is, of course, but one of the many risks associated with business investments. Indeed, in many industries it is normal and expected that firms will experience some periods during which the risk-adjusted rate of return on capital is above normal, and other periods when it is below normal. Sound competition policy should not allow firms to restrict competition to avoid downside risks in their rate of return, any more than sound competition policy should intervene to deprive successful firms of their upside returns when times are good.(37)

These days, it is unlikely that well-counseled firms will explicitly argue that they need to be saved from "ruinous" or "cutthroat" competition. But, under one name or another, this idea is likely to resurface. For example, two merging firms may well argue that ongoing competition will leave them with insufficient profits to make valuable and necessary investments to serve consumers. This is effectively a version of the "ruinous competition" argument that should be treated skeptically.

C. The Failing Firm Defense

A recession causes more firms to experience financial distress. There are likely to be more bankruptcies in 2009 than in recent years when the economy was stronger. Some firms may otherwise be viable but have made financial mistakes that combined with the recession have driven them into bankruptcy. Others will limp along until the economy recovers. All in all, it

Copyright © 2009 Association of Corporate Counsel

seems reasonable to expect that there will be an increasing number of mergers and acquisitions in the months ahead involving weak or failing firms or divisions. There may also be an element of opportunism at work, as some firms attempt to use the current economic conditions as a pretext to secure approval of what would otherwise be judged an anticompetitive merger.

While I am always open to new evidence and new arguments, and while judgment certainly must be exercised in cases involving weak or failing firms, so far I have seen no evidence, and heard no arguments, that would lead me to conclude that the current circumstances require a fundamentally different test than has been applied in the past to failing firms and divisions, as outlined in Section 5 of the Horizontal Merger Guidelines. (38) If a merger involving a failing firm or division really will benefit consumers by generating cognizable efficiencies, that merger will meet the stringent standards of the failing firm test in the Guidelines.(39)

Importantly, the failing firm defense automatically incorporates the possibility that the merger will generate cognizable efficiencies. The key point is that there would be no good economic reason for a successful firm to pay a premium to buy a truly failing rival in the absence of any such efficiencies: acquiring the failing rival would not protect the successful firm from competition, since (by definition) the failing firm's assets would otherwise leave the market. So it must be some synergy that makes the failing firm's assets especially valuable to the acquiring firm. These arguments apply regardless of whether the overall economy is in recession or not.

The fact that a firm has been losing money does not mean that it is a "failing firm" in an antitrust sense. To begin with, accounting losses do not necessarily correspond to true economic losses from ongoing operations, especially for firms that have taken on substantial debt. Beyond that, the requirements of the failing firm defense are designed to identify those limited circumstances in which the firm's assets would exit the market but for the proposed acquisition. If the firm owns important assets whose value is greatest in their current use, these assets are unlikely to exit the market, even if the firm cannot meet its financial obligations in the near future. One signal of this situation is that investors place greater value on the firm or division as an ongoing concern than in liquidation. Other evidence regarding the value of incumbency is also relevant to this inquiry.

One can also ask whether some mergers may be pro-competitive, even if the acquired firm does not meet the failing firm test, because the acquired firm is financially weak. This is sometimes called the "flailing firm" defense. In principle, of course, there can be efficiencies when one firm acquires its financially weak rival. However, following Section 4 of the Horizontal Merger Guidelines, to invoke an efficiency defense, the merging parties would have to establish that these efficiencies are large enough so that consumers are not harmed by the loss of competition resulting from the merger. While it is possible that a merger will generate efficiency by improving the acquired firm's access to capital, this is a very delicate argument, for several reasons: the acquired firm may soon have improved access to capital as the economy improves; the acquired firm may be able to gain improved access to capital through other means, in which case the claimed efficiency would not be merger-specific; the merged entity may well have less *incentive* to make investments, due to diminished competition, even if its cost of capital is lower than the financially weak firm; the acquiring firm's cost of capital may go up as lenders look at the overall credit risk of the merged entity; and, if access to capital is generally restricted, even for projects with an above-normal rate of return, entry to provide competitive discipline may be difficult. In any event, these are some of the factual considerations that could come into play in a given merger investigation.

Copyright © 2009 Association of Corporate Counsel

D. Exclusionary Conduct

As noted above, a recession can be especially tough on firms that are already weak in some respect, e.g., because they have higher costs than their rivals or a weaker balance sheet going into the recession. Likewise, a recession can be especially tough on smaller firms that are struggling to survive and compete against larger, more-established rivals with much stronger balance sheets. Yet today's smaller, newer firms may have the strongest incentives to disrupt the status quo. They also may offer innovative new products and services, so long as they can gain a presence in the market and grow large enough to reach minimum viable scale.

For all these reasons, new and innovative firms may be especially susceptible during a recession to exclusionary tactics by dominant firms. Under the leadership of Assistant Attorney General Christine Varney, the Antitrust Division will vigilantly enforce the antitrust laws to prevent monopolists from maintaining their monopoly power by engaging in predatory or exclusionary behavior, especially during tough economic times when their smaller rivals are most vulnerable.

5. Conclusions

History teaches us that reducing antitrust enforcement during economic hard times does not promote economic recovery. The most striking example of this is the ill-fated National Industrial Recovery Act of 1933, which effectively legalized cartels covering a wide swath of American industry. These cartels delayed economic recovery during the Great Depression. By the late 1930s, the lesson had been learned: antitrust enforcement was reinvigorated by Thurman Arnold, who took over leadership of the Antitrust Division in 1938. Let us not forget that lesson.

We at the Antitrust Division are dedicated to vigorous enforcement of the antitrust laws during these challenging economic times.

FOOTNOTES

†. I am grateful to Wayne Dunham and Ken Heyer for their assistance in preparing this speech. I have greatly benefited from discussions of these issues over the years with Jonathan Baker, Joe Farrell, Bill Kovacic, and Steve Salop. None of these individuals should bear any responsibility for the opinions offered here.

1. Testimony of Alan Greenspan before the House Committee on Oversight and Government Reform, October 23, 2008. Greenspan testified that "yes, I found a flaw, I don't know how significant or permanent it is, but I have been very distressed by that fact." See Edmund Andrews, "Greenspan Concedes Error on Regulation," *New York Times*, October 23, 2008.

2. The Antitrust Division is dedicated to disproving the sentence immediately following this famous one by Adam Smith: "It is impossible indeed to prevent such meetings by any law which either could be executed, or would be consistent with liberty and justice."

3. Mark Whitener puts this nicely in his introduction, "A Crisis of Confidence," to the cover stories on "Antitrust and the Economic Crisis" in the Spring 2009 issue of *Antitrust*: "If antitrust is viewed as just another form of regulation, we risk replacing antitrust's analytical moorings with a series of *ad hoc* judgments by regulators."

Copyright © 2009 Association of Corporate Counsel

4. In some situations, market power can itself result from imperfect information.

5. "Vigorous Antitrust Enforcement in this Challenging Era," Christine Varney, Assistant Attorney General for Antitrust, Remarks as Prepared for the Center for American Progress, May 11, 2009, available at http://www.usdoj.gov/atr/public/speeches/245711.htm.

6. The essential reading on this topic is Ellis Hawley's classic book, *The New Deal and the Problem of Monopoly: A Study in Economic Ambivalence*, Princeton University Press, 1966. Many of the historical observations I make below regarding the Great Depression come from Hawley. For a recent discussion focused on antitrust, see John Harkrider, "Lessons from the Great Depression," *Antitrust*, 23(2), 6-11 (2009).

7. Dan Crane takes a rather gloomy view of competition policy during times of crisis: "In the almost 120-year history of the Sherman Act, no political administration has reacted to a crisis by calling for more vigorous enforcement of the antitrust laws. To the contrary, administrations of both parties have responded to crises--both martial and economic--by explicitly or implicitly pulling back on antitrust enforcement. Industrialists have used crises as opportunities to deepen their grip on markets." See Dan Crane, "Antitrust Enforcement During Times of National Crisis," *Global Competition Policy*, December 2008, p.4. Perhaps some comfort can be taken by noting that much of Crane's discussion relates to reduced antitrust enforcement during times of war rather than economic distress.

8. Crane, op. cit., p. 5, gives a brief description of this historical episode, citing Ron Chernow, *The House of Morgan*, 1990, and Edmond Morris, *Theodore Rex*, 2001.

9. I focus here on the U.S. experience during the Great Depression. Similar lessons can be learned from the much more recent experience of Japan during its "lost decade." Porter and Sakikibara conclude that weak competition policy in Japan contributed to Japan's sluggish economic growth in recent years, stating: "While competition has long been vigorous in many Japanese industries and has been noticeably opened in the last decade, serious distortions and impediments to competition remain. Until Japan addresses these issues more frontally, the period of Japanese economic stagnation will be unnecessarily protracted." Michael Porter and Mariko Sakikibara, "Competition in Japan," *Journal of Economic Perspectives*, 18(1), 27-50 (2004), p. 47.

10. Ellis Hawley, "Herbert Hoover and the Sherman Act, 1921-1933: An Early Phase of a Continuing Issue," 74 *Iowa Law Review* 1067-1068 (1989).

11. William Kovacic and Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking," *Journal of Economic Perspectives*, 14(1), (2000), p. 46, citing Ellis Hawley, "Herbert Hoover, the Commerce Secretariat, and the Vision of an 'Associative State,' 1921-1928." *Journal of American History*. June, 61, pp. 11640 (1974).

12. See, generally, Hawley (1966), op. cit. See also Spencer Waller, "The Antitrust Legacy of Thurman Arnold." *St. John's Law Review*, 78: 569-613, (2004), especially at p. 571, footnote 10.

13. As Hawley explains, many of the ideas underlying the NRA came from "industrialists and pro-business planners, men who drew their ideas from the war experience or the Associational Activities of the nineteen twenties, and who felt that an enlightened business leadership, operating through self-governing trade associations, should make most of the decisions. The depression, so some of these business planners argued, was due mostly to

Copyright © 2009 Association of Corporate Counsel

irresponsible 'chiseling' and 'cutthroat competition'; and the government, if it wanted to bring about recovery, should help 'responsible and enlightened businessmen' to force the 'chislers' in line." Hawley, op. cit., p. 13-14. General Hugh Johnson, who was selected to head the NRA, came from this camp. "Johnson, after all, was familiar with the operations of the War Industries Board, the only comparable project that could serve as a precedent. The depression had strengthened his conviction that unregulated competition led to disaster." Hawley, op. cit., p. 23.

14. Waller, op. cit., pp. 57273.

15. *Appalachian Coals v. U.S.*, 288 U.S. 344 (1933).

16. Harold Hotelling, "Curtailing Production is Anti-Social," in *The Collected Economic Articles of Harold Hotelling*, Adrian C. Darnell Editor, p. 138.

17. Christina Romer, "Why Did Prices Rise During the 1930s?" *Journal of Economic History*, 59(1), 167-199, p. 197.

18. Harold Cole and Lee Ohanian, "New Deal Policies and the Persistence of the Great Depression: A General Equilibrium Analysis." *Journal of Political Economy*, 112 (4): 779-815, (2004).

19. Jason Taylor finds that output growth from March 1933 to June 1934 was significantly lower in industries in which the NIRA created effective cartels than in other industries, but that many of these cartels broke down in the Spring of 1934. Jason Taylor, "Cartel Code Attributes and Cartel Performance: An Industry Level Analysis of the National Industrial Recovery Act," *Journal of Law and Economics*, 50, 597-624, (2007). See also Jason Taylor, "The Output Effects of Government Sponsored Cartels During the New Deal," *Journal of Industrial Economics*, 50, 1-10, (2002).

20. National Recovery Review Board 1935, 3d report, pp. 3437, as cited by Cole and Ohanian, p. 792-93, who also note studies done by the FTC finding limited competition in a number of manufacturing industries, including automobiles, chemicals, aluminum, and glass, and report that the NRRB also found evidence of monopoly in wholesale and retail trade.

21. *A.L.A. Schechter Poultry Corp. v. United States* 295 U.S. 495 (1935).

22. Ellis Hawley, (1966), op. cit. at pp. 7290.

23. As quoted in Halley, op. cit., p. 411.

24. Richard Posner, "A Statistical Study of Antitrust Enforcement." *The Journal of Law and Economics*, 13(2): 365-419 (1970). See Table 1 and 15, page 366.

25. Reduced competition not only leads to higher prices and lower output in the short run, which inhibits economic recovery. It also dampens the incentive to innovate, thus harming longer-term economic growth as well.

26. For a short, accessible discussion that can serve as an entrée to the huge literature on the causes of the Great Depression, see Christina Romer, "The Nation in Depression," *Journal of Economic Perspectives*, 7(2), 19-39 (1993).

Copyright © 2009 Association of Corporate Counsel

27. Indeed, this was the basic theme of my book with Hal Varian, *Information Rules: A Strategic Guide to the Network Economy*, Harvard Business School Publishing, 1999. "Technology changes. Economic laws do not."

28. See http://www.uscourts.gov/Press_Releases/2008/bankrupt_f2table_sep2008.xls and http://www.uscourts.gov/bnkrpctystats/sept2007/f2table.xls. These data include bankruptcies leading to liquidations and well as reorganizations. During the 2000-2008 time period, about 62% of all bankruptcies were liquidations under Chapter 7.

29. Even so, it is worth noting that the 2008 figure of 38,000 is equal to the average during 1999-2004, and far lower than *any* annual figure during the 1988-1998 time period. This reflects a secular decline in the number of bankruptcies. The average number of bankruptcies during the 1990s was about 57,000 per year.

30. Government subsidies or bailouts for firms that are "too big to fail" might even be seen as an "efficiency" associated with a merger that creates a firm that is then "too big to fail." Clearly, structuring a business so it might later qualify for an emergency government bailout does not constitute a true economic efficiency; if anything, the opposite is true.

31. Statement of Carl Shapiro before the Subcommittee on Courts and Competition Policy, Committee on the Judiciary, U.S. House of Representatives, "A New Age for Newspapers: Diversity of Voices, Competition, and the Internet," April 21, 2009, available at http://www.usdoj.gov/atr/public/testimony/245063.htm.

32. The newspaper industry has limited antitrust immunity under the Newspaper Preservation Act of 1970.

33. *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

34. "A recession can facilitate strong growth in long term productivity. Unlike a boom, when inefficient players may survive and even grow, an economic downturn will tend to drive out the less efficient market players. This process of creative destruction leaves a stronger and more efficient supply base, thus driving innovation and productivity growth in the next period of expansion. This is a reason why competition agencies should apply a rigorous failing-firm 'defence,' especially in a downturn." John Fingleton, CEO, Office of Fair Trading, "Competition Policy in Troubled Times," January 20, 2009, available at http://www.oft.gov.uk/shared_oft/speeches/2009/spe0109.pdf.

35. Economic theory does not give a clear prediction regarding how incentives to collude vary with the business cycle. See, for example, Kyle Bagwell and Robert Staiger, "Collusion over the Business Cycle," *Rand Journal of Economics*, 28(1), 82-106 (1997) and the references cited therein. The empirical literature is likewise ambiguous on how cartel activity varies over the business cycle, in part because not all cartel activity is detected, so measuring cartel enforcement activities is not the same as measuring cartel activity. Nonetheless, a good argument can be made that suppliers will be especially tempted to collude when they are facing tough times and have substantial excess capacity.

36. More specifically, consider a claim that a proposed merger between close competitors will benefit consumers by reducing competition, thereby elevating profits and reducing the merged firm's cost of capital. Under the Horizontal Merger Guidelines, §4, this would not appear to be a cognizable efficiency, since it results from a loss in competition. "Cognizable efficiencies are merger-specific efficiencies that have been verified and do not arise from

Copyright © 2009 Association of Corporate Counsel

anticompetitive reductions in output or service."

37. Again, one can hope the lesson was learned during the Great Depression. On this point, one need look no further than the Supreme Court's unfortunate ruling in *Appalachian Coals v. United States*, 288 U.S. 344 (1933).

38. See *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

39. For a recent discussion of the economic rationale for the failing firm defense, and how it incorporates efficiencies, see Ken Heyer and Sheldon Kimmel, "Merger Review of Firms in Financial Distress," Economic Analysis Group Discussion Paper , March 2009, available at http://www.usdoj.gov/atr/public/eag/244098.pdf.

Copyright © 2009 Association of Corporate Counsel

Federal Trade Commission

Thoughts on the Withdrawal of the DOJ Section 2 Report

Remarks of J. Thomas Rosch*
Commissioner, Federal Trade Commission

before the

IBA/ABA Conference on Antitrust in a Global Economy
New York, NY

June 25, 2009

Thank you for the opportunity to present some introductory remarks on single-firm conduct enforcement in the United States. This is an area of significant interest on both sides of the Atlantic. In just the last few years, we have witnessed three Supreme Court decisions interpreting Section 2 of the Sherman Act,[1] the issuance and then the withdrawal of the Department of Justice's Report on single-firm conduct,[2] the European Commission's record fine against Intel for abuse of dominance, debate within the Courts of Appeals about how to handle

---

* The views stated here are my own and do not necessarily reflect the views of the Commission or other Commissioners. I am grateful to my attorney advisor, Darren Tucker, for his invaluable assistance in preparing this paper.

[1] *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 129 S. Ct. 1109 (2009); *Weyerhaeuser Co. v. Ross-Simmons Hardware Lumber*, 127 S. Ct. 1069 (2007); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

[2] U.S. Dep't of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (2008) [hereinafter Report].

Copyright © 2009 Association of Corporate Counsel

certain types of exclusionary conduct claims,[3] and several FTC Section 2 enforcement actions, particularly in the standard-setting context.[4]

I'm going to spend most of my time discussing the DOJ's single-firm conduct Report. First, I will provide some background regarding the Report and explain why, despite its withdrawal, I think the Report is still relevant. Second, I will describe my principal objections to the Report. Third, I will offer some ruminations on the future of Section 2 enforcement. And finally, I will discuss some procedural differences between Section 2 and Article 82 that are often overlooked.

I.

Let me begin with some background on the DOJ's Report. From June 2006 to May 2007, the DOJ and FTC held a series of joint hearings to explore the antitrust treatment of single-firm conduct. The agencies' goal was "to explore how best to identify anticompetitive exclusionary conduct for purposes of antitrust enforcement under Section 2 of the Sherman Act."[5]

On September 8, 2008, the Department of Justice issued a 213-page Report purportedly based on the hearings. Several things stood out about the Report. First, it included several safe harbors for actions by firms with monopoly or near monopoly power, which, by definition, are the firms covered by Section 2. Second, the Report advocated standards under which conduct would only violate Section 2 if the anticompetitive effects disproportionately outweighed the

---

[3] *See Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008) (rejecting standard for evaluating bundled discounts applied in *LePage's Inc. v. 3M,* 324 F.3d 141, 162 (3d Cir. 2003) (en banc)).

[4] *See* Section III, *infra.*

[5] Consumer Benefits and Harms: How Best to Distinguish Aggressive, Pro-Consumer Competition from Business Conduct To Attain or Maintain a Monopoly, 71 Fed. Reg. 17872 (Apr. 7, 2006).

Copyright © 2009 Association of Corporate Counsel

potential procompetitive benefits. And third, the Report expressed great concern with harm caused by over-enforcement of Section 2, which is often called Type I error.

The FTC declined to join the Antitrust Division's Report. Three of the four FTC Commissioners, including myself, issued a statement that criticized the Report as a "blueprint for radically weakened enforcement of Section 2 of the Sherman Act."[6] We explained that under the Report firms with monopoly power or near monopoly power would be able to engage in a variety of exclusionary practices "with impunity, regardless of potential foreclosure effects and impact on consumers."[7]

The Report was effective for only eight months. On May 11, 2009, the new Assistant Attorney General for Antitrust Christine Varney withdrew it, declaring that it "no longer represents the policy of the Department of Justice with regard to antitrust enforcement under Section 2 of the Sherman Act."[8] She took particular exception to what she characterized as "an excessive concern with the risks of over-deterrence and a resulting preference for an overly lenient approach to enforcement."[9] The withdrawal of the Report resulted in front-page

[6] Statement of Commissioners Harbour, Leibowitz and Rosch on the Issuance of the Section 2 Report by the Department of Justice 1 (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmt.pdf. Then-Chairman Kovacic issued a separate statement. *See* Statement of Federal Trade Commission Chairman William E. Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act (Sept. 8, 2008), *available at* http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf.

[7] Statement of Commissioners Harbour, Leibowitz and Rosch, *supra* note 6, at 10.

[8] Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in this Challenging Era, Remarks prepared for the Center for American Progress 8 (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/speeches/245711.pdf; *see also* Press Release, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/245710.pdf.

[9] Varney, *supra* note 8, at 8.

Copyright © 2009 Association of Corporate Counsel

headlines in the *New York Times* and *Washington Post*, notwithstanding that the withdrawal had been widely expected based on comments made at her confirmation hearing. Ironically, only two days after General Varney withdrew the Report, the European Commission announced a record fine under Article 82 against Intel for $1.45 billion.

You may ask what is there left to discuss about the DOJ's Report, now that it has been withdrawn. Actually, quite a bit. The debate about the proper scope of Section 2 was no more resolved by the withdrawal of the Report, as was the debate that was occasioned by its issuance. Despite the many flaws I see in the Report, there are many traditional Chicago school adherents who see much to admire in it. Despite General Varney's admonition that the "Report and its conclusions should not be used as guidance by courts, antitrust practitioners, and the business community,"[10] I expect that orthodox Chicago school adherents will continue to reference the Report as a model for Section 2 enforcement standards.

To be sure, the actual impact of the Report to date appears to be quite modest. The issuance of the Report did not mark a shift in Section 2 enforcement philosophy at DOJ, but rather reflected the enforcement at DOJ over the prior eight years.[11] I am aware of no state or federal court decisions that cite to the Report, and its influence on the legal and economic literature has to date been limited.

But it is important to consider that the Report was issued only nine months ago. Keep in mind that the Antitrust Modernization Commission's report had little impact until almost a year later when the Ninth Circuit in the *PeaceHealth* decision adopted a modified version of the

---

[10] *Id.*

[11] As has been noted elsewhere, the Antitrust Division did not initiate any Section 2 cases during the prior administration, although it did prosecute two that had been started under the Clinton administration. *See United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005); *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

Copyright © 2009 Association of Corporate Counsel

discount attribution test proposed by the AMC for Section 2 bundled discounts[12] – which is almost certainly the greatest impact of the AMC to date. All of which is to say that the Report may be withdrawn but it – and the debate over the proper framework or frameworks for Section 2 cases – is not dead. The ongoing debate on the proper scope of Section 2 is alive and is likely only to be invigorated following General Varney's action last month.

II.

I will next explain my objections to the DOJ's Report.

The first and most serious problem with the Report was that it was too ambitious. The Report itself acknowledged that "it has proven particularly difficult to develop substantive consensus on the appropriate standards for evaluating single-firm conduct."[13] Yet the Report not only purported to summarize the case law, but went on to assert what the law *should* be. The Report did that by, among other things, articulating new standards to be applied to specific types of conduct. In doing so, the Report significantly overstated the level of consensus regarding the proper framework for analyzing single-firm conduct. One of the clearest lessons emerging from recent legal and economic commentary is that there is a lack of agreement respecting what the Section 2 law should be.

In my view the far better approach would have been for the Report to summarize what we learned from the hearings, identify outstanding issues in Section 2 enforcement, describe the conflicting positions on each of those issues, and suggest ways for further study. I would also liked to have seen the summaries of current Section 2 case law better distinguish between

---

[12] *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008); ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 94-100 (2007).

[13] Report at 175.

Copyright © 2009 Association of Corporate Counsel

Supreme Court holdings and dicta in terms of their precedential value. A balanced report, such as that, would have made a substantial contribution to Section 2 development.

My second criticism is that the Report unnecessarily circumscribed the agencies' prosecutorial discretion by setting forth a variety of bright-line safe harbors that had little, if any, basis in Supreme Court precedent.[14] Those safe harbors were highlighted in boxes throughout the Report. For example, the Report adopted a rule of per se legality for refusals to deal by monopolists, regardless of purpose or effect.[15] This flew in the face of express language to the contrary in *Trinko*[16] and would needlessly adversely impact and constrain the agencies' ability to investigate and prosecute conduct that might harm consumers. Another example was the broad safe harbor applicable to loyalty discounts in the Report, which would treat those practices as legal if they either satisfied a standard predatory pricing test *or* rivals "remain on the market."[17] This immunization of all or nearly all loyalty discounts by a monopolist finds no support in the caselaw and might well harm consumers.

---

[14] Report at 2-3 ("Where appropriate, the Department has set out 'safe harbors' to create certainty for businesses and encourage precompetitive activity. In other areas, the Department has articulated specific standards that should be applied."); *id.* at 46 ("The Department will continue to work to develop conduct-specific tests and safe harbors.").

[15] *Id.* at 129 ("The Department believes that antitrust liability for unilateral, unconditional refusals to deal with rivals should not play a meaningful part in section 2 enforcement.").

[16] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (stating that the right to refuse to deal with rivals is not "unqualified" and that a refusal to cooperate with rivals "[u]nder certain circumstances . . . can constitute anticompetitive conduct and violate § 2").

[17] Report at 105 ("Rivals' continued presence in the market casts serious doubt on the existence of anticompetitive effects—consumers continue to benefit from the bundled discounting as well as rivals' presence. Accordingly, the Department believes that if rivals have not exited the market as a result of the bundled discounting and if exit is not reasonably imminent, courts should be especially demanding as to the showing of harm to competition.").

Copyright © 2009 Association of Corporate Counsel

To be sure, there can be a useful role for safe harbors and bright-line tests in antitrust enforcement. They can help create certainty for businesses and reduce litigation costs. But, as the Supreme Court has recognized, these tests are only appropriate in limited circumstances such as predatory pricing and predatory bidding claims, where the Court was concerned about the threat to consumer welfare from challenges to low prices.[18] It is important to bear in mind that Section 2 enforcement, by definition, only applies to firms with monopoly or near monopoly power, which is a small percentage of U.S. companies. That arguably makes the need for broad safe harbors and rules of per se legality in order to avoid over-enforcement less necessary than in some other areas of antitrust law.

My third criticism is that the Report downplayed the risk of under-enforcement (Type II error), while emphasizing the risks of over-enforcement (Type I error). The Report's introduction did pay lip service to the harm from under-enforcement of Section 2. For example, the Report acknowledged that failure to condemn violations of Section 2 might not only shield the individual firm's exclusionary conduct, but also might "empower other dominant firms to adopt the same strategy."[19] While the Report espoused the view that markets are self-correcting, it admitted that this process "may take substantial time" during which consumers may be harmed and the dominant firm may develop new exclusionary practices to prolong its market

[18] *Brooke Group Ltd. V. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222, 224 (1993); *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 127 S. Ct. 1069 (2007).

[19] Report at 14; *see also id.* at 16 ("As with false positives, the cost of false negatives includes not just the failure to condemn a particular defendant's anticompetitive conduct but also the loss to competition and consumers inflicted by other firms' anticompetitive conduct that is not deterred.").

Copyright © 2009 Association of Corporate Counsel

dominance.[20] Finally, the Report acknowledged the difficulty for courts to restore competition once it has been lost.[21]

Nevertheless, it is clear that the Report viewed these as relatively minor considerations compared to the much greater risk of over-enforcement. Page after page, the Report described the dangers of false positives, citing to, for example, the writings of Judges Bork, Posner, and Easterbrook; Justice Scalia's *Trinko* opinion, the *Brooke Group* opinion, and a handful of hearing witnesses that were clearly not representative of all Section 2 stakeholders. The repeated references to *Trinko* never mentioned that there was a regulatory safety net in that case in the event that the refusal to deal injured customers. Likewise, the Report glossed over the fact that *Brooke Group* involved a practice (predatory pricing) where the risk of false positives is especially acute.

The result of this one-sided weighing of risks were the safe harbors that I previously mentioned and the disproportionality test. Under that test, which was to be applied in the absence of a conduct-specific rule, a Section 2 plaintiff would have to demonstrate that the harm to competition substantially outweighed the benefits.[22] That test was inconsistent with rule-of-reason analysis, which simply asks whether the anticompetitive harm outweighs the procompetitive effects. The disproportionality test required a prohibitively high burden of proof and would cripple effective enforcement against monopolistic abuses.

My fourth criticism is that the witnesses at the Section 2 hearings were not representative of the views of all Section 2 stakeholders, despite the efforts of both agencies to assemble

---

[20] *Id.* at 17.

[21] *Id.* at 14.

[22] *Id.* at 45.

Copyright © 2009 Association of Corporate Counsel

balanced witness panels.[23] The result was that consumer interests were not fairly represented.[24] Even the witnesses testifying on behalf of business interests were not representative of most businesses.[25] There were few real business witnesses, i.e., persons actually employed by a corporation, and nearly all of those were in-house counsel, not actual business people.[26] By contrast, there was no shortage of testimony from academics and economists, who constituted the majority of the hearing witnesses.[27] There was also no shortage of testimony from the

---

[23] One of the principal goals of the hearings, as reflected in the Federal Register notice announcing the program, was participation from a wide range of interested parties, particularly witnesses with real-world experience with conduct raising Section 2 concerns. *See* Consumer Benefits and Harms: How Best to Distinguish Aggressive, Pro-Consumer Competition from Business Conduct To Attain or Maintain a Monopoly, 71 Fed. Reg. 17872 (Apr. 7, 2006) ("[T]he agencies are soliciting public comment from lawyers, economists, the business community, consumer groups, academics (including business historians), and other interested parties. . . . The Agencies encourage submissions from business persons from a variety of unregulated and regulated markets, recognizing that market participants can offer unique insight into how competition works and that the implications of various business practices may differ depending on the industry context and market structure. The Agencies seek this practical input to provide a real-world foundation of knowledge from which to draw as the Hearings progress. Respondents are encouraged to respond on the basis of their actual experiences. The goal of these Hearings is to promote dialogue, learning, and consensus building among all interested parties . . . .").

[24] No consumers or organizations representing consumer interests testified in the hearings. Three panels were devoted to business concerns; none was devoted to consumer concerns. *See* Report app.

[25] Representatives from fourteen companies testified during the hearings: American Airlines, AMD, Broadcom, Cisco, Eastman-Kodak, General Electric (2), General Motors, Hewlett-Packard, Intel (2), Microsoft, Qualcomm, Red Hat, Royal Philips Electronics, and Verizon. Only three witnesses were from firms that prosecuted Section 2 claims (AMD, Broadcom, and Red Hat), and those witnesses were cited sparingly compared to those representing, for example, Microsoft and Intel. Attorneys from the U.S. Chamber of Commerce and the Generic Pharmaceutical Association also testified at the hearings.

[26] All but one of the corporate witnesses were attorneys serving in the in-house legal departments of those businesses.

[27] 79 of the 138 panel witnesses (57%) were from academia or were practicing economists, at least on a part-time basis. Some witnesses testified on more than one panel.

Copyright © 2009 Association of Corporate Counsel

antitrust defense bar.[28] I was also troubled by the Report's almost complete failure to disclose witnesses' financial interests relating to Section 2 litigation.

My fifth concern is that the Report suggested that the Merger Guidelines' SSNIP test (and hence critical loss analysis) is the only appropriate way to define the relevant market in a Section 2 case.[29] This is problematic for two reasons.

To begin with, application of the hypothetical monopolist test is fraught with peril in a monopoly maintenance case because the use of prevailing prices, as required by the test, can lead to defining overly broad markets. This is known as the Cellophane Fallacy.[30] To be sure, economists have proposed a variety of ways to account for this problem – such as estimating prevailing prices in the absence of monopoly power – but these techniques are "quite difficult" to apply in practice, as the Report itself acknowledged.[31]

Additionally, Sherman Act caselaw is clear that direct evidence – including evidence from the mouth of the defendant – may be used to define the relevant market. For example, the Sixth Circuit in *Conwood Co. v. United States Tobacco Co.* said that "[w]hether a company has monopoly or market power 'may be proven directly by evidence of the control of prices or the

[28] 39 of the 138 panel witnesses (28%) were from defense firms. (There is some double counting with the figures in the prior footnote for lawyers holding simultaneous positions in law firms and academia.) There was only one witness from a plaintiffs' firm (Haglund Kelley in Portland), who was cited only twice in the Report.

[29] Report at 27 ("Despite its limitations in the Section 2 context, there exists no clear and widely accepted alternative to the hypothetical monopolist methodology for defining relevant markets." (citing three economists)).

[30] *See United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956).

[31] Report at 27 ("[D]etermining the competitive price is apt to be quite difficult . . . .").

Copyright © 2009 Association of Corporate Counsel

exclusion of competition.'"[32] The Report acknowledged these cases but relegated the use of direct evidence to a kind of gatekeeping function.[33] Likewise, the "practical indicia" for defining markets described in *Brown Shoe*,[34] which have been applied in Section 2 cases,[35] were never even mentioned, much less discussed.

My sixth concern with the Report is that each type of exclusionary conduct was considered on a standalone basis. The Report adopted specific tests for certain types of exclusionary conduct, such as predatory pricing, loyalty discounts, price bundling, tying, refusals

---

[32] 290 F.3d 768, 783 n.2 (6th Cir. 2002) (quoting *Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 97-98 (2d Cir. 1998)); *see also Am. Tobacco Co. v. United States*, 328 U.S. 781, 789 (1946) (exclusion of competitors supported jury's monopolization finding); *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 307 (3d Cir. 2007) ("The existence of monopoly power may be proven through direct evidence of supracompetitive prices and restricted output."); *Spirit Airlines v. Northwest Airlines*, 431 F.3d 917, 950-51 (6th Cir. 2005) (reversing summary judgment for defendant because evidence of output reduction and price increases following plaintiff's exit from the market could show monopoly power); *PepsiCo, Inc. v. Coca-Cola Co.*, 315 F.3d 101, 107-08 (2d Cir. 2002) (per curiam); *United States v. Microsoft Corp.*, 253 F.3d 34, 51 (D.C. Cir. 2001) ("the existence of monopoly power is clear" where a firm can profitably raise prices substantially above the competitive level); *Re/Max Int'l v. Realty One*, 173 F.3d 995, 1018-19 (6th Cir. 1999) ("[A]n antitrust plaintiff is not required to rely on indirect evidence of a defendant's monopoly power, such as high market share within a defined market, when there is direct evidence that the defendant has actually set prices or excluded competition."); *Image Technical Servs. v. Eastman Kodak Co.*, 125 F.3d 1195, 1202 (9th Cir. 1997) ("Market power can be proven by either direct or circumstantial evidence.").

[33] Report at 30 ("In some circumstances, an inability to find any anticompetitive effects may serve as a useful screen, enabling courts or enforcement officials to conclude quickly that a section 2 violation is implausible.").

[34] *Brown Shoe Co. v. United States*, 370 U.S. 294 325 (1962) (holding that the boundaries of a product market can be "determined by examining such practical indicia such as industry or public recognition of the []market as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors").

[35] *See, e.g.*, *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966); *Newcal Indus. v. Ikon Office Solution*, 513 F.3d 1038, 1045 (9th Cir. 2008); *HDC Medical, Inc. v. Minntech Corp.*, 474 F.3d 547 (8th Cir. 2007); *Geneva Pharms. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 496 (2d Cir. 2004).

Copyright © 2009 Association of Corporate Counsel

to deal with rivals, and exclusive dealing. I think there is some merit to doing this, because I do not subscribe to any of the "one-size-fits-all" tests that others have proposed.

The Report, however, did not identify the analysis to be applied when confronted with allegations of multiple forms of exclusionary conduct. Are we to examine each practice separately under the specific test described in the Report? Not clear. Are we to apply the disproportionality test to some or all of the conduct? Not clear. Are we to apply some type of "monopoly broth" test (which, by the way, is never discussed in the Report).[36] Also not clear. This is a significant shortcoming, given that, in my experience, rarely does a Section 2 plaintiff allege just a single form of misconduct.

My seventh concern is that there was little discussion regarding how evidence of intent might be taken into account in Section 2 cases. This shortcoming was particularly curious given that attempted monopolization is a specific intent offense.[37] One would think that evidence as to which conduct was intended by the defendant to result in anticompetitive consequences would be

[36] Some courts have suggested that a group of acts may constitute a violation of Section 2, even if no single act is found to be an act of monopolization. *See, e.g.*, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) (Sherman Act plaintiffs "should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each"); *LePage's Inc. v. 3M*, 324 F.3d 141, 162 (3d Cir. 2003) (en banc) ("The relevant inquiry is the anticompetitive effect of 3M's exclusionary practices considered together."); *City of Anaheim v. S. Cal. Edison Co.*, 955 F.2d 1373, 1376 (9th Cir. 1992) ("[I]t would not be proper to focus on specific individual acts of an accused monopolist while refusing to consider their overall combined effect."); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981) ("The proper inquiry is whether, qualitatively, there is a 'synergistic effect'"); *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 986 (7th Cir. 1980) (characterizing a mix of exclusionary conduct as a "monopoly broth"); *Tele Atlas N.V. v. Navteq Corp.*, 2008-2 Trade Cas. (CCH) ¶ 76,417 (N.D. Cal. Nov. 13, 2008) ("To appreciate the effect of otherwise lawful acts, the jury must consider the acts' aggregate effect.").

[37] *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 456 (1993) (a showing of attempted monopolization required "a specific intent to monopolize"). Conspiracy to monopolize also requires a showing of specific intent. *See United States v. Yellow Cab Co.*, 332 U.S. 218, 225 (1947); *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

Copyright © 2009 Association of Corporate Counsel

highly probative, as some courts have suggested.[38] There was silence on the role of intent evidence in a monopoly maintenance case, other than a passing suggestion that it be disregarded in its entirety.[39] As for attempted monopolization, the Report's only (rather obvious) suggestion was that proper intent evidence should demonstrate "a specific intent to destroy competition or build monopoly"[40] but not "an intent to compete vigorously."[41]

My eighth and – I'm sure you'll be relieved – final criticism is the Report's frequent citation to Section 1 cases as though they were Section 2 cases. Historically, exclusive dealing, tying, bundled discounts, and other vertical non-price restraints were challenged under Section 1 of the Sherman Act or Section 3 of the Clayton Act. Rarely were they challenged under Section 2. Yet over the last decade, courts have sustained challenges to vertical restraints under Section 2 while dismissing the same claims under Section 1 or Section 3,[42] as claims based on Section 1

---

[38] *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 213, 238 (1918) ("[K]nowledge of intent may help the court to interpret facts and to predict consequences."); *Microsoft*, 253 F.3d at 59 ("Evidence of the intent behind the conduct of a monopolist is relevant . . . to the extent it helps us understand the likely effect of the monopolist's conduct."); *U.S. Football League v. NFL*, 842 F.2d 1335, 1359 (2d Cir. 1988) ("Evidence of intent and effect helps the trier of fact to evaluate the actual effect of challenged business practices in light of the intent of those who resort to such practices.").

[39] Report at 104 ("[T]wo other panelists voiced concern about relying on evidence of either anticompetitive intent or business justification. One panelist stated that 'trying to . . . look for evidence of intent one way or the other is sufficiently manipulable or hideable that I'm worried about playing that game.'" (citation omitted)); *see also id.* at 6 (summarizing criticism of the specific intent requirement for an attempt offense).

[40] Report at 6 (quoting *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 626 (1953)).

[41] Report at 6 (quoting *Spectrum Sports*, 506 U.S. at 459).

[42] *See, e.g., United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005); *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (en banc); *Conwood*, 290 F.3d at 783; *Microsoft*, 253 F.3d at 59.

Copyright © 2009 Association of Corporate Counsel

or Section 3 became much more difficult for plaintiffs to sustain after the *Leegin*, *Kahn*, *Sharp Electronics*, *Monsanto*, *Jefferson Parish*, and *Sylvania* decisions.[43]

Let me give you an example of how this plays out in practice. In the *Microsoft* case, the district court dismissed the Section 1 exclusive dealing claim because Microsoft had not "completely excluded Netscape."[44] But the district court, and ultimately the D.C. Circuit, found that the same agreements supported liability under Section 2 even though the foreclosure was less than the 40-50% share usually required to establish a Section 1 violation.[45] Similarly, the D.C. Circuit found that some of Microsoft's efforts to integrate its browser violated Section 2 as an illegal tie. Yet the court reversed the district court's finding of liability under Section 1 and remanded for a rule of reason analysis.

Put simply, the standards applied to vertical restraint claims under Section 2 are different from those applied in claims based only on Section 1 or Section 3. Yet the Report – and sometimes the commentators and witnesses – referenced Section 1 and Section 3 cases as though they were Section 2 cases. This had the effect of misstating the law in a way that suggested that courts have blessed vertical restraints practiced by monopolists. This is yet another way that the Report improperly sought to raise the bar to challenging conduct that might be illegal if practiced by a firm with monopoly or near-monopoly power.

---

[43] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 127 S. Ct. 2705 (2007); *State Oil v. Khan*, 522 U.S. 3 (1997); *Business Elects. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 724 (1988); *Monsanto Co v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761 (1984); *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

[44] *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 53 (D.D.C. 2000).

[45] *Microsoft*, 253 F.3d at 70.

Copyright © 2009 Association of Corporate Counsel

III.

So where does that leave the state of Section 2 enforcement? Of course, I cannot comment on the Antitrust Division's plans, but General Varney has already spoken several times on the topic. The two agencies have disagreed in the past on the propriety of certiorari on some FTC Section 2 cases.[46] I am hopeful that the agencies will see more eye-to-eye on these issues in the future.

But regardless of what happens at the DOJ, the FTC remains ready, willing, and able to challenge violations of Section 2 of the Sherman Act. Since 2000, the Commission has brought two monopolization cases in the standard setting context: *Unocal* and *Rambus*. In the first case, we alleged that Unocal failed to disclose its clean-fuel patents while helping to establish industry standards for reformulated gas that incorporated its technology. We reached a consent agreement with Unocal shortly after trial before an FTC ALJ.[47] In the second case, the Commission found that Rambus had failed to disclose certain DRAM patents to a standard setting organization that ultimately adopted standards covered by the intellectual property. The Commission found that this conduct violated Section 2, but the Court of Appeals for the D.C. Circuit reversed for lack of causation between the deception and the selection of the standard.[48] The agency has also challenged a number of reverse payment, or pay-for-delay, cases in the pharmaceutical industry; although, I should say that these were primarily Section 1 cases.

[46] *See, e.g.*, Statement of the Federal Trade Commission Declining To Join the U.S. Department of Justice Recommendation That the United States Supreme Court Review the Decision of the Court of Appeals for the Ninth Circuit In *linkLine Comms. v. Pacific Bell Telephone Company* (May 23, 2008), *available at* http://www2.ftc.gov/os/2008/05/P072104stmt.pdf.

[47] *In re Union Oil Co. of Cal.*, Docket No. 9305 (July 27, 2005) (decision and order), *available at* http://www.ftc.gov/os/adjpro/d9305/050802do.pdf.

[48] *Rambus, Inc. v. FTC*, 522 F.3d 456, 469 (D.C. Cir. 2008).

Copyright © 2009 Association of Corporate Counsel

In addition, the agency has used its Section 5 authority to challenge unilateral conduct. In the *Valassis* case, a leading producer of newspaper inserts made public statements in an analyst conference call that amounted to an invitation to collude to raise prices and allocate customers. The case was resolved with a consent order.[49] In the *N-Data* case, we challenged a patent holder's breach of a predecessor's commitment to a standard setting organization to license certain Ethernet-related patents on defined royalty terms after the industry became committed to a standard incorporating the intellectual property. The FTC's claim was resolved through a consent order.[50]

IV.

Next, I'd like to talk briefly about two important procedural differences between Section 2 enforcement and Article 82 enforcement that are often lost in discussions about these two statutes. The first difference involves how these statutes apply to merger control. In the United States, the antitrust agencies can challenge a transaction both prospectively and retrospectively under Section 7 of the Clayton Act. For example in *United States v. E.I. du Pont de Nemours & Co.*, the Department of Justice successfully challenged the acquisition of General Motors stock by DuPont approximately thirty years after the acquisition.[51] Although it is extremely unlikely that the U.S. agencies would attempt to challenge such an old transaction today, the agencies

[49] *In re Valassis Commc'ns, Inc.*, FTC File No. 051 0008, Docket No. C-4160 (Apr. 19, 2006) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510008/0510008.shtm.

[50] *In re Negotiated Data Solutions LLC*, FTC File No. 051 0094 (Sept. 22, 2008) (decision and order), *available at* http://www.ftc.gov/os/caselist/0510094/index.shtm.

[51] *United States v. E.I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1961) ("the Government may proceed at any time that an acquisition may be said with reasonably probability to contain a threat that it may lead to a restrain of commerce or tend to create a monopoly of a line of commerce.").

Copyright © 2009 Association of Corporate Counsel

regularly review consummated mergers for potential harm and have challenged a number of them in recent years.

By contrast, the EC Merger Regulation operates prospectively only. The EC has only one chance to review a transaction and cannot seek to unwind a transaction once it has been consummated. Nevertheless, Article 82 can play a "backstop" to the EC Merger Regulation and be used to challenge anticompetitive transactions ex post.

Indeed, a recent development in EC merger review is the view that Article 82 can serve as an effective deterrent to post-merger anticompetitive behavior. In the GE/Honeywell case, the Court of First Instance stated that "the Commission must, in principle, take into account the potentially unlawful, and thus sanctionable, nature of certain conduct as a factor which might diminish, or even eliminate, incentives for an undertaking to engage in particular conduct."[52] The court pointed to Article 82 in particular as a potential deterrent to companies behaving anti-competitively post-merger. The EC recently incorporated these principles into its guidelines for non-horizontal mergers.[53] The U.S. agencies do not follow this approach for several reasons including the ability to apply Section 7, which has a lower standard of proof, retrospectively.

---

[52] Case T-210/01, *General Elec. v. Commission* [2005] ECR II-000 ¶ 73; *see also* Case C-12/03 P, *Commission v. Tetra Laval BV* [2003], ECR I-000 ¶¶ 74-76.

[53] Guidelines on the Assessment of Non-Horizontal Mergers under the Council Regulation on the Control of Concentrations Between Undertakings ¶ 46 (2008) ("[W]hen the adoption of a specific course of conduct by the merged entity is an essential step in foreclosure, the Commission examines both the incentives to adopt such conduct and the factors liable to reduce, or even eliminate, those incentives, including the possibility that the conduct is unlawful. Conduct may be unlawful *inter alia* because of competition rules or sector-specific rules at the EU or national levels.").

Copyright © 2009 Association of Corporate Counsel

More specifically, if a merger results in increased prices, the merged entity may be liable under Article 82(a), which prohibits exploitative practices, including excessive prices.[54] Under this section, the EC (and the Community) can challenge "excessive pricing," which the courts have defined as a price having "no reasonable relation to the economic value of the product supplied."[55] This is, of course, a significant divergence from Section 2 of the Sherman Act, which does not condemn high prices. Challenges to "excessive prices" under Article 82 have been rare and successful challenges rarer still. Moreover, it appears that the Commission has sought only price controls as relief.[56] In theory, though, the full range of remedies under Section 82 would be available for excessive prices.

Additionally, a consummated merger could in theory be indirectly challenged under Article 82 if the merged company abused its market power. In this respect Article 82 and Section 2 function similarly, although the requirement to show monopoly power in the United States means that only a small percentage of mergers could effectively be challenged in this manner. As I previously mentioned, the more common approach in the United States is to challenge consummated mergers under Section 7 of the Clayton Act, which the antitrust agencies can enforce at any time.

A second important procedural difference between Section 2 enforcement and Article 82 enforcement is that the EC, unlike the U.S. agencies, is administrative in nature. That means that

---

[54] Article 82(a) of the European Commission Treaty (one type of abuse of dominance is "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions").

[55] Case 27/76, *United Brands v. Commission*, 1978 E.C.R. 207 ¶ 250. To determine whether prices are excessive, courts consider the product's costs of production, prices of comparable products in the same and other markets, and profit margins of other products sold by the company. *See id.* ¶¶ 301-303; *Napp Pharms. v. Director General of Fair Trading*, [2002] Comp AR 13: European Commercial Cases 177.

[56] *See, e.g., United Brands v. Commission*, 1978 E.C.R. 207.

Copyright © 2009 Association of Corporate Counsel

a Commission decision to close an Article 82 investigation can be challenged by certain third parties, including consumer associations, third parties directly affected by the Commission's action, persons that actively participated in the Commission's investigation, and member states.[57] As a result, the Commission may be nudged into enforcement actions in marginal cases. There is nothing like that here, and that is arguably a powerful argument why over-enforcement is more of a concern than under-enforcement in the United States than it is in Europe.

V.

In sum, the withdrawal of the DOJ's unilateral conduct report was a welcome development: while the Report's demise may not have any direct effect on the FTC, the agencies' approaches toward Section 2 enforcement now appear to be in closer alignment than they have been in some time. And while important substantive and procedural differences remain, the withdrawal of the Report may also bring the U.S. agencies and the European Commission in closer alignment on unilateral conduct issues.

Thank you for your time and attention.

[57] *See* Article 230 ("Any natural or legal person may . . . institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former."); Article 232 ("Any natural or legal person may . . . complain to the Court of Justice that an institution of the Community has failed to address to that person any act other than a recommendation or an opinion.").

Copyright © 2009 Association of Corporate Counsel

Significant Amendments to Canada's Competition Act and Investment Canada Act Now in Force

BUDGET IMPLEMENTATION ACT (2009) PROCLAIMED IN FORCE

A. Significant Amendments Become Law

- On March 12, Bill C-10 received royal assent and came into force of law. The *Budget Implementation Act* (2009) enacts several significant amendments to the *Competition Act* and the *Investment Canada Act*.

B. Highlights of New Provisions

- Introduction of U.S.-style "second request" mechanism for mergers.
- Introduction of national security test on investments by non-Canadians in new or existing Canadian businesses.
- Government now has criminal and civil enforcement options for agreements between competitors.
- Expansion of civil liability for damages to *per se* illegal agreements between competitors.
- Decriminalization of resale price maintenance, price discrimination and predatory pricing.
- Penalties and remedies:
  - Higher fines and longer jail terms for criminal conduct
  - Monetary penalty for abuse of dominance
  - Increased monetary penalties for misleading advertising
  - Private right of access for resale price maintenance.

C. Merger Review Process – Competition Act

- **Recap of prior law:**
  - Under the prior merger review process, the maximum waiting period prior to closing was 42 days from the date of filing. To prevent closing after the waiting period, the Commissioner of Competition could seek injunctive relief from the Competition Tribunal in order to obtain more time to review the transaction.
  - Unless volunteered by the parties, the Commissioner had to apply for a court order (i.e., subpoena) to obtain information over and above the pre-merger filing. The Commissioner had three years to challenge a completed merger.
- **What has changed?**
  - New amendments replace the existing merger review process with one that closely resembles the U.S. procedure for merger review.
  - Initial 30-day waiting period followed by possible demand for more detailed information ("second request") in cases that raise substantive competition issues.
  - Requested information must be "relevant" to a competitive assessment of proposed merger, but no judicial oversight or similar procedural protection against overreaching demands.
  - Third-party requests for information still require court authorization.
  - Parties not permitted to close the transaction until 30 days after compliance with the second request.
  - Commissioner retains right to apply for subpoenas and temporary injunctions to extend review prior to closing.
  - Commissioner's right to challenge a merger is now limited to a period of only one year after closing.

CONT'D ON PAGE 2

Copyright © 2009 Association of Corporate Counsel

CONT'D FROM PAGE 1

D. Foreign Investor Review – Investment Canada Act

- **Recap of prior framework rules:**
  - Applies to acquisition of control of a Canadian business or creation of a new Canadian business by a non-Canadian investor.
  - Review threshold was based on "book value" of business assets.
  - Substantive test for reviewable transactions: whether a transaction is "likely to be of net benefit to Canada"? Minister's decision is based on an application for review, which may include undertakings and representations from third parties and government entities.
- **What has changed?**
  - New ground for review of foreign investment: whether investment could be injurious to national security?
    - Term "national security" left undefined.
    - Federal Cabinet obtains broad powers over investments that raise national security concerns, including the power to block transactions or impose terms and conditions prior to authorizing the investment.
  - New financial thresholds triggering review:
    - C$600-million for two years following implementation.
    - C$800-million for two additional years.
    - C$1-billion thereafter (adjusted annually for inflation).
    - Financial thresholds based on "enterprise value" of assets.
    - Thresholds apply to all sensitive sectors other than culture – including uranium, transport and financial services.

E. Agreements Between Competitors

- **Recap of prior law:**
  - Prior law required Crown to prove that an agreement/arrangement between competitors had lessened competition "unduly" or had unreasonably enhanced a product's price.
  - Evaluation of conduct incorporated complex legal/economic concepts such as market power, relevant market, etc.
  - Criminal standard of proof (i.e., beyond a reasonable doubt) made prosecuting these cases an uphill battle for the Crown.
  - Competitive effects test governing hard-core cartel agreements was out of step with other major antitrust jurisdictions (i.e., U.S. and EU).
  - Civil actions for damages were based on the criminal law "undueness" test, which has discouraged private suits.
- **What has changed?**
  - Criminal standard changes from focus on economic effects to *per se* rules.
  - Government now has two enforcement options for agreements between competitors:
    - hard core cartel agreements (e.g., price-fixing activity) are subject to serious criminal sanctions and private actions for damages; and
    - other agreements between competitors that could lessen or prevent competition substantially are subject to investigation by the Bureau and civil review by the Tribunal, although no fines or private damages can be imposed.
  - New criminal standard makes it illegal for competitors (or persons who would be likely to compete) to enter into an agreement or arrangement:
    - fixing prices;
    - allocating sales, territories, customers and markets; and
    - fixing production or supply.
  - Breach of these *per se* rules could lead to a prison term not exceeding 14 years or a fine not exceeding C$25-million and also exposes parties to civil liability for damages.
  - New defence places the burden on the defendants to prove, on the balance of probabilities, that:

CONT'D ON PAGE 3

Copyright © 2009 Association of Corporate Counsel

CONT'D FROM PAGE 2

- the agreement/arrangement is ancillary to a broader or separate principal agreement that includes same parties; and
- the agreement/arrangement is "reasonably necessary" for implementing the principal agreement.

- Retains other existing defences (agreements between affiliates, export cartels, regulated conduct, etc.)

- Compliance considerations:
  - Review of existing commercial agreements with competitors to ensure compliance, including joint venture agreements, strategic alliances, non-compete agreements, distribution contracts, IP licences, franchise agreements, etc.
  - Consider seeking Bureau's compliance advice during one-year transitional period. Criminal prohibitions (and derivative civil liability) do not come into force until one year from the date of royal assent, i.e., March 12, 2009.
  - Specific provision for voluntary application to Bureau for "binding" advisory opinions for agreements and arrangements entered into before Act came into force.
  - Update compliance programs and training modules.
- Civilly Reviewable Agreements Between Competitors
  - Existing and proposed agreements between competitors that are not subject to the criminal *per se* prohibitions are covered by a new civil review provision of the Act (new Section 90.1).
  - Commissioner is the only person who can bring enforcement proceedings to Tribunal.
  - Agreements that are likely to substantially lessen competition can only be remedied by a Tribunal prohibition order.
  - Tribunal's assessment of non-criminal agreements between competitors will be based on the same assessment criteria that currently apply to mergers.
  - Efficiencies defence that parallels the defence under the merger provisions of the Act is available.

F. Abuse of Dominance

- Significant Administrative Monetary Penalties for Abuse of Dominance
  - Competition Tribunal now has authority to impose AMPS of up to C$10-million (C$15-million for repeat contraveners).
  - Possible chilling effect on vigorous and aggressive competition in the marketplace.
  - Constitutionality concerns have been raised regarding similar provisions because of penal consequences for contravention of a civil provision.

G. Agreements with Customers/Suppliers/Licensees

- Provisions dealing with price discrimination, resale price maintenance and predatory pricing, all of which are currently criminal offences, are repealed.
  - New civil provision for resale price maintenance designed to address situations where resale price maintenance has an adverse effect on competition.
  - Price discrimination and predatory pricing are now dealt with exclusively under the civil provisions of the statute governing abuse of dominance (monopolization), which requires that there be a showing of substantial anticompetitive effects.

For further information, please contact a member of Blakes Competition, Antitrust & Foreign Investment Group.

Copyright © 2009 Association of Corporate Counsel

Competition Bureau Canada Bureau de la concurrence Canada

Canada

Home > Media Centre > Speeches

Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition

Canadian Bar Association, Competition Law Section, 2009 Spring Forum

Toronto, Ontario
May 12, 2009

(Check against delivery)

Introduction

Thank you for your introduction, and for this opportunity to join you for the Spring Forum on Competition Law.

Having just completed a stimulating and rewarding cross-Canada "amendments tour", where we had the privilege to meet with a wide range of interested Canadians, I confess it is nice to be home — or closer to it — with our colleagues in the Bar Association and other stakeholders with whom we collaborate regularly. I had the opportunity to speak to some of you at Langdon Hall in February, but this is the first time I am addressing a large audience since the passage of the amendments to the *Competition Act*, a significant development in the history of competition law in Canada. I am very pleased to be here.

We are excited by the amendments, in the sense that we firmly believe that we now have the tools to effectively discharge our fundamental mandate — that is, to enforce the Act to promote and protect competitive markets, for the benefit of all Canadians. I will turn to touch on the fundamentals of those amendments in a moment but, before I do that, let me address one topic that is particularly relevant to this audience, although the payoff will be enjoyed far beyond this group. I am referring specifically to the collaboration between the Section and the Competition Bureau.

Relations with the Bar

As I mentioned in February and, for those who know me, know well, the relationship between the Bureau and the Bar has been a long-term interest of mine. In 2006, the Section Executive and the Bureau agreed to establish a Task Force on Collaboration. It is fair to say, I think, that we all recognized there were opportunities we were missing to promote a more healthy and productive — innovative, if you will — dialogue across our two constituencies, with a view to ever-better enforcement policies and practices. As pleased as we members of the Task Force were with the release of our report in the summer of 2007, I don't think any of us realized what we had started. Nor, certainly, could we have recognized that, after almost two years of cultivating a whole new level of debate and collaboration as between the Bar and Bureau, we would get the opportunity of a lifetime to put the fledgling relationship to the test!

Well, here we are. And, to my mind, we are very fortunate that we set ourselves on this course. From my first phone call to John Bodrug earlier this year, as it was becoming clear we might well have amendments, the Section, and many members of the Bar more generally, have been generous in sharing their perspectives, in a largely productive and respectful way. With the invaluable assistance of the CBA, we have already engaged in a number of formal and informal technical sessions to gather input and to

Copyright © 2009 Association of Corporate Counsel

discuss the amendments and our proposed enforcement policy and practices. While of course we don't agree on everything, it has been very gratifying to see us all work hard together to clearly and honestly articulate our concerns. The rigour this joint quest for efficient implementation of the amendments has added to the process cannot be overstated. We are testing ourselves, you are testing us, and together we are constructively identifying, with the greatest particularity we can, the scope and the limits of these amendments and how they should be enforced. We will continue to turn to and count on your insights and perspectives. I am confident all Canadians will be the beneficiaries as we shape effective and predictable implementation of these provisions and enter an era of reinvigorated, while always measured and responsible, enforcement of our competition laws.

This Conference

Now, let's move on to some content. One of the ways in which the Bar and the Bureau have always been able to come together is in this venue, and its counterpart conference in the Fall. As those of you attending the CBA conference last September will recall, we were uncharacteristically quiet owing to the election then under way — I am certainly pleased — and hope you'll agree — that we are back in front of the microphones here, and looking forward to participating fully and openly in the debates.

Yes there are the amendments, and we will discuss these a good deal I am sure. But we had and continue to have a great deal of other important work ongoing at the Bureau that your agenda raises, and that we will want to address. As you know, what antitrust philosophy should inform an approach to unilateral conduct is a live and lively topic in circles around the globe. For example, the European Commission has recently released its enforcement approach dealing with Article 82, while the U.S. Department of Justice enforcement guidelines on Section 2 appear to continue to provoke debate, having now been explicitly withdrawn by the new Assistant Attorney General, Christine Varney, who has committed to aggressively pursuing monopolization cases. The months ahead promise to be interesting.

Consistent with that swell, last year we identified our approach to abuse of dominance cases as a subject we wanted to explore further and clarify through revised guidelines. In January we issued our draft revised guidelines to reflect recent jurisprudence and modern economic thinking with what we believe is the best approach.

As part of our consultation process on these draft guidelines, we are organizing a roundtable for September to bring together leading experts from the private and public sectors, from Canada and abroad, to extend and enrich the debate about the guidelines. We believe this kind of open forum will advance our appreciation of different perspectives and contribute to a better final product, one that you, your clients, and we can rely on to provide strong, clear guidance in this complex area of the law.

That said, while guidelines are valuable, they need to be put to the practical test of case work. I can tell you that our Civil Matters Branch is looking at a number of challenging issues in various sectors of the economy. We expect to be able to address some of those challenges through the resolution of cases this year.

Amendments

Now, on to the amendments. The amendments became law on March 12, 2009, with the grant of Royal Assent. The exception is the cartel provisions, which come into force in March 2010.

These changes have modernized the Act and brought it more closely in line with the competition laws of our trading partners. We are confident that the changes will better protect Canadian consumers and legitimate businesses from the harm caused by anti-competitive conduct, and advance predictability in the enforcement of our laws.

We acknowledge that with this opportunity comes a significant responsibility to implement the amendments in the most effective and transparent way possible.

Copyright © 2009 Association of Corporate Counsel

Consultation

To that end, our number one priority since it became clear the amendments were likely to become law has been to plan and deliver upon an extensive program of outreach and consultation to the Bar, business community, and consumer groups. Central to this effort has been our publication of two sets of draft guidelines, on the new merger review process and competitor collaborations. Both are out for consultation, and both will provide material guidance on how the Bureau intends to move forward in these key areas.

A guiding principle for us throughout this process has been to offer as much predictability and transparency as possible and to lay the foundation for Canadians to trust we will act responsibly, but firmly and effectively, to enforce the important market framework law that has been entrusted to our stewardship.

Our outreach started right after the legislation received Royal Assent in March. I made a series of telephone calls to senior practitioners and business groups across the country to plan our consultations and educational sessions. As complements to the guidelines, we have posted FAQs and general explanatory material on our Web site. As well, we have been actively engaged in a rather intense schedule of meetings with business and consumer groups in Montreal, Ottawa, Toronto, and Vancouver so far, hosted technical roundtables on our draft guidelines and participated in all manner of informal consultations with interested parties. It's been time enormously well-invested. We have learned a good deal, and will be adjusting our guidelines to respond to certain issues. Most important, perhaps, we want to build on the momentum to keep this important communication going. And I look forward to doing so in the coming months as we gain experience with the new Act.

Now, let me turn to a few of the key features of the amended legislation.

Specific amendments

A good deal of the initial public attention was focused on the revised Merger Review provisions.

As many of you know, consistent with the recommendation of the Competition Policy Review Panel, the amendments introduce a two-stage merger review process. The vast majority of mergers must be cleared within 30 days after filing. For those very few mergers that raise significant potential issues, the Bureau may issue a Supplementary Information Request; pending compliance with that request, parties can not close. But, as soon as they comply with the information request (which is subject to ongoing narrowing with the Bureau), they can close after 30 days pass.

As the most significant feature, in introducing this new process the amendments align the incentives for merging parties and the Bureau to communicate early and openly, to drive to the heart of any possible substantial issues, and to do so quickly. Let me assure you of a few things. First, we will strive to continue our strong record of resolving 90% of filings within 10-14 days. Second, we will work hard, be creative and accessible, and do all we can responsibly to reduce the burden of any Supplementary Information Requests that are issued. And third, and this is a theme that emerged in our roundtables last week as something the Bar feels strongly we need to retain, we will be flexible and will work with parties to make this new system work.

As noted, we have provided "Made in Canada" guidelines that provide a detailed discussion on Bureau proposals to narrow the scope of Supplementary Information Requests as much as reasonably possible. We are heartened that the general response we have received to our "Made in Canada" guidelines, reflecting the unique Canadian experience and context, has been very positive. Interested parties are invited to continue to provide comments by May 29. The plan is to issue guidelines in final form before the end of the summer.

Cartels/Competitor Collaborations

We are pleased that the initial concern about the new merger process appears to have quieted, and we have heard from many that our guidelines were among the reasons why. We hope that the same will be true of the competitor collaboration guidelines released last Friday. We have tried very hard to ask ourselves the tough questions as to what we believe Parliament intended to catch in the new narrow cartel regime, and taken pains in our draft enforcement guidelines to be explicit in exempting, categorically, certain kinds of agreements from criminal investigation.

We believe these amendments create a more effective criminal enforcement regime. They narrow criminal exposure to the most egregious forms of cartel agreements, while at the same time allowing other forms of potentially anti-competitive competitor collaborations to be reviewed under a civil standard, including the necessity for the Bureau to establish substantial economic harm.

We look forward to consultations on the competitor collaboration guidelines in June, and to issuing guidance later this year, well before the provisions come into force. In doing so, clarity, transparency, and effectiveness will again be our watchwords.

Another significant set of amendments repealed the former criminal pricing provisions. Removing the spectre of criminal prosecution from these activities will, we believe, help promote innovative, competitive pricing behaviour as companies seek a competitive edge through creativity and honest play. Decriminalizing these practices increases certainty for Canadian business that innovative pricing behaviour will not be exposed to the risk of a "criminal" investigation. In this way, we believe the amendments strike the right balance between innovation and business growth, and better protection for legitimate businesses from unlawful practices.

The fourth basket of changes involves the deceptive marketing provisions, where the penalties for individuals used to be nominal — a maximum of $50,000 for a first-time offence, and $100,000 for subsequent offences — mere license fees in many cases. These individual practices have been raised to more meaningful levels of $750,000 and $1 million. The same goes for companies; the penalties have been increased to $10 million and $15 million, for first and subsequent offences, respectively.

Finally, I am sure you have all noted the introduction of the potential for Administrative Monetary Penalties for abuse of dominance, at a maximum of $10 million for a first offence and a maximum of $15 million for subsequent offences. The Government takes this conduct seriously. In appropriate cases, which may well not be every case, the Bureau will request the Tribunal to consider ordering this deterrent.

I feel incredibly fortunate to be leading the Bureau at such an exciting, groundbreaking time. The corresponding responsibility is significant. We at the Bureau are working hard and our talented staff are committed to getting the "right" enforcement practices in place and the resources devoted to the right work. At the same time, and significantly, the support in the sense of engagement which many of you have been providing will help shape these provisions into what I am confident will be effective and enduring enforcement tools and practices.

Enforcement

Let me close by reinforcing a message I mentioned earlier in passing. Yes, the new legislative changes are incredibly important. Yes, we must direct and explain ourselves plainly through appropriate guidance, in this and in every area of our enforcement. And yes, we are determined to do this in an open, collaborative, and respectful fashion.

But at the end of the day, we must not lose sight of our first responsibility. It is our duty to actively enforce the law. Canadians must have confidence that we will do so in a measured, responsible, and effective fashion.

In doing so, we benefit from the substantial guidance we have developed and made public over the past few years, our maturing cooperative and collaborative relationships with our foreign counterparts, and the opportunity the amendments have given us, including breathing new life into the interest among our

Copyright © 2009 Association of Corporate Counsel

stakeholders beyond the Bar. I believe the time is right, then, to more actively engage in our enforcement role.

To do that we need to initiate responsible cases more often. We must and will always be measured, and consider consensual resolutions where the public interest supports doing so, but we should not be paralyzed by the fear of losing a case. Jurisprudence brings clarity. It sharpens the lines and marks the bounds of acceptable conduct.

Provided the case is responsible, whether we win or lose, we will achieve three objectives that are important to us, important to you as Canada's competition advisors, and important to Canada's competitive framework.

First, we shed light on the issues before the courts. This attention alone will help deter anti-competitive conduct.

Second, we clarify and provide transparency. Guidelines on complex enforcement issues are important, but can only go so far. Greater clarity and transparency comes from jurisprudence.

Third, we demonstrate we have the will to responsibly enforce the law. There is no substitute for this message as an effective deterrent to other individuals or companies that might contemplate anti-competitive practices.

Conclusion

There is no doubt that the current economic environment brings particular challenges. These pressures only confirm to me that, in all of our work, we must be clear, timely and decisive. And we must resist calls for the Bureau to lighten antitrust scrutiny in a time of economic crisis, as to do so would be to abandon Canadians when they need us most, and would risk lasting harm.

The *Competition Act*, as a law of general application, can accommodate both ordinary and extraordinary market conditions. It applies during times of prosperity to prevent conduct that deprives markets of innovation, efficiency and productivity. It is of equal, or greater, importance during times of economic hardship, when consumers and legitimate business can ill afford the costs of anti-competitive activities.

I assure you that we will stay the course, remain principled while sensitive to the hardship defining the environment around us. And we will engage our new tools to protect the market from anti-competitive behaviour. That will include open lines of communication, consultation, and measured enforcement.

Thank you.

Date Modified: 2009-05-27

Copyright © 2009 Association of Corporate Counsel

Competition Bureau Canada Bureau de la concurrence Canada

Canada

Speaking Notes for Melanie L. Aitken, Interim Commissioner of Competition

The Senate Banking, Trade and Commerce Committee Hearings Regarding *Competition Act* Amendments

Ottawa, Ontario
May 13, 2009

(Check against delivery)

Thank you, Mr. Chairman.

It is an honour to be here today to discuss the recent amendments to the *Competition Act*. My name is Melanie Aitken and, since January, I have had the privilege of serving as Interim Commissioner of Competition. Prior to that I headed the merger review group at the Competition Bureau, and before that I spent many years in private legal practice in Toronto.

I would like to say how pleased we are at the Bureau to have the new tools Colette has just described to carry out our mandate to enforce the *Competition Act*. We firmly believe the amendments will help us better fulfill our mission, which is to contribute to the prosperity of Canadians by protecting competitive and honest markets where efficiencies and innovation are fostered, and where consumers can make informed choices.

An honest marketplace benefits everyone in the economy — businesses and consumers. It is the goal of the *Competition Act*, and the role of the Bureau, to ensure those conditions prevail. And yet, as Colette has highlighted, before the amendments, our cornerstone cartel provision was ineffective and badly out of step with that of our major trading partners. This was a particular challenge for us at the Bureau, since combating cartels is our number one priority because of their very harmful effects.

At one and the same time, the provision was too broad and too narrow. It was too narrow, and an outlier around the world, in that, to convict, the prosecution had to prove not just an agreement between competitors to fix prices, but further, in this context of unambiguously harmful conduct, an anti-competitive effect. Needless to say, this consumed enormous resources to try to establish a complex economic effect; very few prosecutions were successful, even when conspirators were caught red-handed.

At the same time, the previous cartel provision captured far too much — every business collaboration in Canada was potentially subject to the threat of criminal prosecution. That included vertical agreements, franchise agreements, and research and development agreements. This broad cartel provision had the potential to discourage firms from entering into beneficial alliances and collaborations.

The Government's fix, as Colette has explained, has been to narrow the criminal provision, explicitly de-criminalizing all but the most egregious of cartel activities, while allowing for review under a civil track of other forms of agreements between competitors that seriously risk substantially lessening or preventing competition. Even then, the most that could happen is an order to dissolve the agreement. No fines, no risk of criminal exposure.

Copyright © 2009 Association of Corporate Counsel

Our previous merger review regime was out of synch as well. The old provisions did not provide us with the proper tools or sufficient time to review the very small number of transactions each year that have the potential to significantly harm competition in Canada. We are confident that the new provisions, designed with an emphasis on predictability and aligning incentives, will allow the Bureau to collect the information we need to proceed with a responsible review. At the same time, it will give more certainty to business about timing and process and harmonize our process with the U.S., which should help parties navigate the process more efficiently in a global marketplace. This is no small matter, and the reduced time frame for challenging mergers and increased thresholds for notification will give merging parties predictability and lighten the compliance burden, particularly for smaller ventures that can less readily assume the associated costs of a filing. It is in the public interest that the Bureau has the tools to do the best job possible in ensuring mergers won't result in a substantial lessening of competition, while doing all we can responsibly do to reduce the burden on business.

Significantly, the amendments decriminalized a number of pricing practices reflecting the reality, and international recognition, that creative pricing can be pro-competitive, and that hard and fast rules carrying the risk of criminal investigation can blunt entrepreneurial incentives. Liberating businesses to be innovative in organizing their pricing practices can only be a good thing; if that freedom is abused, the company will still be subject to civil sanctions.

Finally, the amendments enhanced penalties for those who break the law. Pre-amendments, the level of deterrence for certain types of illegal conduct was negligible. For many it was seen as just a licence fee for misleading and cheating honest consumers and businesses. Now, in areas such as false and misleading advertising, which target vulnerable consumers and businesses, not only can the courts and Tribunal administer higher penalties, we will now be able to act on behalf of consumers to seek restitution in many cases — an additional, powerful deterrent and a way for victims to get their money back.

Similarly, the *Act* did not effectively deter anti-competitive conduct in the area of abuse of dominance, where the Tribunal was generally limited to requiring the offending company to discontinue the activity going forward. In other words, the company got to keep any money it made breaking the law, having excluded healthy competition through anti-competitive conduct that was designed to eliminate competition. What is key is that these amendments introduce material incentives to comply with the law.

There is no doubt in my mind that the changes to the *Act*, including the ones I have highlighted here, coupled with the strong investigative and analytical teams at the Bureau, will allow us to better enforce the *Competition Act* on behalf of Canadians.

I would suggest that this is even more important in a recession. Economic crime cuts closer to the bone when times are tough, and, if anything, we believe that the temptation to break the law may increase. Cartels and other anti-competitive conduct are more prevalent in declining industries, while the kind of innovation, productivity growth and cost effectiveness that honest competition can unleash are important drivers of recovery. For that reason, the principled application of sound competition policy is critical in promoting a speedier recovery from the economic downturn.

We are very conscious, however, that our role must be carefully calibrated. We must be measured, and communicate clearly what is onside and what is potentially illegal under the new law. But we must also enforce the law, so that legitimate business alliances, innovation and efficiencies in the economy can all flourish.

Let me be clear: this is not about creating obstacles to legitimate business conduct. We take seriously our duty to make sure those in the marketplace understand this, and that is why we are out in the community conducting consultations and education sessions with national consumer groups, the Bar, and the business communities in Toronto, Montreal and Vancouver.

For example, we worked with the Canadian Chamber of Commerce and the Canadian Council of Chief Executives to put on an education session for their members in Toronto last week. We have met with Catherine Swift and others from the Canadian Federation of Independent Business. We have an event

Copyright © 2009 Association of Corporate Counsel

planned with the Retail Council of Canada. In Vancouver and Montreal, we held open events for the local business communities. And more are planned across the country to ensure everyone who cares has an opportunity to present their input, and that we can provide as much explanation and education as possible in return.

The feedback we have received has been very positive. Many participants have described the sessions as valuable and said they walked away feeling they could work well with the new legislation.

But Mr. Chairman, Honourable Senators, we are doing more than just talking. We have a responsibility and a commitment to ensure these amendments are implemented in the most effective and transparent way possible. And so, we have issued draft guidelines outlining our approach to the two major substantive areas of change to the law; namely, our merger review process, and competitor collaborations. These draft guidelines lay out, as clearly as we can, how we intend to proceed in these two areas.

The draft merger review process guidelines explain how we will ensure that any burden on merging parties is reduced to the extent reasonably possible, while still allowing us to do our important work on behalf of Canadians. Our face-to-face consultations wrapped up last week, and the exchange and reception were quite encouraging.

The second draft guidelines, those on competitor collaborations, were made public last Friday, and will likewise be the subject of extensive consultations later this spring. These guidelines discuss in detail our approach to the new legislation and explicitly exclude specific types of agreements from criminal exposure. We provide concrete examples that illustrate the clear limits to what we would investigate under the criminal provision, and describe our approach to all other agreements. We state clearly that we are interested in taking cases only where there is a significant competition issue.

We will listen to the wisdom of our interlocutors in the legal, business and consumer communities, and we will make any necessary changes to our two sets of draft guidelines before issuing them in final form in the coming months.

Mr. Chairman, I have had the great good fortune to be leading this organization when these amendments passed. I have clearly communicated to all our staff that getting the implementation right — making sure the new and improved *Competition Act* is administered and enforced in the most effective, efficient manner possible — is our number one priority.

As Interim Commissioner, I take my role as a law enforcement officer very seriously, and I will not hesitate to act when we uncover evidence of a breach of the law. Business crime costs everyone in the economy. Honest competitors deserve the full protection of the law.

We are committed to doing our part, responsibly, to ensure legitimate business grows strongly in Canada, and we believe these amendments will help us do so.

And with that, Mr. Chairman, Honourable Senators, Colette and I would welcome your questions.

Date Modified: 2009-07-09

Copyright © 2009 Association of Corporate Counsel

ACC Extras

Supplemental resources available on www.acc.com

507 - How to Conduct an Efficient & BeneficialAntitrust Audit
Program Material. Decemeber 2007
http://www.acc.com/legalresources/resource.cfm?show=19916

Model Association Antitrust Compliance Policy
Sample Form & Policy. January 2009
http://www.acc.com/legalresources/resource.cfm?show=129043

Model Association Antitrust Compliance Guide.
Sample Form & Policy. January 2009
http://www.acc.com/legalresources/resource.cfm?show=129380

Please note, these additional resources are provided by the Association of Corporate Counsel and not by the faculty of this session.

Copyright © 2009 Association of Corporate Counsel