Antitrust Modernization Commission Releases Report and Recommendations

On April 2, 2007, the Antitrust Modernization Commission (“AMC”) released its Report and Recommendations to Congress and President Bush. The bipartisan AMC was commissioned by the Modernization Act of 2002 to examine whether antitrust law needed to be modernized, solicit views from interested parties, evaluate modernization proposals and report findings. Of the AMC’s 80 recommendations, the most significant include abolishment of the Robinson-Patman Act, legislation to permit recovery by indirect purchasers, statutory reform to allow claim reduction and contribution by joint tortfeasors, reform of merger enforcement procedures, adoption of a new test for bundled-discount cases and limitations of antitrust law immunities and exemptions.

When the AMC was commissioned, many believed that major antitrust law changes were imminent, due to the evolution of U.S. markets and advancements in economic understanding. Practitioners, scholars and government enforcers contributed to the AMC’s evaluation process and looked to the AMC to recommend changes to substantive antitrust law, including its application to specific industries. However, any constituency hoping to push the antitrust laws to be either more active or less interventionist will be disappointed by the report. While the AMC has made some significant recommendations, its report finds that overall, existing antitrust law is sound, adequate and flexible enough to accommodate almost all cases without special rules or exceptions. Other than the proposed repeal of the Robinson-Patman Act, the AMC recommended no changes to substantive antitrust law. Even its findings on the Robinson-Patman Act were hardly revelatory, as the act has been heavily criticized and its enforcement in decline for many years.

Recommendations of the AMC include:

Repeal of the Robinson-Patman Act. Congress should repeal the Robinson-Patman Act in its entirety. While the law was intended to protect small businesses by prohibiting sellers from offering better prices to large businesses, the AMC said that it results in less discounts for consumers and may actually harm small businesses by causing some manufacturers to avoid dealing with them at all. The AMC determined that the Robinson-Patman Act is also unnecessary because small businesses are already satisfactorily protected under other antitrust laws.

Allowance of indirect purchaser federal claims. Congress should pass comprehensive legislation for direct and indirect purchaser claims, overruling the Supreme Court’s prohibition of indirect purchaser cases under Illinois Brick and Hanover Shoe. The proposed legislation would limit direct and indirect purchasers to recoveries based on their actual damages, so that duplicative recoveries from a defendant would be avoided. It would also permit indirect purchaser actions brought under state laws to be removed to federal court and consolidated with direct purchaser cases.

Apportionment of liability for joint and several defendants. In cases involving joint and several liability, non-settling defendants should be permitted to reduce
plaintiffs’ claims by the greater of the settlement amount or the settling defendant’s share of liability. The proposed legislation would also permit claims for contribution among non-settling defendants.

Reform of merger enforcement procedures and standards. New procedures for merger clearances should be adopted. The AMC recommended that merger clearances occur in a shorter period of time and that the Federal Trade Commission and Antitrust Division of the Department of Justice enter a new merger clearance agreement to determine which agency will make a merger determination in a short period of time. The agencies should make the second request process more transparent, such as by informing merging parties of the reasons for a second request, and issuing “closing statements” when no action is taken, to improve public understanding of the agencies’ enforcement policy. The AMC also recommended that greater weight should be given to efficiencies arising out of mergers, particularly those related to innovation.

Adoption of a bundled-discount test. The AMC’s recommendations are intended to provide greater clarity and certainty on bundled pricing violations of Section 2 of the Sherman Act, on which the law is presently unclear. The AMC recommends that courts adopt a three-part test for bundled discounts, requiring a showing that (1) after allocating all discounts and rebates attributable to the entire bundle of products to the competing product, the defendant sold the competitive product below its incremental cost for that product; (2) the defendant is likely to recoup its short-term losses; and (3) the bundled discount has or is likely to adversely affect competition.

Limitation of immunities and exemptions. Antitrust immunities and exemptions should only be permitted where societal goals outweigh consumer welfare or a market failure requires regulation. Even where those requirements are met, the AMC recommended that immunity should be narrowly construed and only apply in limited circumstances.

If adopted, the AMC’s recommendations may provide for a more streamlined, efficient merger review process and provide some greater certainty in antitrust law. However, given the AMC’s finding that antitrust law is mostly adequate in its present state, antitrust law is unlikely to be significantly changed in the near future.