FOREIGN AND INTERNATIONAL COMPETITION LAW AND POLICY DEVELOPMENTS

BOOK REVIEW: *THE EUROPEAN COMMISSION'S JURISDICTION TO SCRUTINISE MERGERS* (2nd ed.)

By: Morten Broberg (The Hague: Kluwer Law International, 2003. 446 Pages)

By: Omar Wakil[1]
McMillan Binch LLP

As Canadian practitioners are well aware, the European Union has recently completed a major overhaul of its competition law regime. The enforcement of Articles 81 (on restrictive agreements) and 82 (on abuse of dominance) has been "modernised" with new powers for the European Commission and a greatly increased role for the national competition authorities and courts of the 25 member states. Earlier this year the European Commission also introduced a package of reforms relating to merger control consisting of a new Merger Regulation ("ECMR"); merger enforcement guidelines; and a series of non-legislative measures designed to improve the Commission's decision-making process.

Something that remained virtually untouched in the reforms was the Merger Regulation's basic jurisdictional test. Article 1 of the ECMR establishes that the regulation "shall apply to all concentrations having a Community dimension" and sets out the circumstances in which a merger will have a "Community dimension". This subject is the main focus of the second edition of Morten Broberg's book, *The European Commission's Jurisdiction to Scrutinise Mergers*.

Whether or not a merger has a Community dimension depends largely on the "turnover" (revenue) of the "undertakings concerned". Broberg, formerly the legal secretary to the President of the European Court of First Instance and now an associate professor at the University of Copenhagen, studies these key elements with remarkable perception and detail. Separate chapters are devoted to the definition of the regulation's concept of "undertakings concerned" and the definition of the "group" to which the undertakings concerned belong. Understanding these important concepts is a necessary prerequisite to the actual calculation of turnovers. These definitional issues are often not straightforward and Broberg helpfully employs practical examples to supplement abstract analysis.

Once setting out how to identify the undertakings concerned and their respective groups, Broberg grapples with issues relating to the calculation of turnover. He examines the basic rules by ascertaining what accounts must be used, what business activities should be included, how taxes and sales rebates are to be treated, and how conversion into Euros should be made. He devotes a chapter to the often-tricky question of the geographic allocation of turnover, a critical issue in EC law as the ECMR thresholds require consideration of merging parties' "Community-wide" turnover as well as turnover in individual Member States. Neither the Merger Regulation nor the Commission's Notice on the Calculation of Turnover provide any substantial guidance regarding the geographic allocation of turnover and for that reason Broberg's analysis of this issue is particularly welcome.

The ECMR does provide that turnover "shall comprise products sold and services provided to undertakings or consumers", clearly referencing the concept of allocation of turnover to the place of the purchaser rather than that of the vendor. This is confirmed in the Commission's Notice on the Calculation of Turnover. But difficult questions remain. For example, where should a sale of a hotel room be allocated? To the location of the hotel (where the service was provided) or the location of the customer when making the reservation and perhaps paying for the room? Broberg handles these and other issues with insight and confidence.

Broberg also examines the calculation of the Community dimension in the financial services sector (where there are special rules) and considers the impact of the EEA Agreement on EC merger control. The penultimate chapter focuses on forum-shopping possibilities, the last on ways in which the current jurisdictional delimitation may be improved. Canadian readers not directly involved in EC merger control matters will likely find this chapter of most interest for its discussion of the effects doctrine and different types of notification thresholds, which may have more direct application to Canadian competition law than some of the EC-specific rules in other chapters.

It is in this last chapter that Broberg fully develops his thesis that the ECMR's current jurisdictional test needs refinement to better capture concentrations likely to create competition problems at the Community level. A core concern is that problems stem from the fact that "the thresholds relate to the size of the parties, not to the transaction itself giving rise to the concentration". Broberg surveys alternatives to the current test in interesting and convincing style. He quite rightly rejects a market-share-based test as rife with problems and a size-of-transaction-only test as being better than a size-of-party-only test, but still potentially problematic. He ultimately suggests that a combined size-of-parties / size-of-transaction test would, as Canadian readers will no doubt be pleased to know, likely be the best of a number of imperfect options insofar as it, if properly structured, is more likely to capture problem mergers than the current test.

This last chapter is both informed and thought-provoking and raises an obvious follow-on question: how likely is it that the ECMR's jurisdictional thresholds will actually be changed? The new Merger Regulation just entered into force on May 1, 2004 and did not modify Article 1. Instead, it overhauled the procedures for referring cases between the Commission and Member States (primarily Articles 4, 9 and 22 ECMR). Changes to Article 9 are expected to make it easier for mergers to be referred downwards to the national competition authorities where they meet the ECMR thresholds but are better suited for review at the national level. Conversely, a completely new Article 22 is expected to make it easier for mergers affecting multiple Member States but that do not meet the ECMR thresholds to be referred upwards to the Commission. And a new Article 4 permits for the first time merging parties to request such referrals. It is a shame that Broberg does not address these changes in detail, or indeed the referral procedure under the old ECMR, which are likely to be of increasing practical importance. Practitioners have now started to consider the scope and application of the new rules in real-life transactions and will soon start building up much-needed practical experience. It will certainly be of interest to see how great an impact the new referral system will have on EC merger control - if it does not work as its drafters intended, Broberg's thesis may well be considered by future European policymakers.

Throughout the book, Broberg explores the scope and meaning of the ECMR and associated notices and guidelines in an easy-to-read style and with a critical

eye. He does not retreat from criticism where he deems it warranted and does not shrink away from saying, "I disagree with the Commission's interpretation". This thoughtful work, which manages to provide both scholarly insight and practical guidance, will be a useful addition to the bookshelves of lawyers and academics in Europe, Canada and elsewhere.

Notes

[1] A senior associate at McMillan Binch LLP, Omar Wakil recently returned to Canada from a secondment to Allen & Overy LLP in Belgium.

AUSTRALIAN NEWSLETTER

By: Robert Baxt, Allens Arthur Robinson
Melbourne, Australia and
Hank R. Spier, Spier Consulting Pty Ltd.,
Canberra, Australia

This edition of the Newsletter is an update of developments in Australia in relation to competition policy and its administration.

Trade Practices Act Amendments

Readers of this Newsletter will have read about the Review of the Competition Provisions of the *Trade Practices Act* (the "Dawson Review"). The Dawson Review was made public in April 2003 and a Government response was issued at the same time. Little has happened since then but finally some draft legislation has seen the light of day. However, in the meantime there has been a Senate inquiry into "The effectiveness of the *Trade Practices Act 1974* in protecting small business" (the "Senate Inquiry") and this has clouded some of the possible changes to the *Trade Practices Act 1974* (Cth) ("TPA"). This Senate Inquiry report has been discussed in an earlier Newsletter.

On June 24, 2004, the Trade Practices Legislation Amendment Bill 2004 (the "Amendment Bill") was tabled in the Federal Parliament. The Amendment Bill follows on from the recommendations of the Dawson Review and the Government's response thereto. It is the first part of a two-part package of amendments to the TPA. The main changes slated for the TPA are as follows:

Collective Negotiation by Small Business

The Amendment Bill introduces a notification process whereby small businesses, or their representatives, will be able to notify the Australian Competition and Consumer Commission ("ACCC") of their intention to collectively negotiate with big suppliers or customers. Such collective negotiation can include collective boycotts. This new notification process is an alternative to the existing authorisation process, where businesses must establish that there would be a net public benefit flowing from the proposed collective bargaining arrangement.

Under the notification process, the ACCC will only have a short time to object to the notification if it is of the view that the public detriments in the collective negotiation proposal outweigh the benefits. After this initial period the conduct is exempted from challenge under the TPA. An exemption can last up to three years.

However, the ACCC can "open up" a notification at any time but once an exemption is in place it is not removed until the statutory processes for such removal have taken place, including a possible appeal to the Australian Competition Tribunal (the "Tribunal").

New Merger Review Processes

A new formal merger clearance process is to be introduced to sit alongside the existing informal review process and the formal authorisation process.

Under the formal merger process, parties to a merger will be able to seek clearance from the ACCC on the basis that the proposed merger does not substantially lessen competition in a market or is not likely to do so. The process will be largely public and the ACCC has 40 days to make its determination before the clearance is deemed refused.

Parties, but not third parties, will be able to appeal an ACCC formal merger determination to the Tribunal. Once clearance is granted the merger cannot be challenged under the TPA.

If a clearance is not granted, parties will still be able to apply to the Tribunal for authorisation. The Tribunal will be able to grant authorisation if it believes that the merger would result, or likely result, in such benefit to the public that the acquisition should be allowed to occur. Such applications are no longer to go to the ACCC but directly to the Tribunal.

Third Line Forcing

Currently under Australian competition law, third line forcing is *per se* illegal although it may be notified or authorised and therefore exempted from the TPA. The Amendment Bill introduces amendments that will make third line forcing subject to a competition test, the same test used for other forms of exclusive dealing. Notification and authorisation will still be available.

Joint Ventures

The TPA has always had special provisions relating to joint ventures and the inter-relationship with the cartel provisions. The Amendment Bill's proposed provisions seek to liberalise these provisions by restricting challenges to joint ventures under the TPA.

Dual Listed Companies

The Amendment Bill's proposed provisions seek to reduce the risk of dual listed companies falling afoul of the TPA's cartel provisions.

Seizure Powers

Currently the ACCC has limited powers of search and seizure where it has reason to believe that the target of such search and seizure can assist the ACCC in establishing whether there has been a breach of the TPA.

The Amendment Bill, on the one hand, widens the search and seizure powers but, on the other hand, requires the ACCC to obtain a warrant from a magistrate. This is similar to the Canadian position. Further, the amendments set out rules for the use of such powers.

Timing of the Amendments

There is some doubt as to whether the Amendment Bill will be debated in Parliament before the next Federal election. However, despite the uncertainty created by a possible change of government, it is safe to assume that most of the proposed changes, except those concerning changes to section 46 (misuse of market power) of the TPA (part of the second wave of changes in the package of amendments to the TPA), will be accepted by the Opposition should it be elected to office later this year. It is possible that the Government will soon move the amendments coming out of its response to the Senate Inquiry.

Senate Inquiry Report

The Federal Government tabled its response to the Senate Inquiry report on June 23, 2004. The Senate Inquiry report had a majority and a minority report, the latter written by Government Senators.

The changes accepted by the Government, largely based on the minority report, are:

- a specific reference in the misuse of market power provisions to predatory pricing and some definitions to assist the courts in considering alleged predatory pricing;
- changes to the unconscionability provisions that add the imposition or utilisation of unilateral variation clauses in a contract to the list of factors that a court can take into account in determining whether unconscionable conduct has occurred; and
- an amendment to proscribe misuse of market power that involves leveraging market power from one market into another. This change is designed to overcome some uncertainty caused by a court decision. It was always assumed that the law covered the leveraging situation.

A further amendment to enable misuse of market power to be alleged where there is co-ordinated conduct by relevant parties.

These changes are not particularly far-reaching but have to be read in conjunction with the previously discussed proposed amendments to the TPA. Nevertheless, these changes taken together represent a substantial package.

There is no doubt that small business and opposition parties will seek to have the TPA amendment package strengthened, particularly in relation to section 46 (the misuse of market power provision), when the legislation is debated in the Federal Parliament.

Reviews of Competition Policy Issues

Competition policy does not stand still. Ongoing reviews of competition issues both at state/territory and federal level have been an ongoing feature in Australian competition law. In recent times there have been a number of reviews by the Productivity Commission (the "Commission"), the Federal Government's economic research body. Telecommunications, gas access, price surveillance and access regulation are all areas which have been reviewed.

The Federal Government has recently sent three further references to the Commission that are of direct relevance to competition policy. These are:

Review of the Impact of National Competition Policy Generally

The Commission has commenced a public inquiry into the impact of national competition policy and related reforms undertaken to date on the Australian economy and community.

Review of the International Liner Shipping Provisions of the TPA

The Commission has commenced a public inquiry into Part X of the TPA and associated regulations. This legislative framework provides an industry-specific regulatory regime for the operation of international liner cargo shipping in Australia. Under Part X of the TPA, the providers of liner cargo shipping services to Australian exporters and importers are permitted to cooperate and form conferences for the provision of those services. Through compliance under Part X, providers are exempt from some general provisions of the TPA which would otherwise apply to such anti-

competitive arrangements. The inquiry is being undertaken in accordance with the Australian Government's Legislation Review Schedule.

Review of the Trans Tasman Competition Policy Arrangements

The Commission, in conjunction with the New Zealand Government, has been asked to undertake a study and report within six months on Australian and New Zealand competition and consumer protection regimes. The business environments in Australia and New Zealand are increasingly integrated, arising in part from the Australia-New Zealand Closer Economic Relations Trade Agreement and associated agreements. These changes are setting the scene for a single economic market. Greater harmonisation of the regulatory environments for business is regarded, by the two governments, as an essential element in developing a single market.

The ACCC

New Members of the ACCC

The Government has recently announced two new Commissioner appointments to the ACCC. This increases the number of ACCC Commissioners to seven.

The new members are:

Dr. Stephen King

Dr. King is an accomplished academic, who has been a Professor of Economics at the University of Melbourne since 1998 and a Professor of Management (Economics) at the Melbourne Business School since 2002. He has a PhD from Harvard University and has published widely in leading economic journals. Dr. King will head the Mergers Panel of the ACCC.

Mr. David Smith

Mr. Smith has been a staff member of the ACCC, and its predecessor organisation, the Trade Practices Commission, for an extended period. He has been the Executive General Manager of the Compliance Division within the ACCC since 2000, and has also managed a number of other branches. David Smith has spent some time at the Canadian Competition Bureau and will have a particular focus on enforcement issues.

ACCC Culture

With the exception of the ACCC Small Business Commissioner, John Martin, the ACCC is now very different to the days of its creation in 1995 and the era of Professor Allan Fels. Furthermore, a very high proportion of senior staff have departed due to retirement and promotion. There is currently a debate both within the ACCC and externally on the best way to administer the TPA and the best way to encourage compliance.

The new ACCC Chairman Graeme Samuel strongly stresses the need to educate business in relation to compliance issues to avoid breaches of the TPA. He is less enthusiastic on pursuing matters through to litigation although he appears resolute on cartels and their negative impact on the community. Samuel has indicated that there are a series of cartels that the ACCC will be taking action against and some of these are as a result of the ACCC's recently upgraded leniency programme. It is too early to see what the impact of the new regime will be. To date, there are mixed views. Some consider the ACCC's approach to be softening while others regard its approach as realistic.

The ACCC has had some mixed results in the courts in high profile merger litigation. As noted earlier, the

Amendment Bill introduces a formal merger clearance process. Graeme Samuel has publicly voiced his concern regarding this proposal especially in relation to the possibility that the long established informal merger review process would decrease in use. He has also expressed concern over the possibility that ACCC workloads would increase if parties tried the informal process first and if unsuccessful applied for formal clearance so that they would be able to appeal the ACCC decision.

In an attempt to discourage the introduction of a formal merger clearance process, the ACCC announced changes to its informal process hoping to make it a more attractive avenue for business. However, the informal review process does not overcome business' fundamental concern that there is no review process in place. Further, it appears to remove the flexibility that was the hallmark of the informal system. It is starting to look like the Canadian system of mandatory merger pre-notification.

It is the Authors' view that the ACCC is in a period of consolidation. The heyday of national competition policy, dramatic increases in penalties, the substantial number of misuse of market power cases and the ACCC's pivotal role in the value added tax system can never be repeated. The ACCC needs to consolidate and find its role in a different era and with different personalities. Having said all that, the ACCC is ultimately an enforcement agency and, in that regard, enforcement, including litigation, must be a primary focus.

The various reviews are a little bit of a threat in a way, yet also a way of getting more power. The ACCC has received financial backing from the Government and that is most welcome.

As of July 1, 2004, it is anticipated that the Australian Energy Regulator ("AER") will take over responsibility for wholesale, network and retail regulation of the gas and electricity industries. Although a constituent part of the ACCC, the AER will operate as a separate legal entity, performing all national energy market regulation functions and exercising its powers under an agreed new national energy legislative framework. The AER will consist of three commissioners, one from the ACCC and two nominees chosen from the states in order to maintain independence from the ACCC. The ACCC will continue to exercise its general competition regulatory powers under Part IV of the TPA. Competition will remain the preserve of the ACCC, while the state-based regulators will continue to be responsible for retail pricing.

EC COMPETITION LAW DEVELOPMENTS

By: Juan A. Rodriguez
Sullivan & Cromwell LLP, London

New EU Competition Commissioner

On August 12, 2004, Jose Manuel Barroso, President-designate of the EC Commission, designated Nellie Kroes-Smit as the successor to Commissioner Mario Monti. Mrs. Kroes's appointment, like that of the other Commissioners designated by Mr. Barroso, has to be approved by the European Parliament before it can take effect on November 1st of this year.

Mrs. Kroes, a Dutch national, has had extensive experience in government and in the private sector. From 1982 to 1989, she served as Minister of Transport, Public Works and Telecommunications in the Netherlands and from 1991 to 2000, she was President of Nyenrode University (the Netherlands). She has been a member of the Boards of a number of well-known companies, including, Lucent Technologies, Inc., Volvo, Nederlands Spoorwegen and Thales. An economist by training, she is regarded

as a proponent of free market principles. Although the designation of Mrs. Kroes as successor to Mario Monti was something of a surprise, it is widely believed that her extensive business experience will equip her to apply EC competition rules in a manner that takes account of business objectives. In her introductory speech on September 28 to the European Parliament's Economic and Monetary Affairs Committee, she stated "I do not consider business to be my natural adversary" adding that her role will be "to apply the rules made for the market to function properly".

U.S. ANTITRUST LAW DEVELOPMENTS

By: Margaret Guerin-Calvert
Competition Policy Associates, Inc., Washington, D.C.

Introduction and Overview

The second half of 2004 witnessed several notable developments in antitrust enforcement activity and outcomes involving mergers as well as cartel activity, with the latter involving issues concerning follow-on private antitrust litigation in the U.S. by foreign plaintiffs. In addition, the federal agencies issued seminal reports in industry areas that had been the subject of intensive hearings and research on industry structure, competitive developments, and future enforcement areas. Finally, the Antitrust Modernization Commission, a body empanelled to review the antitrust issues in the U.S., commenced its initial meetings and solicited comments from interested participants on the issues that the Commission should consider addressing in its ultimate report to Congress. The following sets out the highlights of the key matters.

Litigation

Merger Activity and Enforcement

Recent reports on the number of merger filings, investigations, and extensive reviews at the federal agencies indicate that there continues to be a number of mergers that are subject to extensive inquiry involving considerable staff resources as well as time.[1] During the summer and fall of 2004, the agencies – particularly the FTC – continued their policy of providing greater disclosure of the reasons for not challenging specific mergers that had undergone extensive inquiry. Among these matters, for example, were the acquisition of Brown & Williamson by RJR Reynolds Tobacco and the acquisition of BMG by Sony.[2] In each of these cases, the FTC issued detailed statements (including dissenting comments) on the competitive issues considered and the rationale for the decisions. These provide useful guidance in specific fact contexts as to the treatment of issues such as coordinated effects and entry.

Two litigated merger cases are of particular interest: one of the merger matters (Arch Coal) involved theories of coordinated effects as the alleged source of competitive effects from the proposed transaction, while the other (Oracle-PeopleSoft) involved unilateral effects. Both involved customer testimony concerning the relevant product market and competitive effects.

Oracle-PeopleSoft, Inc.[3]

The Oracle-PeopleSoft decision reached in the early fall entailed the application of an "unilateral" effects theory in the software industry and entailed extensive customer and economic expert testimony. Following a tender offer in June of 2003 for the shares of PeopleSoft, the Department of Justice initiated an investigation which ultimately resulted in a challenge in February 2004 of the proposed takeover. The

Department of Justice was joined in its suit by a number of states and the case went to trial in the summer of 2004 with a decision rendered in September.[4] At issue was a claim by the DOJ and the states that the merger would have combined two of essentially three providers of a particular category of software and that such products constituted a separate relevant product. The companies provided products broadly characterized as enterprise application software or EAS, and it was on one of these types of software, "enterprise resource planning" system software, that the DOJ had raised concerns. In specific, the DOJ and the states had concerns that the merger would combine two of the suppliers of certain "high function HRM (human relations management) and FMS (financial management systems)" products and that these products constituted a separate market from other enterprise application software (ERP) products.

The Plaintiffs alleged that the relevant product market was distinct and excluded other types of software products and that the relevant customers were limited to the U.S. suppliers. In contrast, Oracle contended that the market was broader and included both more products and additional suppliers and that potential entry would deter or limit adverse competitive effects. The Court ultimately concluded (at 18-20) that the market was broader than that alleged by the Plaintiffs and included additional software and suppliers, and that competitors could re-position so as to constrain pricing. On this basis, the Court found lower market shares and also found that there was sufficient post-merger competitive pressure to constrain any anti-competitive effects.

Of interest to readers in the Court's decision is the long section on the theories of unilateral effects (at 29-47) where the Court sets out its views on "differentiated products unilateral effects claims" and the standards and evidence that it regards as relevant in support of such claims. (Similarly, the briefs and other public materials are of interest for setting out in significant detail the application of unilateral effects theories and the definition of product markets.) In setting out its decision, the Court reviews the customer testimony presented by both sides as well as the testimony of economic experts. Customer testimony was noted by the Court as a central element in the Plaintiffs' case and it noted that customer testimony could serve to put "a human perspective or face on the injury to competition" and that such testimony needed to be accompanied by "credible and convincing testimony" (concerning the cost of alternatives) or expert testimony (at 66). The Court ultimately concluded that customer testimony with respect to "concrete and specific actions" that had been taken by some customers to turn to or consider other vendors was an important factor in determining that the narrower product market had not been proven by the Plaintiffs and its findings in favor of Oracle.

Arch Coal, Inc-New Vulcan Coal Holdings, LLC[5]

The Arch Coal-New Vulcan (or Triton) merger case involved theories of anticompetitive effects due to coordinated interaction. The case was voted out by the FTC in March 2004 after an investigation of the transaction and the FTC was joined in its complaint on April 1, 2004 by a number of states. Trial commenced in the summer of 2004 with a decision rendered in August 2004. The Court reached the conclusion that the proposed transaction involving the combination of two suppliers of Southern Powder River Basin ("SPRB") coal to electric utilities (and that involved a divestiture of a mine in the SPRB to another firm) would not result in a significant lessening of competition. The result of that decision was to deny the grant of an injunction; subsequently, the United States Court of Appeals for the District of Columbia declined to enter an emergency injunction and the FTC later decided to withdraw their appeal.

The Court's decision focuses on the issue of product market definition and customer testimony in support of market definition and ultimately rejects a narrower market. Of interest to readers is an extensive section setting out theories of coordinated interaction, generally, and the specific coordinated effects theories advanced by the Plaintiffs in the case (at 31-61), as well as an assessment of the factors that make coordination "likely" or "unlikely." The section also addresses theories of "mavericks." In addition, the decision sets out analysis of entry and divestiture.

Other Major Litigation - The Empagran Decision[6]

Of note, and also addressed elsewhere in this issue, was the Empagran decision issued by the U.S. Supreme Court, which addressed whether foreign (e.g., non-U.S. plaintiffs) could bring certain types of claims under U.S. antitrust laws – in specific, the Court was addressing whether claims relating to conduct outside of the U.S. that did not involve effects in the U.S. could be brought under U.S. law. The case arose in the context of international cartel activity enforcement action and follow-on lawsuits. In reaching its decision, the Court emphasized the interests of other governments and the remedies available. The Court did remand an issue back to the D.C. Circuit as to whether a particular theory raised by the Plaintiffs concerning the linkage between domestic and foreign pricing effects remained.

Other Major Initiatives

The mid to late 2004 period has also been characterized by comprehensive review and reporting on major industries and competition as well as the antitrust laws and practices in the U.S. The following highlights three such areas of considerable interest to those practicing in the U.S. or engaged in particular industry sectors or seeking out extensive studies applying antitrust principles to areas such as joint ventures.

Antitrust Modernization Commission[7]

Ongoing in the U.S. is a review of the antitrust laws and related issues by a special commission, "The Antitrust Modernization Commission," which was created pursuant to the Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856. According to Commission statements:

> The Commission (which) consists of 12 members, 4 of which were appointed by the President, 4 of which were appointed by the leadership of the Senate, and 4 of which were appointed by the leadership of the House of Representatives Id. § 11054(a), is charged:
>
> (1) to examine whether the need exists to modernize the antitrust laws and to identify and study related issues;
>
> (2) to solicit views of all parties concerned with the operation of the antitrust laws;
>
> (3) to evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and
>
> (4) to prepare and submit to Congress and the President a report.

The report in turn could involve any recommendations for legislative or other changes in the administration of the antitrust laws. The Commission's website includes information on pending meetings; currently, the Commission is reviewing comments and recommendations made as to the issues that it should consider as central in its activities.

Healthcare Report

The FTC and DOJ issued a joint report, "Improving Health Care: A Dose of Competition", in July 2004, which was based on hearings held between February and October 2003, research, and comments filed and extensive transcripts, which are available at the FTC website.

There are several areas of note for readers, including those working outside of the healthcare area. First, the report reviews the importance of the role of price and non-price competition in healthcare for the promotion of quality and innovation (such as improved pharmaceuticals or the entry and expansion of generics) and addresses several of the areas of enforcement activity that the agencies regard as fostering such competition. Second, and of particular note, is the review of factors that make more complex the ability of the marketplace to achieve desired outcomes, and the availability of sufficient and timely information for consumers to be able to make choices. The report also notes that regulation of healthcare, including by the government as major purchaser, can have distortionary effects in the marketplace and that certain forms of entry regulation could limit competition.

Third, the report goes well beyond the U.S. healthcare system in its usefulness for antitrust practitioners since much of the analysis of organizational forms and types of coordination that are involved among physicians in networks (for negotiations with insurance companies) provides significant insight into the application of rule of reason to joint ventures and relevant efficiency or business justification arguments in a wide array of contexts. Of interest in this context for those assessing the ancillarity of various agreements are the sections addressing the importance of alignment of incentives and incentive mechanisms for achieving outcomes that the marketplace may not be achieving readily. Interestingly, the number one recommendation of the report addressed the point that "private payors, governments, and providers should continue experiments to improve incentives for providers to lower costs and enhance quality and for consumers to seek lower prices and better quality."

Fourth, the sections of the report that deal with enforcement activity in the pharmaceutical industry, while somewhat unique to the specific regulatory requirements of the U.S. system, nonetheless also provide guidance on the types of arrangements or contracts that may raise issues in other industry contexts.

The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement, FTC Staff Study, August 2004

In addition to the healthcare report, the FTC Staff issued a study in August 2004 concerning enforcement activity in the petroleum industry over the last 20 years. The report provides an extensive review and case studies of the structural change in the industry, the divestitures involved in several mergers, and research on the implications of change in the industry. While the report is focused specifically on one major sector of the economy, it provides an overview of virtually two decades of mergers and enforcement activity in an industry in which the resolution of many competitive issues has been divestiture. As such, it provides a useful perspective on the evolution of divestiture policy that could prove relevant for other industry contexts.

Conclusion

Recent enforcement actions, court decisions, and reports have focused specifically and extensively on core competition issues in the U.S., particularly on unilateral as well as coordinated effects theories, as well as the complex issues associated with antitrust

enforcement in contexts involving regulated sectors, imperfect consumer information, and the need for more complex organizational constructs and contracts to achieve new products or outcomes.

Notes

[1] See, for example, the report issued by the Department of Justice with respect to workload statistics broken down by type of activity, extensive investigation, challenges and business reviews at http://www.usdoj.gov/atr/public/12848.htm.

[2] See release of 22 June 2004 at ftc.gov.

[3] http://www.cand.uscourts.gov/cand/judges.nsf/61fffe74f99516d088256d480060b72d/bee7112f772c3c2c88256f0a007660b?

[4] The Department of Justice on October 1, 2004 decided not to appeal the decision stating: "We have decided not to appeal the district court's decision. The evidence, including the testimony of numerous customers, strongly supported our case against this proposed transaction. While we disagree with the district court's disappointing decision, we respect the role of the courts in the United States merger review process. Similarly, while we disagree with some of the legal observations in the district court's opinion, the ultimate outcome rested on detailed factual findings that would appropriately receive great deference in the appellate process. I commend the efforts of the fine Antitrust Division lawyers and economists who worked so hard to protect competition in this case, as well as the efforts of the 10 state attorneys general who joined us in this effort." http://www.usdoj.gov/atr/public.

[5] http://www.dcd.uscourts.gov/04-534.pdf. In the interests of full disclosure, the author served as the economic expert for the parties to this transaction at trial.

[6] *F. Hoffman-La Roche Ltd.* v. *Empagran S.A.*, 124 S. Ct. 2359 (2004). For a more detailed discussion and different perspectives, see, for example: theantitrustsource, www.Antitrustsource.com, September 2004, *Perspectives on Empagran*.

[7] http://www.amc.gov.