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 Institutions: The Enforcement Role
of the States With Respect to Federal Antitrust Laws in Merger Cases

The Section of Antitrust Law ("Antitrust Section" or "Section") of the American Bar Association ("ABA") is pleased to submit these comments to the Antitrust Modernization Commission (the "Commission") in response to its request for public comment dated May 19, 2005 regarding specific questions relating to Government Enforcement Institutions: The Enforcement Role of the States with Respect to Federal Antitrust Laws selected for study by the Commission. These comments address the Commission's questions regarding the allocation of federal merger enforcement among states, private plaintiffs, and federal agencies.[1] The views expressed herein are being presented on behalf of the Antitrust Section. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association.

Summary of Comments

There is a long history of state attorney general enforcement of the federal mergers laws in the United States. State antitrust enforcement is rooted in principles of federalism and, according to the Supreme Court, Congress authorized state attorneys general to enforce federal merger law. Limiting state enforcement of federal merger laws, an action not being recommended by the Section, would appear to require an act of Congress. The remainder of the Section's comments respond directly to the Commission's four questions.

1. What role should state attorneys general play in merger enforcement?

We discuss below the history of state attorney general enforcement of federal merger law. A rigorous evaluation of whether that role or some other for the states is preferable would require a better collection of information on the incidences of state merger activity than the Section has been able to collect. Absent a valid empirical basis, the Section is unwilling to recommend dramatic changes to the system of dual federal-state merger enforcement or to discount the criticisms of the system as it currently operates. Instead, we identify some of the key benefits and costs of the current system of dual federal-state merger enforcement. The key benefits include state attorneys general acting as a backup to federal merger enforcement. Dual enforcement also permits the federal government to play a role in protecting local economies. The costs include delay and costs of duplicative review (including attorneys fees in settlements), potentially subjecting transactions to state attorney general investigation motivated by political,

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[1] These comments do not address federal civil and criminal non-merger antitrust enforcement or the enforcement of state antitrust or unfair competition laws.

rather than competition, interests, and application of divergent enforcement approaches and remedies that could undermine the enforcement of sound antitrust principles.

If the Commission does not otherwise obtain the analysis or examples that it has requested in other responses, it may consider using its authority to collect the data on the costs and benefits of dual federal-state merger enforcement. If time or resources are limited, the Commission may wish to focus its data collection efforts on differences in remedies sought by federal and state enforcers and the award of attorneys fees to attorneys general in settlements. Alternatively, the Commission could encourage state attorneys general and the federal agencies to examine the issue. Also, the Section recommends that the Commission encourage the state attorneys general through the Multistate Antitrust Task Force to increase the transparency of state merger enforcement. Costs of dual enforcement could be reduced further if state attorneys general and federal agencies agree to allocate, in appropriate cases, responsibilities between them to avoid duplication in the investigation. Although the Section is not proposing a specific formulation for allocating merger review and enforcement, one approach may be to allocate responsibility for a merger review premised on the same fundamental comity principles that may apply among jurisdictions in the international arena, with the understanding that comity does not preempt either federal or state enforcers from acting within their authority in a particular situation. Costs of dual review could also be reduced through increased "soft" convergence of the application of section 7 of the Clayton Act to particular transactions, *i.e.*, a consistent application of established antitrust principles that respects differences arising from the evolution of such principles. The costs of the review and risks of inconsistent outcomes could be reduced further by: (i) increasing the degree of coordination on requests for information; and (ii) where both the federal and state authorities wish to obtain relief, seeking a single remedy (one order) enforced by one entity (a federal district court or the FTC) or, in the alternative, encouraging courts to invite comments from federal agencies as to any different relief requested by state enforcers.

2. Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers? To what extent has the protocol for coordination of simultaneous merger investigations established by the federal enforcement antitrust agencies and state attorneys general succeeded in addressing issues of burden, delay, and/or uncertainty associated with multiple state and federal merger review?

As explained above, the Antitrust Section is unaware of sufficient evidence to support dramatic changes in the current system. The Antitrust Section was unable to gather direct evidence of when and how the merger protocol for coordination of simultaneous merger investigations established by the federal enforcement antitrust agencies and state attorneys general has succeeded or failed because the enforcers do not make the information available. As discussed below, private parties play little role in merger review and the Commission should not encourage or discourage a larger role.

3. What role should private parties play in merger enforcement, and what authority should they have to seek to enjoin a merger?

The Section's review of private actions reveals relatively little private merger enforcement. The role of private merger challenges appears to have been limited by the Supreme Court's antitrust standing jurisprudence and the Hart-Scott-Rodino Antitrust Improvements Act, which allows agencies to review mergers before they are consummated, thus limiting the actual anticompetitive effects of certain mergers. Private parties therefore play a limited role in merger enforcement, and the Commission should not take any action to encourage or discourage any change to the system.

4. What lessons, if any, can be learned from Europe's referral (or "one-stop shop") system of allocating merger enforcement between the EC and Member States? How does the more regulation-oriented European tradition (as opposed to a more enforcement-oriented U.S. tradition) affect any comparison of the two systems?

The new European system is designed to allow (in appropriate cases) merging parties to enjoy the benefit of a single competition review, increase administrative efficiency, and avoid duplication, fragmentation, and inconsistent rulings. Under the prior regime in Europe, premerger notification and suspensory obligations applied at both the European Union and Member State level imposed costs on merging parties that generally have not been imposed in the United States. Creating a system of allocating mergers between federal agencies and state attorneys general similar to Europe's referral system would require altering the existing premerger notification system in the United States. Also, the Section observes that the current European merger regulation is too new to evaluate how well the system is working.

Comments

The Section has summarized its response to each of the four questions posed by the Commission. Before providing more detail and by way of introduction, the Section provides a brief history of state attorney general authority to enforce the federal merger laws and a description of the sources of that authority.

History of State Attorney General Merger Enforcement

In 1890, when Congress passed the Sherman Act, state law strictly controlled corporations. As Professor Hovenkamp observed, "in the 1890s one state was not required to permit another state's corporations to do business within its borders."[2] The Sherman Act, when adopted, was considered to be better suited to prohibiting cartel behavior than anticompetitive mergers or acquisitions; state corporation law was thought to be the logical way to control mergers.[3]

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[2] Herbert H. Hovenkamp, *Antitrust Policy, Federalism, and the Theory of the Firm: An Historical Perspective*, 59 ANTITRUST L.J. 75, 78 (1990).

[3] *Id.*

State corporate law proved ineffective at preventing anticompetitive transfers, paving the way for state antitrust statutes.[4] By 1890, fourteen states had enacted some form of constitutional proscription against monopolies, and at least thirteen states had passed statutes that resembled the Sherman Act in that they made restraints of trade unlawful.[5] By 1910, state antitrust law was used more often than the Sherman Act to attack corporate accumulations of monopoly power.[6] After a brief period of intense activity, however, "the magnitude and relative significance of state antimonopoly activity declined after World War I . . . ."[7]

State merger enforcement increased during the 1980s after Congress granted states *parens patriae* authority to bring antitrust actions on behalf of consumers, and provided supplemental funding to aid state enforcement of federal antitrust laws in response to the perceived lack of federal government enforcement activity.[8]

State Attorney General Authority to Enforce Federal Merger Law

State antitrust enforcement generally and merger enforcement specifically are rooted in federalism principles.[9] Generally speaking, constitutional challenges to state enforcement of federal antitrust laws have not met with success.[10] Excluding situations in which the state is acting in a proprietary capacity as a directly injured party, state merger enforcement actions under federal antitrust law are based on the states' common law or statutory *parens patriae* capacities.

Federal courts have exclusive jurisdiction over federal antitrust claims.[11] Thus, state attorney general merger enforcement actions under federal antitrust law necessarily occur in federal court. *Parens patriae* actions by the states were sanctioned by the Supreme Court in *Georgia v. Pennsylvania R.R. Co.*[12] The Court upheld a common law challenge to a price-fixing conspiracy that alleged injury to the economy of the state from the discrimination against Georgia manufacturers and shippers. The Court noted that while the enforcement of criminal sanctions for violations of the federal antitrust laws had been entrusted to the federal government, Congress authorized civil suits

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4 *Id*. at 80-85.

5 ABA ANTITRUST SECTION, MONOGRAPH NO. 21, STATE MERGER ENFORCEMENT, 8 n.31 (1995) [hereinafter STATE MERGER ENFORCEMENT MONOGRAPH].

6 May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law: 1880-1918*, 135 U. PA. L. REV. 495, 499 (1987).

7 *Id*. at 592.

8 *See* Michael DeBow, *State Antitrust Enforcement: Empirical Evidence and a Modest Reform Proposal*, *in* COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY 267, 269 (ed. Richard Epstein and Michael Greve, American Enterprise Institute 2004).

9 STATE MERGER ENFORCEMENT MONOGRAPH, *supra* note 5, at 74.

10 ABA Section of Antitrust Law, STATE ANTITRUST ENFORCEMENT HANDBOOK 3, 18 (2003).

11 General Inv. Co. v. Lake Shore & M.S. Ry., 260 U.S. 261, 267 (1922).

12 324 U.S. 439 (1945).

> not only by the United States but by other persons as well. And we find no indication that . . . it restricted the States to suits to protect their proprietary interests. Suits by a State, *parens patriae*, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts.[13]

The state attorneys general may not, however, bring *parens patriae* antitrust actions for damages under federal merger law because *parens patriae* recovery is not encompassed in the reference to a plaintiff's "business or property" in section 4 of the Clayton Act.[14] In *Standard Oil*, the Court also expressed concern about duplicative recoveries. By contrast, section 16 of the Clayton Act authorizes injunctive relief "against threatened loss or damage by a violation of the antitrust laws," and injunctive actions do not threaten duplicative recoveries.[15] The Supreme Court held in *California v. American Stores Co*.[16] that attorneys general had the authority to seek injunctive relief in merger challenges.

This history suggests that it would take an act of Congress, and one that would likely face constitutional challenge, to preclude state attorney general enforcement of Section 7.[17]

The Section now addresses the Commission's specific questions.

Question 1. What role should state attorneys general play in merger enforcement? Please support your response with specific examples, evidence, and analysis regarding burden, benefits, delay, and/or uncertainty involved in multiple State and Federal merger reviews.

The Antitrust Section has attempted to collect or otherwise identify existing data to respond to this question. The Section's efforts focused on creating or identifying data that could determine empirically the costs and benefits of a dual system (as opposed to a single federal-only system). Such data collection efforts would, to a large extent, require a merger retrospective and access to confidential information and work product of the merging parties, the federal agencies, and state attorneys general. We have been unable to create or identify a satisfactory database.[18]

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13 *Id.* at 447.

14 Hawaii v. Standard Oil Co., 405 U.S. 251 (1972).

15 *Id.* at 264.

16 495 U.S. 271 (1990).

17 Any act of Congress would also have to address the enforcement of state antitrust laws to implement effectively a new structure for state attorney general involvement in federal merger matters. DeBow, *supra* note 8, at 279-80.

18 The existing databases that we uncovered include those discussed in DeBow, *supra* note 8; Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673 (2003); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. SCH. L. REV. 1047 (1990); a database being developed by the National Association of Attorneys General (which is not available), and a database describing enforcement actions in the state of Maine (which can be found at http://www.abanet.org/antitrust/committees/state-antitrust/maine_antitrust_actions.pdf). Lists of merger enforcement actions taken by Maryland and Texas are also included as attachments to California's testimony to the Commission about state merger enforcement. Testimony of California Chief Assistant Attorney General Thomas Greene Concerning State Merger Enforcement Before the Antitrust Modernization Commission (July 15, 2005), *at*

Absent a valid empirical basis, the Section is unwilling either to recommend altering dramatically the system of dual merger enforcement or to discount the criticisms of the system as it currently operates.

Notwithstanding these data limitations, the Antitrust Section has identified key benefits and costs of dual merger review.

Benefits of Dual Merger Review

The Antitrust Section has identified two significant benefits of dual merger review. First, the state attorneys general act as a backup to federal merger enforcement. This is particularly valuable with respect to mergers that involve primarily local issues (such as hospital and grocery store mergers) and in very large mergers where state resources can be added to federal resources to identify all relevant issues (such as specific local effects of national oil and gas mergers).

In mergers affecting local markets, the federal government may not have the resources to analyze mergers with particular local impacts. Also, the state attorneys general may contribute materially to the federal investigations and litigation. An example of this contribution results from comparing the district court decision in *FTC v. Tenet Health Care*[19] with that in *United States v. Long Island Jewish Med. Ctr.*[20] Some attribute the FTC's district court victory in *Tenet Health Care*, in part, to the participation of the Missouri Attorney General.[21] Some believe that the Department of Justice's case may have been weakened in *Long Island Jewish Med. Ctr.* because the New York Attorney General did not participate in challenging the merger.[22]

In larger mergers, joint investigations may provide additional resources that would not be available if the federal government were the only investigating authority. The effects of the merger in national markets can be reviewed by the federal government, while the local markets can be investigated by the state attorneys general. This approach allows a single investigation to cover many markets.

Another aspect of states "backing up" the federal enforcement efforts is displayed when states act even though federal enforcers do not. Supporters of active state merger enforcement point to the value of the state attorneys general enforcing federal antitrust laws to counter periods of lax federal enforcement (i.e., when federal politics or scarcity of resources limits presumably proper antitrust merger enforcement).

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http://amc.gov/public_studies_fr28902/enforcement_pdf/050715_Greene-CA_OAG-Enforc_Inst.pdf (last visited Sept. 25, 2005).

[19] 186 F.3d 1045 (8th Cir. 1999) (reversing lower court order granting the FTC and attorney general a preliminary injunction).

[20] 983 F. Supp. 121 (E.D.N.Y. 1997).

[21] Calkins, *supra note* 18, at 689.

[22] *Id. See also Long Island Jewish Med. Ctr.*, 983 F. Supp. at 131-43 (discussing the New York Attorney General's view of the merger and conduct relief).

The second major benefit of dual merger enforcement is that it permits the federal government to play a role in protecting local economies when a state attorney general does not have sufficient resources to investigate, but has the expertise to identify and contribute to a federal investigation. Allowing the state attorneys general to work with the federal government allows the local authorities to protect localized competition. This cooperation has been particularly useful in healthcare and energy transactions.

Costs of Dual Merger Review

The Antitrust Section has identified three significant costs of dual merger review: (1) the delays and expenses of dual review, (2) the susceptibility of the state attorneys general to local political interests, and (3) the risks of divergent enforcement approaches or remedies that could undermine the enforcement of sound antitrust principles.

With respect to delays and expenses associated with dual review, while it is not uncommon for state attorneys general to participate in such review by requesting and obtaining documents and information, in the view of party counsel, there are instances where a state attorney general contributed few resources, provided little expertise, and conducted little or no document review. In these instances, dual review appeared to add costs with little corresponding benefit. In addition, there are instances in which state and federal authorities issued different requests for information even though they appeared to be pursuing the same theory.[23] In most instances, the issue was resolved through negotiations that narrowed the requests and made them consistent.

Another cost of dual merger review is the requirement by some state attorneys general that merging parties pay attorneys fees as part of settlements. Those in favor of allowing attorneys general to collect their fees suggest that private plaintiffs obtain fees and the attorneys general should obtain them as well. Proponents also explain that the federal government obtains a filing fee for every transaction reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976,[24] but state attorneys general only seek fees when they conclude that the merger would reduce competition in their respective state. The fees, it is argued, also reflect a lost opportunity for the attorney general to investigate some other antitrust law violation.

Those opposed to attorneys general obtaining fee awards argue that state and federal law enforcers, unlike private parties in civil actions, should not be paid their attorneys fees and should not treat law enforcement as a profit center. Opponents also note that fees in private cases are only awarded after a decision on the merits.[25] They also suggest that the receipt of fees

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[23] Coordination among the states has reduced the number of matters in which parties are required to respond to multiple document requests from multiple states.

[24] 15 U.S.C. § 18a.

[25] This position is not consistent with the many class action settlements that include attorneys fees. *See* February 15 letter from the FTC to Committee on Rules of Practice and Procedures of the Judicial Conference of the United States, *at* http://www.ftc.gov/opa/2002/02/rule23.htm (last visited September 25, 2005) (discussing attorneys fees in class actions).

provides the attorneys general with the incentive to bring an enforcement action or continue an investigation when neither is warranted.

Although the Antitrust Section is not taking a position as to whether state attorneys general should be allowed to seek or negotiate their fees, it notes that if fees are to be awarded, there needs to be an analysis of the appropriate fee level. Typically, the state attorneys general seek market rates. If fees are to be collected, some suggest that the state attorneys general be compensated for the value added to an investigation.[26] Another suggestion is that it would be appropriate to reimburse the state attorneys general their costs.

Other potential expenses of dual enforcement include: (i) delays in the negotiation of consent decrees where state attorneys general and the federal government have different enforcement or remedy philosophies (and the accompanying potential for opportunistic behavior, as each government party to the consent negotiations may have an incentive to be the last to agree); (ii) travel to the relevant state capital(s) in addition to Washington; (iii) delays from the coordination and decision-making of multiple enforcers; and (iv) coordination of meetings.

The second cost to dual enforcement is the risk that state attorneys general may use the antitrust laws to protect interests of their own states even when the enforcement action is not consistent with sound antitrust principles.[27] This concern is held by many members of the antitrust bar and many commentators express or describe this concern.[28] It is not difficult to identify expressions of concern, but our review of the literature and attempt to collect data show that supporting or refuting those concerns empirically is quite difficult. For example, there are several state attorney general enforcement actions that the Section believes support this concern, including: *Pennsylvania v. Russell Stover Candies, Inc*.,[29] *Maine v. Conners Brothers Ltd*.,[30] and

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[26] *See id.* at 6-7 (suggesting close scrutiny of attorney fee awards, especially where a government action has preceded the class allegation, settled the case and class counsel bears little risk).

[27] We exclude from this concern the legitimate interest in the local population's petitioning the state attorney general to take action in a merger. The concern here is an agenda to protect a local economy or constituency by using the antitrust laws in ways that are unrelated to or would be inconsistent with the established purposes of the antitrust laws.

[28] *See, e.g.*, Lande, *supra note* 18, at 1063 *citing 60 Minutes with Charles F. Rule Assistant Attorney General, Antitrust Division*, 58 ANTITRUST L.J. 377, 381 (1989); Zuckerman, Courts May Not, and Should Not, Order Divesture in Private Section 7 Cases, 4 ANTITRUST 37, 41 (1990) ("State Attorneys General use Clayton Act actions to pursue local employment concerns, without regard to the interests of consumers nationally, or even in their own state."); *see also* Robert Bell, *States Should Stay Out of National Mergers*, 3 ANTITRUST 37, 39 (1989); Jonathan Rose, *State Antitrust Enforcement, Mergers, and Politics*, 41 WAYNE L. REV. 71, 117, 121 (1994) (noting that states "may challenge mergers for reasons other than the merger's effect on competition. The political and social goals of antitrust, or more parochially a desire to protect state firms and jobs, may induce a state attorney general to act"); Charles F. Rule, "On Being Head of the Antitrust Division: The World View of a Soon-to-Be Former Assistant Attorney General," Remarks Presented Before the Antitrust Law Section of the New York State Bar Association (Jan. 18, 1989) ("State attorneys general are elected officials, and parochial political concerns may well influence their decisions to challenge mergers"); Helene Jaffe, *Multi-State Compact Procedure and Pre-Merger Review*, 58 ANTITRUST L.J. 223, 227 (1989).

[29] 1993-1 Trade Cas. (CCH) ¶ 70,224, at 70,924 (E.D. Pa. 1993) (denying a request for preliminary relief because, in part, the attorney general failed to provide sufficient evidence to show "how Pennsylvania's general economy will suffer from the violation alleged by plaintiff. The evidence produced at the preliminary injunction hearing does not establish that Pennsylvania consumers will pay more for gift or promotional boxed chocolates or

Wal-Mart Stores Inc. v. Rodriquez.[31] The Section recognizes that attorneys general bringing these actions and others disagree with this view of these three cases.[32] In addition, one commentator studying the issue empirically concluded that "while parochial and externality [using merger laws to favor state residents] concerns are theoretically well grounded, they do not find much empirical support in the states' actions to date."[33] While this small sample appears insufficient to support the concern, the lack of a satisfactory data source also does not refute the concern.

The third significant cost of dual federal-state merger review involves the dangers and risks of divergence in enforcement approaches or remedies, which could undermine the ability to enforce sound antitrust principles.[34] The Section has identified numerous dual federal-state merger reviews where the state attorney general, but not the federal government, obtained relief.[35] Also, in our experience, federal agency and attorney general consent orders often require different relief even when the states are suing under federal law only.

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that as a result of the acquisition, Stover, in exerting increased power, will drive local chocolatiers out of business."); Calkins, *supra* note 18, at 694 (discussing *Russell Stover* as a matter in which settlement involved a conduct remedy that was motivated, at least in part, to protect jobs in Pennsylvania). *See also* Laurel A. Price, Chair, NAAG Multistate Antitrust Task Force and Deputy Attorney General, New Jersey, Remarks at the ABA Section of Antitrust Law Spring Meeting (April 8, 1994) *in* [1985-1997 Current Comment Transfer Binder] Trade Reg. Rep. (CCH) ¶ 50,137, at 49,050 (Apr. 13, 1994) (describing the settlement of a state attorney general challenge to the acquisition of Whitman's Chocolates Division of Pet, Inc., by Russell Stover Candies, Inc., that included a $45,000 payment to the state attorney general, of which $25,000 was to provide job assistance to displaced workers, $10,000 to fund business development near the Whitman chocolate plant, and $10,000 to support state antitrust enforcement).

[30] 2000-2001 Trade Cas. (CCH) ¶ 72,937, at 87,973 (Me. Superior Court Mar. 29, 2000), cited by DeBow, *supra* note 8, at 276.

[31] 373 F.3d 747 (1st. Cir. 2003) (where the attorney general apparently sought to preserve local business). *See also* Calkins, *supra* note 18, at 694 (discussing GS Indus/Nucor Corp. and B.F. Goodrich/Coltec Indus. as examples of state enforcement that may not have been consistent with established antitrust principles).

[32] *E.g.*, Comments of the Maine Attorney General on the Role of States in Enforcing Federal Antitrust Laws Outside the Merger Area, at 12-14, Comments of the Maine Attorney General on the Role of States in Enforcing Federal Antitrust Laws Outside the Merger Area (July 15, 2005) at 12-14 (referring to *Conners*, the attorney general of Maine testified that "this case offers an example of enforcement designed to protect local competition based on legitimate antitrust analysis"), *at* http://amc.gov/public_studies_fr28902/enforcement_pdf/050715_Rowe-Maine_AG-Enforc_Inst.pdf (last visited September 25, 2005); *see also Pennsylvania v. Russell Stover*, 1993-1 Trade Cas. ¶ 70,224, at 70,083-84 (describing the complaint as alleging a violation of Section 7 of the Clayton Act). Perhaps these differences highlight the difficulty of identifying "proper" and "improper" merger cases.

[33] DeBow, *supra note* 8, at 275.

[34] *Compare* U.S. DEP'T OF JUSTICE & FEDERAL TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 0.1 (1992) (with Apr. 8, 1997 revisions to efficiencies), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,104 ('the unifying theme of the Guidelines is that mergers should not be permitted to create or enhance market power or to facilitate its exercise") *with* NATIONAL ASS'N OF ATTORNEYS GENERAL, HORIZONTAL MERGER GUIDELINES § 2 (1993), *reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,406 ("Mergers may also have other consequences [in addition to creating or enhancing market power] that are relevant to the social and political goals of section 7. For example, mergers may affect the opportunities of small and regional business to survive and compete").

[35] The recent Federated/May merger provides such an example. *Compare* Statement of the Commission Concerning Federated Department Stores, Inc./The May Department Stores Co., FTC File No. 051-0111, *at*

Even when the consent orders of the federal and state authorities are the same, state attorneys general, a court, or federal enforcement authorities may interpret the same order differently. For example, the refusal of one authority to approve a buyer or asset package approved by another authority can result in a violation of one or more consent orders.[36] Such disparate views also can delay consent negotiations.

In addition to the potential for conflicting remedies, divergent federal and state approaches also may hinder coordination between the two levels of government. In one instance, a state has intervened on the side of the defendant in an enforcement proceeding brought by a federal enforcement authority.[37] In other instances, state attorneys general seek relief that may result in reduced output (such as agreements not to increase market share or build new facilities). Some attorneys general have settled quickly out of concern that the federal government will not adequately protect their local (and legitimate) competition interests. These differences and inconsistencies add time, costs, and uncertainty to dual review, possibly limiting the willingness of governments to share work product and run dual investigations efficiently. The costs of such conflicts inevitably are borne, at least in part, by the parties.

One final potential cost of dual review is that it may undercut the United States' ability to recommend one-stop merger review to emerging antitrust regimes and in international bodies.

Recommendations

The Section recognizes that these comments have not provided the specifics that the Commission requested. If the Commission does not otherwise obtain the requested analysis, the Antitrust Section recommends that the Commission use its authority to collect data to measure with greater accuracy the costs and benefits of dual federal-state merger review. If time and resources do not allow for a complete study, the Commission may consider focusing its empirical analysis on the diverging remedies among enforcers and the award of attorneys fees to state attorneys general. If the Commission cannot or does not want to take such action, the Commission could suggest that the federal antitrust authorities and state attorneys general pool resources and conduct hearings to collect and review such data with the involvement of academia and the private bar. State attorneys general also should be encouraged to increase the transparency of their enforcement policies by explaining the bases for their enforcement decisions, much as the two federal agencies are doing.

The Antitrust Section also recommends that the Commission consider measures to reduce the costs associated with dual enforcement. One way to reduce costs would be for the federal

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http://www.ftc.gov/os/caselist/0510001/050830stmt0510001.pdf (closing investigation of merger after "exhaustive" investigation did not "uncover any evidence that this particular merger will have any adverse effect on competition"), *with* Assurance, *at* http://www.oag.state.ny.us/press/2005/aug/Federated%20Assurance.pdf (requiring divestitures to resolve competitive concerns with the same merger).

[36] *See, e.g.*, Analysis of Proposed Consent Order to Aid Public Comment § IV.C, Chevron Corp., 5 Trade Reg. Rep. (CCH) ¶ 15,151, at 22,107 (2001), *available at* http://www.ftc.gov/os/2001/09/chevtexana.htm (allowing extra time to comply with FTC consent order if state does not approve a proposed buyer of to-be-divested assets).

[37] Complaint, FTC v. BP Amoco, p.l.c., No. 00-0416 SI (N.D. Cal. Feb. 4, 2000), *at* http://www.ftc.gov/os/2000/02/bpcomplaint.pdf.

authorities and state attorneys general to, where appropriate, allocate responsibilities between them to avoid duplication in investigations.[38] Although the Section is not proposing a specific formulation for allocating merger review and enforcement, one approach may be to allocate responsibility for a merger review premised on the same comity principles that the Section suggests apply among jurisdictions in the international arena.[39] Notably, comity is not preemption and each party would have the authority to take whatever action it has the legal right to take with regard to a particular transaction.

Another measure would be to encourage federal and state enforcers to continue to work toward "soft" convergence of substantive merger law. Soft convergence would be the consistent application of established antitrust merger principles by the federal antitrust authorities and state attorneys general, but would recognize that the evolving nature of antitrust law may give rise to different enforcement approaches in selected cases. In this regard, soft convergence continues to provide a solid foundation for a realistic improvement in the system. Although enforcers are unlikely to view each transaction identically, such an effort can reduce the incidence of substantive difference in enforcement perspectives.

Such an effort could come from initiatives by the state attorneys general and the federal enforcement agencies. To that extent, additional joint training sessions, participation by state attorneys general and the federal government in workshops, and additional application of economic theory and resources to merger review could foster efficient and effective dual merger review.

The Antitrust Section also recommends that federal and state governments be encouraged to increase coordinating information requests to avoid inconsistency. In addition, where both federal and state agencies seek relief, they should be encouraged to seek relief in a single court (or the FTC), rather than multiple orders and supervising authorities. The Commission could also encourage federal courts to seek federal agencies' views as to the propriety of different relief sought by one or more states.[40]

The importance of coordination among multiple reviewing agencies is reflected in Section X of the International Competition Network's Recommended Practices for Merger Notification Procedures.[41] Recommended practices that might enhance coordination between federal and state agencies include the development of formal protocols or memoranda of understanding between federal and state agencies, early identification of the need for

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[38] ABA Section of Antitrust Law, The State of Federal Antitrust Enforcement – 2004, 47-48 (Feb. 2, 2005), *at* http://www.abanet.org/antitrust/comments/2004/federal_at_enforcement.html (recommending that merger enforcement be allocated to reduce costs).

[39] *See generally*, Joint Comments of the American Bar Association's Section of Antitrust Law and Section of International Law and Practice on Draft European Commission Notices and Draft Regulation Implementing Regulation 1/2003 (Dec. 2003) (discussing methods of allocating antitrust investigations).

[40] *See* DeBow, *supra* note 8, at 281 (suggesting that Congress could avoid potential problems by passing legislation requiring state attorneys general to notify the federal antitrust authorities in cases involving injunctive relief and granting the federal government the right to intervene in the notified matter).

[41] http://www.internationalcompetitionnetwork.org/mnprecpractices.pdf.

coordination in a particular merger review, and facilitation of the merging parties' cooperation in the merger coordination process.

Question 2: Should merger enforcement be limited to the federal level, or should other steps be taken to ensure that a single merger will not be subject to challenge by multiple private and government enforcers? To what extent has the protocol for coordination of simultaneous merger investigations established by the federal enforcement antitrust agencies and state attorneys general succeeded in addressing issues of burden, delay, and/or uncertainty associated with multiple state and federal merger review?

As explained above, the Antitrust Section has been unable to gather sufficient evidence to assess the success or failure of dual federal-state merger enforcement. Also, the Antitrust Section was unable to gather direct evidence of when and how the merger protocol for coordination of simultaneous merger investigations established by the federal enforcement antitrust agencies and state attorneys general has succeeded or failed, because enforcers have not disclosed that information. This is a question better addressed by the state attorneys general and federal agencies themselves. This question also raises the question of whether a merger should also be subject to private challenge. As discussed below, private parties play little role in merger review and the Commission should not encourage or discourage a larger role.

Question 3: What role should private parties play in merger enforcement, and what authority should they have to seek to enjoin a merger? Please support your response with specific examples, evidence, and analysis regarding burden, benefits, delay, and/or uncertainty involved.

The Antitrust Section does not believe that private merger enforcement has played a significant role in merger enforcement. We have identified only 65 reported decisions from the past 20 years that involve private merger enforcement actions. This amounts to a minute proportion of the entire merger activity, especially when one considers the enormous merger activity of the 1990s.

While we have not conducted a detailed study of all the cases, the limitations on private actions generally stem from limitations on third parties bringing such actions under *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,[42] *Associated General Contractors v. California State Council of Carpenters*,[43] and *Illinois Brick Co. v. Illinois*.[44] In addition, the cost of merger litigation is relatively large and, since passage of the premerger notification statute in 1976,[45] large mergers

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42 429 U.S. 477 (1977).

43 459 U.S. 519 (1983).

44 431 U.S. 720 (1977).

45 15 U.S.C. § 18a.

are reviewed before they are consummated, limiting the actual anticompetitive effects of certain mergers.[46]

The Section recommends, therefore, that the Commission not take any action to encourage or discourage additional private enforcement of the merger laws.

Question 4: What lessons, if any, can be learned from Europe's referral (or "one-stop shop") system of allocating merger enforcement between the EC and Member States? How does the more regulation-oriented European tradition (as opposed to a more enforcement-oriented U.S. tradition) affect any comparison of the two systems?

The Antitrust Section has examined the new merger regulation in the European Community and its mechanism for allocating or reallocating matters among the EU Commission and Member States. In pertinent part, the regulation provides that referrals may be made at the request of merging parties to the EU Commission[47] (one-stop shop) or to a Member State prior to its notification at the national or community level. In addition, if a transaction has a significant impact on a Member State, the EU Commission or the Member State may ask for the transaction to be referred to the Member State from the EU Commission. This system is intended to allow parties to benefit in appropriate cases from a single competition review, increase administrative efficiency, and avoid duplication, fragmentation, and inconsistent rulings.

The Antitrust Section notes that the European tradition of each Member State having its own competition authority and formulating its own competition laws, including premerger notification requirements, provides Member States with formal access to the merger review process under a regulatory rubric that is not available to states in the United States. Because of multiple premerger notification and suspensory obligations that do not exist in the United States, dual merger review in Europe imposed significant costs on parties that have not generally been imposed in the United States. In the United States, no formal mechanism exists for the federal government to refer a matter to one or more state governments and the HSR Act rules would have to be amended to account for a system of referring matters to the states. Accordingly, creating a referral system similar to the European Union would require changing substantially the premerger notification scheme in the United States, which the Section does not recommend. The Antitrust Section recognizes that additional experience with the relatively new European Union system could inform the Section's views in the future.

The Antitrust Section trusts that these comments and recommendations will be helpful to the Commission, and is prepared to respond to any questions or comments.

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[46] *But see* Dagher v. Saudi Refining Inc., 369 F.3d 1108 (9th Cir. 2004) (private § 1 damage action following an FTC review and divestiture order for formation of joint venture), *cert. granted*, 73 U.S.L.W. 3745 (June 27, 2005).

[47] If a transaction is notifiable in at least three Member States and the Member States agree, the EU Commission acquires exclusive jurisdiction to review the case.