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# CONSUMER NEWS

By Douglas C. Nelson\*

## Antitrust Modernization Commission Goes to Work

For the first time since World War II, Congress has authorized a comprehensive review of the nation's antitrust laws.<sup>1</sup> Essentially, antitrust laws protect business competition, which, in turn, benefits consumers by ensuring a competitive marketplace. The Antitrust Modernization Commission Act of 2002 ("AMC"), authorizes a twelve-member bipartisan panel to conduct a three-year examination of U.S. antitrust law and related issues.<sup>2</sup> The Commission held its first public meeting on July 15, 2004.<sup>3</sup>

The Commission's members, who were chosen by President Bush and Congressional leaders, are evenly split between Republicans and Democrats.<sup>4</sup> Despite the Commission's bipartisan make-up, however, the panel has drawn criticism for its lack of diversity.<sup>5</sup> The panel consists of only one member who can be said to

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<sup>1</sup> See Jaret Seiberg, *Rules of the Road, Stacked Deck?* DAILY DEAL, Mar. 15, 2004 (discussing the U.S. competition review panel appointees drawing criticism for lack of diversity and confusion regarding vertical merger guidelines).

<sup>2</sup> Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, 116 Stat 1856 (to be codified in 15 U.S.C.).

<sup>3</sup> Press Release, Antitrust Modernization Commission, Antitrust Modernization Commission Holds First Public Meeting, Seeks Public Comment on Topics for Study, and Unveils Website, *available at* [www.amc.gov](http://www.amc.gov) (Jul. 16, 2004).

<sup>4</sup> Seiberg, *supra* note 1. Although Republicans and Democrats may differ with regard to some areas of antitrust law, in recent years, there has been a considerable convergence of opinion as to fundamental antitrust principles. Robert Pitofsky, Address at the Loyola University Chicago School of Law (Sept. 27, 2004).

<sup>5</sup> Seiberg, *supra* note 1.

represent states attorneys general; and no member of the panel can be said to represent private plaintiffs' lawyers or consumer advocates.<sup>6</sup> Given this lack of diversity, the Commission's ability to persuade Congress on issues related to state and private antitrust enforcement has been called into question.<sup>7</sup> On the other hand, six members of the Commission have ties to the recent Microsoft antitrust litigation.<sup>8</sup> Consequently, the panel appears to be well equipped to consider difficult high-tech intellectual property issues that simply did not exist the last time Congress reviewed this area of law.

While it is anticipated that the panel will examine a variety of antitrust issues over the next three years, the AMC does not specify the issues to be studied, and instead leaves it to the Commission to define its scope and priorities.<sup>9</sup> At the Commission's first public meeting, House Judiciary Committee Chairman, F. James Sensenbrenner, Jr., a Republican from Wisconsin, urged the twelve-member panel to examine, among other things, the relationship between antitrust law and intellectual property rights, the impact of state and federal enforcement of antitrust laws, and the application of foreign antitrust laws to U.S. industries.<sup>10</sup> Each of these areas seems likely to get a share of the Commission's attention over the next three years.

Historically, intellectual property rights and antitrust law have been viewed as being at odds with one another because while the owner of intellectual property is entitled to a "monopoly," antitrust

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<sup>6</sup> *Id.* The Chairman of the Commission is Deborah Garza, a partner at Fried, Frank, Harris, Shriver & Jacobson LLP in Washington D.C. The other members are Makan Delrahim, New York State Deputy Assistant Attorney General; Deborah Majoras, FTC Chairman; Debra Valentine, Assistant General Counsel at United Technologies Corp.; Dennis Carlton, University of Chicago economist; Sanford Litvak, former general counsel at Walt Disney Co.; Steve Cannon, general counsel for Circuit City Stores, Inc., John Shenefield of Morgan, Lewis & Bockius LLP; Johathan Yarkowsky of Patton Boggs LLP; Jack Warden of Sullivan & Cromwell LLP; and Don Kempf of Morgan Stanley. Jaret Seiberg, *New Panel could Reshape Merger Law*, DAILY DEAL, July 14, 2004.

<sup>7</sup> Seiberg, *supra* note 1.

<sup>8</sup> *Id.*

<sup>9</sup> Antitrust Modernization Commission Act of 2002, Pub. L. 107-273, 116 Stat 1856 (to be codified in 15 U.S.C.).

<sup>10</sup> See Press Release, U.S. House of Representatives, Committee on the Judiciary, Sensenbrenner Introduces Antitrust Study Commission Legislation, available at [www.house.gov/judiciary/news\\_062701.htm](http://www.house.gov/judiciary/news_062701.htm) (June, 27 2001) (discussing issues and problems relating to the modernization of antitrust laws).

laws outlaw monopolies as defined under the Sherman Act.<sup>11</sup> More recently, however, courts have come to view the two bodies of law as “actually complementary, as both are aimed at encouraging innovation, industry and competition.”<sup>12</sup> Still, developing and clarifying the fine line between these two bodies of law without harming either competition or innovation is likely to be a difficult challenge facing the Commission over the next three years.

Meanwhile, state authority to review mergers has been under attack as wasteful and redundant even before federal appellate court Judge Richard Posner called the states “barnacles” on the ship of federal antitrust enforcement.<sup>13</sup> Companies are frustrated by state involvement that no doubt complicates and extends the investigation into proposed mergers. For example, the Federal Trade Commission approved Wal-Mart Stores Inc.’s purchase of a supermarket chain in Puerto Rico in 2002, but Puerto Rico sued, forcing Wal-Mart to take the case to a federal appeals court.<sup>14</sup> State officials, however, say their involvement is critical because they ensure that federal enforcers do not skirt their responsibilities.<sup>15</sup> For example, they point to Ronald Reagan’s eight years as president as a time when antitrust enforcement would have stopped altogether without the involvement of the states.<sup>16</sup>

Likewise, the application of foreign antitrust laws in a way that hurts U.S. business interests is an area that would seem to warrant closer examination. At the Commission’s first public meeting, Sensenbrenner remarked that “I am increasingly convinced that foreign antitrust authorities have applied their antitrust laws in a

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<sup>11</sup> M. Howard Morse, *Intellectual Property Licensing: The Intersection Between Intellectual Property Rights and the Antitrust Laws*, at [http://www.drinkerbiddle.com/file/Morse\\_IP\\_Antitrust.pdf](http://www.drinkerbiddle.com/file/Morse_IP_Antitrust.pdf) (Dec. 1, 2003).

<sup>12</sup> See e.g. *Atari Games Corp. v. Nintendo of Am., Inc.*, 897 F.2d 1572, 1576 (Fed. Cir. 1990) (reasoning that when a patented product is so successful that it creates its own economic market or consumes a large section of an existing market, the aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds).

<sup>13</sup> Jaret Seiberg, *Checks and Imbalances*, DAILY DEAL, July, 26 2004.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* U.S. Assistant Attorney General R. Hewitt Pate suggests an approach similar to that recently adopted by the European Commission. Under this approach, the European Commission has the right to review pan-European mergers, but if it declines, review of the merger is delegated to the member county most affected by the proposed merger. *Id.*

discriminatory manner that unfairly advances foreign commercial interests at the expense of American business and American jobs. . .”<sup>17</sup> Although the Commission’s mission as stated in the AMC includes the examination of the nation’s antitrust law and “related issues,”<sup>18</sup> a extensive study of the fairness of the application of foreign laws to U.S. companies would seem to detract from the Commission’s focus on its primary mission, namely, examining the need for modernizing U.S. antitrust law.

Congress’ last commissioned study of antitrust laws, the Temporary National Economic Committee (“TNEC”) began hearings in 1938 and issued its final report in 1941.<sup>19</sup> The TNEC hearings were a massive undertaking, producing eleven bound volumes of material, representing the most detailed analysis of American industry ever conducted.<sup>20</sup> Ultimately, however, the TNEC failed to agree on any major changes to the nation’s competition law, and by the time the final report was issued, circumstances had changed as wartime patriotism swept the nation.<sup>21</sup>

While the AMC was passed with little fanfare, the Commission’s impact could be substantial and may be affected as much by the scope of its investigation, as by changes in the economic condition in the next three years before the Commission’s report is due.<sup>22</sup> If the economy slips into depression, if international deposes between antitrust regimes worsen, if intellectual property rights expand and become perceived as anticompetitive, or if state and federal antitrust enforcers continue to clash, then the Commission’s report and recommendations may come at a time when U.S. antitrust law is ripe for change. Indeed, even if the Commission’s report fails to have an immediate impact, it should provide a valuable reference point as new antitrust legislation is contemplated in the more distant future.<sup>23</sup>

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<sup>17</sup> Jaret Seiberg, *Lawmaker: Speed Merger Reviews*, DAILY DEAL, July 16, 2004.

<sup>18</sup> Antitrust Modernization Commission Act of 2002, Pub. L. 107-273, 116 Stat 1856 (to be codified at 15 U.S.C.).

<sup>19</sup> Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029, 1032 (2003).

<sup>20</sup> *Id.* at 1034.

<sup>21</sup> *Id.* at 1035.

<sup>22</sup> *Id.* at 1047.

<sup>23</sup> *Id.* at 1051.