

Interview with Antitrust Modernization Commission Chair Deborah A. Garza

Editor's Note: On April 3, 2007, the Antitrust Modernization Commission issued its Report and Recommendations to the President and Congress.¹ The 12-person Commission was established by the Antitrust Modernization Commission Act of 2002 to study the U.S. antitrust laws and determine whether they should be modernized.

Deborah A. Garza was designated Chair of the AMC by President George W. Bush. In this interview, Chair Garza discusses the Commission's recommendations for reforming the antitrust laws, the prospects for Congressional, agency, and judicial adoption of the Commission's recommendations, and reflections on the process.

Ms. Garza is a partner in Fried, Frank, Harris, Shriver & Jacobson LLP's Washington, D.C. office and from 1989 to 2001 was a partner at Covington & Burling. Prior to that, she served in the Antitrust Division of the U.S. Department of Justice as Chief of Staff and Counselor from 1988 to 1989, and as Special Assistant to the Assistant Attorney General for Antitrust from 1984 to 1985. On May 7, 2007, she will rejoin the Antitrust Division as Deputy Assistant Attorney General for Regulatory Matters.

The Antitrust Source conducted this interview on April 23, 2007.

ANTITRUST SOURCE: At this year's ABA Spring Meeting you called the AMC's report a "consensus report," noting that the majority of recommendations were unanimous. Were you surprised by the extent of the consensus and how did you work to achieve that consensus?



DEBORAH GARZA: I was pleasantly surprised, although it was something the Commissioners decided early on we would aim to achieve. It was clear from the beginning that we had a diversity of viewpoints, experience, and background, and that, on some issues, some Commissioners held very different ideas.

But we thought it would be most useful to Congress and the President for us to identify issues where we did have substantial consensus. If we were going to spend three years on this project, we wanted to make it time well spent. We thought it would be most useful to provide the views of a bipartisan majority of the Commissioners. We wanted to develop areas of common ground as strongly and thoroughly as possible.

That having been said, dissenting opinions often can be very influential. So, we didn't attempt to suppress divergent viewpoints. It was always intended that we would communicate them either in the body of the report or through separate Commissioner statements.

ANTITRUST SOURCE: Was one of your goals to reach as strong a majority as you could on each issue?

GARZA: We did not identify specific recommendations from the start as to which we tried to get a majority. The Commission staff developed a slate of possible recommendations as a framework

¹ The report is available at http://www.amc.gov/report_recommendation/amc_final_report.pdf.

for deliberations based on input from commentators and witnesses and the comments by Commissioners themselves. During the deliberations, some of those recommendations fell by the wayside, others were tinkered with, and new ones were developed. During the deliberative process, it became clear there was substantial consensus and support among the Commissioners on certain issues and recommendations.

ANTITRUST SOURCE: Nine of the twelve Commissioners wrote separate statements explaining their disagreements with certain recommendations or to offer their own perspective on them. What do these statements add to the report? Should there be less weight given to recommendations with dissenting views?

GARZA: There are some worthwhile things addressed in the separate statements. Clearly, there were some issues that were of major significance to some Commissioners that either didn't get developed fully in the report or didn't end up being the majority position.

An example is the appropriate welfare standard (that is, total welfare or consumer welfare). Because we did not have a consensus, the issue was not developed in the report. The separate statements of Commissioners Jacobson, Carlton, and Kempf, however, discuss some of the relevant considerations.

Another example as to which there was majority support, is indirect purchaser litigation. Several of the Commissioners felt that indirect purchaser legislation should be a priority. They accordingly highlighted that recommendation by addressing it in their individual statements. Another example is Commissioner Shenefield's explanation of why he disagreed with the Commission's recommendation to repeal the Robinson-Patman Act and how he would prefer to see the Act amended.

ANTITRUST SOURCE: What has the reaction been to the release of the Commission's report? What feedback have you received?

GARZA: Reaction is still coming in. Congress was in recess when we released the report. The relevant Congressional staff has begun to digest it, and I understand there likely will be hearings. There is a hearing tentatively scheduled before the House Judiciary Committee Antitrust Task Force on May 3.

There are a couple of issues already queued up in Congress where the report might be material. There are certain proposals being considered with respect to, for example, the McCarran-Ferguson Act antitrust exemption for the insurance industry. The rest, I think, will depend on whether there is a constituency supporting a recommendation. For example, some group—possibly the ABA—will have to sponsor indirect purchaser litigation reform for it to get any traction. The AMC Commissioners would like to see action on our recommendation regarding a global clearance agreement between the Justice Department and FTC, but the fate of that recommendation may depend to some extent on the attitude of the Justice Department and the FTC.

ANTITRUST SOURCE: Some of the recommendations are directed towards Congress. Do you foresee yourself or other members of the Commission spending time with Congress explaining or advocating the recommendations?

GARZA: The Commission will expire at the end of May. But individual Commissioners may be asked to testify on specific issues as experts or to explain the report and recommendations.

Because I am going into the Justice Department starting May 7, I personally won't be lobbying any particular position, unless it is the position of the Justice Department.

ANTITRUST SOURCE: Several of the recommendations are directed to the courts. How will the Commission's recommendations be conveyed to the courts?

GARZA: I assume that either parties will cite the report, or the enforcement agencies will look for appropriate cases to advance the law in some of the areas discussed in the report.

ANTITRUST SOURCE: Let's talk a little bit more about the Commission itself. The composition of the AMC is different from prior antitrust commissions by not containing current members of Congress, the courts, or members of academia. Would you have liked to have a broader mix of Commissioners appointed?

GARZA: I think it was the right mix. Everybody on the Commission has a substantial amount of antitrust expertise either as enforcers, practitioners, policy makers, and/or members of legislative staff. In addition, we made an effort to reach out broadly to diverse points of view, including beyond the antitrust bar.

So, I think we really had the best of both worlds. I think it was better not to have people who were sitting on the Commission as representatives of certain interest groups. When that happens, you get people digging in. It discourages the kind of open mindedness and shifting of views that we had on the Commission, where no one regarded himself or herself as having a particular axe to grind.

ANTITRUST SOURCE: One of the comments directed at the Commission is that the composition of the Commission, although bipartisan, was somewhat weighted towards the defense bar. What is your reaction to that criticism?

GARZA: A number of Commissioners spent substantial parts of their careers as enforcers—for example, John Shenefield, Sandy Litvack, Makan Delrahim, Debra Valentine, Steve Cannon, and myself—and enforcers are plaintiffs. In addition, the record demonstrates that the Commissioners had before them, and considered, what you might call the plaintiff's perspective. In fact, I don't think the report is biased. Our focus was on optimal antitrust enforcement, not necessarily on the defendant's view or the plaintiff's view, but on issues of efficient enforcement, deterrence, transparency, and fairness. Those issues overrode any sort of plaintiff or defendant bias.

ANTITRUST SOURCE: One of the first tasks of the Commission was to determine which topics to study. And you ultimately came up with approximately 30 subjects including civil procedure, remedies, criminal procedure, mergers and acquisitions, and single-firm conduct. How did the Commission decide which topics to study?

GARZA: We initially formed study groups of Commissioners focused on particular areas, such as civil enforcement and criminal enforcement, for example. Based on a review of comments received from the public, and working with the staff, study groups recommended issues for study, explaining why and suggesting priorities.

The Commission held more than one public meeting at which we discussed the study group recommendations and decided on issues to study. While we made some attempt to prioritize

issues, that was difficult to do a priori. Mistakenly or not, rather than struggling to reduce the list at the beginning, I assumed priorities would arise in the course of further study and deliberation.

At different times during the course of the Commission's work, a number of Commissioners (myself included) thought having fewer issues on our plate would have been better. But it would have been difficult to get consensus on which issues to eliminate. In addition, although it was a lot of work for us, it may be more valuable to have covered the landscape. So many of the issues we looked at are interrelated. An adjustment in one area affects another. Remedies and substantive standards are related, for example. It is useful to look at the whole range of issues.

I will say, too, that at the time, I did not support studying immunities and exemptions at all. I felt the Commission had a very full plate, and immunities and exemptions struck me as a very political area as to which the Commission might have very little influence. I was very concerned about the amount of resources and time that could be required to examine specific immunities and exemptions, and also about the potential politicization of the Commission. I believe I also voted against studying regulated industry issues for similar reasons. But, as it turns out, the immunities and exemptions and regulated industries issues may be of greatest interest to Congress.

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ANTITRUST SOURCE: Picking up on that point, the Commission came out fairly critical of antitrust immunities and exemptions, but did not recommend any specific repeals. Why is that?

GARZA: We thought it would be most valuable to come up with a framework for analyzing immunities and exemptions either in the first instance, before they are enacted, or in any kind of review of existing immunities. I don't think any immunity or exemption was likely to find favor from a majority of this group of Commissioners. Some Commissioners also felt very strongly that singling out one or more immunity or exemption would send the wrong message about others, by suggesting that they were less problematic.

There was also a concern about the feasibility of a commission such as ours being able to assemble the kind of record that could be the basis for saying, here is all you need, Congress, to repeal this immunity. That's a gargantuan task for even one immunity or exemption to do it right, let alone for all immunities and exemptions.

Then, there's the political part of it. The only time more than a very small number of people attended our deliberations was when we were considering immunities and exemptions. Then we had a fairly packed room. And I understand lobbyists were trying to create all kinds of excitement on the Hill about what we might recommend. I did not want the rest of the Commission's work to be undermined by a lot of noise about immunities and exemptions, or have the report considered "DOA" because of those issues. I was also, frankly, worried that our funding might be at risk if particular Senators or Representatives were upset about a position we appeared to be taking or might take on an exemption or immunity, although that never occurred.

We did, though, hold hearings on three specific immunities to help frame our deliberations. Those three were the McCarran-Ferguson Act, Shipping Act, and Export Trading Company Act. Congress, of course, was already holding hearings on McCarran, and the EU had just decided to eliminate its shipping exemption.

ANTITRUST SOURCE: Obviously, the Commission did its work in a political environment. Did you feel pressure from Congress on any particular issues? Did you brief Congress on progress or status during the process?

GARZA: It was made clear to us from the very beginning by the Congressional staffs that the Commission was to decide through its own processes, without influence, what issues to study. We were not directed one way or another.

Now, everyone knows that when a study group recommended the Commission take on the trade laws, we did get letters from members of Congress advising that this was not an area on which they had expected the Commission to focus. That view was consistent with my own thinking about where the Commission should be focused. We had a big enough challenge focusing on the antitrust laws, and the Commissioners were not trade law experts. The views of these Congressmen were legitimately relevant to the Commissioners' decision not to study the trade laws. But I would not characterize them as "pressure."

Throughout the Commission's work, Commissioner Yarowsky and I met with staffs on both the House and Senate sides, representing both parties, to keep them updated on our progress. Usually, we met with Democratic and Republican staffs together.

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ANTITRUST SOURCE: Let's turn to some of the specific recommendations. What, in your view, are the AMC's most significant recommendations?

GARZA: First, let me say that our conclusions about the fundamental soundness of current antitrust policy are as important as any of the recommendations for change. For those in the antitrust bar, some of our general conclusions may seem obvious. But they may not be so obvious to those outside the bar, and they have not always been accepted.

As to the specific recommendations, one thing that seems relatively small, but may be significant, is the recommendation on merger clearance. The enforcement agencies note that clearance issues arise in connection with only a small minority of mergers reviewed. It is true that only a very few HSR filings actually receive scrutiny. Nevertheless, transactions that are reviewed get hung up in merger clearance disputes more than anybody would like to see happen. Clearance disputes affect staff morale, are inconsistent with the intent of the HSR Act waiting period, can unnecessarily delay the realization of significant merger efficiencies, and undermine public confidence in the system, which is bad government.

Any of us who have had clients involved in a clearance dispute can testify to the fact that it is one thing to have your merger looked at before it can close, but another to be caught up in a turf battle between the FTC and the Antitrust Division; that is really hard to explain. A protracted clearance dispute tends to color a client's attitude toward the rest of the governmental review process.

Of course, the enforcement agencies attempted to resolve the problem themselves through the 2002 global clearance agreement negotiated between the FTC and Antitrust Division under the guidance of Tim Muris and Charles James. Senate appropriators threatened to reduce funding to one or both of the enforcement agencies unless the agreement was abandoned. In the aftermath, clearance issues arguably have grown even worse.

The Commission's recommendation to deal with the problem is for the relevant Congressional committees to communicate to the enforcement agencies that some sort of global agreement would be acceptable at this point and to work with the agencies as appropriate to draw the industry lines. Second, we recommended that Congress amend the HSR Act to provide that, in any case, transactions will clear within a set short period of time. We suggested nine calendar days. If these recommendations improved the current situation, they alone might recoup the investment that was made in the Commission.

A number of Commissioners are very enthusiastic about the recommendation on indirect purchaser litigation. The Commission recommended that the Supreme Court's decisions in *Illinois Brick*² and *Hanover Shoe*³ be overruled by statute to the extent necessary to enable indirect purchasers to sue to recover damages in federal court under the Sherman Act. Overall damages would be capped at the amount of the overcharge trebled, but all consumers able to demonstrate injury under current standards could recover, whether they are direct or indirect purchasers.

We all agreed that the current system—with claims in multiple federal and state courts—is a mess. Nobody testified that the system is working just fine. As a matter of process, it costs too much and places enormous burden on the courts and on the parties. In addition, several Commissioners were concerned about the logic and fairness of allowing uninjured direct purchasers to recover damages while barring injured indirect purchasers from being made whole or restricting their ability to recover damages based on the state in which they live. If implemented, the Commission's recommendation could make the current system fairer and more logical and efficient, ensuring that more money goes into the pockets of injured consumers (and not lawyers).

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ANTITRUST SOURCE: Why did the Commission recommend nine days to resolve clearance disputes?

GARZA: I believe the 2002 agreement aimed for clearance in nine days.

ANTITRUST SOURCE: Do you expect that the Commission's indirect purchaser recommendations will gain traction on the Hill?

GARZA: I don't know. It depends on whether there are any groups out there—such as the ABA or the Chamber of Commerce—that pick up on it. I would not expect it to go anywhere unless someone decides to champion it.

ANTITRUST SOURCE: The Commission also recommended the repeal of the Robinson-Patman Act. Do you think that has a chance on the Hill, and did the Commission consider other approaches short of repealing the Act?

GARZA: Speaking for myself, I don't expect it to happen, though I would love to be proved wrong. Again, it's one of these things where you need a constituency, and I don't know whether repealing the Robinson-Patman Act would be a priority for any organized constituency. It might be difficult to get people excited about repealing a law that prohibits price discrimination. The arguments may be too subtle to overcome popular sentiment that price discrimination must be bad. I nevertheless voted for the recommendation because its repeal is right as a matter of principle.

Antitrust lawyers have been complaining about the Robinson-Patman Act since very soon after it was enacted, and there are a lot of reasons why it is bad policy. I believe we heard from the FTC and FTC Chairman Debbie Majoras that it is difficult for the United States to discourage other competition regimes from enacting similar pricing regulation as long as we have the Robinson-Patman

² *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

³ *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968).

Act on the books. We say, “Do as we say, not as we do,” and that is not very persuasive. Moreover, any truly anticompetitive effects of price discrimination can adequately be addressed through the Sherman Act.

In his separate statement, Commissioner Shenefield explains how he would specifically amend the statute. While a majority of Commissioners obviously felt that repeal was more appropriate than amendment, if repeal is impossible, perhaps amendment can address many of the more troublesome aspects of the Act.

Commissioner Yarowsky was also concerned about repeal, but for a different reason. I believe he thought it might be better to retain the Robinson-Patman Act, more sensibly enforced, than to repeal it and risk having it be replaced by other price discrimination legislation applicable to specific industries, for example. Such mini-RP Acts could be more mischievous than what we have now with the Robinson-Patman Act. Others commenting on the Commission’s recommendation have made a similar observation relating to the possibility that states would enact or step up enforcement of state law prohibiting price discrimination.

So, there were lots of pros and cons in recommending repeal, and we considered them all. But, in the end, this group of antitrust practitioners could not resist the opportunity to call for repeal.

A majority of the Commissioners felt that the states had a significant, complementary role to play with federal enforcers. So, we did not recommend that the states be excluded from enforcement of federal antitrust law or that state law be preempted.

ANTITRUST SOURCE: One of the issues that the Commission studied was the FTC and DOJ’s dual responsibility for federal merger enforcement. In the preliminary draft report, the Commission was fairly critical of having two enforcement agencies and said the “consequences of dual enforcement are costly and unfair to businesses.” The final report omitted this language and did not recommend comprehensive change. Why the apparent shift?

GARZA: Well, I’m not sure I would agree that there was a shift in the Commission’s views. It is clear that, if we were writing on a clean slate, we probably would not have recommended creating two separate federal agencies with largely concurrent jurisdiction. (Although we did receive testimony suggesting it was useful to have enforcement competition between two agencies, an idea as to which I was personally dubious.) Nevertheless, it seemed clear that we were not going to see the dismantling of the Federal Trade Commission, and for good reasons. So, rather than propose the impossible, we decided to focus on steps that actually could be taken to address some of the inefficiencies that can arise from dual enforcement jurisdiction and eliminate the reality, or the perception, of unequal treatment depending on what agency handles a matter.

ANTITRUST SOURCE: Another topic that the Commission studied was the enforcement role of the states with respect to federal antitrust laws. What were the Commission’s findings and recommendations in this area?

GARZA: A majority of the Commissioners felt that the states had a significant, complementary role to play with federal enforcers. So, we did not recommend that the states be excluded from enforcement of federal antitrust law or that state law be preempted.

But, just as it can be problematic for there to be two federal enforcers, it can also be problematic to have 50 separate enforcers layered on top of those two, even before you get to international enforcement. It is particularly a problem where conflicts are possible and nationwide conduct is involved. It doesn’t make sense to try to regulate national markets through 52 different enforcement entities that could be at odds with each other in terms of either their enforcement policies or remedies.

We recommended increased cooperation and coordination and convergence on standards. We also recommended that the states continue to focus their efforts on localized conduct and effects. Through coordination, cooperation, convergence, and appropriate focuses, we can eliminate a lot of the potential for conflict and confusion.

ANTITRUST SOURCE: According to the Commission, how should the responsibility for enforcement of the antitrust laws in regulated industries be divided between the antitrust agencies and regulatory bodies, such as the FCC?

GARZA: The general sense of the Commission was that it did not make sense to have both a regulatory agency and the Antitrust Division or Federal Trade Commission looking at competition issues. Competition issues generally should be within the province of the antitrust enforcement agencies, which should consult with the regulatory agencies to understand the facts. We recommended that antitrust standards should apply except where Congress might identify some important interest that cannot be accommodated within the framework of the antitrust law.

ANTITRUST SOURCE: One of the report's recommendations is the use of a three-part test to determine whether bundled discounts violate Section 2. How did the Commission reach consensus in this contentious area?

GARZA: It came up relatively late in the process, during one of the final deliberation meetings. I believe Commissioner Jacobson recommended it for discussion. Initially, we were not focused on developing a specific standard. But, as discussion evolved, the Commission was united in recognizing the value of a clear safe harbor, so that business can have some certainty on what is safe discounting practice.

The safe harbor we proposed is conservative. It is a price-cost test that would attribute the entire amount of the discount to the non-monopolized product or service. This test likely will not shield a lot of pricing that probably is not problematic. Pricing that does not meet the safe harbor test would be subject to further rule of reason scrutiny.

ANTITRUST SOURCE: Did anyone dissent from that recommendation?

GARZA: No. There wasn't any dissent, though Commissioner Carlton and I did note that a lot of pricing that is unlikely to be objectionable would not pass muster under the proposed safe harbor screen. While we might have preferred a different standard, having any safe harbor and certainty is an improvement over what exists now.

ANTITRUST SOURCE: Are there any other recommendations that you would like to mention?

GARZA: We made recommendations in the area of international antitrust enforcement and antitrust and intellectual property. I think it's worth noting those because Representative Sensenbrenner, who sponsored the legislation creating the AMC, publicly identified these areas as ones he hoped the Commission would address. (Another area was the appropriate role of state enforcement.)

Congressman Sensenbrenner and others were particularly concerned about whether competition laws were being used or could be used by other countries to discriminate against U.S.-based companies, for example. Although we did not find evidence of such discrimination, we

agreed that the potential for conflict is real and significant. The Commission's report encourages the FTC and DOJ to continue to seek procedural and substantive convergence around the world on sound principles of competition law. We also recommend that the United States pursue more bilateral and multilateral cooperation agreements with more of our trading partners, and we make recommendations about what those agreements should include. We also recommend that the agency budgets include funds to provide technical assistance to other countries for the purpose of enhancing convergence and cooperation.

We also recommended that the DOJ and the FTC report to Congress on the feasibility of developing a centralized international merger notification system, for the purpose of easing the burden of companies engaged in cross-border transactions. Now, I myself am skeptical about the ability to adopt a centralized notification system and whether it would actually reduce, rather than increase, burden. But it is a legitimate "ask," and if it cannot be done, or if there are significant downsides, it is worth explaining to the business community why merging companies will have to continue to make multiple filings.

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ANTITRUST SOURCE: Looking back at the Commission's work, what do you think worked well and what could have worked better in terms of the process?

GARZA: I think three years is a bit long. Two years might be better, though it does take time to find staff and, in essence, build a small agency. The Commission staff really did a great job, and we were fortunate to get top-rate people. But it is hard to attract talented people out of the government or private practice for so long a period of time. We were very, very fortunate to have the FTC assign Andrew Heimert to us, which helped in enabling him to stay for the entire three years.

In addition, this is really technical, but the way the statute is written, in some circumstances, we couldn't compensate people even as well as the federal government does. I would have preferred to have had more discretion in what we paid staff.

On balance, I appreciate the transparency requirements. It did make deliberation more complicated because it all had to be done in properly noticed public meetings. While we had no interest in secrecy, it wasn't easy to get 12 busy Commissioners in one room at the same time. E-mail or even telephone calls would have been so much easier, but would not have worked with the FACA⁴ requirements of public deliberation. In the end, though, I think the degree of transparency was very beneficial.

It was an extra challenge to have to identify the issues to study, rather than having a limited set of issues presented to us for study. But, part of the value we delivered was in identifying the issues worthy (in our opinion) of study.

Finally, 12 commissioners is a lot. It worked out perfectly, as it turns out, and the dynamic of these 12 commissioners was terrific. But that large a group made it difficult to coordinate meetings.

So, my "dream commission" might be eight commissioners, two years, a preordained set of issues, and the freedom to compensate the staff as I thought was appropriate. That having been said, however, I am happy with the report as it is, there is no Commissioner who I would have wanted to give up, and I am not sure that any of those changes would have resulted in a significantly better or different report. ●

⁴ Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 §§ 1-15.

Supreme Court's *Weyerhaeuser* Decision Follows Recent Pattern

Darren S. Tucker and Kathleen M. Pessolano

On February 20, 2007, the U.S. Supreme Court issued its decision in *Weyerhaeuser v. Ross-Simmons Hardwood Lumber*,¹ the sixth antitrust decision by the high court over the last three years. Still remaining on the Court's docket for the current term are another three cases involving antitrust issues. While many have noted the court's newfound and perhaps unprecedented level of interest in antitrust cases, more noteworthy is the pattern that has emerged from these recent cases.

From *Trinko*,² decided in January 2004, to *Weyerhaeuser*, Supreme Court antitrust cases have shared a common set of features: (1) the decision below favored the plaintiff; (2) the Court followed the recommendation of the Justice Department, when asked, in granting certiorari;³ (3) the Justice Department filed an amicus brief favoring the defendant; and (4) the Supreme Court reversed the appellate court decision unanimously or by a wide margin. The three antitrust cases currently before the Supreme Court have so far also followed this pattern. In all nine of these cases, the Justice Department has favored a narrowing of antitrust liability, and in eight of the nine cases (abstaining in the ninth), the FTC has favored a narrowing of liability. In the six recent antitrust decisions the Supreme Court already has handed down, the justices have tallied a total of 49 votes in favor of antitrust defendants and 2 in favor of plaintiffs.

While the predictive power of the pattern that has characterized the six decided cases should not be overemphasized, the trend may shed some light on the likely outcomes of the pending cases.

The *Weyerhaeuser* Decision

In *Weyerhaeuser*, the Supreme Court held that the *Brooke Group*⁴ test for predatory pricing claims under Section 2 of the Sherman Act also applies to predatory-bidding claims. The unanimous decision for petitioner *Weyerhaeuser* reversed the Ninth Circuit's judgment that to prevail in its predatory-bidding claim, *Ross-Simmons* did not need to show recoupment, but only that *Weyerhaeuser* had bought more inputs than it needed at a higher price than necessary. *Ross-Simmons* conceded that it had not satisfied the *Brooke Group* standard, so the Supreme Court's decision in *Weyerhaeuser* meant reversal of the jury verdict for *Ross-Simmons*.

Both parties, *Weyerhaeuser* and *Ross-Simmons*, operated sawmills that bought logs and processed them into finished lumber. *Ross-Simmons* contended that *Weyerhaeuser* overpaid by

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¹ 127 S. Ct. 1069 (2007).

² *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

³ Since early 1998, the Court has followed the recommendation of the Antitrust Division whether to grant certiorari each time the Court has requested the government's view.

⁴ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

\$20 million per year for sawlogs, which artificially increased sawlog prices and drove Ross-Simmons out of business. A jury found for Ross-Simmons and awarded \$78.7 million. The Ninth Circuit affirmed the judgment, rejecting Weyerhaeuser's claim that the jury instruction should have included a recoupment requirement as in the *Brooke Group* test. Instead, the Ninth Circuit held that Ross-Simmons had to show only that Weyerhaeuser had bought more logs than it needed at a higher price than necessary.

Following the Ninth Circuit's ruling, Weyerhaeuser petitioned the Supreme Court for certiorari. The Department of Justice and the FTC (by a 3–2 commissioner vote) submitted joint amicus briefs recommending that the Court grant review and that the *Brooke Group* standard should apply to predatory-bidding cases, just as it does to predatory-pricing cases.

The Supreme Court agreed and unanimously reversed the Ninth Circuit, holding that the *Brooke Group* test applies to predatory-bidding claims. Specifically, the Court, in an opinion delivered by Justice Thomas, held that in a predatory-bidding case, "[a] plaintiff must prove that the alleged predatory bidding led to below-cost pricing of the predator's outputs. . . . A plaintiff in a predatory-bidding case must also prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power."⁵ The Court did not specify by which measure to determine the rival's cost; it repeated the *Brooke Group* requirement that the prices complained of are below "an appropriate measure of its rival's costs."⁶

The Court found that predatory-pricing and predatory-bidding claims are analytically similar in several ways: both involve the deliberate use of unilateral pricing measures for anticompetitive purposes; both require firms to incur short-term losses on the chance of gaining supracompetitive profits later; and both present the risk of chilling procompetitive behavior with too lax a liability standard (like a failed predatory-pricing scheme, a failed predatory-bidding scheme can be a boon to consumers). The Court held that, given these similarities, and given the close theoretical connection between monopoly and monopsony, the *Brooke Group* test should apply both to predatory-bidding and predatory-pricing claims.

The Court noted that Ross-Simmons conceded it had not satisfied the *Brooke Group* standard and, therefore its predatory-bidding theory of liability could not support the jury verdict for Ross-Simmons. On that basis, the Court vacated the Ninth Circuit's judgment and remanded the case.

Other Recent Supreme Court Decisions

On January 13, 2004, the Supreme Court unanimously (9–0) reversed and remanded the Second Circuit's decision in favor of the plaintiff in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*.⁷ The Court held that the plaintiff's complaint alleging breach of an incumbent local exchange carrier's 1996 Telecommunications Act duty to share its network with competitors did not state a claim under Section 2 of the Sherman Act. In *Trinko*, the Department of Justice and the FTC submitted amicus briefs favoring the defendant and urging the Court to grant certiorari.

On June 14, 2004, in *F. Hoffmann La Roche v. Empagran*,⁸ the Supreme Court vacated and remanded the D.C. Circuit's decision for the plaintiff. The Court, 8–0, held that, where the price-fixing conduct significantly and adversely affects customers both outside and within the United

⁵ *Weyerhaeuser*, 127 S. Ct. at 1078.

⁶ *Brooke Group*, 509 U.S. at 222.

⁷ 540 U.S. 398 (2004).

In the six recent antitrust decisions the Supreme Court already has handed down, the justices have tallied a total of 49 votes in favor of antitrust defendants and 2 in favor of plaintiffs.

States, but the adverse foreign effect is independent of any adverse domestic effect, the Foreign Trade Antitrust Improvements Act of 1982 exception does not apply, and thus, neither does the Sherman Act, to a claim based solely on the foreign effect. The Justice Department and the FTC filed an amicus brief supporting a decision favorable to the defendant.

On March 6, 2006, the Supreme Court in *Illinois Tool Works, Inc. v. Independent Ink*,⁹ vacated and remanded the Federal Circuit's decision for the plaintiff. The Supreme Court, by a vote of 8–0, held that because a patent does not necessarily confer market power upon the patentee, in all cases involving a tying arrangement the plaintiff must prove that the defendant has market power in the tying product. Once again, the Department of Justice and the FTC filed an amicus brief supporting the defendant's position.

On February 28, 2006, in *Texaco Inc. v. Dagher*,¹⁰ the Supreme Court reversed the Ninth Circuit's decision for the plaintiff. The Supreme Court held, by a unanimous 8–0 vote, that it is not per se illegal under Section 1 of the Sherman Act for a lawful, economically integrated joint venture to set the prices at which it sells its products. The Justice Department and the FTC submitted joint amicus briefs favoring the defendant and urging the grant of certiorari.

On January 10, 2006, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC Inc.*,¹¹ the Supreme Court reversed and remanded the Eighth Circuit's decision for the plaintiff. The Supreme Court, this time by a vote of 7–2, held that a manufacturer may not be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer. The Department of Justice and the FTC filed an amicus brief in support of the defendant's position.

Pending Supreme Court Cases

The three antitrust cases currently before the Supreme Court have so far followed the same pattern: the decision in the circuit court favored the plaintiff; the Justice Department, if asked, recommended that the Court grant certiorari; and the Justice Department filed an amicus brief favoring the defendant on the merits.

Bell Atlantic v. Twombly,¹² a class action antitrust suit against the regional Bell operating companies, involves allegations of conspiracy to exclude competitors from, and not to compete against one another in, their respective geographic markets for local telephone and high speed Internet services. The issue in the case is whether a complaint alleging a conspiracy plus parallel or similar behavior, but facts only supporting parallel conduct, is sufficient to survive a motion to dismiss. The Second Circuit's decision, reversing the Southern District of New York's dismissal of the complaint for failure to state a claim, favored the plaintiff. The Supreme Court granted certiorari on June 26, 2006, and heard oral argument November 11, 2006. The Department of Justice submitted an amicus brief in support of the defendant's position. The FTC, however, did not join the Justice Department's brief.

⁸ 542 U.S. 155 (2004).

⁹ 547 U.S. 28 (2006).

¹⁰ 547 U.S. 1 (2006).

¹¹ 546 U.S. 164 (2006).

¹² 425 F.3d 99 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 2965 (2006).

*Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹³ presents the Supreme Court with the opportunity to reevaluate the per se rule against vertical minimum price-fixing established in the *Dr. Miles* case from 1911.¹⁴ The plaintiff in *Leegin*, a retailer of products manufactured by Leegin, alleged that Leegin violated Section 1 of the Sherman Act by entering into agreements with retailers to fix the price of certain branded products. The jury found for the plaintiff, and the Fifth Circuit upheld the jury verdict, applying the longstanding per se rule against vertical minimum price fixing. The Supreme Court granted certiorari on December 7, 2006, and the Justice Department and the FTC submitted an amicus brief urging a decision favoring the defendant. On March 26, 2007, the Court heard oral argument, during which Justices Breyer, Souter, Stevens, and, to a lesser extent, Ginsburg, signaled reluctance to overturn *Dr. Miles*.

The third case, *Credit Suisse First Boston Ltd. v. Billing*, involves the standard for implied anti-trust immunity in underwriting syndication for securities offerings including IPOs.¹⁵ Underwriting firms such as the defendants assert that the standard should be potential conflict between securities regulation and antitrust law. The Second Circuit decided the case in favor of the plaintiffs. The Antitrust Division, but not the FTC, urged the Supreme Court to grant certiorari, which it did on December 7, 2006. The agencies then filed a joint amicus brief supporting the defendant's position on the merits. The Supreme Court heard oral argument in the case on March 27, 2007.

Nuances to the Pattern

While the pattern has thus far held in all six of the recently decided Supreme Court antitrust cases and the three pending cases, some nuances have emerged. The federal enforcement agencies have not always been unanimous in their positions. Disagreements have emerged between the enforcement agencies as well as within the FTC on whether to recommend the grant of certiorari and whether to support the defendant's position.

The FTC voted to join the Justice Department's amicus brief on the merits in all but one case: *Twombly*. Plaintiffs noted that this was "not for lack of interest, as FTC representatives vigorously participated in meetings with counsel on both sides before the Solicitor General's brief was filed."¹⁶ Plaintiffs urged that this "apparent lack of concurrence of the FTC . . . should not escape the Court's notice."¹⁷

On occasion, the FTC has also declined to join the Justice Department's amicus briefs advising whether certiorari should be granted. As noted above, the FTC did not join the Justice Department's amicus brief in *Credit Suisse First Boston* recommending the grant of certiorari, but did join the Department's merits brief. Nor did the FTC join a few of the Antitrust Division's recent amicus briefs advising against granting certiorari.¹⁸

¹³ 171 F. App'x 464 (5th Cir.), *cert. granted*, 127 S. Ct. 763 (2006).

¹⁴ *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

¹⁵ 426 F.3d 130 (2d Cir. 2005), *cert. granted*, 127 S. Ct. 762 (2006).

¹⁶ Brief for Respondents at 10 n.4, *Bell Atlantic v. Twombly*, No. 05-1126 (Oct. 13, 2006), available at http://www.abanet.org/publiced/preview/briefs/pdfs_06-07/05-1126_Respondent.pdf.

¹⁷ *Id.*

¹⁸ See *FTC v. Schering-Plough Corp.*, 126 S. Ct. 2929 (2006) (denying certiorari); *McFarling v. Monsanto Co.*, 545 U.S. 1139 (2005) (denying certiorari); *CSU, L.L.C. v. Xerox Corp.*, 531 U.S. 1143 (2001) (denying certiorari); *Practice Mgmt. Info. Corp. v. AMA*, 525 U.S. 810 (1998) (denying certiorari); *Portland Gen. Elec. Co. v. Columbia Steel Casting Co.*, 523 U.S. 1112 (1998) (denying certiorari).

The most significant disagreement between the agencies occurred in the Schering-Plough case.

The most significant disagreement between the agencies occurred in the *Schering-Plough* case. The FTC challenged a settlement agreement between a branded pharmaceutical company (Schering) and a generic competitor, under which the generic agreed to delay entry and received compensation from the branded manufacturer. The FTC found the agreement to be anti-competitive,¹⁹ and the Eleventh Circuit reversed.²⁰ The FTC then filed a petition for certiorari. Asked for its views by the Court, the Antitrust Division urged the Supreme Court not to hear the case due to the lack of a circuit court split. On June 26, 2006, the Court agreed,²¹ dealing a significant blow to the FTC's efforts to combat "reverse payment" pharmaceutical settlements.

In other cases, even when the FTC did join the Justice Department's amicus brief supporting the defendant, the commissioners have not always been unanimous. In the *Weyerhaeuser* and *Leegin* cases, the commissioners' vote to join the Justice Department in filing the merits amicus brief was 3–2. Interestingly, the dissenters varied in the two cases and did not necessarily fall along party lines. In *Weyerhaeuser*, Commissioners Leibowitz (D) and Rosch (R) dissented; in *Leegin*, Commissioners Leibowitz (D) and Harbour (I) dissented.

In *Leegin*, Commissioner Harbour took the rare step of preparing a separate, open letter to the Court, at odds with the Commission's amicus brief.²² In the letter, Commissioner Harbour stated that a decision by the Supreme Court to overrule the *Dr. Miles* precedent would "wrongly eliminate" per se illegality for vertical minimum price fixing.²³ She stated that unless the Court replaces the precedent with a "clearly articulated legal framework that preserves—at a minimum—a strong presumption of illegality," vertical minimum price fixing will become "beyond effective challenge under the federal antitrust laws."²⁴

Conclusion

The apparent division among the justices at the *Leegin* oral argument calls for caution in relying too heavily on the recent pattern to predict the results of the antitrust cases now pending before the Supreme Court. Nevertheless, it is remarkable that in six consecutive cases: (1) the decision below favored the plaintiff; (2) the Court followed the recommendation, when requested, of the Department of Justice in granting certiorari; (3) the Justice Department filed an amicus brief favoring the defendant; and (4) the Supreme Court reversed the appellate court decision unanimously or by a wide margin. In these six cases, the Supreme Court justices registered a total of 49 votes for antitrust defendants and 2 votes for plaintiffs. The antitrust community soon will discover whether this pattern will continue. ●

¹⁹ *Schering-Plough Corp.*, FTC Docket No. 9297, 2003 WL 22989651 (Dec. 8, 2003) (opinion of the Commission), available at <http://www.ftc.gov/os/adjpro/d9297/031218commissionopinion.pdf>.

²⁰ *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (2005).

²¹ *FTC v. Schering-Plough Corp.*, 126 S. Ct. 2929 (2006) (denying certiorari). Remarking on the *Schering* case, Commissioner William Kovacic recently said that "I think from both the antitrust division and the 11th Circuit we got the deference that a wayward child would get from an irate parent, which is to say zero." Corey Boles, *FTC Commissioner Criticizes Relations With DOJ*, DOW JONES NEWS SERVICE (Jan. 29, 2007), <http://online.wsj.com/article/BT-CO-20070129-710666.html?mod=crnews>.

²² Open letter from Pamela Jones Harbour, Comm'r, Fed. Trade Comm'n, to Supreme Court of the United States (Feb. 26, 2007), available at <http://www.ftc.gov/speeches/harbour/070226verticalminimumpricifixing.pdf>. Commissioner Harbour's letter, which does not appear in the Court's docket, is unlikely to play a role in the Court's deliberations.

²³ *Id.* at 1.

²⁴ *Id.*

Are Private Equity Consortia Anticompetitive?

The Economics of Club Bidding

Elizabeth M. Bailey

With the costs required to comply with the Sarbanes-Oxley Act and the pressure public companies face to deliver consistent earnings growth, many companies are “going private.” A company goes private when its stock (i.e., equity) is acquired by private investors, as opposed to being traded on a public stock exchange, such as the New York Stock Exchange or NASDAQ. Private equity firms, such as Blackstone Group, The Carlyle Group, and Texas Pacific Group, raise funds from institutional investors (e.g., pension funds and college endowments) as well as wealthy individuals and use these funds, along with bonds and/or bank loans (i.e., debt), to purchase companies on the block (Target Companies). A private equity firm expects to profit from its purchase through its exit strategy, typically by fixing up the Target Company and then selling it several years later to a strategic buyer, to another private equity firm, or through an initial public offering.¹

There has been a growing trend toward private equity firms combining in consortia to submit bids for a Target Company rather than individual private equity firms making independent bids.² A private equity bidding consortium, or club, is comprised of two or more private equity firms that pool their funds in order to submit a joint bid for a Target Company. For example, in August 2005, SunGard was acquired by a consortium of seven private equity firms, including Bain Capital, Blackstone Group, Goldman Sachs Capital Partners, Kohlberg Kravis Roberts (KKR), Providence Equity Partners, Silver Lake, and Texas Pacific Group, for \$11.4 billion.³ Similarly, in December 2005, a consortium of private equity firms, including The Carlyle Group, Clayton, Dubillier & Rice, and Merrill Lynch Global Private Equity purchased Hertz Corporation from the Ford Motor Company for \$15 billion.⁴ And in December 2006, a consortium of private equity firms, including Blackstone Group, The Carlyle Group, Permira Advisors, and Texas Pacific Group, completed an almost \$18 billion buyout of Freescale Semiconductor.⁵

The trend toward consortium bidding has attracted the interest of the U.S. Department of Justice. In October 2006, it was reported that several private equity firms received letters con-

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¹ Private equity firms often take a role in the management and oversight of the Target Company's operations, including working with the existing management team to improve operations and strategic decision making, serving on the board of directors, and/or replacing the existing management.

² Sharon Tancredi, *The Uneasy Crown-Private Equity*, *ECONOMIST*, Feb. 8, 2007.

³ SunGard, Press Release, Consortium of Private Equity Funds Completes Acquisition of SunGard; Transaction Ranks as Second Largest LBO Ever (Aug. 11, 2005), available at <http://www3.sungard.com/news/default.aspx?id=521&year=2005&iid=2>.

⁴ Ford Motor Co., Press Release, Ford Completes Sale of the Hertz Corporation to Private Equity Group (Dec. 21, 2005), available at http://media.ford.com/newsroom/release_display.cfm?release=22241.

⁵ Freescale Semiconductor, Press Release, Consortium of Private Equity Firms Completes Acquisition of Freescale Semiconductor (Dec. 1, 2006), available at http://media.freescale.com/phoenix.zhtml?c=196520&p=irol-newsArticle_print&ID=937966&highlight=.

taining a voluntary request for information from the New York office of the DOJ.⁶ As it has been reported, these letters suggest that the DOJ is interested in understanding whether and how consortium bidding softens competition. The plaintiffs' bar has been quick to follow, with at least one class action lawsuit filed against 13 private equity firms for joint bidding practices.⁷

This article provides an economic framework for evaluating whether consortium bidding by private equity firms is pro- or anticompetitive. In addition, this article proposes some empirical strategies to disentangle competitively neutral bidding practices from anticompetitive bidding practices when there is no "smoking gun." Outside counsel advising private equity firms on the competitive effects of consortia bidding practices under a rule of reason analysis will find these empirical analyses helpful in distinguishing between bidding practices that are competitively neutral and bidding practices that are potentially anticompetitive.

The Competitive Concern: Fewer Bidders Lead to Lower Prices

Private equity firms bid to purchase a Target Company in an auction setting.⁸ The competitive concern in this setting is one of monopsony power: the potential for bidders to depress the price paid for the Target Company to a level that is below the competitive price.⁹ These auctions can take a variety of forms, but are best described as either a first-price sealed bid auction or an ascending bid auction.¹⁰ In a first-price sealed bid auction, each bidder independently values the Target Company, chooses a bid price, and then offers to buy that Target Company at the price it bids. After the auction closes, the sealed bids are opened and the winner is the highest bidder. The winning bid price is equal to that firm's bid. In an ascending bid auction, bidders successively raise their bid prices. The winning bidder is the last bidder that remains, once no higher bids are received, and the winning price is that firm's bid. Unlike a sealed bid auction, in an ascending bid auction each bidder can observe and respond to its rivals' bids during the auction.¹¹

Assuming all private equity firms are able to bid individually, bidding by a consortium of those firms reduces the number of entities available to submit a bid. With fewer bidders, some economic models predict the auction will result in lower prices paid, on average, for the Target Company.¹² The intuition for the softening of competition is straightforward. The more bidders there are, the

⁶ Dennis K. Berman & Henny Sender, *Private-Equity Firms Face Anticompetitive Probe*, WALL ST. J., Oct. 10, 2006, at A3.

⁷ *Murphy v. Kohlberg Kravis Roberts & Co. et al.*, No. 06-cv-13210 (S.D.N.Y. filed Nov. 15, 2006).

⁸ A Target Company may also be acquired through bilateral negotiations (called "negotiated" deals) between a buyer and the Target Company. These agreements may contain provisions (called a "go shop" provision) that permit the Target Company to shop for a better offer during a specified period of time after the agreement is in place. If a more attractive offer is obtained from another firm, counteroffers may result, thus approximating rounds of bidding. If another offer is accepted, a break-up fee to the initial buyer is typically required. As an example, the Maytag Corporation reached a buyout agreement with a consortium of private equity firms and then shopped itself around, ultimately accepting a higher offer from the Whirlpool Corporation. See, e.g., Brenon Daly, *Maytag Could Draw Higher Bids*, DAILY DEAL, May 20, 2005.

⁹ For a discussion of monopsony power, see U.S. Dep't of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (1992 revised 1997), available at <http://www.ftc.gov/bc/docs/horizmer.htm>.

¹⁰ For two useful introductions to the economics of auctions, see R. Preston McAfee & John McMillan, *Auctions and Bidding*, 25 J. ECON. LIT. 699 (June 1987); Paul Milgrom, *Auctions and Bidding: A Primer*, 3 J. ECON. PERSP., Summer 1989, at 3.

¹¹ Bid prices for Target Companies are not always readily observable in each round of bidding. In many cases, the seller's investment bank running the auction may only indicate to the bidders that they need to bid higher in the subsequent round if they want to win the auction without revealing the identity of the other bidders or other bid prices. Public trade press reports may provide some contemporaneous information on rivals' bids. And a seller's investment bank may have some discretion over the dissemination of information related to the identity of rival bidders and rival bid prices.

higher (on average) the highest valuations of the Target Company will be and thus the higher (on average) the highest price bid.

Competitive concerns surrounding joint bidding is nothing new. For example, during the early 1970s, joint bids for federal outer-continental shelf (OCS) oil lease tracts by two or more of the largest oil companies were becoming increasingly common. Policy makers at the U.S. Department of Interior and in Congress expressed concern that joint bidding was an attempt by oil companies to diminish the number of bidders in the OCS auctions in order to lower bid prices. As a result of this concern, regulations were adopted in 1975 that prohibited certain oil companies from submitting joint bids for OCS leases.¹³

The Competitive Concern Breaks Down: The Wrong Counterfactual

... without consortia of private equity firms, there may be fewer bidders participating in auctions for these companies, potentially resulting in significantly lower bids.

Any argument that starts with the premise that a bidding consortium reduces the number of bidders available to bid is predicated on an assumption that the consortium members would bid individually absent the consortium. For large buyout deals, however, this counterfactual is likely to be wrong. Most private equity firms do not have funds large enough to permit them to submit a bid individually for very large Target Companies. While there are estimated to be 2,700 private equity firms, only about ten private equity firms, such as Blackstone Group, The Carlyle Group, Thomas H. Lee Partners, KKR, and Texas Pacific Group, are estimated to have funds at or above \$8 billion, with the largest fund rumored to be between \$16–20 billion.¹⁴ For this reason, no single private equity firm is able (at this time) to bid individually for very large companies. As a result, without consortia of private equity firms, there may be fewer bidders participating in auctions for these companies, potentially resulting in significantly lower bids.

A related reason why consortium bidding may increase rather than decrease bid prices is that consortium bidding allows private equity firms to limit their exposure to risk. Even very large private equity firms with funds in excess of the valuation of the Target Company may limit the amount of equity the fund can put into any one investment.¹⁵ For example, an \$8 billion fund may be limited to investing substantially less than \$8 billion in any one investment. Consortium bidding allows private equity firms to bid on transactions that they would otherwise not bid on due to concerns about their investment portfolio being too heavily concentrated in a single investment. By allowing private equity firms to diversify, consortium bidding results in more bids being submitted for large Target Companies.

While it may seem possible for a large number of private equity firms to come together to form a consortium to buy a Target Company, coordination costs limit that possibility. For a Target Company with an estimated value of \$10 billion, a consortium of 10 private equity firms each with \$1 billion funds available would seem to be equally as viable as a consortium of 100 private equi-

¹² For additional discussion, see McAfee & McMillan, *supra* note 10.

¹³ For a more detailed discussion of OCS bidding behavior, see Kenneth Hendricks & Robert H. Porter, *Joint Bidding in Federal OCS Auctions*, 82 AM. ECON. REV.: PAPERS & PROCEEDINGS 506 (1992). Hendricks and Porter argue their empirical results are consistent with consortium bidding reducing bid prices for OCS leases. However, others have argued empirical results are consistent with consortium bidding increasing bid prices for OCS leases. See C.E. Moody, Jr. & W.J. Kravant, *Joint Bidding, Entry, and the Price of OCS Leases*, 29 RAND J. ECON. 276 (1988).

¹⁴ See *supra* note 2.

¹⁵ Similarly, it is common for financial intermediaries to limit risk by setting a limit on the maximum amount of loans made to a single borrower, single industry and/or single geographic region. For additional discussion of this point, see ANTHONY SAUNDERS & MARCIA MILLON CORNETT, *FINANCIAL INSTITUTIONS MANAGEMENT: A RISK MANAGEMENT APPROACH* 342 (5th ed. 2006).

ty firms each with \$100 million funds available and equally as viable as two private equity firms each with \$5 billion funds available.¹⁶ However, there are substantial costs associated with coordination among a large number of private equity firms that deter a consortium structure with many members. These coordination costs include reaching agreement on management strategy, on governance structure such as voting rights and board seats, and on the exit strategy. As a result, for the largest of these Target Companies, coordination costs likely would limit the number of participants in consortia and thus the number of possible consortia available to bid.

Finally, it is important to keep in mind that the universe of bidders for a Target Company is often not limited to private equity firms bidding individually or as part of a consortium. Strategic bidders, such as horizontal competitors as well as firms that operate upstream or downstream from the Target Company, also bid to purchase Target Companies. For example, during late 2004 and early 2005, Hollywood Entertainment Corporation, a video rental retailer, entertained bids from at least three firms, including one private equity firm, Leonard Green & Partners LP, and two strategic players that are also video rental retailers, Blockbuster Inc. and Movie Gallery Inc.¹⁷

Information Pooling Provides Additional Benefits

An additional reason consortium bidding may increase rather than decrease bid prices is that consortium bidding allows private equity firms to pool information. In the economics literature on auctions, the information that bidders have about the value of the object being bid on comes in two general forms: the private value model and the common value model.¹⁸

In the private value model, the object up for bid has a different value to each bidder with each bidder knowing its own valuation but not the valuation of the other bidders. In the common value model, the object up for bid has the same value to each bidder and no bidder knows the true value of the object. Each bidder has its own estimate of the value of the object and these individual estimates are not known to the other bidders.

The private equity buyout context contains an element of both the private value model and the common value model. Some bidders may value the Target Company more than other bidders because they have identified, based on their individual expertise, ways in which to enhance the value of the Target Company that other bidders do not see because they lack that expertise. This corresponds to the private value model. On the other hand, some components of the Target Company may have the same value to each bidder, such as the current stock of inventory or future industry demand conditions. This corresponds to the common value model.

In the common value model, there is uncertainty about the true value of the object up for bid. Since bidders are uncertain about the true value, each bidder must form its own independent estimate of the value of the Target Company. Since it is difficult to value a Target Company, some bidders will have analyses that overestimate the true value while other bidders will have analyses that underestimate the true value.¹⁹ Those firms that estimate a high valuation are likely to bid high, resulting in a winning bidder that is likely to be a bidder that overestimated the true value of the Target Company. Therefore, the bidder that bids the highest, thereby winning the Target Company,

¹⁶ This illustration is a slight simplification as private equity firms typically purchase the Target Company with a combination of equity and debt. As a result, \$10 billion in equity from one or more funds is not typically required in order to purchase a Target Company at a price of \$10 billion.

¹⁷ See Ron Orol, *Blockbuster to Launch Hollywood Bid*, DAILY DEAL, Dec. 29, 2004.

¹⁸ For additional exposition on these models as well as variations on them, see *supra* note 10.

¹⁹ The true value of the object is assumed to equal the mean of the bidders' valuations.

will know it overpaid. The winner's ex post regret on having won is called the "winner's curse" because winning indicates to the bidder that its price bid was too high.²⁰ Anticipating that they may suffer from the winner's curse, bidders reduce their bid prices.

Learning other bidders' valuations limits the winner's curse because it provides additional information about the true value of the object up for auction. By having a second opinion, the likelihood that the winning bidder's bid will be substantially above the true valuation is reduced. For example, suppose a bidder's independent analysis estimates a high valuation of the Target Company. At this point, the bidder is unsure whether its valuation is high because the value of the Target Company is truly high or because its analysis overestimated the true value of the Target Company. Without additional information, the bidder may reduce its bid in an attempt to mitigate the possibility of overpaying. Now suppose the bidder gets a second opinion, say by learning another bidder's independent estimate of the Target Company's true valuation. If that other bidder's independent valuation is also high, then it is less likely that the initial bidder's high valuation is due to an erroneous analysis and, as a result, that bidder is less likely to reduce its bid to mitigate overpaying. As there is a common value component to the value of a Target Company, learning another private equity bidder's valuation provides useful information about the true value of the Target Company and, all else equal, results in higher bids on average.²¹

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Repeated Games Allow for Signaling and Punishment Threats

While there are good reasons why a bidding consortium may result in higher not lower bid prices, in a repeated game, there are additional factors to take into account. These additional factors may lead to lower prices paid for the item being auctioned.

Competition may be softened when the same bidders compete against one another in multiple auctions over time.²² Competition can be softened, or even eliminated, through explicit agreements on which bidder will win the auction. Competition also can be softened through implicit understandings among bidders on their bidding practices.

In a repeated game, if players are able to observe rival players' past actions, players may be able to signal their intent to rival players. The signal may come as an expression of interest in winning a certain auction. The signal may also come as a threat to punish certain rival bidders after observing their past actions. The ability to signal and threaten punishment may result in lower prices paid for the object up for auction if the rival players find it in their unilateral best interest to soften their bidding strategy based on the observed signal.

One does not need to look too hard to find examples of signaling and threats in repeated auctions. For example, during the Federal Communication Commission wireless spectrum auctions held during the mid-1990s, bidders were alleged to have signaled information to other bidders. By embedding three digits at the end of their bid amount, bidders were able to signal to rival bidders which licenses they wanted to purchase and signal which of their bids were submitted in

²⁰ For more on the winner's curse, see *supra* note 10.

²¹ See Vlad Mares & Mikhael Shor, *Industry Concentration in Common Value Auctions: Theory and Evidence* (Working paper 2006), available at <http://ssrn.com/abstract=901067>. The authors find that information pooling leads to higher bid prices, on average. Using experiments, the authors also find that the effect of the reduction in the number of bidders outweighs the effect of information pooling resulting, on average, in lower bid prices.

²² For additional discussion, see *supra* note 10.

retaliation for continued aggressive bidding by rival bidders.²³ To disrupt this practice, subsequent FCC spectrum auctions introduced rule changes that limited the increments in which bidders could bid. The DOJ also pursued antitrust complaints against certain bidders.²⁴

While the precise structure of auctions for Target Companies differs from those held for wireless spectrum,²⁵ these auctions have the flavor of a repeated game in that some private equity firms face each other time and time again in auctions for different Target Companies. For example, Blackstone Group and Texas Pacific Group were both part of the winning bidding consortia in the auction for SunGard in 2005 and in the auction for Freescale Semiconductor in 2006.²⁶ Similarly, KKR, Bain Capital, and Silver Lake were all part of the bidding consortium that won the auction for SunGard in 2005 and a different consortium that lost the auction for Freescale Semiconductor in 2006.²⁷ In addition, all five of these private equity firms bid jointly (and won) the auction for SunGard but were members of different consortia bidding against one another in the Freescale Semiconductor auction.

As the FCC spectrum auctions demonstrate, a bidding consortium is not necessary in order for firms to signal and/or to threaten punishment. However, the presence of bidding consortia in a repeated game is likely to heighten concern that bidders will be able to signal information effectively to one another due to the information exchange inherent in the formation of such consortia.

In forming a bidding consortium, the private equity firms contemplating the consortium typically discuss the terms of the joint bid including bid price, governance provisions, and exit strategy. In communicating this type of information to one another, private equity firms may reveal, intentionally or unintentionally, their strategy with respect to other companies that are expected to come on the block in the future. Further, through these types of communications, private equity firms may be able to send signals that have the potential to soften competition in future auctions, such as “if you don’t bid on my deal, I won’t bid on yours” or “if you drop out of certain auctions, I’ll compensate you by allowing you to take an interest in the Target Company after I win.”

Empirical Strategies

It can be difficult to distinguish anticompetitive bidding behavior from competitively neutral bidding behavior without a smoking gun. For example, observing that a private equity firm dropped out of an auction is consistent with multiple hypotheses, some competitively neutral and some potentially anticompetitive. A private equity firm may not bid in an auction for a particular Target Company for a wide range of reasons, including (1) the magnitude of the expected (or observed) bids exceeds that private equity firm’s valuation of the Target Company; (2) the private equity firm

²³ Bids for wireless spectrum licenses were often above \$1,000,000. Rather than bidding in whole numbers, bidders were alleged to have used the last three digits to send a signal. For example, the 483 in a hypothetical bid of \$1,000,483 corresponds to the letters GTE on a telephone keypad. For additional discussion, see Peter Crampton & Jesse Schwartz, *Collusive Bidding: Lessons from the FCC Spectrum Auctions*, 17 J. REG. ECON. 229 (2000); Peter Crampton & Jesse Schwartz, *Collusive Bidding in the FCC Spectrum Auctions*, 1 CONTRIB. TO ECON. ANAL. AND POL’Y 11 (2002).

²⁴ See, e.g., Competitive Impact Statements for the DOJ’s Final Judgment entered into with Omnipoint Corp., available at <http://www.usdoj.gov/atr/cases/f2000/2066.htm>, and with Mercury PCS II, L.L.C., available at <http://www.usdoj.gov/atr/cases/f2000/2063.htm>.

²⁵ One difference is that unlike the auction for a Target Company, the wireless spectrum auctions had many different licenses auctioned off simultaneously.

²⁶ See *supra* notes 3 & 5.

²⁷ See *id.*; Henny Sender & Don Clark, *Freescale Agrees to Blackstone Offer of \$17.6 Billion*, WALL ST. J., Sept. 16, 2006, at A3.

identified another potential investment that it estimates has a higher risk-adjusted expected return than the Target Company; or (3) the private equity firm communicated with the members of a previous consortium that if it failed to bid on this particular Target Company, the other consortium members would not bid on a different Target Company in the future. Only the third scenario would raise antitrust concerns.

Using bid data, economists can provide helpful empirical analyses to assist in distinguishing between bidding practices that are competitively neutral and bidding practices that are anti-competitive. Outside counsel advising private equity firms should consider retaining an economist to assess the effect of bidding practices using historical bid data as these strategies are likely to be employed by economists at an enforcement agency. As well, these empirical analyses can help private equity firms' outside counsel evaluate the ultimate likelihood of success of class action litigation against various private equity firms.

*Using bid data,
economists can provide*

The following are some of the key considerations that must be addressed in a quantitative analysis that assesses the competitive effect of consortium bidding behavior:

*helpful empirical
analyses to assist in
distinguishing between
bidding practices that
are competitively
neutral and . . .
anticompetitive.*

- **Account for the Relevant Factors that Affect Bid Prices.** Any econometric estimate of the relationship between the number of distinct bidders and the winning bid price needs to control for the relevant characteristics of the Target Company as well as demand and cost factors that affect bid prices. Failure to do so may lead to omitted variable bias and the potential for misleading interpretations of the coefficient estimates. Indeed, a simple regression of the winning bid price on whether a bidding consortium is present or not is likely to show that bid prices are higher in the presence of a bidding consortium compared to bid prices when no bidding consortium is present because bidding consortia are more often observed in auctions for large Target Companies for the reasons discussed above (e.g., fund size constraints and diversification requirements).
- **Identify a Competitive Benchmark.** To assess whether bid data are more consistent with competition than with collusion, one needs to specify a competitive regime (the control group) to which one can compare the bid patterns during the regime of possible coordination (the test group). The appropriate competitive regime may be the behavior of the same set of firms in a particular time period before or after the time period of the test regime. On the other hand, the appropriate competitive regime may be a different set of firms within the same time period as the test regime.
- **Specify How the Coordination Scheme Works.** To assess whether bid data are more consistent with competition than with collusion, the alleged method by which competition is softened must be specified. For example, is the mechanism one of forgone bids: Do consortium members agree not to bid against one another when one consortium member bids individually for a Target Company? On the other hand, is the mechanism one of false bids: When one consortium member bids individually on a Target Company, do the other consortium members agree to submit false bids to simulate the appearance of competition?
- **Rule out Alternate Hypotheses.** Any attempt to assess empirically whether consortium bidding results in lower bid prices must be able to rule out alternate explanations for the observed bidding patterns. For example, economic data can be used to assess whether the opportunity cost of tying up funds in a particular investment exceeds the firm's valuation of a Target Company.

Conclusion

Absent a smoking gun identifying explicit coordination, it can be difficult to distinguish between those bidding practices that result in competitively neutral outcomes from those that result in anti-competitive outcomes. It can also be difficult to determine with certainty the number of bidders that are necessary to obtain a competitive outcome. As discussed above, under a rule of reason analysis, there are numerous reasons why bidding consortia may have no effect on competition and may in fact lead to more aggressive bidding for companies on the auction block. ●

Three Years After *Verizon v. Trinko*: Broad Dissatisfaction with the Whole Thrust of Refusal to Deal Law

Robert A. Skitol

When the Supreme Court granted certiorari in *Verizon Communications v. Law Offices of Curtis V. Trinko* in 2003,¹ many observers naturally assumed the Court would thereupon clarify and narrow the circumstances under which a dominant firm's refusal to deal with a competitor could violate Section 2 of the Sherman Act. Yet, in the immediate wake of the Court's 2004 opinion,² I suggested in this publication that the result generated more questions than answers and would likely expand opportunities for mischievous litigation in this area.³ Today, after more than three years of experience with lower courts' applications of the Court's ruling, *Trinko* has proven to be among the least satisfactory antitrust opinions of the Supreme Court in the past three decades. It has unsettled more than it has settled; made the law less rather than more predictable; and exacerbated more than resolved the most contentious controversies in monopolization and attempted monopolization cases.

Decision in a Nutshell

Trinko was a consumer class action on behalf of New York City customers of AT&T in its capacity as a new-entrant local phone service provider competing with Verizon, the incumbent monopoly local service provider. Plaintiffs claimed that Verizon refused to provide AT&T with access to its systems and support operations in a reasonable manner, thereby impairing AT&T's ability to provide competitive services. They challenged this refusal as both a violation of Verizon's regulatory obligations under the Telecommunications Act of 1996 and exclusionary conduct in violation of Section 2 of the Sherman Act. Verizon moved to dismiss the Telecom Act claim on the ground that plaintiffs lacked standing to sue under that statute and that violations of it were subject to regulatory remedies; Verizon moved to dismiss the Sherman Act claim on the ground that a mere failure to meet Telecom Act obligations to cooperate with competitors did not constitute the "willful acquisition or maintenance" of monopoly power necessary for a Section 2 violation. On those grounds, the district court dismissed both claims.

The Second Circuit affirmed the dismissal of the Telecom Act claim, but reversed the dismissal of the Sherman Act claim, remanding for further proceedings. The latter ruling rested on the determination that the allegations could establish Section 2 liability under either the essential facilities doctrine or the monopoly leveraging doctrine. The Supreme Court then reversed that holding, thereby bringing the case to an end.

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¹ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 538 U.S. 905 (2003) (granting certiorari).

² *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

³ Robert Skitol, *Correct Answers to Large Questions About Verizon v. Trinko*, ANTITRUST SOURCE, May 2004, at 1, at <http://www.abanet.org/antitrust/at-source/04/05/skitol.pdf>.

Justice Scalia, writing for a six-Justice majority, explained that the Telecom Act neither foreclosed nor created new antitrust liabilities in light of the Act's savings clause to the effect that nothing therein "shall be construed to modify, impair, or supersede the applicability of any of the antitrust laws."⁴ He then turned to the question whether Verizon's alleged refusal to cooperate with its competitor (in the manner prescribed by the Telecom Act) "violate[d] preexisting antitrust standards."⁵ The starting point on that issue was a sweeping restatement of the *Colgate* holding that the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to the parties with whom he will deal."⁶ Justice Scalia acknowledged that this right is not unqualified but emphasized that "[w]e have been very cautious in recognizing" exceptions.⁷

The dispositive

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to the Trinko Court

was that Aspen's

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to achieve an anti-

competitive end. . . ."

Justice Scalia then discussed and distinguished at some length the Court's 1985 decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,⁸ a recognized exception involving termination of a voluntary and "presumably profitable" course of dealing that made it a case "at or near the outer boundary of § 2 liability."⁹ *Aspen* concerned a ski area consisting of four mountains. Aspen Skiing, the owner of three of them, discontinued a longstanding cooperative arrangement with plaintiff Highlands, owner of the fourth mountain, under which both firms offered a joint multi-day all-area ski ticket. Aspen Skiing thereafter refused even to allow plaintiff to purchase tickets for skiing on defendant's mountains at the retail price. The *Aspen* Court upheld a jury verdict for plaintiff, concluding that Aspen Skiing "elected to forgo" short-run benefits "because it was more interested in reducing competition . . . over the long run by harming its smaller competitor."¹⁰ By contrast, in *Trinko*, Verizon never voluntarily assisted its rivals and would not have done so absent the compulsion of the Telecom Act. The dispositive difference to the *Trinko* Court was that Aspen's conduct "suggested a willingness to forsake short-term profits to achieve an anticompetitive end"¹¹ while no such factor was present in the Verizon situation.

Justice Scalia also discussed and distinguished an earlier major refusal to deal precedent in which the Court upheld liability, *Otter Tail Power Co. v. United States*.¹² There the defendant refused to transmit a rival's electric power over the defendant's transmission lines to enable the rival to compete with the defendant in the sale of power to various municipalities. The key distinction, according to the *Trinko* Court, was that Otter Tail "was already in the business of providing a service to certain customers (power transmission over its network), and refused to provide the same service to certain other customers."¹³ By contrast, in *Trinko*, "the services allegedly withheld [by Verizon] are not otherwise marketed or available to the public."¹⁴

⁴ *Trinko*, 540 U.S. at 406 (discussing 47 U.S.C. § 152).

⁵ *Id.* at 407.

⁶ *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

⁷ *Trinko*, 540 U.S. at 408.

⁸ 472 U.S. 585 (1985).

⁹ *Trinko*, 540 U.S. at 409.

¹⁰ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985).

¹¹ *Trinko*, 540 U.S. at 409.

¹² 410 U.S. 366 (1973).

¹³ *Trinko*, 540 U.S. at 410.

¹⁴ *Id.*

On those grounds, the Court held that “Verizon’s alleged insufficient assistance in the provision of service to rivals is not a recognized antitrust claim”¹⁵ And this conclusion, the Court continued, “would be unchanged even if we considered to be established law the ‘essential facilities’ doctrine crafted by some lower courts”¹⁶ As the Court explained, the “indispensable requirement” under that doctrine is unavailability of access to an essential facility, an element missing in this situation in light of the Telecom Act’s imposition of access obligations.¹⁷

The Court explained why it did not believe traditional antitrust principles justified “adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors.”¹⁸ The Court emphasized the presence of a “regulatory structure designed to deter and remedy anticompetitive harm,” leading to a judgment that the “slight benefits” of antitrust intervention are outweighed by the costs and risks of any court’s attempted enforcement of “detailed sharing obligations.”¹⁹ In a footnote on that point, the Court then disposed of the Second Circuit’s suggestion that plaintiffs could rely on a monopoly leveraging theory: “To the extent the Court of Appeals dispensed with a requirement that there be a ‘dangerous probability of success’ in monopolizing a second market, it erred.”²⁰

My Earlier Commentary

My initial effort at analysis of the opinion, only four months after its issuance, highlighted three new questions from it. First, I asked whether short-term profit sacrifice would now be the definitive test for when a refusal to deal can be the basis for a Section 2 claim. My answer was yes and no. On the one hand, Justice Scalia did sharply distinguish between liability in *Aspen* and non-liability in *Trinko* on the ground that profit sacrifice was present in the former but not in the latter situation. And he provided several reasons why, absent that factor, it would be a bad idea to make a monopolist’s refusal to share or cooperate with rivals an antitrust offense: lessening investment incentives, requiring courts to act as central planners, facilitating collusion. On the other hand, profit sacrifice is both underinclusive and overinclusive as a standard of general applicability. In some circumstances, a refusal to deal without any profit sacrifice can bring about exclusionary effects without any efficiency justification; in other circumstances, a refusal to deal entailing some profit sacrifice could be justified by legitimate business reasons.²¹

Second, I asked whether the Court had now newly elevated motive or intent as a central element in Section 2 law in contrast to lower courts’ recent preference for a focus on effects in Section 2 cases. Again, my answer was yes and no. On the one hand, the Court did emphasize motive/intent differences between *Aspen* and *Trinko*. A related message from the *Trinko* opinion seemed

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 411.

¹⁸ *Id.*

¹⁹ *Id.* at 414–15.

²⁰ *Id.* at 415 n.4 (citing *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459 (1993)). There was no dissenting opinion. Justice Stevens, joined by Justices Souter and Thomas, wrote separately to concur in the judgment on the ground that the complaint should have been dismissed for plaintiffs’ lack of standing, without reaching the merits of the allegations. In their view, the plaintiffs’ alleged injury was “purely derivative” of the alleged injury to AT&T, precluding standing under *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519 (1983).

²¹ Skitol, *supra* note 3, at 3–4.

to be that discontinuance of an existing relationship would now be considerably more vulnerable to a Section 2 claim than a refusal to initiate a relationship of any kind: an inference of anticompetitive animus is plausible in the former but not in the latter. On the other hand, it seemed inconceivable that Justice Scalia and his colleagues meant to diminish the fundamental place of effects evidence in Section 2 cases. Thus, the more likely message might be that the Court had now made proof of bad intent an additional significant burden on plaintiffs rather than diminishing the longstanding significant burden of proving anticompetitive effect.²²

Third, I asked whether the essential facilities and monopoly leveraging doctrines would remain viable grounds for Section 2 claims. This time I answered no and yes. On the one hand, the Court was not subtle about its disdain for both doctrines. While expressly declining either to recognize or to repudiate the essential facilities doctrine, the Court cited approvingly to Professor Areeda's slashing attack on it. The monopoly leveraging doctrine was given short shrift: "leveraging presupposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected."²³ On the other hand, more robust versions of both doctrines survive and can be grounds for future Section 2 cases consistent with the thrust of Justice Scalia's opinion. His reason for rejecting the essential facilities argument on the *Trinko* facts, for example, was that a necessary element—unavailability of access to essential facilities—was not met since the applicable telecom regulatory regime ensured that access. In markets without that regulatory protection, a monopolist's denial of rivals' access to resources necessary for competition could still be a sound basis for Section 2 liability.²⁴

[D]iscontinuance of an existing relationship would now be considerably more vulnerable to a Section 2 claim than a refusal to initiate a relationship of any kind

Other Early Commentaries on *Trinko*

Subsequent to my publication, many other members of the antitrust bar and academia published more thorough analyses of *Trinko* and its implications. Most of these articles reflected far more certainty than mine about *Trinko*'s impact on refusal to deal law; but they also revealed sharp disagreements over the direction and extent of that impact.²⁵

Thus, for example, one author dismissed *Trinko*'s importance as little more than "a restatement of the status quo *ante* of monopolization doctrine" and as announcing no "substantive change in Section 2 doctrine."²⁶ Another author opined that *Trinko* "planted the seed for a complete overhaul" of duty-to-deal law and predicted that "there will be few, if any, exceptions to the principle that a firm, even a monopolist, has absolutely no duty to sell to or cooperate with a potential competitor."²⁷ A third author argued that *Trinko* altered the law of *Aspen* in a "devious" manner, opening "wide the door to argument in every Section 2 case that the starting point is skepticism about

²² *Id.* at 4–5.

²³ *Trinko*, 540 U.S. at 415 n.4.

²⁴ Skitol, *supra* note 3, at 5–6.

²⁵ See, e.g., Jonathan Rubin, *The Truth About Trinko*, 50 ANTITRUST BULL. 725 (2005); George Hay, *Trinko: Going All the Way*, 50 ANTITRUST BULL. 527 (2005); John Thorne, *A Categorical Rule Limiting Section 2 of the Sherman Act: Verizon v. Trinko*, 72 U. CHI. L. REV. 289 (2005); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. CHI. L. REV. 147 (2005); Marina Lao, *Aspen Skiing and Trinko: Antitrust Intent and Sacrifice*, 73 ANTITRUST L.J. 171 (2005); Eleanor Fox, *Is There Life in Aspen After Trinko? The Silent Revolution of Section 2 of the Sherman Act*, 73 ANTITRUST L.J. 153 (2005); John Lopatka & William Page, *Bargaining and Monopolization: In Search of the Boundary of Section 2 Liability Between Aspen and Trinko*, 73 ANTITRUST L.J. 114 (2005).

²⁶ Rubin, *supra* note 25, at 725.

²⁷ Hay, *supra* note 25, at 528, 547.

Section 2 based on fear that courts will condemn ambiguous conduct that is in fact efficient.”²⁸ None of these many thoughtful authors anticipated how lower court interpretations of *Trinko* would evolve or the breadth and intensity of the resulting dissatisfaction with *Trinko*'s impact.

Post-*Trinko* Case Law

Lower court opinions applying *Trinko* over the past couple of years can be seen as expanding Section 2 liability in this area, a result that could not have been what Justice Scalia intended. In a significant range of circumstances, refusal to deal claims have now become easier rather than harder to sustain as antitrust plaintiffs have learned how to use *Trinko* to defeat early dismissal motions and even to survive the summary judgment stage. *Trinko*'s analysis of *Aspen* has become an instructive roadmap for plaintiffs asserting refusal to deal claims in situations involving discontinuance of voluntary relationships.

Indeed, lower courts have read *Trinko* as allowing plaintiffs to probe for evidence that a refusal to deal reflected a deliberate decision to sacrifice short-term profits for longer term anticompetitive benefits. Particularly where a plaintiff can show prior and “presumably profitable” dealings, the courts are interpreting such evidence as indicia of anticompetitive motive. If plaintiffs are unable to allege facts of that kind, their claims may be easily dismissed.²⁹ But where plaintiffs can allege prior voluntary dealing, or other indicia of anticompetitive intent, their claims can survive and lead to intrusive discovery processes.³⁰

One Fifth Circuit panel has held *Trinko*'s key lesson to be that courts in cases of this kind should determine whether a “business’s refusal to deal is based on anticompetitive motives versus a valid business strategy.”³¹ An Eleventh Circuit panel stated that *Trinko* “effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim,” implying that that element alone may suffice to enable a plaintiff to proceed to the discovery stage.³² Indeed, according to a Colorado district court, *Trinko* supports a Section 2 essential facilities claim “focused on the monopolistic intent of the defendant” if the defendant allegedly “(1) refused to provide a product that it had in the past, despite the fact that defendant would benefit financially from the transaction, and (2) chose to thereby sacrifice short-term gains in hopes of making long term monopolistic profits.”³³ Again, particularly in cases involving discontinuance of a prior relationship, these holdings almost ensure that a plaintiff can get to a jury on conflicting evidence of subjective intent.

Trinko's impact on the interaction between antitrust law and regulatory regimes is less clear. The lower courts have issued conflicting decisions over the continued viability of “price squeeze” law

²⁸ Fox, *supra* note 25, at 169.

²⁹ See, e.g., *ASAP Paging, Inc. v. Century of San Marcos, Inc.*, 2005-1 Trade Cas. (CCH) ¶ 74,849 (5th Cir. June 24, 2005); *Covad Commc'ns Co. v. Bell South Corp.*, 374 F.3d 1044 (11th Cir. 2004) (*Covad I*); *New York Merc. Exch., Inc. v. Intercontinental Exch., Inc.*, 323 F. Supp. 2d 559 (S.D.N.Y. 2004); *Levine v. Bell South Corp.*, 302 F. Supp. 2d 1358 (S.D. Fla. 2004).

³⁰ See, e.g., *Covad Commc'ns Co. v. Bell Atlantic Corp.*, 398 F.2d 666 (D.C. Cir. 2005) (*Covad II*); *Am. Cent. E. Tex. Gas Co. v. Union Pac. Resources Group Inc.*, 2004-1 Trade Cas. (CCH) ¶ 74,271 (5th Cir. Jan. 27, 2004); *Tucker v. Apple Computer, Inc.*, No. C-06-04457-JW (N.D. Cal. Dec. 20, 2006); *A.I.B. Express, Inc. v. FEDEX Corp.*, 358 F. Supp. 2d 239 (S.D.N.Y. 2004); *Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc.*, 331 F. Supp. 2d 513 (E.D. Tex. 2004); *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 2d 1048 (D. Colo. 2004).

³¹ *Am. Cent. E. Tex. Gas Co.*, 2004-1 Trade Cas. (CCH) ¶ 74,271 at 98,227.

³² *Covad I*, 374 F.3d at 1049.

³³ *Nobody in Particular Present*, 331 F. Supp. 2d at 1113.

as it has evolved in regulatory contexts.³⁴ The conflict arises from the ease with which a vertically integrated monopolist's allegedly excessive price for a nonintegrated rival's use of its facilities can be characterized as a refusal to deal on reasonable terms that is then subjected to *Trinko*'s "motive" test. These same courts are also divided on whether the below-cost and recoupment elements of a price predation claim under *Brooke Group* should now apply to a price squeeze claim.

What About Kodak?

As noted above, the *Trinko* opinion devotes considerable effort to distinguishing away two of the Court's prior refusal to deal precedents, *Aspen* and *Otter Tail*. It is nonetheless completely silent about the Court's more recent 1992 refusal to deal pronouncements in *Image Technical Services v. Eastman Kodak Co.*,³⁵ which is clearly among the most controversial Section 2 decisions of the past 20 years. In *Kodak*, the Court declared the law to be that a monopolist's "right" to refuse to deal with a competitor "exists only if there are legitimate competitive reasons for the refusal."³⁶ The *Kodak* Court's formulation places the burden on the firm with monopoly power to justify its refusal rather than, as *Trinko* appears to prescribe, placing the burden upon the plaintiff competitor to prove an anticompetitive motive for the refusal. And the *Kodak* opinion's express rejection of three proffered justifications for the refusal to deal there at issue as sufficient grounds for granting summary judgment suggests the Court was quite serious about this burden point.³⁷

The absence of any comment upon or even passing footnote reference to *Kodak* in the *Trinko* opinion is at least curious in light of Justice Scalia's stinging dissent to the *Kodak* majority opinion. He complained, *inter alia*, about the result bringing "the sledgehammer of § 2 into play."³⁸ As his dissent predicted, *Kodak* has generated a large volume of litigation over "aftermarket" monopolization and attempted monopolization as well as tying claims, many of which have resulted in years of discovery before dismissal at the summary judgment stage. *Trinko* has not impeded the pursuit of *Kodak* aftermarket cases of this kind; unlike the *Trinko* case itself, these lawsuits have continued to survive early dismissal motions and to generate major costs for all parties involved before getting to summary judgment dispositions.³⁹

Pre-*Trinko* aftermarket case law generated a sharp conflict over the standard for determining when a refusal to share—or to continue sharing—patented parts or other intellectual property can be the basis for a Section 2 claim. The Ninth Circuit in 1997, in a later stage of the *Kodak* case, adopted a "rebuttable" presumption that a refusal to share intellectual property is supported by a valid business justification.⁴⁰ The Ninth Circuit held that this presumption was rebutted on the record there at issue by evidence of subjective "bad" intent. In an almost identical case against

³⁴ See, e.g., *Covad II*, 398 F.3d at 673–74; *Covad I*, 374 F.3d at 1050–53; *Linkline Commc'ns, Inc. v. SBC Cal., Inc.*, CV-03-5265-SVW (C.D. Cal. Apr. 4, 2005); *Linkline Commc'ns, Inc. v. SBC Cal., Inc.*, CV-03-5265-SVW (C.D. Cal. Oct. 20, 2004); *Stein v. Pac. Bell Tel. Co.*, 173 F. Supp. 2d 975 (N.D. Cal. 2004).

³⁵ 504 U.S. 451 (1992).

³⁶ *Id.* at 483 n.32.

³⁷ *Id.* at 483–85.

³⁸ *Id.* at 489.

³⁹ See, e.g., *HDC Med., Inc. v. Minntech Corp.*, 2007-1 Trade Cas. (CCH) ¶ 75,567 (8th Cir. 2007); *Harrison Aire, Inc. v. AeroStar Int'l, Inc.*, 423 F.3d 374 (3d Cir. 2005).

⁴⁰ *Image Tech. Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997).

Xerox in 2000, the Federal Circuit established a virtually conclusive presumption against liability for such conduct and expressly rejected the *Kodak* allowance of subjective intent evidence.⁴¹

Given the whole thrust and tone of *Trinko*, it seemed at first glance destined to accelerate resolution of the *Kodak-Xerox* divide. Instead, *Trinko* has intensified the conflict and expanded it into new directions, with fresh ammunition for both sides. *Trinko's* focus on intent or motive would seem to support the *Kodak* approach; the larger focus on investment disincentives would seem to support the *Xerox* approach. Commentators remain deeply divided over this issue.⁴² It is thus now all the more regrettable that the Department of Justice and the Solicitor General persuaded the Court to deny certiorari in *Xerox*, losing the opportunity to resolve a critical issue at the intersection between antitrust and intellectual property law in 2001.⁴³

Compelling evidence

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Conduct Hearings].

FTC-DOJ Hearings

Compelling evidence of today's virtually unanimous dissatisfaction with *Trinko* and its impact on refusal to deal law can be found in the transcript and related submissions for a panel on refusals to deal under Section 2 in joint hearings held by the FTC and Department of Justice in July 2006.⁴⁴ These materials reflect incisive perspectives from and extended dialogue among six antitrust practitioners and scholars: Bill Kolasky, Hew Pate, Bob Pitofsky, Steve Salop, Tom Walton, and Mark Whitener. There were sharp differences among them in their views on what the agencies should advocate and how refusal to deal law should ideally evolve over the years ahead. The main commonality among them was unhappiness with the post-*Trinko* state of affairs.

Thus, for example, Pitofsky and Salop were sharply critical of the *Trinko* opinion's excessive hostility to the whole idea of an antitrust duty to deal of any sort; they had harsh words for Justice Scalia's pronouncements about investment disincentives, courts acting as central planners, collusion concerns, and false positives. Their expressed preference for law development was in the direction of a more open and effects-based rule of reason analysis for this area generally. On the other hand, Pate and Whitener were sharply critical of the way *Trinko* gave new life to *Aspen* and has thereby enabled continuation of litigation over refusal to deal claims with a focus upon intent evidence. Their expressed preference for law development was in the direction of per se legality for unilateral (unconditional) refusals to deal generally, including discontinuance of prior relationships and also including refusals to share non-intellectual property as well as intellectual property assets. Pate and Whitener would thus simply overrule *Aspen*.

There was also considerable disagreement among the six panelists over the utility of *Trinko's* focus on the "profit sacrifice" element, highlighting problems with it as a Section 2 standard. The panelists also disagreed about *Trinko's* impact on Section 2 issues beyond refusals to deal, such as the appropriate treatment of exclusive dealing and of "conditional" licensing. They also debated the appropriate role (if any) for the essential facilities doctrine in the post-*Trinko* world. While Bill Kolasky provided several fresh and creative ideas for a structured middle-ground rule of rea-

⁴¹ CSU, L.L.C. v. Xerox Corp. (*In re Indep. Serv. Org. Antitrust Litig.*), 203 F.3d 1322 (Fed. Cir. 2000).

⁴² See, e.g., Herbert Hovenkamp, Mark Janis & Mark Lemley, *Unilateral Refusals to License*, 10 J. COMPETITION L. & ECON. 1 (2006); Joseph Bauer, *Refusals to Deal with Competitors by Owners of Patents and Copyrights: Reflections on the Image Technical and Xerox Decisions*, 55 DEPAUL L. REV. 1211 (2006); Michael Carrier, *Refusals to License Intellectual Property After Trinko*, 55 DEPAUL L. REV. 1119 (2006).

⁴³ See Brief for the United States as Amicus Curiae, CSU L.L.C. v. Xerox Corp., Supreme Court Dkt. 00-62 (Jan. 2001).

⁴⁴ U.S. Dept. of Justice & Federal Trade Comm'n, *Hearings on Section 2 of the Sherman Act: Single-Firm Conduct as Related to Competition*, available at <http://www.ftc.gov/opa/2006/07/section2july.htm>.

son approach to this area generally, he also captured the central problem with *any* application of Section 2 to refusals to deal that are unaccompanied by other conduct of an exclusionary nature:

There really is a more fundamental point, and that is the language and the congressional intent underlying Section 2. Section 2 is designed to prohibit affirmative conduct that is designed to gain a monopoly through improper means. And I don't think that you can use Section 2 to impose an affirmative duty on someone to share unless they have taken affirmative acts to acquire or maintain their monopoly by improper means. Simply not sharing is not an affirmative act.⁴⁵

I cannot adequately summarize here the full thrust of those presentations and exchanges that will now provide a robust record for the agencies' eventual report. Some overarching observations that the agencies might well discern from it, however, are that *Trinko* has done at least as much harm as good, the post-*Trinko* state of affairs is unsound, and some new direction is desirable.

Trinko has done at least as much harm as good, the post-Trinko state of affairs is unsound, and some new direction is desirable.

The AMC Weighs In

The prevailing state of refusal to deal law received four pages of attention in the April 2007 report and recommendations of the Antitrust Modernization Commission (AMC).⁴⁶ The AMC was appropriately diplomatic but nonetheless clear about problems with the *Trinko* legacy:

Although the Court's decision in *Trinko* provided some guidance on the factors that might suggest liability for a refusal to deal with a rival, the decision is far from definitive. Businesses need better guidance from the courts on how to avoid antitrust scrutiny for a refusal to deal with a rival.⁴⁷

As the AMC thereafter observed, the *Trinko* Court appeared to suggest that two circumstances warrant exceptions to the "no duty" rule: termination of a voluntary course of dealing and refusal to provide to a customer rival the same service provided to other customers. As its report then highlighted, however, the Court "did not explain what additional factors would be required to establish Section 2 liability in such circumstances."⁴⁸

The AMC went on to summarize three alternative approaches advanced in the course of its hearings on this subject: (a) a rule of reason test centered on a pricing benchmark; (b) a "no economic sense" or "profit sacrifice" test; and (c) "an examination of whether the conduct or pricing at issue is coercive or provides incentives."⁴⁹ The AMC declined to recommend any of them. The AMC's only conclusion on this subject was neither surprising nor particularly enlightening:

The Commission endorses the longstanding principle that, in general, firms have no duty to deal with a rival in the same market. To the extent that circumstances exist in which firms may be liable for a refusal to deal with a rival in the same market, the courts should further clarify those circumstances.⁵⁰

⁴⁵ *Id.* at 102.

⁴⁶ ANTITRUST MODERNIZATION COMM'N, REPORT & RECOMMENDATIONS (Apr. 2007), available at http://amc.gov/report_recommendation/toc.htm.

⁴⁷ *Id.* at 101.

⁴⁸ *Id.* at 102.

⁴⁹ *Id.*

⁵⁰ *Id.* at 104.

Judge Posner's Solution

We were better off 21 years ago when Judge Posner issued his opinion in *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*⁵¹ In that case, a seller of telex terminals had come to rely on help from Western Union sales personnel for leads to telex service customers. Western Union terminated the help so that it could sell more of its own terminals. The Seventh Circuit reversed a Section 2 judgment for the seller. Judge Posner explained why Section 2 liability should not rest on any distinction between an initial refusal to deal and a discontinuance of prior dealings, nor on evidence of “bad” intent. He also interpreted *Aspen* in a manner that avoids all (or most) of the mischief that *Trinko*'s less thoughtful interpretation has generated.

Judge Posner began with the proposition that “a firm with lawful monopoly power has no general duty to help its competitors” and then defined the key issue as follows: “If a monopolist does extend a helping hand, though not required to do so, and later withdraws it . . . , does he incur antitrust liability?”⁵² His “no” answer was explained as follows:

Since Western Union had no duty to encourage the entry of new firms into the equipment market, the law would be perverse if it made Western Union's encouraging gestures the fulcrum of an antitrust violation. Then no firm would dare to attempt a graceful exit from a market in which it was a major seller . . . [I]f Western Union had known that by distributing a list of rival vendors it was undertaking a journey from which there could be no turning back—a journey it could not even interrupt momentarily—it would have been foolish to have embarked.⁵³

What was described as “the most dramatic document in the case” involved a Western Union official saying “these turkeys . . . ought to be flushed.”⁵⁴ Judge Posner explained why it was entitled to no weight: “[I]f conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors (‘these turkeys’) is irrelevant.”⁵⁵ As he then observed, “that Western Union wanted to ‘flush these turkeys’ tells us nothing about the lawfulness of its conduct”; the question was “not whether Western Union withdrew the vendor list in order to make money at the expense of Olympia, which of course it did, but whether such withdrawal was an objectively anticompetitive act.”⁵⁶ And his response was that “[i]t was not, once the basic premise that monopolists are not required to help their competitors, but need only refrain from anticompetitive acts such as denial of access to essential facilities, is granted.”⁵⁷

Judge Posner's favorable reference to the essential facilities doctrine is of some interest in light of *Trinko*'s disparaging comments on it. Suffice it to say that Judge Posner appeared quite comfortable with the general idea of liability for a refusal to share an essential facility under circumstances that his own circuit prescribed in *MCI* three years earlier.⁵⁸

⁵¹ 797 F.2d 370 (7th Cir. 1986).

⁵² *Id.* at 376.

⁵³ *Id.* at 376, 378.

⁵⁴ *Id.* at 373.

⁵⁵ *Id.* at 379.

⁵⁶ *Id.*

⁵⁷ *Id.* at 380.

⁵⁸ *MCI Commc'ns Corp. v. AT&T*, 708 F.2d 1081 (7th Cir. 1983). *MCI* prescribed four elements necessary to establish liability under the essential facilities doctrine: “(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.” *Id.* at 1132–33.

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The essential facilities reference is also relevant to the way he undertook to distinguish *Aspen* at an earlier point in the opinion. While *Aspen* as presented to the Supreme Court did not rest on the essential facilities doctrine, Posner's interpretation of the *Aspen* rationale for liability rests on the same general principle: "If [*Aspen*] stands for any principle that goes beyond its unusual facts, it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where some cooperation is indispensable to effective competition."⁵⁹ And his reading of the *Aspen* opinion was supportive of that interpretation:

The joint ticket had originated at a time when there was competition among the different ski mountains at Aspen, and similar tickets were offered at other multi-mountain ski areas. . . . In other words, competition required some cooperation among competitors. *Aspen Highlands* is . . . like the essential-facility cases in that the plaintiff could not compete with the defendant without being able to offer its customers access to the defendant's larger facilities.⁶⁰

In short, under Judge Posner's analysis, neither prior dealing nor "anticompetitive" motive or intent is entitled to much, if any, weight. What matters is whether the defendant refuses to cooperate with a competitor in circumstances where that cooperation is necessary for effective competition, resulting in either threatened or actual monopolization of the market at issue.

Conclusion

Today, three years after the *Trinko* decision, most observers probably believe that the Court reached the correct result on the allegations of the complaint at issue.⁶¹ But few if any informed observers can like the proffered rationale or many aspects of the *Trinko* opinion. The overall tone of deep hostility to duties to deal generally offends those who support a more expansive scope for Section 2 in a variety of refusal to deal situations. The "reinterpretation" of *Aspen* as a precedent supporting claims involving discontinuance of prior voluntary arrangements and anything akin to a profit sacrifice motive offends those who believe refusal to deal claims should never or at least almost never survive the Rule 12(b) stage. Both factions as well as those in the middle should want to see the courts move more in the direction of the Posner analysis in *Olympia Leasing* over the years ahead. ●

⁵⁹ *Olympia Equipment Leasing*, 797 F.2d at 379.

⁶⁰ *Id.* at 377.

⁶¹ One prominent exception is Eleanor Fox who argues at some length that *Trinko* was a stronger case for Section 2 liability than *Aspen*: "the *Trinko* facts fit the *Aspen* principle better than do the *Aspen* facts" and this is because "Verizon clearly had monopoly power; it engaged in exclusionary conduct without efficiency justification; and it did so solely to impair the quality of the service provided by its competitors and, thus, to preserve its own monopoly"; in contrast, "Aspen Skiing may have lacked monopoly power; its refusal to agree to a more balanced allocation of revenues with Highlands may have been efficiency-justified as a normal exercise of contract rights, and the imposed duty to deal was a mandate for the market's only two competitors to collude on price." Fox, *supra* note 25, at 166–67.

Increasing the Bite Behind the Bark: Extradition in Antitrust Cases

J. William Rowley, D. Martin Low, and Omar K. Wakil

The long arm of enforcers in the United States and elsewhere seems set to get longer with the increased use of extradition in cartel cases. Recent trans-Atlantic developments signal that extradition, or the threat of extradition, may become more common internationally. This will have important practical and legal consequences for business people with cartel exposure and for those who advise them. Although the prospect of extradition is real and growing, the most important impact of the latest developments may be the pressure they place on international executives to submit voluntarily to the jurisdiction of U.S. authorities.

There is growing international recognition that punishing individuals is an important part of effective cartel enforcement. Australia, Canada, Ireland, Israel, Japan, Korea, the UK, and the United States have, or are in the process of adopting, laws providing for criminal sanctions against individuals. Although the United States in particular has had remarkable success prosecuting foreign corporations in international cases, extradition—the ability of enforcers to get their hands on individuals outside their jurisdictions—is playing a more important role as enforcers target individuals in the fight against international cartels.

In most common law jurisdictions, there is a strong presumption that personal criminal jurisdiction lies only over a person who is physically present within the territory of the court, regardless of whether subject-matter jurisdiction exists. While jurisdiction has historically been established through personal service of process, other techniques, such as extradition, can be used by authorities to reach non-resident individuals—and perhaps even corporations. Extradition is the process by which one nation, usually (but not always¹) by way of bilateral treaty, requests and obtains from another nation the surrender of an individual suspected or convicted of criminal wrongdoing. Extradition arrangements also exist in the form of multilateral treaties and conventions.

The number of extradition treaties in force in the world is staggering—virtually every country has multiple bilateral treaties. For example, the United States has treaties with well over 100 countries.² Canada has 50 bilateral treaties in force and is a party to 12 multilateral treaties con-

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¹ For example, apart from the United States or South Korea (the only countries with which Japan has specific extradition treaties), Japan will extradite persons other than Japanese nationals provided that the requirements of its legislation are satisfied. Toubou Hanzainin Hikiwatashi Hou [Extradition Act], Law No. 89 of 1953, as amended) article 3 item 2. Canada's Extradition Act, S.C. 1999, c. 18, which implements the London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed at Kingstown in November 2002), see *infra* note 11, designates many Commonwealth countries as extradition partners without requiring a specific bilateral treaty to exist between the two countries. This, however, does not mean there is necessarily reciprocity between the two countries, just that there is a process by which the Government of Canada can make a request for the extradition of an individual located in the foreign jurisdiction. The role of reciprocity is shown in section 23 of the scheme, which provides that nothing in the scheme shall prevent the application of the scheme with modifications by one country in relation to another country that has not brought the scheme fully into effect.

² See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, REVIEW OF THE OFFICE OF INTERNATIONAL AFFAIRS' ROLE IN THE INTERNATIONAL EXTRADITION OF FUGITIVES (Mar. 2002), available at <http://www.usdoj.gov/oig/reports/OBD/e0208/intro.htm>.

taining mutual legal assistance and extradition provisions.³ The UK also has bilateral extradition treaties with roughly 50 countries.⁴ Many EU Member States have similar numbers.

Extradition treaties usually adopt either an enumerative method or an eliminative method.⁵ A treaty that follows the enumerative, or “list,” method sets out a list of the specific crimes for which extradition will be granted. The more modern eliminative, or “no-list,” method defines extraditable offenses in terms of their penal consequences according to the laws of the two countries by a minimum standard of severity.⁶

Both methods normally observe the principle of double criminality. This “requires that an act shall not be extraditable unless it constitutes a crime according to the laws of both the requesting and the requested States.”⁷ The punishment required to create an extraditable offense is generally at least one-year imprisonment in both countries. However, this can and occasionally does vary.⁸ For example, Canada’s Extradition Act⁹ provides for extradition where the offense is punishable by imprisonment of at least two years or more in both countries, unless the relevant extradition treaty specifies otherwise. The Canada-U.S. treaty specifies that an offense will be considered extraditable if the punishment in both countries is imprisonment for a term exceeding one year.¹⁰

In the Commonwealth context, the London Scheme for Extradition Within the Commonwealth¹¹ is designed to increase cooperation in the administration of criminal justice. It provides a guideline for extradition within the Commonwealth arrangements that, among other things, simplifies provisions dealing with double criminality and includes provisions dealing with extraterritorial offenses.

Foreshadowing the approach of the English courts in the *Norris Case*, discussed further below, the scheme specifically provides that it shall not matter whether the elements of the offense differ in two countries, as an offense will be looked at in its totality. Under the scheme, extraditable

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³ See http://www.rcmp-grc.gc.ca/intpolicing/centralauth_e.htm.

⁴ UK FOREIGN & COMMONWEALTH OFFICE, BILATERAL EXTRADITION TREATIES, available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1044360289117>.

⁵ See UNITED NATIONS CRIME AND JUSTICE INFORMATION NETWORK, INTRODUCTION TO THE DATABASE ON BILATERAL AGREEMENTS ON EXTRADITION, JUDICIAL/LEGAL ASSISTANCE, CONTROL OF NARCOTIC DRUGS, AND PRISONER TRANSFER BY COUNTRY (June 1996), available at <http://www.uncjin.org/Laws/extradit/intro.pdf>.

⁶ I.A. SHEARER, EXTRADITION IN INTERNATIONAL LAW 134 (1971).

⁷ *Id.* at 137.

⁸ In Japan, “double criminality” is also required. Pursuant to article 2 items 3 and 4 of the Toubou Hanzainin Hikiwatashi Hou [Extradition Act], Japan cannot extradite an individual when the offense is not punishable by imprisonment of three years or more in either Japan or the requesting country. In other words, the offense needs to be punishable by imprisonment of three years or more in both Japan and the requesting country in order for Japan to extradite.

⁹ Extradition Act, S.C. 1999, c. 18.

¹⁰ Protocol Amending the Treaty on Extradition between the United States of America and Canada, Jan. 11, 1988, U.S.-Can., art. 1, 27 I.L.M. 422 (amending the Treaty on Extradition, Dec. 3, 1971, U.S.-Can., art. 2, 27 U.S.T. 983).

¹¹ London Scheme for Extradition within the Commonwealth (incorporating the amendments agreed at Kingstown in November 2002), formerly known as Commonwealth Scheme on the Rendition of Fugitive Offenders, adopted in 1966 and last amended in November 2002 at the Commonwealth Law Ministers’ meeting at Kingstown, St. Vincent and the Grenadines, available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B56F55E5D-1882-4421-9CC1-71634DF17331%7D_London_Scheme.pdf. Not a formal treaty, the Scheme contains guidelines to be implemented in the extradition laws and agreements of Commonwealth countries. See also *Excerpts from the Communiqué of Commonwealth Law Ministers’ Meeting held in Kingstown, St Vincent and the Grenadines*, November 2002, COMMONWEALTH LEGAL ASSISTANCE NEWS (CRIMINAL LAW SECTION OF THE COMMONWEALTH SECRETARIAT), No. 51, Feb. 2003, available at http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B0B76D2D1-D641-4E1C-A4EC-BA29CA0414F8%7D_clan%2051.pdf.

conduct as between Commonwealth countries is an offense punishable by at least two years imprisonment, although nothing in the scheme prevents Commonwealth countries from making alternative provisions.¹² So, for example, under the UK Extradition Act 2003,¹³ for Commonwealth countries, such as Canada, Australia, New Zealand, and South Africa, extraditable conduct is defined as offenses punishable by one year in prison.¹⁴

Legislation enacted in each country allows for the implementation of the scheme, without any requirement for further instruments, such as a treaty between the countries. The scheme has been implemented by legislation in most Commonwealth countries. Because much of the legislation was enacted some time ago, however, there has been some push for member countries to review their domestic laws for extradition to determine if they are sufficient to implement the scheme fully.¹⁵

The Canada-U.S. Experience: Extraditing to Canada

The Canada-United States Extradition Treaty¹⁶ allows each country to request from the other the extradition of individuals who are charged with, or have been convicted of, an offense within the jurisdiction of the requesting state. This enables each country to establish personal jurisdiction over individuals who may be found in the other country, when the two conditions standard to extradition treaties are met:

- The principle of double criminality is satisfied; that is, the conduct in question must be criminal in both countries. (It is the *conduct*, not the name of the offense, that is relevant.)¹⁷
- In addition, extradition will be granted only for offenses punishable by imprisonment of more than one year.

The current treaty adopts the “no-list” approach, but the double criminality and the minimum penalty requirements appear to be met for hard-core cartel offenses under both the Sherman Act and the Competition Act. This is certainly the view of the Canadian Competition Bureau, and there is supportive case law.¹⁸ Interestingly, although extradition has been invoked on occasion in competition cases by both Canada and the United States, matters have not yet proceeded to the stage of litigation or judicial decision in either country.

¹² *Id.* art. 23.

¹³ Extradition Act, 2003, c. 41 (Eng.).

¹⁴ *Id.* §§ 137 & 138.

¹⁵ COMMONWEALTH SECRETARIAT, REPORT OF THE COMMONWEALTH COMMITTEE ON TERRORISM (CCT): COMMONWEALTH PLAN OF ACTION (2002), available at <http://www.thecommonwealth.org/Templates/Internal.asp?NodelD=35145>.

¹⁶ Treaty on Extradition, Dec. 3, 1971, U.S.-Can., 27 U.S.T. 983 [hereinafter *Canada-United States Extradition Treaty*].

¹⁷ The concept of double criminality is captured in Article 2 of the *Canada-United States Extradition Treaty*, which provides: “Extradition shall be granted for conduct which constitutes an offense punishable by the laws of both Contracting Parties by imprisonment or other form of detention for a term exceeding one year or any greater punishment.”

¹⁸ “In cartel matters, section 45 of the *Competition Act* corresponds with section 1 of the *Sherman Act*. For the purposes of double criminality, by analogy, reference can be made to the decision in *Falconbridge* [. . .] to support the appropriateness of extradition in respect of cartel conduct.” See Denyse Mackenzie, Senior Deputy Commissioner, Criminal Matters Branch, Competition Bureau, Canada, International Cartel Enforcement: Enforcers Sans Frontières, Address Before the Insight International Competition Law Conference 21 (May 16, 2006). Although *obiter dicta*, the Ontario Court of Appeal in *Falconbridge* (a decision under the Mutual Legal Assistance Treaty (MLAT)) concluded that section 45 of the Competition Act is the substantive counterpart of section 1 of the Sherman Act. See *Canada (Commissioner of Competition) v. Falconbridge Ltd.*, [2003] O.J. No. 1563 (Ont. C.A.). This was an appeal of a judgment of the Ontario Superior Court of Justice, Docket No. 11140, Oct. 1, 2002. Leave to appeal to the Supreme Court of Canada was denied. *Canada (Commissioner of Competition) v. Falconbridge Ltd.* [2003] S.C.C.A. No. 302, File No. 29845.

Two deceptive marketing cases involving extradition to Canada are as close as the two countries have come to formal extradition in the North American competition context, although extradition *from* Canada appears to have been under consideration in the *Disposable Plastic Dinnerware* case in the United States.¹⁹

In *Thomas Liquidation*,²⁰ deceptive marketing charges under the Competition Act were brought against parties resident in the United States as a result of claims they made to Canadians.²¹ An extradition request was made on behalf of the Attorney General of Canada and an arrest warrant was issued in the United States, preparatory to the commencement of extradition proceedings. However, the American suspect waived his right to an extradition hearing and came to Canada to plead guilty to the offense. In fact, the individual did not plead in his personal capacity, but on behalf of the corporate accused.

The *Thomas Liquidation* outcome highlights several points: most notably that the threat of extradition can be used, in effect, to bring a nonresident corporate defendant within the jurisdiction of the enforcement authority. The extradition of a corporate employee does not automatically entail jurisdiction over the corporation because of the separate legal personality of the corporation.²² However, under Canadian law, the presence of a senior executive (“manager, secretary or other executive officer”) can, in the right circumstances, be sufficient to establish jurisdiction over a company when that executive is present in Canada.²³ And in a closely held corporation, the threat of extradition against one of the executives or owners may be sufficient to procure agreement on the part of the corporation itself to come in and accept responsibility.

¹⁹ In a 1995 price-fixing case, two Canadians, among the seven individual defendants who pleaded guilty and received jail sentences from 4 to 21 months, were the first foreign executives ever to agree to serve time in U.S. prisons for violations of the Sherman Act. Pursuant to an MLAT request from the United States, and through execution of domestic search warrants, simultaneous raids took place on conspirators’ offices in Montreal, by the Royal Canadian Mounted Police, and in California, Massachusetts, and Minnesota, by the FBI. While there is no public reference to possible extradition, the risk of an extradition request may have been influential in the decisions of the Canadian defendants to go to the United States to plead guilty. See Press Release, U.S. Dept’t of Justice, Antitrust Division Breaks Price Fixing Conspiracy in Disposable Plastic Dinnerware Industry (June 9, 1994), available at http://www.usdoj.gov/atr/public/press_releases/1994/211853.htm.

²⁰ Press Release, Competition Bureau, Canada, Thomas Liquidation Inc. Fined \$130,000 for One Count of Misleading Advertising Under the Competition Act (Feb. 7, 1995), available at <http://cb-bc.gc.ca/epic/internet/incbbc.nsf/vwGeneratedInterE/ct00119e.html>.

²¹ The other marketing case involves a U.S. extradition request against three Canadian citizens resident in Canada indicted in the United States for telemarketing fraud targeting American citizens. The individuals were arrested on extradition warrants in 2004 and ordered extradited. The case currently is under appeal and the individuals are in custody.

²² Lower level employees may not represent the company in a role or capacity of sufficient seniority that would enable them to be served on behalf of the corporate entity itself, as a senior management role must be shown, if an individual is to be served on behalf of a corporation. They may be formally employed by a subsidiary of the primary corporate accused. Or the individual’s employment may be terminated, prior to execution of a warrant for their extradition, if they were sufficiently senior. There is also case law indicating that, for corporate service to be effective, the officer or employee who is in Canada must be shown to be present on the business of the company. While there does not appear to be any jurisprudence under the Criminal Code dealing with circumstances in which an executive officer is present in Canada, jurisprudence under Ontario’s Rules of Civil Procedure suggest that a representative of a foreign corporation will not properly be served in Canada unless its representative is in the country to carry on the business of the corporation. See *Santa Marina Shipping Co. v. Lunham & Moore Ltd.*, [1978] 18 O.R. (2d) 315 (Ont. H.C.J.).

²³ As noted, for corporate service to be effective, the officer or employee who is in Canada must be shown to be present on the business of the company. That representative premise seems unlikely in the case of a person who has been extradited to Canada exclusively for the purpose of his or her trial, or the execution of a sentence, for a specific cartel offense. However, where key individuals are exposed to a risk of extradition, it certainly increases the pressure to resolve, by agreement, both individual and corporate criminal liability. *Thomas Liquidation* demonstrates that compelling the attendance of a corporate representative by extradition may, in some situations, be all that is really required to reach the company.

Thus, the mere risk of extradition for a cartel offense will generate significant legal and practical pressure on both the company and on its senior individuals. It may be tactically important, as the *Thomas Liquidation* case shows, for the enforcement agencies to initiate extradition to bring that pressure to bear.²⁴

The Recent UK-U.S. Experience: Extraditing to the United States

In 2003 the United States and the UK updated their extradition arrangements in the context of the fight against international terrorism, but the changes are also relevant in the fight against international cartels. The UK ratified and statutorily incorporated the terms of the new treaty into UK law through the Extradition Act 2003 the same year the treaty was negotiated. The U.S. Senate eventually ratified the treaty in September 2006, and it will likely become fully effective once signed by the President of the United States and after both governments exchange instruments of ratification.

[T]he mere risk of extradition for a cartel offense will generate significant legal and practical pressure on both the company and on its senior individuals.

Under the Extradition Act 2003, the United States is listed as a “category 2” territory with which a fast-track extradition process may be implemented. While a dual criminality requirement remains, the Act effectively broadens the list of extraditable offenses by doing away with the old system and including any offense punishable under the laws of both territories by at least one year imprisonment. In the result, most white-collar financial crimes will be caught.²⁵

Under the current treaty, the U.S. prosecutor has to outline the extraditable offense and provide information that would justify the issuance of a warrant for arrest in the UK. In other words, the *allegation* of an extraditable offense appears to be sufficient. Although UK requests for extradition from the United States still require a showing of “probable cause,” and thus the submission of some evidence, the UK authorities insist that the requirements in each country do not constitute a substantial difference in the evidentiary burden between the two countries.

The Norris Case

The most notable antitrust extradition case to date involves Ian Norris—the first foreign national indicted under the Sherman Act ever to be ordered extradited to the United States (although an appeal is pending). Norris, the former CEO of Morgan Crucible, which, with its subsidiaries, was convicted for cartel offenses in the United States and Canada,²⁶ was indicted in the United States

²⁴ For the individual, of course, arrest on an extradition warrant in one’s own place of residence is only different in degree from serving a sentence in a foreign country. The very extended proceedings involving General Augusto Pinochet in the United Kingdom may substantiate that view, even though the eventual result in that case was rejection of the extradition proceedings. *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [1999] 2 All E.R. 97. General Pinochet was under 24-hour armed guard in a rented house from October 1998 to January 2000.

²⁵ The first post-Extradition Act 2003 case that put issue of extradition for white-collar crime into the public spotlight involved a U.S. request for the extradition of three UK bankers to face charges in the United States for Enron fraud-related charges. While not a cartel case, the *NatWest Three* case illustrates the UK’s willingness to respond favorably to extradition requests from the United States under the Extradition Act 2003. The extraditions were made in the face of very considerable public protests. See *Norris v. Government of the United States of America*, [2007] All E.R. (D) 199 (Jan.), available at <http://www.bailii.org/ew/cases/EWHC/Admin/2007/71.html>.

²⁶ See Press Release, Competition Bureau, Canada, Morgan Companies Fined \$1 Million for Obstruction and Price-Fixing (July 16, 2004), available at <http://strategis.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02917e.html>; US. Dep’t of Justice Antitrust Case Filings, *United States v. Morganite, Inc. and The Morgan Crucible Company plc*, available at <http://www.usdoj.gov/atr/cases/morganite0.htm>. In Europe, however, Morgan Crucible was one of the first companies to be granted full immunity from fines. See Press Release, EUROPA, Commission Fines Five Companies in Carbon and Graphite Products Cartel, available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1651&format=HTML&aged=1&language=EN&guiLanguage=en>.

on charges of price fixing and for allegedly orchestrating a conspiracy to obstruct justice, tamper with witnesses, and corruptly persuade others to destroy documents.

The crux of the *Norris* case is whether the price-fixing and obstruction of justice offenses he is charged with in the United States are “extradition offenses” for the purposes of the Extradition Act 2003. Dual criminality is directly at issue, because the conduct in question took place before the enactment of the Enterprise Act,²⁷ which explicitly criminalized price fixing in the UK in 2002.²⁸

The Crown Prosecution Service (on behalf of the United States) has so far successfully circumvented this issue by characterizing Norris’s conduct as equivalent to a conspiracy to defraud, which was a criminal offense during the relevant period. The High Court ruled that an agreement to price-fix dishonestly comes within the scope of this common law offense. On the issue of dual criminality, the High Court did not accept Norris’s textual argument that, unlike the English concept of a conspiracy to defraud, dishonesty was not an essential element of section 1 of the Sherman Act. Extradition treaties, the High Court held, were to be given broad construction so as to enable them to serve their transnational purpose of bringing to justice those accused of serious crimes.²⁹

The High Court went on to say the abolition of the evidentiary burden³⁰ by the Extradition Act 2003 meant that it was neither sensible nor necessary to expect a requesting state to ensure exact correspondence between the legal ingredients of the two offenses. It was sufficient to compare the conduct constituting the alleged offense in the United States with the offense that would have been established, if the conduct had occurred in the UK. The important point in this case was that Norris’s conduct in the UK at the relevant time could have constituted the common law offense of conspiracy to defraud—that was all that had to be shown for the dual criminality requirement to be satisfied.

In January 2007 Norris’s High Court appeal was dismissed. In March 2007, however, two High Court judges certified several issues as important points of law that were appropriate to be heard by the House of Lords. An appeal to the House of Lords can only be made on a point of law of general public importance and where it is agreed by the High Court that the point is one which should be considered by the House of Lords. The five issues certified by the High Court for the House of Lords to consider include several key issues of general application in the context of extradition for cartel offenses. One, obviously, is whether price fixing is equivalent to a conspiracy to defraud and, if so, whether it matches the U.S. offense of price fixing and satisfies the requirements of the Extradition Act 2003. A second issue is whether obstruction of or interference with U.S. administrative, investigative or judicial authorities is an extradition offense under the Extradition Act 2003, and third, whether the passage of time is a bar to Norris’s extradition, considering the U.S. authorities have disclosed no evidence. Although the High Court judges have certified these issues as being of general public importance, and although Norris’s lawyers have

²⁷ Enterprise Act, 2002, c. 40 (Eng.).

²⁸ In the Pinochet case the House of Lords held that extradition will not be granted for offenses under foreign law that were criminalized in the UK after the conduct terminated. *Reg. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte* (No. 3), [1999] 2 All E.R. 97.

²⁹ *Norris*, *supra* note 25, ¶ 123.

³⁰ Under the new regime it is no longer necessary to put before the court evidence sufficient to justify a committal for trial or a case to answer if the conduct constituting the offense had been committed in the UK. It is enough for the requesting state to identify the conduct and for the court to consider whether it would, if proved, have constituted an offense in the UK.

stated they will appeal to the House of Lords immediately, there is no guarantee that the House of Lords will accept the case. Most observers appear to think that the key legal issue for determination, if leave to appeal is granted, will be the characterization issue, that is, whether the common law offense of conspiracy to defraud is in law equivalent to section 1 of the Sherman Act.

A Canadian precedent may be instructive on this issue, not in the context of extradition, but as an indication of the relatively easy judicial acceptance of the equivalence between a classical cartel offense and fraud. In the *Canadian Dredging* case, *R. v. McNamara (No. 1)*³¹ in 1981, 13 individuals and corporations were convicted on seven counts of conspiracy to defraud, under sections 338(1) and 423(1)(d) of the Criminal Code. The conduct in question related to dredging contracts between public authorities and the accused, where their bids were alleged to have been tendered on a collusive basis, with the low bidders including in their costs compensation to be paid to the “high bidders” or “non-bidders.” Such a bid-rigging conspiracy is indisputably one of the more common offenses under section 1 of the Sherman Act. Although bid rigging was equally clearly an offense under what is now section 4 of the Competition Act, the case was prosecuted as conspiracy to defraud, rather than bid rigging. The characterization of the offense was not considered in any of the appeal judgments, much less appealed, and, while the case ultimately went to the Supreme Court of Canada, the question at issue there was corporate criminal liability. There simply was no judicial question that the bid-rigging conspiracy might not constitute fraud. If the House of Lords does deal with the issue of characterization in the future, they may find the Canadian treatment of *McNamara* to be of interpretive help.

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The Implications of *Norris*

Norris is significant for international cartel enforcement for at least two reasons. First, it appears to open the door to extradition in other cases involving U.S. antitrust offenses that occurred prior to the entry in force of the Enterprise Act. The position of former Christie’s Chairman Sir Anthony Tennant, a resident of the UK, may be a case in point. Tennant has so-far avoided trial in the United States for his involvement in the Christie’s/Sotheby’s price-fixing case, although his counterpart at Sotheby’s, Alfred Taubman, was sentenced to a year and a day in prison, on conviction under the Sherman Act.³² The determination that dual criminality might be established using conspiracy to defraud could, in the abstract, lead to a re-evaluation of the Tennant case. As a practical matter, U.S. limitation periods will often limit the extent to which there will be extradition for old crimes, at least where the individuals have not previously been indicted in the United States.³³ Nevertheless, the threat remains.

Second, the *Norris* case may also open the door to extradition for cartel offenses from countries—at least those with a non-list approach to extradition like Commonwealth members—that have not yet criminalized price fixing for individuals but do, like the UK, have a conspiracy to

³¹ [1981] 56 C.C.C. (2d) 193, *aff’d sub nom.* *R. v. Canadian Dredge & Dock Co.*, 9 O.A.C. 321, 59 N.R. 241, [1985] 1 S.C.R. 66.

³² See Press Release, U.S. Dep’t of Justice, Former Chairmen of Sotheby’s and Christie’s Auction Houses Indicted in International Price-Fixing Conspiracy (May 2, 2001), available at <http://www.usdoj.gov/opa/pr/2001/May/199at.htm>. In addition to serving his one year and a day prison sentence, Alfred Taubman had to pay a \$7.5 million fine for his role in a scheme between Sotheby’s auction house and Christie’s to fix the price of sellers’ commissions at fine art auctions.

³³ There is no statute of limitations for cartel offences in Canada, which also investigated the Christie’s/ Sotheby’s case, so Tennant and other international cartelists will face at least potential exposure to liability in Canada for the rest of their lives.

defraud offense.³⁴ This is because the case holds that the conduct underlying section 1 of the Sherman Act is sufficient to constitute conspiracy to defraud and hence satisfies the double criminality requirement in countries where there is no criminal liability for cartel offenses, as such. If the House of Lords accepts that position, (or declines an appeal), *Norris* may become a persuasive precedent in other common law jurisdictions. Extradition for competition offenses from and between Commonwealth countries may in particular be facilitated, given the broad policy underlying the London Scheme for Extradition within the Commonwealth.

Travel Alerts in Extradition Cases

The willingness of the UK authorities to extradite for foreign cartel offenses, coupled with the increased risk that other, particularly Commonwealth, countries might follow the *Norris* precedent, brings significant new risks to traveling business people.

This risk stems partially from the invocation of Interpol “Red Notices” for assistance.³⁵ The U.S. authorities were the first to use these in antitrust cases, but Red Notices are commonplace in other criminal enforcement contexts, and other jurisdictions may well follow the lead of the United States. When a Red Notice is issued, people sought by a particular country (so called fugitives from justice) are placed on lookout lists, which are provided by Interpol to foreign enforcement authorities throughout the world. If a foreign police authority (for example, at an immigration check point) identifies a listed individual, Interpol then notifies the seeking country, which has the option either to request a provisional arrest as a matter of urgency or to make a formal extradition request. For example, a Japanese national who had been indicted in the United States in the *Nucleotides* case was arrested on a Red Notice after trying to enter India.³⁶ Although the Justice Department’s extradition efforts were ultimately unsuccessful, the Ajinomoto executive was held in custody in India for several months.

To date, what was considered as the weak link of the Red Notice system is that the ability to secure the transfer of the individual to the country that wants him or her is co-extensive with the scope of applicable extradition arrangements. Until now that principle had the effect of limiting extradition in cartel cases to a handful of countries. However, with the move to modern “no list” extradition treaties and cases like *Norris*, foreign executives will be well advised to avoid not just those jurisdictions with criminal cartel laws, but the many others that recognize conspiracy to defraud.

³⁴ Similarly, numerous jurisdictions have obstruction offences, and the case reinforces the fact that extradition may also occur not for the core cartel conduct, but for related criminal conduct if obstruction is part of the charge. On this, see B. Byrne et al., *Extending the Long Arm of United States Antitrust Law: The Ian Norris Extradition Battle*, GLOBAL COMPETITION REV., May 2006, at 13, available at http://www.cgsh.com/files/tbl_s47Details/FileUpload265/616/CGSH_Extending_the_long_arm.pdf.

³⁵ James M. Griffin, Deputy Ass’t Atty. Gen., Antitrust Division, U.S. Dep’t of Justice, *The Modern Leniency Program After Ten Years—A Summary Overview of the Antitrust Division’s Criminal Enforcement Program*, Address before the Annual Meeting of the ABA Section of Antitrust Law (Aug. 2003), available at <http://www.usdoj.gov/atr/public/speeches/201477.htm>.

³⁶ See D. Singh, *Japanese Held*, TELEGRAPH (India), Dec. 22, 2002, available at http://telegraphindia.com/1021222/asp/nation/story_1505528.asp; see also Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., U.S. Dep’t of Justice, *Charting New Waters in International Cartel Prosecutions*, Address before the Twentieth Annual National Institute of White Collar Crime of the ABA Criminal Justice Section (Mar. 2, 2006), available at <http://www.usdoj.gov/atr/public/speeches/7647.htm>.

Conclusion

As with so many enforcement efforts, the threat of extradition and the Red Notice initiative are investments in psychology.³⁷ Apart from their deterrent effect, such enforcement efforts are designed to encourage voluntary cooperation by criminal participants.

A particular practical threat of extradition and Red Notices is the restrictions they place on travel freedom. International executives value and indeed, very frequently require, the ability to travel freely. The U.S. experiences in recent years demonstrates that these individuals often prefer to admit liability and accept punishment, even imprisonment, instead of becoming geographically isolated for many years. (It is also just plain bad for business if executives are effectively excluded from meeting their foreign customers and conducting business abroad.)³⁸

Even where extradition would be difficult or potentially unavailable, the mere knowledge that one is a “person of interest” to police is liable to heighten personal anxiety. The increasingly real risk of delays at immigration or even temporary incarceration while a “hit” is investigated is, at the least, disquieting, for executives traveling on business or pleasure. Together with other elements of moral suasion, the threat of extradition is in that sense simply another element for offshore executives to consider in deciding whether they should face the music in the United States, Canada, or another of the growing number of jurisdictions that are adopting criminal cartel regimes. ●

³⁷ Another such enforcement effort is the web of Mutual Legal Assistance Treaties entered into between the United States and many of its enforcement allies.

³⁸ Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., U.S. Dep’t of Justice, When Calculating the Costs and Benefits of Applying for Corporate Amnesty, How Do You Put a Price Tag on an Individual’s Freedom?, Address before the Fifteenth Annual National Institute of White Collar Crime of the ABA Criminal Justice Section (Mar. 8, 2001), available at <http://www.usdoj.gov/atr/public/speeches/7647.htm>.

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: In this edition we offer comments on recent papers relating to network neutrality and essential facilities. Send suggestions for papers to review, or your comments, to Editors William Page at page@law.ufl.edu and John Woodbury at jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Comments and Summaries

Comment on Net Neutrality

In the last issue, Editor Patrick Thompson provided an informative overview of network neutrality on the Internet, an “it” policy topic inside the D.C. beltway that has global implications.¹ And as with any good paper, it piqued my curiosity and encouraged my search for related papers. At the outset, I will tell you that there are only a handful of papers that are of journal quality. And those that are leave something to be desired. The good news is that (almost all of) the issues raised by network neutrality advocates are familiar themes in antitrust. In my contribution to this issue's *Paper Trail*, I discuss some of that relevant literature.

As a general statement, network neutrality seems to mean that broadband users have access to all Web content without their Internet service providers “preferring” certain content in any way.² The push for net neutrality is being driven by some stylized facts: that there have been incidents in which access to sites or applications has been blocked by broadband providers, that broadband providers have considered both charging fees to application providers for “priority” access and providing content themselves that would be preferred to third-party content, and that competition among broadband providers is not sufficient to deter this kind of unfair and anticompetitive activity. In this view, absent active governmental intervention, broadband providers will have continuing incentives to engage in these activities, with substantial adverse consequences for the future of the Internet, consumers, and the public at large—application innovation and the quality of political discourse will be diminished.

¹ Patrick S. Thompson, *A Perspective on the Net Neutrality Debate*, ANTITRUST SOURCE, Feb. 2007, at <http://www.abanet.org/antitrust/at-source/07/02/Feb07-Thompson2=23f.pdf>.

² Lessig and Wu note: “Fundamentally, should the Commission care if the Internet remains a ‘neutral’ network—more precisely, one that does not favor one application (e.g., the World Wide Web), over others (e.g., mass online gaming)? Is it of any concern to the public if the Internet is biased to favor some things over others?” Letter from Professors Lawrence Lessig and Tim Wu to Marlene Dortch, Secretary, Federal Communications Commission at 22 (Aug. 22, 2003), available at http://www.timwu.org/wu_lessig_fcc.pdf. (Note that many of the net neutrality papers are available at <http://www.timwu.org/>.) In this article, Thompson notes: “Net neutrality is shorthand for allowing consumers access to the Web sites and applications offered by content providers of their choice, without the risk that content will be blocked or that consumers will be unable to access ‘non-preferred’ content at the same speeds as ‘preferred’ content.” Thompson, *supra* note 1.

Access Restrictions

The allegations of access denial to Web services and applications are potentially the most persuasive arguments for government action. One often-cited example noted by Thompson and described in greater detail in a paper by Greg Sidak³ is a matter investigated by the FCC involving Madison River, a rural telephone company and DSL provider. Madison River allegedly blocked Internet ports to deny its DSL subscribers access to a VoIP service. The allegation was that Madison blocked that service to protect its wireline telephone revenues. The dispute was resolved by a consent decree in which Madison agreed to cease engaging in that kind of activity and made a “voluntary payment” to the FCC.

As Sidak points out, the consent decree precluded an examination of the facts surrounding the dispute, including why Madison might have behaved in this way (was there a plausible efficiency reason?) or how many Madison subscribers were affected and how many VoIP services were affected. Thus, it is hard to evaluate this incident on its merits.

In any event, Sidak dilutes the persuasiveness of his own analysis of the Madison example by claiming that critics have distorted the facts of this case by, e.g., suggesting that it was an FCC action (as opposed to an action by an FCC bureau) and by characterizing the “voluntary payment” as a fine. These details can only be minutiae in the process of evaluating the need for net neutrality. He also suggests without any real explanation that because Madison was a rural telephone company, the blockage event was not necessarily predictive of what telcos and cable operators would do in more urban environments. Even if correct, why wouldn’t that mean that there may be policy concerns in rural areas?

But even if the facts of Madison were as the net neutrality advocates suggest, one observation is hardly a sound basis for a dramatic policy innovation. Tim Wu provides additional, but still spoty evidence on the scope of restrictions imposed by some broadband operators.⁴ Specifically, Wu surveys the cable and DSL terrain as it existed in 2002, identifying restrictions on the use of the service by customers. For example, 10 percent of the large cable operators surveyed prohibited attaching WiFi equipment to the cable modem, 40 percent prohibited any home networking, and all prohibited operating a server on the service. No surveyed DSL provider restricted the use of WiFi or home networking, while a third of surveyed DSL providers prohibited the use of a server in connection with the service.⁵

Although the survey continues to be cited as evidence of broadband provider use restrictions, it was undertaken at a time when there were less than 50 million broadband users, a number that has more than doubled since then.⁶ Thus, it seems to me that it is possible that these restrictions represent temporary aberrations rather than persistent conduct on the part of broadband providers as they adjust to a rapidly growing and changing market. In Sidak’s imperfect update of the survey (imperfect because of the mergers in the industry since 2002), there is now no large cable operator that prohibits the use of WiFi equipment or home networking. While cable opera-

³ J. Gregory Sidak, *A Consumer-Welfare Approach to Network Neutrality Regulation of the Internet*, 2 J. COMPETITION L. & ECON., Sept. 2006, at 60, at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=928582.

⁴ Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 143–45 (2003), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=388863.

⁵ *Id.* at 160.

⁶ Sidak, *supra* note 3, at 47.

tors still prohibit using servers on their networks, there was a slight decline (to 29 percent) in the number of DSL providers maintaining such a prohibition.⁷

One might not find it particularly surprising that (at least initially) cable operators may have been more restrictive than DSL providers in how their subscribers used the broadband service. Unlike DSL, the cable network is shared, and excessive use by some cable subscribers can cause deterioration in the quality of use by others. As the broadband “pipe” grew over time, providing more bandwidth and speed, congestion on these fronts may have become less of a concern. In any event, the Sidak survey update suggests that the apparent evidence of restrictions on the use of the broadband service was or may be a transitory phenomenon.

More generally, the issue of foreclosure is not a new one in antitrust or in the media specifically. A key argument of opponents to the AOL-Time Warner merger was that AOL would trap subscribers in a “walled garden” where they would only have access to Time Warner content. That is, AOL would make it difficult for their subscribers to access rival content on the Web. As a result, so the story goes, AOL could charge a premium to Web advertisers to reach AOL subscribers and AOL could charge a premium for any applications provided within the walled garden. In addition, Time Warner content would possess an artificial competitive advantage over other content rivals competing with Time Warner for access to other Internet users. That rival content would be harmed by the inability to attain scale economies and network effects because that content would not be able to reach the AOL subscriber base. Importantly for the net neutrality debate, the feared conduct did not, in fact, seem to materialize. Indeed, AOL has abandoned the garden altogether as it has become effectively just another Web portal like Yahoo!

Similarly, for years, the concern of the FCC has been that large cable operators would disadvantage the services of program suppliers that rivaled those affiliated with the cable operator (e.g., Time Warner cable systems refusing to carry Showtime that competed with its own HBO). There was never any systematic evidence of such conduct, although that has not stopped the FCC from continuing to express concern over such a possibility. There was similarly little evidence for a much earlier FCC concern—that in-house television series production by NBC, ABC, and CBS would anticompetitively foreclose independent series producers.

Sidak notes that one would not necessarily expect broadband providers to deny their subscribers access to Web content. Just as more and better programming increase the attractiveness of cable service to potential households—programming and cable distribution are complementary inputs for the consumer—more and better Web applications increase the attractiveness of broadband service to would-be subscribers.⁸

That's not to say that foreclosure actions in principle would not be profitable. As in the AOL allegations, it is possible that that by denying access to rival content and, thus, weakening a rival content provider, a broadband provider could increase its own market power in the content market. And there is arguably evidence generally of foreclosure risk. The entire modern history of telephony policy (at least until recently) can be roughly characterized as pursuing what now appears to be the quixotic quest of facilities-based, wireline telephony competition. Some believe that competition was frustrated at every turn by first, the old Ma Bell version of AT&T, and later, by the divested Bell Operating Companies. From restricting the ability of users to add an attachment to

⁷ *Id.* at 75.

⁸ None of this should be interpreted as suggesting that any access denial would be anticompetitive. We know, for example, the exclusivity can have a sound efficiency basis.

a phone that permitted more private conversations to degrading, delaying, or denying the provision of access to the local exchange network, the local telephone companies in this view thwarted downstream competition successfully. To be sure, if these telcos had been allowed to charge a monopoly price for their services (i.e., for “permission” to add an attachment or for local exchange access), that foreclosure may not have occurred. But attempts to constrain the prices charged by the monopoly telco to more competitive levels resulted in non-price tactics to discourage entry. (I hasten to add that Sidak has a different view, discussed in his paper.⁹)

Of course, a general economic precondition for these kinds of foreclosure concerns is the absence of alternative “pipes” for providers of Web applications. If these providers have alternative ways of reaching consumers (or consumers have alternative ways of reaching them), then any antitrust issue is moot. In his 2006 congressional testimony, Lessig notes that “[i]n most markets, an effective duopoly controls access to high speed Internet.”¹⁰ Sidak responds with a number of what I regard as weak counterarguments. For example, he notes that each geographic locale has typically two leading providers of broadband Internet service—the DSL provided by the telco and cable’s modem service. He notes that “the prevalence of these two types of technology precludes VoIP competitors [and presumably any content or application rivals] from claiming that either a DSL provider or a cable modem provider has a duty to deal because neither has a monopoly in high-speed Internet service.”¹¹ Whether or not the shares of each provider type are sufficiently high to trigger a legal duty to deal, they hardly leave one sanguine about the current state of broadband competition. As Sidak notes, 95% of broadband service is provided by DSL providers and cable modem providers. He also notes that there are numerous alternatives in the wings, including WiFi and WiMax. While these alternatives may be growing, they are still obviously nascent and may not impose significant constraint on cable and telco conduct—or at least that case has not been made.¹²

Further, Sidak notes that concentration in this industry has fallen substantially over time, from an HHI of 6500 in 1999 to about 5000 in 2005. Other things equal, some of us may be a bit reluctant to suggest that a 5000 HHI signifies a robustly competitive industry. To be sure, though, 2 is generally better than 1. But I also note that the antitrust agencies have a virtual ban on any deals that reduce the number of firms in a market from 3 to 2.

Sidak does point to some facts that he regards as supportive of broadband competition, such as the increase in broadband penetration, the increase in broadband investments, and the falling prices of broadband services. While these facts may give comfort that consumers are not being harmed relative to the opposite of all of those facts, reliance on those facts still begs the question of whether more competition would result in even more dramatic facts.

⁹ Sidak, *supra* note 3, at 28–29. I would also urge the reader to review the complementarity story (that providers want to add content that will be attractive to consumers) and the exceptions in Joseph Farrell & Philip J. Weiser, *Modularity, Vertical Integration, and Open Access Policies: Towards a Convergence of Antitrust and Regulation in the Internet Age*, 17 HARV. J.L. & TECH. 86 (2003). I generally recommend this paper as an easy way to understand the antitrust and regulatory issues involved.

¹⁰ Lawrence Lawrence, Testimony Before the Senate Committee on Commerce, Science, and Transportation 5 (Feb. 7, 2006) (citation omitted), <http://www.commerce.senate.gov/pdf/lessig-020706.pdf>.

¹¹ Sidak, *supra* note 3, at 36.

¹² Sidak also claims that with respect to VoIP in particular, dial-up access would, for some marginal consumers, be a good substitute for broadband access because VoIP “works” at dial-up speeds as well as broadband speeds. Putting aside how substantial any performance difference might be, it is not obviously plausible that a Merger Guidelines SSNIP (small but significant and non-transitory increase in the price) for VoIP over broadband services would likely lead many to either substitute dial-up service for or add dial-up service to their broadband service for a monthly dial-up fee in addition to the fee charged by the VoIP provider.

Access Tiering

Advocates of net neutrality have also expressed concerns about providers' proposals to engage in "access tiering," i.e., to charge application providers for priority delivery to consumers.¹³ Under access tiering, providers would, for a fee or for competitive advantage, deliver some applications to the consumer faster than others. Wu put it perhaps most colorfully:

[I]t's obvious that a firm like AT&T . . . can, through implicit threats of degradation, extract a kind of protection money for those with the resources to pay up. It's basically the Tony Soprano model of networking, and while it makes sense for whoever is in a position to make threats, it isn't particularly good for the nation's economy, innovation, or consumer welfare.¹⁴

One antitrust interpretation of this concern is that by allowing the broadband provider to engage in access tiering, the provider can use discriminatory prices to disadvantage rival content providers, thus resulting in downstream anticompetitive outcomes. While not as dramatic as an access denial, the anticompetitive harm in this view would be no less real.

But there also seems to be some tendency to regard access tiering as harmful even if the pricing is regarded as more or less competitive. Lessig writes that those applications that cannot or will not pay the price will be "relegated to the digital equivalent of a winding dirt road."¹⁵ In this view, the effect on innovation in the Internet—a hallmark of the growth of the World Wide Web—will be substantial: "[A]n Internet where an innovator has to ask permission (and pay potentially significant fees) before deploying a new technology threatens the Internet's golden goose of allowing innovation over an open platform."¹⁶

Sidak responds, first, that currently, packets flow through the broadband pipe more or less randomly—spam and emergency medical notifications are treated equally in terms of delivery—and in the event of congestion, some packets are just dropped. Slow delivery and dropped packets significantly degrade some services, including Internet telephony (through increased latency) and video (through a disruption in video quality or continuity). Some application providers may be prepared to pay higher fees for priority access to ensure the quality of the service offered. Where bandwidth is limited, such a pricing scheme will (as a general matter) allocate that bandwidth to its highest valued uses, an outcome that promotes rather than reduces consumer welfare. Using price to allocate a scarce resource is the underlying normative and positive *raison d'être* of a market-based system. Treating all applications "neutrally" in an unprioritized manner will harm consumers (and application providers) who place a high value on a high-quality VoIP service or video.

Second, Sidak notes that the net neutrality approach will discourage the provision of innovative applications that would benefit from prioritization and that are more highly valued than other applications (whose provision will be encouraged) that are less highly valued by consumers. Thus, while net neutrality may seemingly place all innovative efforts on a common footing with respect to Internet access, it in fact will bias innovation towards one class of applications—those that don't require priority.

¹³ Lessig Testimony, *supra* note 10, at 8–10; Thompson, *supra* note 1, at 6.

¹⁴ Tim Wu, Testimony Before the House Committee on the Judiciary Telecom & Antitrust Task Force 2 (Apr. 25, 2006) available at <http://judiciary.house.gov/media/pdfs/wu042506.pdf>.

¹⁵ Lawrence Lessig & Robert McChesney, *No Tolls on the Internet*, WASH. POST, June 8, 2006, at A-23, available at <http://www.washingtonpost.com/wp-dyn/content/article/2006/06/07/AR2006060702108.html>.

¹⁶ Robert D. Atkinson & Philip J. Weiser, *A "Third Way" on Network Neutrality*, Information Technology and Innovation Foundation 5 (May 30, 2006), <http://www.itif.org/files/netneutrality.pdf>.

Third, to the extent that the prioritization is being driven by what would otherwise be quality-degrading congestion, then those higher charges for higher priority access will serve to encourage broadband providers to invest in additional capacity, which in turn will provide a broader platform for application innovation. To the extent that prioritization is not permitted, that will discourage broadband investment and innovation.

While I regard these as quite powerful counters to the parade of horrors raised by net neutrality advocates, other Sidak arguments are less persuasive. For example, Sidak argues that in any event, there will be no absolute reduction in the “slow-lane” speed of service because the speed of broadband access has been increasing rapidly.¹⁷ Priority applications will be delivered sooner relative to other applications, but the absolute delivery speed of the non-priority applications will not fall according to Sidak.

While the general increase in the speed of service may mitigate some of the concerns of net neutrality advocates, it is not evident to me on what basis Sidak concludes that the speed in the slow lane will not fall. If a provider were to respond to congestion today by introducing priority delivery, then without any increase in capacity, it does seem that the non-priority applications would travel more slowly if the others are traveling more quickly. And even if the broadband capacity expands, it is not obvious (to me, anyway) why the default speed would necessarily stay the same, as Sidak claims. The broadband provider may be able to slow down service to some applications even as the “baseline” speed is increasing.

In addition, Sidak argues that the kind of price discrimination reflected in access tiering is an everyday phenomenon that a firm expects to adopt in anticipation of substantial sunk costs. Moreover, among other efficiency justifications, Sidak repeatedly argues that the theory of Ramsey pricing teaches that this price discrimination is welfare maximizing.

Ramsey pricing grew out of regulatory concern on how to set prices when fixed costs are substantial, so that incremental or marginal costs are significantly less than average total cost. Thus, the price = marginal cost outcome that is so pro-consumer under competition would result in losses to a firm experiencing a substantial gap between marginal and average total cost. One solution to this problem is to set prices that maximize welfare, subject to the constraint that the revenues of the firm just equal its costs. The resulting prices would be set in inverse proportion to the demand elasticity. Regulators rely on price discrimination to ensure that the output produced under scale economies is as close as possible to that competitive outcome. To minimize the output distortion from non-marginal cost pricing, a higher price is charged to those with less elastic demands (because their purchase decisions are less responsive to increases in prices) than to those with more elastic demands.

While Sidak understands that the revenue constraint insures optimality in the case of Ramsey pricing, he does not explain why that constraint is relevant for the pricing of unregulated broadband services. Without such a revenue constraint, there is no necessary presumption that discriminatory prices are welfare maximizing. That is not to dispute the possibility that allowing price discrimination might be the best that we can do short of price regulation (which may make consumers even worse off). And priority pricing in principle has a sound efficiency basis when allocating a scarce resource. But it does seem a bit of stretch to argue that the discriminatory prices of broadband providers are Ramsey prices.

¹⁷ Sidak, *supra* note 3, at 86.

But there is one horrible regarding access pricing that is more difficult to dismiss, even if one thought that there was competition among broadband providers for subscribers. In their presentation in the FTC's Broadband Connectivity Workshop, Joe Farrell and Simon Wilkie expressed concern about a version of the "terminating access" problem.¹⁸ Suppose a content supplier sought access to a particular broadband provider's subscribers. The provider could charge a monopoly price to that content provider for access to its subscribers. And consumers would not have any price incentive to switch providers (since the content providers are the ones paying the price). Indeed, to expand the monopoly subscriber base and thus the profits it could earn from selling access to these subscribers, broadband providers may have an incentive to *lower* subscriber prices. The effect of what are effectively monopoly access prices charged by specific broadband providers could discourage content provider investments generally.

As Farrell and Wilkie point out, the terminating access problem has been central to many debates in mobile and landline telephony, and one solution is to regulate the terminating access fee. Another, more elegant solution is to require that the recipient of the call pay all of the charges (including terminating access) for the call. Then, the consumer would have an incentive to switch providers if the terminating access fee is inflated.

With respect to broadband content, a key empirical issue here is whether the value of additional content to end-users that can be captured by the broadband providers outweighs the profits from restricting the availability of content via a high access price. But at some margin, it is easy to see the calculus favoring higher access prices. One solution—impose all of the access charges on the end-user, forcing the broadband provider to compete for subscribers on the basis of all costs—has its own set of problems, discussed below. And as the AOL and cable examples above suggest, there has been little evidence of any output restriction (although, of course, that observation is merely comforting, not dispositive).

Customer Tiering

Net neutrality advocates would argue that any adverse effects on broadband investment incentives resulting from a ban on access tiering can be largely or completely offset by permitting operators to charge consumers for higher speed/priority delivery. In contrast to access tiering, customer tiering would allow users to control what applications they use and are willing to pay for.

This alternative pricing scheme is not flawless. First, there will be some or many consumers who value some applications with priority delivery but not enough to pay for fast-lane service for all applications. As a result, some content providers whose service quality is enhanced by priority delivery and who are willing to pay for priority delivery will be discouraged from making those investments, this will skew innovation to those that do not require priority delivery, and the value of the Internet to consumers will be diminished. That reduction in value will also affect the broadband provider's incentive to invest in expanding broadband capacity.

Second, payments by content providers to reach broadband subscribers on a priority basis could in effect subsidize subscribers' access to broadband services. For example, advertisers are willing to pay more for greater consumer reach. To provide that more valuable reach, the broadband provider may well have an incentive to subsidize subscribership to a broadband application, encouraging content providers to create applications relying on priority delivery. Thus, one unintended consequence of a ban on access tiering could be fewer consumers subscribing to

¹⁸ FTC Workshop, Broadband Connectivity Competition Policy (Feb. 13–14, 2007), at <http://ftc.gov/opp/workshops/broadband/index.shtml>.

broadband service or more consumers relegated to the slow lane because they are unable to pay for fast lane service.¹⁹

Distortions in Political Messaging

Sidak notes that in addition to generalized concerns of net neutrality advocates regarding the potential skewing of content development by the broadband provider, concerns have also been raised that Web sites that carry social or political messages may be relegated to the slow lane or barred completely from access to the subscribers of a broadband provider. Sidak counters that the presumption that political organizations will be left in the slow lane is not necessarily correct. He observes that in fact many political organizations are financially capable of paying for fast-lane service.²⁰

Sidak is treading where economists (and apparently the ABA) usually fear to go.²¹ It seems to me that the obvious argument is that even if broadband provision was competitive, the usually discussed informational externalities of political messaging might justify a governmental subsidy to these organizations. That is certainly preferable to imposing what could well be a substantial tax on all consumers of broadband services by barring access tiering and discouraging broadband and content investments. (But, as Bill Page reminds me, there may be constitutional barriers to implementing this policy.)

Of course, there is no reason to believe that such subsidies will be forthcoming, so this argument has less force, which in turn makes this concern more difficult to dismiss. Sidak argues credibly that there is no significant evidence that broadband subscribers have been denied access to any content for political reasons.²² In addition, the evaluation of harms to political messaging on the broadband front should (it seems to me) be done in the context of evaluating all sources of political messaging. It could be that even widespread political content discrimination by broadband providers would have little effect on the overall quantity of political messages supplied. But as I said, this is a space that economists typically avoid.

¹⁹ In addition to consumer tiering, there have been at least two other content non-discrimination proposals. One proposal, described (but not supported) and discussed by the ABA Section of Antitrust Law in its comments to the FTC on net neutrality, would permit access tiering if the prices were non-discriminatory. ABA Section of Antitrust Law, Comments in Response to the Federal Trade Commission's Request for Public Comment Regarding Broadband Connectivity Competition Policy 1 (Mar. 2007), <http://ftc.gov/os/comments/broadbandwrkshop/527031-00064.pdf>. Clearly, this may be a less distortionary approach than an outright ban on access tiering. Nonetheless, that proposal may be (as the ABA notes) a substantial financial boost to the incomes of antitrust practitioners. How one determines whether service A is sufficiently like service B to deserve A's price may not be straightforward. One only has to recall the drawn-out battles before the FCC and courts regarding the telcos claim that they could not provide the same kind of services to local exchange customers that they provided to themselves. And to the extent that constraints on the pricing of priority services result in some or many services being unable to obtain the priority they would prefer, then consumers will be harmed and content innovation incentives will be reduced.

Atkinson and Weiser propose that broadband providers be allowed to engage in access tiering, although if challenged they would have to provide a legitimate business justification for the practice, what is in effect a non-discrimination rule. In addition, they would mandate a bandwidth set-aside with some minimum quality specifications to insure that consumers and content providers have access to all the "basic uses" of the Internet. By restricting the ability of broadband providers to deploy their capacity to different uses, this proposal compounds the costs of a non-discrimination rule. Atkinson & Weiser, *supra* note 16, at 3–4.

²⁰ Sidak, *supra* note 3, at 79.

²¹ In its comments to the FTC, the ABA disavowed any attempt to evaluate the social and political consequence of net neutrality. See ABA Section of Antitrust Law, *supra* note 19.

²² Sidak, *supra* note 3, at 78–83.

And This Leaves Us Where?

Like other observers, I hesitate to interfere with the development of the Internet. As Thompson suggests, an ex ante “do no harm” approach may be the better of the alternatives, relying on ex post antitrust to police any potentially anticompetitive activity. The ABA notes that absent a finding that broadband is not offered in a competitive marketplace, it is highly skeptical that adoption of any non-discrimination rules will lead to consumer benefits: “We believe that the better approach is to allow the market to operate freely subject to the requirements of the antitrust laws.”²³ The same conclusion is reached in an analytically vacuous public statement by a number of respected economists²⁴ (and I’m not just saying that because I wasn’t asked to join in-it may be that that’s the only way to get agreement) as well as in a separate statement by the economic dean of regulation, Alfred Kahn.²⁵

As Farrell notes in his FTC presentation,²⁶ reliance on antitrust may work if the penalties are sufficient to deter the discriminatory behavior of concern. The disadvantage of relying on antitrust is its lack of nimbleness, its inability to react quickly to rapidly changing situations. Given how error-prone antitrust can be, some may view that as an advantage.

And like Farrell, I am troubled by the extent to which decisions like *Trinko* may have removed the ability of antitrust enforcement to reach the kind of exclusionary conduct of concern to net neutrality advocates. (On this point, see Bill Page’s discussion below.) As I noted above, my comfort here is the seeming absence of that kind of behavior with respect to AOL and cable programming. In addition, I am concerned about the lack of any obvious solution to the terminating access problem, short of rate regulation or (surprisingly enough) customer tiering. And these solutions, as discussed above, have the potential to result in substantial consumer losses. “Wait and see” may not be an ideal prescription, but given the alternatives and the evidence, it may be optimal, i.e., the best one can realistically do under the circumstances.

While my discussion here more than covers just the tip of the iceberg in the net neutrality debate, there is still a lot of the iceberg left. I would urge interested readers to look more closely at the materials cited here.

—JRW

²³ ABA Comments, *supra* note 19, at 1.

²⁴ William Baumol et al., Economists’ Statement on Network Neutrality Policy 3, AEI-Brookings Joint Center for Regulatory Studies (Mar. 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=976889: “We believe the issues raised in the net neutrality debate can be effectively addressed by using antitrust authority where appropriate, allowing Internet pricing flexibility, and fostering more efficient use of spectrum to facilitate entry into the broadband market.”

²⁵ Alfred E. Kahn, *Network Neutrality*, AEI-Brookings Joint Center for Regulatory Studies (Mar. 2007), available at <http://www.aei-brookings.org/admin/authorpdfs/page.php?id=1374>.

²⁶ Joseph Farrell, Net Neutrality, Presentation before the FTC Workshop on Broadband Connectivity Competition Policy (Feb. 13, 2007), available at <http://ftc.gov/opp/workshops/broadband/index.html>.

Summary

Daniel F. Spulber & Christopher S. Yoo,

Mandating Access to Telecom and the Internet: The Hidden Side of *Trinko*

http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID978534_code219969.pdf?abstractid=978534&mirid=1

In this paper, Daniel Spulber and Christopher Yoo consider whether and to what extent *Trinko*²⁷ has foreclosed application of the essential facilities doctrine to telecommunications and the Internet. Antitrust law recognizes that even dominant firms have a right to refuse to deal with rivals and with potential customers and suppliers. Nevertheless, some lower courts have read Section 2 of the Sherman Act to require a monopolist that controls an essential facility to provide its rivals access to it in certain circumstances. In *Trinko*, the Supreme Court refused explicitly to reject or approve the doctrine, but found it inapplicable to a claim that an incumbent local telephone company had illegally refused to provide unbundled access to elements of its network. The Court's reasoning endorsed principles that set limits on plaintiffs' ability to use the antitrust laws to gain access to a rival's productive resources. Some commentators have read *Trinko* as foreclosing Sherman Act claims to mandatory access in telecommunications, while others have tried to limit the holding. Spulber and Yoo offer their own reading of *Trinko*, then propose a framework for evaluating mandatory access claims in the telecom and Internet context.

After recounting the history of the essential facilities doctrine and the traditional and recent economic criticisms of it, Spulber and Yoo conclude that the theoretical literature "suggest[s] that vertical exclusion is much less problematic than initially believed" and that the empirical literature confirms that it rarely causes consumer harm. The authors suggest that some lower courts have mandated access to enhance static efficiency, but have not recognized that doing so may reduce dynamic efficiency by limiting firms' incentives to create alternate sources of supply. *Trinko* recognized this concern when it noted that requiring "firms to share the source of their advantage . . . may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities."²⁸ It also recognized that antitrust courts are not well equipped to police mandatory access, which necessarily involves "identifying the proper price, quantity, and other terms of dealing."²⁹ Nevertheless, it offered "clues" that might support some more narrowly defined claims to access.

Spulber and Yoo point to the network neutrality controversy to illustrate the importance of the debate over how best to interpret *Trinko*. Thus far, the FCC has not adopted a rule prohibiting cable or DSL providers from discriminating against particular forms of Internet content. Instead, it has stated a policy generally supporting a neutrality principle and (as the previous note in this edition of *Paper Trail* shows) has acted against particular service providers that may have violated the principle. Suppose, in this regulatory context, a content provider sued a broadband provider claiming it was denied equal access to subscribers. Read most broadly, *Trinko* would bar such a claim because, for example, the courts would be ill suited to administering the terms of access; read most narrowly, *Trinko* would not apply at all, because "unlike in *Trinko*, access to the bottleneck input [is] not available through regulation" because of the FCC's somewhat tentative regula-

²⁷ Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

²⁸ *Id.* at 407–08.

²⁹ *Id.* at 408.

tory policy. A third interpretation would make the applicability of antitrust hinge on some level of scrutiny of “the effectiveness of the agency’s efforts to address the anticompetitive conduct.”

To analyze possible applications of what is left of the essential facilities doctrine, Spulber and Yoo use graph theory to classify and analyze the sorts of access that an antitrust court might mandate. The authors distinguish five types of access that actors might seek—retail access, wholesale access, interconnection access, platform access, and unbundled access—and identify the costs and benefits to networks and to their users from mandating access in each instance. Interestingly, they find that courts have generally taken account of the concerns that their analysis highlights.

The authors find that mandating *retail access* to the network by end users is not appropriate because it would only require sharing of the facility without increasing competition. The essential facilities doctrine recognizes this concern by limiting its applicability to competitors. Mandating *wholesale access* by intermediaries seeking to serve end users is also problematic because it can disrupt a network’s efficiency by requiring outsourcing of distribution, again without necessarily increasing competition. *Otter Tail*³⁰ is problematic on these grounds because it essentially required a power company to sell electricity at wholesale so that another entity could resell it to consumers. *Trinko* seems to suggest, however, that a refusal to deal is only problematic if the dominant firm refuses to sell to a rival at its *full retail price*, as the defendant apparently did in *Aspen Skiing*.³¹ That reasoning seems to undercut any general obligation to provide access at a wholesale price. Spulber and Yoo argue that it would also be problematic to require firms that provide wholesale access to do so on a nondiscriminatory basis.

Mandating one network to provide *interconnection access* to another “network that provides similar services to . . . similarly situated customers” can impose important costs on the first network. Spulber and Yoo argue that mandated interconnection access is often inappropriate because networks typically have adequate incentives to interconnect in order to gain the benefits of network effects. It may also be inappropriate if rival incompatible networks are competing for dominance. Spulber and Yoo provide a lengthy discussion of how the FCC’s framing of various interconnection requirements have recognized these incentives. They also analyze *Aspen Skiing* as an inappropriate requirement of interconnection access.

The essential facilities doctrine has most often been invoked to justify mandatory *platform access* to a network by providers of complementary services. The AT&T consent decree, for example, required local telcos to give long distance service providers platform access to the local exchange. Network neutrality is also a platform access theory. But, according to Spulber and Yoo, in most instances, network owners already have sufficient incentives to allow access to their platforms by complementors. The value of a network increases to the extent it offers a wider range of complementary services. Thus, firms will typically refuse access on efficiency grounds. Mandating access, on the other hand, is difficult for courts to police, and undermines incentives to develop incompatible competing systems. It requires standardized access, which can limit the range of variables on which network owners compete. Thus, mandated access is not appropriate unless entry into the network market is impossible, as may have been true of the local telephone exchange at the time of the AT&T consent decree.

³⁰ *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

³¹ *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 593 (1985).

Unbundled access requires a network to lease elements of the network to rivals. Spulber and Yoo note that this form of access is most clearly foreclosed by the reasoning of *Trinko*, which emphasized the importance of preserving investment incentives and of avoiding burdening the courts with intractable administrative tasks.

As this summary indicates, Spulber and Yoo's analysis ultimately offers little scope for essential facilities claims involving telecommunications or the Internet. ●

—WHP

Book Review

The Globalization of Antitrust Casebooks

Einer Elhauge and Damien Gerardin

Global Antitrust Law and Economics

Foundation Press • 2007

Reviewed by Alden F. Abbott

Throughout much of the 20th century, antitrust law appeared to be a peculiarly American institution. Forged by Congress in the Gilded Age and the Progressive Era, antitrust seemed to represent a distinctly American response to the exercise of excessive power by business—one that curbed business practices deemed anticompetitive without resorting to state ownership, control, or detailed regulation of the economy. By contrast, other nations relied much more on direct state oversight of the economy, either through ownership of the means of production or through explicit government guidance of private sector activity. Although antitrust laws were adopted by some industrialized nations before and after World War II, their real influence (except in the case of the European Community) was minimal.¹ Moreover, foreign industrialized nations generally rebuffed U.S. Government antitrust enforcement efforts directed at foreign anticompetitive conduct (including cartel agreements) that affected U.S. commerce. The Communist bloc and developing nations, meanwhile, totally rejected antitrust law.

Over the last two decades, however, antitrust laws have sprouted wings and been adopted by over 100 countries, including all of the economically significant nations of the world. Simultaneously, as multinational business activity has grown apace, these laws are being applied both to domestic and foreign firms—as American corporations faced by foreign antitrust investigations have learned to their chagrin. Officials from multiple regimes increasingly have cooperated on antitrust investigations, including cartel and merger enforcement. American antitrust practitioners need to take into account the implications of competition law developments in a host of jurisdictions (often in consultation with foreign competition lawyers), in order to advise and represent their clients. As a result, antitrust policy—more commonly referred to abroad as “competition policy”—has gained a prominent place in international economic diplomacy.

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¹ Shortly after the end of World War II, occupied Japan adopted a statute based on the U.S. Federal Trade Commission Act, but it was widely deemed a dead letter for many years thereafter. As late as 1994, then Assistant Attorney General for Antitrust Anne Bingaman referred to “Japan’s historically weak antimonopoly enforcement record” and questioned “whether there has really been any meaningful change in Japan” in this regard. Anne K. Bingaman, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks Before the Japan Society Regarding the Role of Antitrust in International Trade (Mar. 3, 1994), available at <http://www.usdoj.gov/atr/public/speeches/intjapan.htm>. For a discussion of the role of the post-War U.S. occupation of Germany in introducing antitrust to Europe, see William Page, *Review of Wyatt C. Wells, Antitrust and the Formation of the Postwar World*, at <http://www.abanet.org/antitrust/at-source/03/07/pagereview.pdf>.

The “globalization of antitrust law,” however, has not yet had a major influence on American antitrust casebooks, which still tend to focus primarily on U.S. antitrust doctrine.² *Global Antitrust Law and Economics*—a new book by Harvard Law School Professor Einer Elhauge and Tilburg University Professor Damien Geradin—ably fills this gap.

Global Antitrust extensively covers all the standard topics dealt with in a basic law school antitrust course. The American doctrinal treatment of each antitrust topic is addressed first, followed by a somewhat less comprehensive analysis of European and other foreign competition law bearing on that topic.³ Summaries of key legal principles are provided, and specific questions (along with occasional hypothetical problems) are set forth to enable students to explore the application of legal concepts. This format is ideal for a variety of users. It enables teachers of basic antitrust to select those supplemental materials on foreign law that they wish to highlight without interfering with the flow of presentation of American antitrust doctrine. It allows teachers of more ambitious comparative antitrust law courses to compare foreign and American standards for each topic they select. Teachers of European antitrust law surveys who wish to draw comparisons with selected U.S. antitrust principles are also served. Furthermore, *Global Antitrust* gives practitioners quick and dirty insights into the status under foreign law of particular domestic antitrust questions. Thus, *Global Antitrust* is one of the rare antitrust casebooks that merits inclusion on the practitioner’s bookshelf. *Global Antitrust* is particularly useful to practicing lawyers in that it focuses on the economic reasoning that underlies modern antitrust jurisprudence in the United States and, increasingly, in foreign jurisdictions. It does this in a straightforward, nontechnical manner that makes economic concepts accessible to a broad audience, including readers without a sophisticated knowledge of economics.

Global Antitrust begins with an extensive chapter on antitrust remedies. This is commendable. Although remedies are key to understanding the constraints that shape as well as the consequences that flow from antitrust enforcement decisions, they too often receive short shrift in introductory antitrust courses. The contrast between American and foreign approaches to remedies highlights up front a key distinction among jurisdictions—a distinction which may affect the decision-making of businesses, public enforcers, and private plaintiffs. More specifically, rules on remedies cut across jurisdictions in different ways: (1) only the United States currently authorizes treble damages recoveries; (2) private lawsuits and class actions are common in the United States but extremely rare abroad (and institutional factors may curb utilization of newly authorized private suits in Europe); (3) criminal sanctions are more severe in the United States than abroad (relatively few foreign jurisdictions even have criminal penalties); (4) antitrust injury, standing, and related doctrines (like the *Illinois Brick* bar on recoveries by indirect purchasers) greatly constrain private actions in the United States (it remains to be seen what doctrines will restrict the growth

Global Antitrust is particularly useful to practicing lawyers in that it focuses on the economic reasoning that underlies modern antitrust jurisprudence in the United States and, increasingly, in foreign jurisdictions.

² For a casebook that serves as a partial exception to this generalization, see ELEANOR M. FOX, LAURENCE A. SULLIVAN & RUDOLPH J.R. PERITZ, *CASES AND MATERIALS ON UNITED STATES ANTITRUST IN GLOBAL CONTEXT* (2d ed. 2004). As its title suggests, this text focuses primarily on American antitrust law but places it in a broader context by highlighting a few foreign antitrust principles that are complementary to the exposition of American doctrine. Another partial exception is the casebook, ANDREW I. GAVIL, WILLIAM E. KOVACIC & JONATHAN B. BAKER, *ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS, AND PROBLEMS IN COMPETITION POLICY* (2002), which contains some discussion of how foreign (primarily European) antitrust law deals with key American antitrust topics.

³ The discussion of European competition law is much more detailed than the explication of the laws of other foreign jurisdictions. This is entirely appropriate for an overview volume because almost all nations’ competition provisions are based either on the U.S. or the EU model, or some combination of the two. This format works well, given that the goal of *Global Antitrust* is to present a doctrinal overview of the different doctrinal approaches to competition law—not to present a compilation of individual nations’ laws. *Global Antitrust*’s carefully selected excerpts, however, provide a capsule overview of certain major antitrust doctrines outside of Europe.

of private lawsuits in Europe); and (5) major civil fines assessed by public enforcers are a prominent feature of European but not American antitrust cases.

The next six chapters cover “bread and butter” antitrust topics. Chapter two focuses on horizontal agreements, surveying key doctrine dealing with price fixing, output restrictions, market divisions, agreements not to deal, social welfare justifications for restraints, intellectual property rights-related restrictions, and buyer cartels. Brief excerpts from important cases and key guidance documents—including the DOJ-FTC Competitor Collaboration Guidelines (2000), DOJ-FTC Antitrust Guidelines for the Licensing of Intellectual Property (1995), and European Commission Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements (2004)—allow for a ready comparative assessment of enforcement philosophies.

Chapter three, regarding unilateral conduct, grapples at the outset with key tensions and distinctions between Section 2 of the Sherman Act and Article 82 of the Treaty of Rome, such as the issues of “collective dominance” (which potentially extends European enforcement’s reach to oligopoly conduct beyond the scope of Section 2) and “exploitative abuses” (which allow “excessive” dominant firm pricing to be reached in Europe but not in the United States). By reprinting highlights from the December 2005 DG Competition Discussion Paper on the Application of Article 82 of the Treaty to Exclusionary Abuses, the authors usefully underscore current European thinking on appropriate ways to assess potential anticompetitive conduct in this area. Market definition principles from the DOJ-FTC Horizontal Merger Guidelines are employed to help explicate dominant firm market definition in the United States, yielding an interesting contrast with the principles enunciated in the European Commission Notice on the Definition of the Relevant Market for the Purposes of Community Competition Law. The contrast between American and European standards for condemning dominant firm pricing practices as “predatory” is also skillfully set forth.

Chapters four and five deal with two classifications of vertical arrangements—vertical agreements that restrict dealing with rivals (chapter four); and vertical agreements and conduct that “arguably distort” downstream competition in distributing a supplier’s products. These distinctions work well as a means for drawing comparisons between American and European law. For example, discussion in chapter four of the 2000 EC Guidelines on Vertical Restraints illustrates how EC law recently has essentially adopted a rule of reason and “economic approach” in assessing these arrangements—thereby moving substantially closer to current American enforcement philosophy. Loyalty discounts and bundling issues—hotly contested in the United States and Europe—are also ably laid out in chapter four. Chapter five skillfully portrays the development of modern doctrine toward vertical price and nonprice restraints and price discrimination, in the United States and Europe. Read together, chapters four and five leave the careful reader with a heightened appreciation for the nature of the distinctions between American and European approaches to vertical arrangements.

Chapter six is an able exposition of the requirements for proving an agreement or concerted action under Section 1 of the Sherman Act and Article 81 of the Treaty of Rome. The similarity of the “no intra-enterprise conspiracy” doctrine across multiple jurisdictions; the fact that both Europe and the United States distinguish between parallel and concerted actions; and the nature of the treatment of information exchanges under American and European law are nicely laid out.

Chapter seven explores all the major issues raised in horizontal merger analysis, employing as frameworks for analysis the 1992 DOJ-FTC Horizontal Merger Guidelines and the 2004 EC Guidelines on the Assessment of Horizontal Mergers. The recent substantial convergence between Europe and the United States in horizontal merger evaluations stands in marked contrast to the divergence between those jurisdictions with respect to vertical and conglomerate mergers, which

is more than adequately explored. The authors could, however, have explained why the vertical provisions of the 1984 U.S. Merger Guidelines—which are cited and discussed in the text—may not accurately represent current thinking about vertical mergers in the American antitrust enforcement community. They might have devoted more attention to the point that the 1984 provisions do not reflect developments in economics that have highlighted substantial efficiencies flowing from vertical integration—including gains in uniting complementary assets, reductions in transactions costs, and avoidance of double marginalization (internalization of pricing decisions when multiple independent actors at different vertical stages have market power). In examining conglomerate mergers, the authors do a fine job of summarizing current European doctrine and of describing the trans-Atlantic dispute arising out of the European Commission's 2001 *GE-Honeywell* ruling. However, in discussing old American precedents regarding concerns arising from conglomerate acquisitions (and in citing 1984 Merger Guidelines language that bears on potential competition problems), the authors could have explained in greater detail why such thinking is out of step with current American enforcement philosophy (which finds little basis for competitive concern arising out of conglomerate mergers). In short, the authors should carefully reassess their treatment of American vertical and conglomerate merger doctrine in preparing the next edition of *Global Antitrust*. This is, however, merely a quibble that does not seriously detract from the merits of an otherwise informative and well organized chapter.

Chapter eight touches briefly on a number of international topics, including extraterritoriality, exports, sovereign activity, the trade-antitrust intersection, international enforcement cooperation, and future prospects for international antitrust law. This last chapter is particularly valuable in giving the reader a general introduction to broader international issues that bear on the application of (and sometimes trump) antitrust law, an important set of concerns that is typically neglected in standard texts. Particularly meritorious is the book's brief discussion of the possible use of trade remedies, such as antidumping complaints, to achieve anticompetitive results that would otherwise be precluded by antitrust.

In sum, the body of the current text is concise and well organized and nicely covers the core of antitrust doctrine here and abroad. There are some areas, however, that would benefit from attention in a second edition of *Global Antitrust*. These suggestions are not aimed at highlighting major shortcomings. They merely seek to promote marginal improvements to an already first rate and innovative product.

First, as a general matter, *Global Antitrust* could benefit from a historical introduction that introduces new students to the development of antitrust law and antitrust doctrine, exposing them to non-economic justifications for this body of law. Although “economics may be the name of the game” today, concerns about small businesses and maintaining “independent” enterprises have not entirely disappeared from the antitrust lexicon. In particular, small business protection appears to maintain substantial weight in a variety of foreign antitrust jurisdictions. Accordingly, a brief analysis of the problems posed by focusing on “populist” as opposed to “economic” enforcement approaches to antitrust would be helpful. A short evaluation of differences among schools of economic analysis applied to antitrust (which may help explain some of the differences in tone between European and American competition policy)—and of “public choice” critiques to mainstream antitrust analysis (and the response of mainstream antitrusters)—are also in order.

Second, *Global Antitrust* gives relatively short shrift to the “state action” and “petitioning” immunities of American antitrust law that encourage rent-seeking activities to achieve anticompetitive outcomes through legislation, regulation, and litigation. Generally speaking, however, such anticompetitive “government-related” conduct typically enjoys less immunity in major foreign

regimes. Thus, for example, the European Commission is able to challenge anticompetitive state rules that undermine competition within the European “single market.” Some recent scholarship, however, maintains that the American state action and petitioning doctrines can be read more narrowly and shield less anticompetitive conduct without undermining those doctrines’ legitimate federalism and First Amendment principles.⁴ A brief exposition of those doctrines (and their limitations), which are invoked in many antitrust cases, would thus have been appropriate.⁵

Third, *Global Antitrust* could fruitfully devote a separate chapter to the intellectual property-antitrust interface (intellectual property licensing issues are dealt with rather briefly in chapter two). In today’s “knowledge economy,” intellectual property assets constitute an increasingly substantial portion of businesses’ net worth. Thus, it is not surprising that intellectual property issues are of growing significance to the antitrust analysis of business transactions, both in the United States and abroad. The federal antitrust agencies have held hearings and issued reports on intellectual property and antitrust,⁶ and intellectual property questions are frequently discussed by international antitrust enforcers. Perhaps the next edition of *Global Antitrust* could include a chapter addressing this perennially hot topic.

Fourth, and finally, the interplay between economic regulation and antitrust could be emphasized more strongly in the *Global Antitrust* text. This is an area that has received a great deal of attention from practitioners, policy makers, and scholars.⁷ It will pose major challenges to antitrust authorities now and in the future, due to its substantial impact on welfare. How best to promote competition in formerly or partially regulated industries remains a major challenge for American antitrust law. It is also particularly significant in the many foreign jurisdictions in which formerly state-owned or controlled entities (utilities and others) have been or are being privatized. Accordingly, regulatory antitrust issues could provide good grist for the authors’ mill as they plan the next edition of *Global Antitrust*.

As a new competitive entry in the antitrust casebook marketplace, *Global Antitrust* will have to stand on its own merits. Those merits are significant indeed. Antitrust law professors and practitioners who have any interest in comparative antitrust (to my mind, this should include virtually the entire universe of such experts) should seriously consider purchasing this volume and keeping it within easy reach. ●

⁴ In recent years, the Federal Trade Commission has issued staff reports on state action and petitioning that considers possible ways to harmonize those doctrines with antitrust principles. The 2003 state action report is available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>; the 2006 petitioning (*Noerr-Pennington* doctrine) report is available at <http://www.ftc.gov/reports/P013518enfperspectNoerr-Penningtondoctrine.pdf>.

⁵ European antitrust regimes increasingly face issues of federalism, as individual European nations’ antitrust laws are applied to conduct that may have a substantial impact within the European Union. Thus, although a discussion of individual European countries’ antitrust statutes would not have been appropriate (nor would an exposition of American state antitrust law have been called for in a volume such as this), a brief discussion of state action problems nicely would have highlighted policy concerns that are not limited to the United States.

⁶ For example, a 2003 FTC report discussed possible patent law reforms aimed at raising patent quality and thereby better harmonizing the antitrust and intellectual property law regimes. See FEDERAL TRADE COMM’N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003), available at <http://www.ftc.gov/os/2003/10/innovationrpt.pdf>.

⁷ See, e.g., TONY PROSSER, *THE LIMITS OF COMPETITION LAW: MARKETS AND PUBLIC SERVICES* (2005) (highlighting the tensions between competition policy and public service regulation under the laws of continental European countries, the United Kingdom, and the European Union). Florida State University College of Law Professor Jim Rossi provides a good overview of Prosser’s work in a November 2005 book review in the ANTITRUST SOURCE. See <http://www.abanet.org/antitrust/at-source/05/11/Nov05-RossiRev11=29.pdf>.