

S P R I N G 2 0 0 9

from the Section Chair

Dear Antitrust Colleague,

THE PRESENT economic crisis may be the most difficult many of us experience in our lifetimes. Only in hindsight will we be able to evaluate fully the impact of this crisis on a variety of areas of our lives. However, it is already clear that the current economy raises both fundamental questions regarding the premises of competition and free markets as public policy and very practical questions regarding the application of the antitrust laws for enforcers and practitioners.



A belief that free markets are the best and most efficient means to economic growth has underlain competition policy for decades. The current economic crisis has shaken faith in this premise, and raised questions as to why markets fail, whether there are more prerequisites to the effective functioning of markets that we thought and, ultimately, whether unfettered reliance on free markets is sound public policy.

Conversely, the response of the U.S. and other governments to this crisis raises equally challenging questions: Has deregulation gone too far, and if so, how and where? How will U.S. investment in private companies (which we have called state aid when other nations have engaged in it) impact the operation of previously private firm, and thereby the markets in which they operate? Is there such a thing as “too big to fail”? If so, how can such a category be defined, and should antitrust principles be used to prevent firms from using a merger to enter this category? (For those who dismiss this last question as outside the boundaries of proper antitrust inquiry, see Federal Trade Commissioner J. Thomas Rosch’s January 29, 2009, speech, “Implications of the Financial Meltdown for the FTC,” available at <http://www.ftc.gov/speeches/rosch.shtm>.)

In May, the Antitrust Section will take up these issues at a symposium on competition as public policy. Symposium Chairs Deborah Majoras and John Shenefield have assembled some leading thinkers to address and debate these issues. The symposium is free to Section members. If you are interested in this symposium, more information is available at the Section’s Web site, <http://www.abanet.org/antitrust>.

Of course, the current economy also raises much more immediate and practical issues for antitrust enforcers and practitioners. Some have suggested that antitrust enforcement is likely to be relaxed in light of the economic distress

facing many industries. However, given the current make-up of the Federal Trade Commission, and the nomination of Christine Varney to be Assistant Attorney General for Antitrust, relying on a relaxation of antitrust enforcement in counseling a client seems a dangerous course to take.

In reality, the changes the current economic crisis bring to antitrust enforcement are likely to be much more subtle than the popular press has suggested. The interface between bankruptcy law and antitrust is almost certain to gain new importance both with respect to the acquisition of assets out of bankruptcy and in the workout process. Likewise, changes to, or the demise of, a supplier base will raise complex issues as to the appropriate boundaries of cooperation between competitors who share that supply base. Issues of failing firms, and failing industries, will be relevant across a spectrum of industries. The next few years will almost certainly be a time in which the variations of the failing firm, flailing firm and failing industry defenses will be reexamined and perhaps reinterpreted.

This issue of ANTITRUST begins the task of discerning the impact of the current economic crisis on antitrust law and policy. John Harkrider’s article, “Lessons from the Great Depression,” usefully relates our current situation to the attempts to find the right role for antitrust enforcement eighty years ago, providing a useful framework for our thinking today. Andrea Gomes da Silva and Mark Sansom’s article, “Antitrust Implications of the Financial Crisis: A UK and EU View” and Ramsey Shehadeh, Joseph Larson, and Ilene Gotts’ article, “The Effect of Financial Distress on Business Investment: Implications for Merger Reviews” both give perceptive analyses of the antitrust issues raised by the current crisis. Likewise, Sandy Pfunder’s article, “Acquisitions from Financially Distressed Entities Under the HSR Act” gives valuable guidance for those advising on these all-too-common transactions in today’s economy.

Antitrust has shown itself to be remarkably adaptable to a variety of changes in the economy, and resilient to efforts to replace it with regulation or state intervention. For those of us who believe that competition is the best way to generate an economy that maximizes consumer welfare, the current economic crisis requires renewed efforts to defend and explain the benefits of sound antitrust enforcement. The Section—through this issue of ANTITRUST, through the May symposium, and through the broad array of programs, publications, and brownbags we present—will continue to advocate for sound antitrust enforcement and policy and to provide the very best in resources to its members in these challenging times. ■

Sincerely,

Jim Wilson
Chair, Section of Antitrust Law, 2008–09