

FALL 2008

from the Section Chair

Dear Antitrust Colleague,

THE FOCUS ON divergence between the enforcement agencies in this issue of ANTITRUST could hardly be more timely. As we look forward to discerning what the merger enforcement policy of the new Administration will be, several issues are worthy of vigorous debate.

First, are we entering into a new era of administrative litigation of merger cases in the FTC? The District of Columbia Circuit decision in *Federal Trade Commission v. Whole Foods* made clear that a different standard, based upon the premise the FTC would engage in Part III administrative adjudication of mergers, applies to the FTC when seeking a preliminary injunction than applies to the Department of Justice Antitrust Division. Specifically, the D.C. Circuit found that the trial court failed to give the FTC adequate deference in the standard it applied for the grant of a preliminary injunction and noted that “the FTC will usually be able to obtain a preliminary injunction blocking a merger by ‘rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation.’”¹

This decision, and the position of the FTC underlying it, open the door to the use of Part III trials in merger cases brought by the FTC. Commissioner Tom Rosch, in a speech given at the Antitrust Section’s Masters Course in September,² urged precisely this course. Further, as part of preparing the way for such trials, Commissioner Rosch advocated major overhauls in the Commission’s Part III rules of procedure, a lower threshold standard for Commission approval of administrative challenges, and streamlining the pre-complaint investigatory process. The FTC on the same day published new proposed rules of procedure for Part III proceedings, seeking to expedite the process.

In the past, our Section and the Antitrust Modernization Commission have warned of potential pitfalls in the use of administrative trials in merger cases before the Commission, including abandonment of competitively neutral mergers because of delay and inconsistent results between the FTC and the Antitrust Division in enforcement.³ The majority of Commissioners appear to remain unconvinced by these comments. Assuming the FTC in the new Administration continues down the road toward routine use of Part III adjudication of merger challenges, the issue of whether the agency



can overcome the concerns that underlie these comments will be one of the most important challenges facing the FTC in the new Administration.

Second, is a gap growing between the Antitrust Division and the FTC in merger enforcement? It is dangerous to use the number of cases each agency has taken to court as a proxy for vigor of enforcement—there are simply too many variables that lead to the decision to bring litigation to simplify the analysis in this way. But certainly, in a system of dual enforcement of Section 7 of the Clayton Act, it would seem axiomatic that the choice of which agency undertakes investigation of a transaction should not impact the probability that the transaction will be challenged or the leverage the enforcer has in extracting negotiated resolution of possible competitive concerns. It is difficult to know in particular cases whether the choice of enforcement agency in the clearance process affects the outcome. The increased use of closing statements has shed some light on the Department of Justice’s views on the role of efficiencies in its decisions whether to challenge a particular transaction. Whether a majority of Commissioners at the FTC are on the same page as to efficiencies analysis is unclear. Likewise, the different points of view between the Antitrust Division and three FTC Commissioners as to the proper application of Section 2⁴ raise the question whether the two agencies also differ on the proper evaluation of competitive effects in the merger context.

At a procedural level, if the FTC moves toward Part III litigation as its norm, particularly in light of the D.C. Circuit’s standard for the grant of a preliminary injunction to the Commission in *Whole Foods*,⁵ an important issue is whether the FTC staff will have greater leverage in settlements than will the Antitrust Division staff. The ability to close a transaction in a timely manner has become all the more important in recent months given the volatility of credit markets. Will parties to a transaction trust that Part III proceedings can really be completed as quickly as a hearing in a federal district court in a case brought by the Antitrust Division? Will looser evidentiary standards in administrative litigation impact outcomes? Conversely, if the FTC pursues Commissioner Rosch’s proposal of streamlining the pre-complaint investigatory process, will the scope of second requests, and thus the cost of pursuing a transaction, diverge between the agencies? These questions ought to be carefully considered by the new Administration.

Third, is it time to consider revision of the Horizontal Merger Guidelines? Just a couple of years ago, the Section took the view that the Guidelines “have stood the test of time and provide valuable guidance to the bar and business community.”⁶ At the same time, the Section suggested that clarification of the current application of the Herfindahl-Hirschman Index and a more detailed description of the competitive effects analysis used by the agencies would improve the usefulness of the Guidelines. Given the questions that have been raised as to whether substantive merger enforcement policy has diverged between the agencies, as

well as the usefulness of clarity as to the enforcement philosophy of the new Administration, public discussion and study of the Guidelines seems timely.

Finally, has merger process reform been effective? The agencies several years ago examined their second request procedures with the promise to make these requests and investigations more efficient and less burdensome. Have those reforms succeeded? Are they keeping up with the countervailing challenges created by the cost and difficulty of producing electronic documents? Is there room for the U.S. to take the lead in increasing convergence with other jurisdictions in merger filings? All of these issues would benefit from study at the beginning of this new Administration.

One strength of the Section is that it has consistently provided a platform for advice and comment to the enforcement agencies that rises above mere rhetoric to well-considered, neutral analysis. The Section also has provided the best possible resources available to practitioners to help them understand the fundamentals and shifts in enforcement policy. This issue of ANTITRUST is a terrific example of such a resource—the articles in this issue on merger enforcement and policy are essential reading for any practitioner doing merger work today.

The Section's *Transition Report*⁷ provides a strong framework for discussion of merger enforcement in the new Administration. Its review of merger enforcement in recent years and identification of the issues a new Administration ought to be considering are a valuable contribution to the public debate, and valuable reading to anyone who cares about this debate. The Section's Spring Meeting on March 25–27, 2009, will provide a platform for that debate, and also offer insight into the direction merger enforcement is moving. As this debate moves forward in the new Administration, the Section will continue to offer its resources to push the discussion beyond rhetoric toward rigorous and thoughtful analysis. ■

Sincerely,



Jim Wilson
Chair, Section of Antitrust Law 2008–09

¹ 533 F.3d 869, 876 (D.C. Cir. 2008).

² J. Thomas Rosch, Commissioner, Federal Trade Commission, Remarks Before the ABA Antitrust Masters Course IV: Reflections on Procedure at the Federal Trade Commission (Sept. 25, 2008), available at <http://www.ftc.gov/speeches/rosch.shtm>.

³ ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 129–50, available at http://govinfo.library.unt.edu/amc/report_recommendation/chapter2.pdf; Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding Government Enforcement Insti-

tutions: Differential Merger Enforcement Standards 9 (Oct. 2005), available at <http://www.abanet.org/antitrust/at-comments/2005/10-05/mergerenfrcstandards10-05-comm.pdf>.

⁴ Compare U.S. DEP'T OF JUSTICE ANTITRUST DIVISION, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (Sept. 8, 2008), available at <http://www.usdoj.gov/atr/public/reports/236681.pdf> with Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), available at <http://www.ftc.gov/opa/2008/09/section2.shtm>.

⁵ 533 F.3d at 876.

⁶ Comments of the Section of Antitrust Law of the American Bar Association in Response to the Antitrust Modernization Commission's Request for Public Comment Regarding U.S. Merger Enforcement Policy and the Horizontal Merger Guidelines (Nov. 2005), available at <http://www.abanet.org/antitrust/at-comments/2005/11-05/mergerenfrcpolicy-com.pdf>.

⁷ Available at <http://www.abanet.org/antitrust/at-comments/2008/2008.shtml>.

TO: Antitrust Section Members

FROM: James A. Wilson, *Chair, Section of Antitrust Law*

SUBJECT: Nominating Committee

■ PURSUANT TO THE BYLAWS of the Section of Antitrust Law, the Chair of the Section is called upon to appoint a Nominating Committee composed of five Section members to nominate Section members for open positions among the Officers and Council to be elected at the next Annual Meeting. I am pleased to announce that I have appointed the following distinguished members of the Section to serve on the 2008–2009 Nominating Committee:

Joseph England, Chair

White & Case LLP
1155 Avenue of the Americas
New York, NY 10036

Andrea M. Agathoklis

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Ray V. Hartwell, III

Hunton & Williams LLP
1900 K Street, NW
Washington, DC 20006

Milton A. Marquis

Dickstein Shapiro LLP
1825 I Street, NW
Washington, DC 20006

Gary Zanfagna

Honeywell International, Inc.
101 Columbia Road
Morristown, NJ 07962

Any member of the Section wishing to make recommendations to the Nominating Committee should convey comments to the Chair or to any other member of the Committee.