

The Justice Department's Section 2 Report: A Mixed Review

William Kolasky

The United States is virtually alone in having two national competition authorities with overlapping authority to enforce the antitrust laws. Over the nearly one hundred years since the Federal Trade Commission was created in 1914, the FTC and Department of Justice Antitrust Division have co-existed in relative harmony. While the two agencies have often pursued different enforcement agendas, they have rarely been in conflict as to the fundamental direction of antitrust enforcement policy.

This year, however, we now have an open split between the two agencies over the standards that should govern antitrust enforcement policy with respect to single-firm conduct under Section 2 of the Sherman Act. After a series of joint workshops with the FTC on monopolization, the Justice Department in September released its own separate report entitled *Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act*.¹ In that Report, the Justice Department argues in favor of a relatively narrow role for the antitrust laws in policing the conduct of dominant and near-dominant firms. The Report proposes what it calls a “substantial disproportionality” test, under which the Department says it will not bring a Section 2 enforcement action unless a firm with monopoly or near-monopoly power engages in conduct, the anticompetitive effects of which are “substantially disproportionate” to its procompetitive justifications.

The same day, the FTC released a stinging statement signed by three of the four sitting Commissioners, attacking the Justice Department Report as “a blueprint for radically weakened enforcement of Section 2 of the Sherman Act.”² In equally colorful language, the FTC statement claimed that the Report “would place a thumb on the scales in favor of firms with monopoly or near-monopoly power” and against the interests of consumers. The statement concluded by saying that the FTC “stands ready to fill any Sherman Act enforcement void that might be created if the Department actually implements the policy decisions expressed in its Report,” and “will continue to be vigilant in investigating and, where necessary, prosecuting Section 2 violations.” In a separate statement, Chairman William Kovacic neither endorsed nor criticized the views of his fellow Commissioners, but called instead for more discussion of, and empirical research into, the issues raised by the Justice Department Report.³

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William Kolasky is a partner in WilmerHale's Regulatory and Government Affairs Department and member of the Antitrust and Competition Group.

¹ U.S. DEP'T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (Sept. 2008), available at <http://www.usdoj.gov/atr/public/reports/236681.htm>.

² See Statement of Commissioners Harbour, Leibowitz, and Rosch on the Issuance of the Section 2 Report by the Department of Justice (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.

³ See Statement of Federal Trade Commission Chairman William E. Kovacic, Modern U.S. Competition Law and the Treatment of Dominant Firms: Comments on the Department of Justice and Federal Trade Commission Proceedings Relating to Section 2 of the Sherman Act (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmtkovacic.pdf>.

This disagreement between the Justice Department and FTC over how Section 2 should be enforced is unfortunate. Over nearly two decades, a broad bipartisan consensus has prevailed in support of strong antitrust enforcement, applying sound economic principles to protect competition, not competitors. This consensus now appears at risk. The Justice Department, reflecting the free market fundamentalism that has characterized Bush Administration economic policy generally, appears to seek through its Report to limit use of the antitrust laws to police single-firm conduct. The FTC, by contrast, with a strong pro-enforcement majority, seeks to broaden the application of the antitrust laws to single-firm conduct. One Commissioner, J. Thomas Rosch, for example, has argued that the Supreme Court's pro-defendant monopolization decisions—such as *Trinko*, *Weyerhaeuser*, and even *Brooke Group*—should be read narrowly in order to provide more scope for Section 2 enforcement.⁴ Commissioner Rosch has also joined with Commissioners Pamela Jones Harbour and Jonathan Leibowitz in advocating broader use of the Commission's authority to outlaw single-firm conduct as an unfair method of competition under Section 5 of the FTC Act even if that conduct would not violate Section 2 of the Sherman Act.⁵ The Commission did just that in its recent action against N-Data,⁶ where it challenged as an unfair method of competition an effort by a patent holder to revise the terms of its commitments to a standard-setting organization several years after its technology was incorporated into an industry standard. The Commission acknowledged that this conduct did not violate Section 2, but nevertheless insisted that N-Data abide by its original commitments.

With a new Administration coming into office in January, it is difficult to predict whether the schism on Pennsylvania Avenue will continue. Barack Obama has been vocal in accusing the Bush Justice Department of having one of the weakest records of antitrust enforcement in the last half century and has promised to reinvigorate antitrust enforcement if elected. John McCain has pointed to Teddy Roosevelt as one of his heroes, citing in particular his reputation as a trustbuster who was not afraid to take on the "great malefactors of wealth" on Wall Street. One might expect that he, too, if elected, might seek to step up antitrust enforcement.

Rather than joining the political debate, it would be more constructive to step back and take an objective look at the Justice Department Report to find ways to bridge the gap. Taking that approach, even the objecting Commissioners would probably agree that the Justice Department Report does a good job analyzing particular types of exclusionary conduct, such as price predation, tying, bundled and loyalty discounts, refusals to deal, and exclusive dealing. For each type of conduct, the Report correctly identifies both the potential anticompetitive effects and procompetitive justifications, and offers useful suggestions as to how such anticompetitive effects and procompetitive justifications should be evaluated in individual cases. The principal focus of the three Commissioners' objections is not to this part of the Report, but rather to the general standard it proposes for exclusionary conduct. And, in that regard, their concerns appear to have some merit.

⁴ See J. Thomas Rosch, A Modest Proposal for Antitrust Decisions at the Supreme Court (Mar. 27, 2008), available at <http://www.ftc.gov/speeches/rosch/080327modest.pdf>.

⁵ See, e.g., J. Thomas Rosch, Section 2 and Standard Setting: *Rambus*, *N-Data* & The Role of Causation (Oct. 2, 2008), available at <http://www.ftc.gov/speeches/rosch/081002section2rambusndata.pdf>.

⁶ Negotiated Data Solutions LLC, FTC File No. 051 0094 (Sept. 23, 2008) (Decision and Order), available at <http://www.ftc.gov/os/caselist/0510094/index.shtm>; Statement of the Federal Trade Commission, In the Matter of Negotiated Data Solutions LLC, FTC File No. 051 0094 (Jan. 23, 2008), available at <http://www.ftc.gov/os/caselist/0510094/080122statement.pdf>.

The Justice Department Report proposes that allegedly exclusionary conduct by dominant and near-dominant firms should be judged using a “substantial disproportionality test.” Under this test, the Justice Department would bring a case only if the conduct harms consumers and competition in a way that is “substantially disproportionate” to any legitimate benefits the monopolist or near-monopolist might realize. The Department argues that this test is superior to the three alternative tests it considered—an effects-balancing test, a no-economic-sense test, and an equally-efficient-competitor test—because it is more administrable and reduces the risk of false positives (i.e., finding conduct unlawful that does not harm competition), which the Department views as more serious than that of false negatives (i.e., finding conduct lawful that does harm competition).

In my view, there is another, more fundamental problem with the Justice Department’s proposed test—namely, it reflects an outdated view of the rule of reason as it is actually applied by the courts.

The three Commissioners’ objection to this “substantial disproportionality” test is that, in applying the rule of reason balancing test to single-firm conduct, it puts a finger on the scale in favor of monopolists and near-monopolists, leaving consumers and smaller competitors with too little protection. In my view, there is another, more fundamental problem with the Justice Department’s proposed test—namely, it reflects an outdated view of the rule of reason as it is actually applied by the courts. As the Supreme Court explained in *California Dental Association v. FTC*,⁷ the courts over the last thirty years have developed a highly structured analytical framework for applying the rule of reason, which has converted it from an ad hoc balancing test to a stepwise, sliding scale test. Under this stepwise approach, the court first examines the alleged anticompetitive effects to determine whether they are serious enough to justify shifting to the defendant the burden of having to explain its conduct. If the court finds those anticompetitive effects to be substantial, it will require the defendant to come forward with procompetitive justifications for the alleged conduct. If the defendant does so, and if those justifications withstand initial scrutiny, the court will then require the plaintiff to show that there are less restrictive alternatives that might have achieved the defendant’s legitimate objectives at less cost to competition.

At each of the last two steps in this process, the degree of scrutiny to which the court will subject the proffered justifications and less restrictive alternatives depends on the strength of the showing at the previous steps. Thus, the more serious the anticompetitive effects, the more closely the courts will scrutinize any proffered justifications. Similarly, how hard the courts will search for less restrictive alternatives, and how closely it will scrutinize them, depends on how strong the prior showings of anticompetitive effects and procompetitive justifications have been. Taking this stepwise approach, the courts rarely, if ever, actually balance the anticompetitive and procompetitive effects to determine their net impact on consumer welfare—a nearly impossible task.

As I have written elsewhere,⁸ this stepwise approach to the rule of reason applies not only to concerted conduct under Section 1, but also to single-firm conduct under Section 2. When the Supreme Court first articulated the rule of reason in *Standard Oil Co. v. United States*,⁹ it applied that rule to both the Section 1 and Section 2 claims against Standard Oil. And in more recent cases in which the courts of appeals have applied the rule of reason to evaluate single-firm conduct under Section 2, they have done so using the same stepwise sliding-scale approach they use for concerted conduct under Section 1.¹⁰ The courts thereby avoid the type of ad hoc balancing the

⁷ 526 U.S. 756, 779–81 & n.15 (1999) (citing William Kolasky, *Counterpoint: The Department of Justice’s “Stepwise” Approach Imposes Too Heavy a Burden on Parties to Horizontal Agreements*, ANTITRUST, Spring 1998, at 41).

⁸ See William Kolasky, *Reinvigorating Antitrust Enforcement in the United States: A Proposal*, ANTITRUST, Spring 2008, at 85, 89.

⁹ 221 U.S. 1 (1911).

¹⁰ See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 58–59 (D.C. Cir. 2001).

Justice Department Report seems so greatly to fear and which it uses to justify its “substantial disproportionality” test.

The stepwise, sliding-scale framework the courts now use to apply the rule of reason is very similar to the more structured framework the Supreme Court has developed over the last forty years to enforce the constitutional guarantees of free speech and equal protection. In the 1960s, there was a debate whether the courts should use a balancing test to protect these rights or instead develop neutral principles to enforce them. The Court resolved this debate by converting what had been an ad hoc balancing test into a more structured stepwise inquiry that looks first at the nature of the infringement and then varies the degree of scrutiny to which the court will subject the proffered governmental justifications with the seriousness of the infringement.

Because the Justice Department Report fails to acknowledge that the rule of reason has likewise evolved to a structured stepwise, sliding-scale test, its concern that the rule of reason, if applied neutrally, will produce too many false positives seems exaggerated. When one examines Section 2 decisions in the Supreme Court and courts of appeals over the last quarter century, it is hard to find evidence to support the Department’s fear that false positives are more likely and more serious than false negatives. Plaintiffs have won very few Section 2 cases, and most of those wins are in cases, such as *Conwood Co. v. U.S. Tobacco Co.*¹¹ and *United States v. Microsoft Corp.*,¹² which most antitrust lawyers and economists agree were rightly decided. Similarly, based on my own experience in counseling clients over more than thirty years, I have seen few, if any, instances in which any client was deterred from procompetitive conduct because of fear of antitrust liability.

With a new Administration in January, we should have further discussion of the standards the agencies and courts should use in enforcing Section 2. Until then, we should treat the Justice Department’s Report, not as its final word, but rather as a discussion draft, and continue to search for a common standard that both agencies could apply. That was how the European Commission presented its report on Article 82 and abuse of dominance. It is an approach that makes particularly good sense here, so that we do not have the Justice Department applying one, highly laissez-faire standard to single-firm conduct and the FTC a different, more restrictive standard. ●

¹¹ 290 F.3d 768 (6th Cir. 2002).

¹² 253 F.3d 34 (D.C. Cir. 2001).

Section 2 Enforcement: A State-Enforcement View of the DOJ Section 2 Report

Don Allen Resnikoff

In issuing its September 2008 report on Section 2 antitrust enforcement,¹ the U.S. Department of Justice stated a goal of providing “clear, objective, effective, and administrable tests” for determining violations of law. “Such tests can provide businesses guidance that will more effectively deter violations.”²

The DOJ Section 2 Report is based on hearings jointly held by DOJ and the FTC, but the FTC declined to join in the Report. Three of the four sitting Commissioners complained that the DOJ Report “prescribes a legal regime that places the . . . [interests of monopolists] ahead of the interests of consumers.”³ These Commissioners asserted that DOJ recommends “drastic changes” in the enforcement of Section 2 that would unnecessarily narrow the scope of illegality under that statute. The Commissioners “strongly distance” themselves “from the enforcement positions stated in the Report,” and stand ready “to fill any Sherman Act enforcement void that might be created.”

The antitrust enforcement role of the states has largely been left out of the discussion, even though the states’ role in monopolization cases is of significance to businesses and consumers. What role are states likely to have in future prosecutions of alleged monopolizing conduct, and how aggressive are state enforcers likely to be? Are the states likely to follow the DOJ’s lead in narrowing Section 2 enforcement, or to join the FTC Commissioners in filling the void left by the DOJ?

Of course, the answers will not be the same for all states. Some states have been aggressive in enforcing monopolization law, while many have not. Moreover, enforcement policies of a state can change swiftly based on local election results. Analysis of recent state enforcement efforts does offer some guidance to future action.

In this article I briefly review this record, focusing particularly on the activities of the most active and aggressive state prosecutors, whose efforts are of the greatest significance to businesses and consumers. Recent prosecutions by states suggest that aggressive state enforcers are likely to share the views of FTC Commissioners Harbour, Leibowitz, and Rosch that the DOJ unduly exaggerated the problems of prevailing enforcement standards, and that the focus of monopolization enforcement should be on consumer welfare. State enforcers are likely to agree with the three Commissioners’ particular criticisms of the DOJ Section 2 Report, including the DOJ’s suggestions

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Don Allen Resnikoff
serves as Senior
Assistant Attorney
General, Antitrust for
the District of Columbia.
Opinions expressed are
the author’s, and do not
represent views of the
Attorney General of the
District of Columbia or
any state. The author
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¹ U.S. DEPT. OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT (Sept. 2008) [hereinafter DOJ SECTION 2 REPORT], available at <http://www.usdoj.gov/atr/public/reports/236681.pdf>.

² *Id.* at 2.

³ Commissioners Harbour, Leibowitz, and Rosch, Federal Trade Comm’n, Statement on the Issuance of the SECTION 2 REPORT by the Department of Justice (Sept. 8, 2008), available at <http://www.ftc.gov/os/2008/09/080908section2stmt.pdf>.

of “safe harbors” for business conduct. State prosecutors tend to look at the specific facts of cases as the basis for exercise of prosecutorial discretion, not rigidly applied rules of thumb on questions like market share and market power.

State Enforcement Activities Against Microsoft

The states’ record in past prosecutions supports this view. The active role of states in the litigation against Microsoft is well known. Good summaries of the history of the litigation and the states’ role may be found at a state-maintained enforcement Web site,⁴ and in the recent U.S. district court opinion discussing decree modification.⁵ Briefly, in 1998 a group of states joined with the DOJ in filing a complaint against Microsoft alleging monopolization, and two years later Microsoft was found liable for maintaining an illegal monopoly in personal computer operating systems. Following an appeal and several additional court hearings, the U.S. District Court for the District of Columbia issued judgments in 2002 prohibiting Microsoft from continuing certain unlawful conduct.

In testimony before the Antitrust Modernization Commission, Steve Houck and Kevin O’Connor, the attorneys who represented plaintiff states at the Microsoft liability trial, emphasized the independent and aggressive role taken by states.⁶ They said that the states had decided to file a complaint against Microsoft before the DOJ did and were prepared to proceed without the DOJ. They said that after consolidation of the state and federal actions against Microsoft, the states made important contributions to the trial, and acted independently and assertively in pursuing settlement negotiations. (Others have complained that the states’ assertiveness caused settlement negotiations to fail.⁷)

Some of the states that participated in the liability trial against Microsoft agreed to settlement in 2001, but not all. Non-settling states filed in court for additional relief. The results of their efforts were meager, as the litigated decree added little to the consent decree. Both the consent and litigated decrees provided for termination five years after entry, subject to the court later ordering an extension.⁸

In October 2007, some states filed motions to extend the termination dates of the Final Judgments. Despite opposition by the DOJ, Judge Kollar-Kotelly partially granted the motions. The DOJ argued in part that “the California Movants do not provide any evidence that the goals of the expiring provisions of the Final Judgments have not been achieved.”⁹ Judge Kollar-Kotelly reached a different conclusion:¹⁰

The Court’s decision in this matter is based upon the extreme and unforeseen delay in the availability of complete, accurate, and useable technical documentation . . . that Microsoft is required to make available to licensees [under the Final Judgments]. The Court concludes that the Moving States have

⁴ Coordinated State Enforcement of Microsoft Antitrust Judgments, available at <http://www.microsoft-antitrust.gov>.

⁵ *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141 (D.D.C. 2008), available at <http://www.microsoft-antitrust.gov/pdf/Jan292008MemOp.pdf>.

⁶ Stephen D. Houck & Kevin J. O’Connor, Comments on the States’ Role in the *Microsoft* Case Re: Working Group on Enforcement Initiatives, available at http://www.law.columbia.edu/null/MSAMCFINAL?exclusive=filemgr.download&file_id=941362&showthumb=0.

⁷ Joe Wilcox, *Major Setback in Microsoft Settlement Talks*, CNET News, Apr. 1, 2000, available at <http://news.cnet.com/2100-1001-238717.html>.

⁸ *New York v. Microsoft Corp.*, 224 F. Supp. 2d 76 (D.D.C. 2002).

⁹ Brief for United States as Amicus Curiae in Opposition to Motions to Extend the States’ Final Judgment, *New York v. Microsoft Corp.*, Civ. Action No. 98-1233 (CKK) (D.D.C. Nov. 9, 2007), available at <http://www.usdoj.gov/atr/cases/f227500/227585.htm>.

¹⁰ *New York v. Microsoft Corp.*, 531 F. Supp. 2d 141, 144 (D.D.C. 2008).

met their burden of establishing that this delay constitutes changed circumstances, which have prevented the Final Judgments from achieving their principal objectives.

As a consequence of the court's granting the states' motion, significant portions of the Final Judgment are now enforced by the states alone.

The DOJ Section 2 Report's discussion of the *Microsoft* litigation reflects the DOJ's concerns about the pitfalls of Section 2 enforcement. Mild endorsement¹¹ is balanced by discussion of the complexity and risk associated with discerning anticompetitive conduct by a company like Microsoft.¹² The DOJ seems to sympathize with the testimony of Microsoft deputy general counsel David Heiner that fear of antitrust enforcement led to "[d]ecisions . . . not to include particular [product] features that would have been valuable to consumers."¹³

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State Enforcement Against the Pharmaceuticals Industry

In addition to the *Microsoft* litigation, some states have been aggressive in initiating monopolization challenges in other industries, such as pharmaceuticals.¹⁴ Two multistate actions brought against Bristol-Myers-Squibb provide good examples. In one, involving the pharmaceutical Buspar, the multistate complaint alleged, among other things, that "BMS was able to [illegally] prevent the entry of generic competitors and illegally maintain its monopoly in the United States over the sale of buspirone hydrochloride-based prescription drug products ("buspirone"). . . . BMS engaged in fraud in order to unlawfully maintain its monopoly for buspirone in the United States."¹⁵ The second multistate action concerning the pharmaceutical Taxol involved similar allegations.¹⁶ Both multistate actions against Bristol were built on FTC initiatives, but the multistate actions were more than mere tag-alongs. Both led to decrees providing for substantial money damages for consumers.

State assertiveness in monopolization cases is consistent with state assertiveness in a broad array of antitrust matters. The U.S. Supreme Court has recognized that separate federal and state exercises of prosecutorial discretion can comfortably reside within the nation's antitrust enforcement mechanism. States, for example, may challenge mergers that the federal agencies have chosen not to oppose.¹⁷

¹¹ DOJ SECTION 2 REPORT, *supra* note 1, at 11.

¹² *Id.* at 12 n.69.

¹³ Sherman Act Section 2 Joint Hearing: Business Testimony Hearing Tr. 26, Jan. 30, 2007 (testimony of David A. Heiner, Vice-President & Deputy Gen. Counsel for Antitrust, Microsoft Corporation), quoted in DOJ SECTION 2 REPORT, *supra* note 1, at 15 n.81. In comparison, the *Microsoft* trial judge catalogued various ways in which Microsoft's violations of Section 2 had hurt consumers and concluded that "[t]he ultimate result is that some innovations that would truly benefit consumers never occur for the sole reason that they do not coincide with Microsoft's self-interest." *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9, 112 (D.D.C. 1999). These findings are also available at <http://www.usdoj.gov/atr/cases/f3800/vii.pdf> (Findings of Fact 409–412).

¹⁴ Elinor Hoffman of the New York State Attorney General's office gave an excellent brief overview of state pharmaceutical prosecutions at the National State Attorney General Program at Columbia Law School. *State Antitrust Enforcement in the Pharmaceutical Industry*, Presentation for Pharmaceutical Conference, National State Attorney General Program, Columbia Law School (May 10–11, 2007), available at http://www.law.columbia.edu/null?&exclusive=filemgr.download&file_id=12308&rtcontentdisposition=filename%3DPharma%20101%20State%20Antitrust%20Law%20and%20Enforcement%20in%20the%20Pharmaceutical%20Industry5—07.ppt.

¹⁵ Fourth Amended Complaint at 6, *Alabama v. Bristol Myers Squibb Co.*, 01 CV 11401 (MDL 1413) (S.D.N.Y. July 25, 2002). This multistate complaint is available on the Florida Attorney General's Web site at <http://myfloridalegal.com/busparcomplaint.pdf>.

¹⁶ Complaint, *Ohio v. Bristol-Myers Squibb Co.*, 1:02-cv-01080 (D.D.C. June 2002). A draft of this multistate complaint is available on the Florida Attorney General's Web site at <http://myfloridalegal.com/taxol.pdf>.

¹⁷ *California v. American Stores*, 495 U.S. 271 (1990); *California v. ARC America Corp.*, 490 U.S. 93 (1989).

State assertiveness in monopolization cases is unlikely to be diminished by the enforcement positions stated in the DOJ Section 2 Report. I believe that vigorous state prosecutors will continue to decide whether to pursue monopolization cases based on a pragmatic and sometimes aggressive view of specific facts, not on the DOJ's recently articulated and cautious enforcement rules of thumb. ●

Chinese Antitrust—Act II, Scene 1

Nathan Bush and Zhaofeng Zhou

Two months have passed since China's first comprehensive competition law, the Antimonopoly Law (AML), took effect.¹ No earth-shattering enforcement actions have been announced so far, and many governmental and commercial practices that have been decried as anticompetitive persist. Awareness of antitrust issues at home and abroad is, however, spreading among Chinese firms and Chinese consumers. The first concrete implementing measures to flesh out the new enforcement structure have been issued, and the first high-profile test cases for the new regime are simmering. The stage is set for a lengthy but lively second act in the drama of modern Chinese competition policy.

A Synopsis of Act I

Act I lasted thirteen years—not counting the prologue of tentative proposals for Chinese antitrust laws in the late 1980s.² The AML's drafting officially commenced in 1994 with the formation of a working group of officials and academics, but progress was sporadic.³ Meanwhile, China's transition from central planning to greater reliance on market forces profoundly altered China's economy and regulatory institutions. Accession to the World Trade Organization (WTO) in 2001 spurred the drafters on, as Chinese officials tasked with opening markets and reforming regulatory practices looked to competition policy as a "valid" instrument for intervening in the marketplace.

The legislative endgame began with the AML's submission to the National People's Congress (NPC) in 2006. By that time, policymakers had largely moved beyond preoccupation with WTO accession to focus on strengthening the role of China and Chinese firms in the global economy while staving off risks of domestic discord. The curtain fell on Act I with the promulgation of the Antimonopoly Law by the Standing Committee of the 10th National People's Congress on August 30, 2007.

Key plot elements for Act II have already been introduced. Antitrust straddles many of the tensions facing Chinese policymakers today: between old habits of central planning and greater faith in market forces; between safeguarding the central role of state-ownership and further loosening the restraints on private enterprise; between promoting world-class "national champions" in key sectors and shielding smaller firms from larger, often more efficient competitors; between the commercial interests of state-owned enterprises and the demands of China's increasingly vocal con-

■ **Nate Bush** is a Counsel and **Dr. Zhaofeng Zhou** is a Legal Consultant in the Beijing office of O'Melveny & Myers LLP.

¹ See Zhonghua Renmin Gongheguo Fanlongduan Fa [Antimonopoly Law of the People's Republic of China], (promulgated by the Standing Committee of the National People's Congress on Aug. 30, 2007 and effective on Aug. 1, 2008), available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXZLK&id=371229&pdmc=11006>. An unofficial English translation is available as an appendix to Nathan Bush, *The PRC Antimonopoly Law: Unanswered Questions and Challenges Ahead*, ANTITRUST SOURCE, Oct. 2007, <http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf>. References and quotations herein are based on this English translation.

² See Youngjin Jung & Qian Hao, *The New Economic Constitution in China: A Third Way for Competition Regime?*, 24 NW. J. INT'L L. & BUS. 107, 112 (2003).

³ See Wang Xiaoye, *Issues Surrounding the Drafting of China's Anti-Monopoly Law*, 3 WASH. U. GLOBAL STUDIES L. REV. 285, 285 (2004).

sumers; between harnessing the gains from foreign investment and foreign trade and insulating sensitive sectors from foreign influence; and between the de jure primacy of the central government and the de facto independence of many local authorities.

There is no clear consensus within China's establishment on how to resolve these tensions. A nucleus of antitrust-savvy officials and scholars view competition policy as a means of promoting consumer welfare and economic efficiency through competitive markets.⁴ (Some within this group, admittedly, support the protection of small- and medium-size enterprises as a freestanding antitrust policy goal.) Officials more removed from the drafting efforts, however, tend to view competition policy as a complement or instrument of industrial policy. Different passages of the AML reflect these competing viewpoints.

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The extent to which Chinese antitrust policy will actually converge with prevailing international practices remains uncertain. As explained elsewhere, the AML rules against “monopolistic conduct” by “business operators” cover much of the same ground as foreign competition laws; most substantive provisions derive from practices in the European Union, United States, Germany, Japan, and other jurisdictions.⁵ Largely following European practice, it prohibits anticompetitive agreements and concerted practices among multiple firms as “monopoly agreements” and confronts unilateral conduct by prohibiting “abuse of dominance.” The AML also establishes new procedures for reviewing mergers, acquisitions, and other “concentrations” on competition grounds. In addition, the AML addresses “administrative monopoly”—the anticompetitive misuse of governmental power to protect or promote favored enterprises. Although the AML imports many general concepts from foreign antitrust laws, it is unclear whether Chinese competition authorities will also embrace the nuances of these doctrines. Much depends on the capabilities and motivations of China's new competition authorities.

Casting the Enforcement Agencies

Among the most contentious issues in the drafting of the AML was determining how to allocate enforcement authority. The three principal contenders included the Ministry of Commerce (MOFCOM), the State Administration of Industry and Commerce (SAIC), and the National Development and Reform Commission (NDRC). Each staked its claim to antitrust leadership on different areas of policymaking and enforcement experience, and each boasted distinct strengths, constituencies, and agendas.

MOFCOM was created in 2003 through the consolidation of the State Economics and Trade Commission and the Ministry of Foreign Trade and Economic Cooperation (MOFTEC). MOFCOM's portfolio includes broad authority over international trade and investment issues and over many domestic commercial matters. MOFCOM led the review of transactions on “antimonopoly” grounds pursuant to the Regulations on the Mergers & Acquisitions of Domestic Enterprises by Foreign Investors (M&A Rules).⁶ These measures, first released in 2003 and overhauled in 2006,

⁴ See, e.g., Wang Xiaoye, Challenges in Enforcing Chinese Antimonopoly Law—The Conflicting Goals of the Law, Presented at the Third Annual Asia Competition Forum 2 (Dec. 11, 2007) (on file with the author).

⁵ See Bush, *supra* note 1 (analyzing the text of the AML).

⁶ See Guanyu Waiguo Touzizhe Binggou Jingnei Qiye de Guiding [Regulations on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors], (promulgated by Ministry of Commerce, State Owned Asset Supervision and Administration Commission, State Administration of Taxation, State Administration of Industry and Commerce, China Securities Regulatory Commission and State Administration of Foreign Exchange on Aug. 8, 2006 and effective on Sept. 8, 2006), available at http://www.legaldaily.com.cn/misc/2006-08/29/content_397421.htm. (Translation available by subscription at <http://www.chinalawinfo.com>.)

sketch out procedures for reviewing certain “mergers/acquisitions of domestic enterprises by foreign investors” and for “offshore mergers and acquisitions.”⁷ Despite widespread confusion as to the requirements (and skepticism as to their relevance), MOFCOM gradually ramped up its merger review efforts. In 2004, MOFCOM organized a new Antimonopoly Office to review mergers and coordinate MOFCOM’s central involvement in the drafting of the AML. By the end of 2007, MOFCOM had reviewed over 400 notified transactions. MOFCOM has also been the primary interlocutor in government-to-government exchanges on competition policy, and most of the Chinese officials who have closely studied foreign competition practices are MOFCOM personnel. MOFCOM is not, however, structured as an investigative agency, and its provincial and local commerce bureaus do not have antimonopoly departments.

The SAIC is a ministry-level organization charged with administering various commercial regulations. It operates through provincial and local Industry and Commerce Administrations (AICs). Although the SAIC also received merger notifications pursuant to the M&A Rules, it assumed a more passive “archival” role. The SAIC’s credentials as an antitrust enforcement agency rest more on its experience enforcing the Anti-Unfair Competition Law.⁸ Most of this enforcement activity involves rules against commercial bribery and deceptive trade practices; the “antitrust” provisions are largely toothless. The SAIC has, however, emphasized its record of enforcing the Anti-Unfair Competition Law’s rules against state-sanctioned monopolies and government agencies that compel consumers to trade with designated firms and against government entities that exclude products from other regions.⁹ In a December 13, 2007 speech, SAIC Vice-Minister Zhong Youping trumpeted the SAIC’s investigation of 6,479 compulsory trading cases involving the power, mail, telecommunications, insurance, banking, gas, tobacco, and salt industries and of 490 cases involving local protectionism.¹⁰ Despite this experience as an investigative and enforcement agency, the SAIC’s current role does not encompass significant economic analysis or economic policymaking.

The NDRC is a powerful macro-economic planning body with broad authority over nationwide industrial policy and economic policy. The NDRC also administers the Price Law, which enables the NDRC to issue guidance or controls for prices of certain products while prices for other products are left to the market.¹¹ The Price Law also prohibits certain “abnormal pricing behaviors,” including price fixing, predatory pricing, and price discrimination. In 2003, the NDRC issued the

⁷ See Waiguo Touzizhe Binggou Jingnei Qiye Zanxing Guiding [Provisional Regulations Regarding Mergers and Acquisitions of Domestic Enterprises by Foreign Investors], (promulgated by Ministry of Foreign Trade and Economic Cooperation, State Administration of Taxation, State Administration of Industry and Commerce, and State Administration of Foreign Exchange on Mar. 13, 2003 and effective on Apr. 12, 2003), available at <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200509/20050900366385.html>. (Translation available by subscription at <http://www.chinalawinfo.com>.)

⁸ See Zhonghua Renmin Gongheguo Fanbuzhengdang Jingzheng Fa [Anti-Unfair Competition Law of the People’s Republic of China], (promulgated by the Standing Committee of the National People’s Congress on Sept. 2, 1993 and effective on Dec. 1, 1993), available at <http://tfs.mofcom.gov.cn/aarticle/date/i/s/200503/20050300027909.html>. (Translation available by subscription at <http://www.chinalawinfo.com>.)

⁹ See *id.*, arts. 6–7.

¹⁰ See Zhong Youping zai Fanlongduan Zhifa Guoji Yantaohui shang Zhichu Gongshang Bumen Yifa Kaizhan Jingzheng Zhifa Qude Jiji Chengxiao [Statement by Zhong Youping at the International Symposium on Antitrust Law Enforcement that AICs’ Enforcement of Competition Rules Has Achieved Positive Results] (Dec. 15, 2007), available at http://www.saic.gov.cn/zwxqx/zwdt/gsyw/zjyw/t20071218_28643.htm.

¹¹ See Zhonghua Renmin Gongheguo Jiage Fa [Price Law of the People’s Republic of China], (promulgated by the Standing Committee of the National People’s Congress on Dec. 29, 1997 and effective on May 1, 1998), available at http://www.gov.cn/ziliao/tf/g/2005-09/12/content_31188.htm. (Translation available by subscription at <http://www.chinalawinfo.com>.)

Interim Price Monopoly Rules, which read like a rough draft of the AML provisions on monopolistic agreements and abuse of dominance.¹² These measures were largely unenforced. However, as the Chinese government became increasingly concerned with inflation in mid-2007, the NDRC responded vigorously to allegations of collusion in regional food markets. In January 2008, the State Council increased the penalties for collusion to fix or increase prices.¹³

The State Council did not rush to name the enforcement authorities—arguably with sound reason. In March 2008, the five-year term of the 10th NPC ended and the 11th NPC began its own five-year term. The last NPC transition triggered a major restructuring of the central government, including the consolidation of the SETC and MOFTEC into MOFCOM. Advocates of a unified enforcement structure hoped a new round of reorganization would lead to a single enforcement agency, or at least alleviate the turf battle. While some ministries were consolidated, MOFCOM, the SAIC, and the NDRC all survived (although the expansion of the Ministry of Industry and Information Technology siphoned away some power from the NDRC).

As August 1 approached, a series of organizational notices unveiled the new enforcement scheme. The State Council opted for a division of authority roughly tracking the existing responsibilities of MOFCOM, the NDRC, and the SAIC.

- MOFCOM formed a new Antimonopoly Bureau, essentially elevating the stature of the former Antimonopoly Office within the ministry.¹⁴ The new Bureau is responsible for reviewing mergers under the AML, building on its experience reviewing mergers involving foreign parties reported under the M&A Rules. It is also responsible for coordinating bilateral and multilateral cooperation on competition policy issues. Somewhat paradoxically, MOFCOM is also responsible for guiding Chinese parties participating in antitrust proceedings overseas. While support for exporters ensnared in foreign antidumping proceedings might make sense, support for firms facing antitrust charges may compromise MOFCOM's ability to cooperate with its foreign peers in cartel investigations.
- The SAIC is now responsible for enforcing the rules against monopoly agreements and abuse of dominance—except for price-related conduct. The SAIC's new Antimonopoly and Anti-Unfair Competition Enforcement Bureau is expected to expand the SAIC's current program for enforcing the Anti-Unfair Competition Law to include AML enforcement.¹⁵

¹² See Zhizhi Jiage Longduan Xingwei Zanxing Guiding [Interim Provisions on Preventing Acts of Price Monopoly], Order [2003] No. 3 (adopted by the State Planning and Development Commission on June 18, 2003 and effective on Nov. 1, 2003), available at http://www.sdpc.gov.cn/zcfb/zcfbl/zcfbl2003/t20050613_6683.htm. (Translation available by subscription at <http://www.chinalawinfo.com>). The State Planning and Development Commission was restructured and renamed the NDRC during the same 2003 government reorganization which created MOFCOM.

¹³ See Guowuyuan Guanyu Xiugai Jiage Weifa Xingwei Xingzheng Chufa Guiding de Jueding [Decision of the State Council on Revision of Provisions on Administrative Punishment of Price-Related Violations] (Jan. 13, 2008).

¹⁴ See Shangwubu Zhuyao Zhizhe Neishe Jigou he Renyuan Bianzhi Guiding [Regulation on Major Duties of the Internal Structure and Staffing Requirements of Ministry of Commerce], issued on Aug. 23, 2008, art. 3 (11), available at http://www.china.com.cn/policy/zhuanti/xbwzj/2008-08/24/content_16316678.htm.

¹⁵ See Guowuyuan Bangongting Guanyu Yinfa Guojia Gongshang Xingzheng Guanli Zhongju Zhuzhao Zhizhe Neishe Jigou he Renyuan Bianzhi Guiding de Tongzhi [Office of the State Council Issued the Notice on the Major Duties of the Internal Structure and Staffing Requirements of State Administration for Industry and Commerce], issued on July 11, 2008, available at http://www.saic.gov.cn/zwxqx/zwdt/zyfb/t20080725_43236.htm.

- The NDRC is now responsible for addressing price-related violations of the AML rules against monopoly agreements and abuse of dominance.¹⁶ These duties fall to the Price Supervision Department, which currently administers the Price Law.

Ironically, the May 2002 draft of the AML anticipated this eventual compromise; it assigned merger review and administrative monopoly issues to MOFCOM's predecessor, MOFTEC, assigned the rules against "price agreements" and collusion to the State Planning and Development Commission (now the NDRC), and assigned the remaining rules against monopoly agreements and abuse of dominance to the SAIC.

This division of authority heightens concerns about inconsistent enforcement and policy coordination. Distinguishing "price-related" violations and "non-price" violations may prove unworkable. Where a single course of anticompetitive conduct combines pricing practices with other non-price measures, it is unclear whether and how the SAIC and NDRC will coordinate their investigations. Conceptually, it may often be difficult to distinguish explicit "price-related" violations and "non-price" violations with equivalent economic effects. Overlaps between the Anti-Unfair Competition Law, the Price Law, and other measures compound these risks, particularly with respect to price-related violations of the Anti-Unfair Competition Law.

More importantly, MOFCOM, the SAIC, and the NDRC may embrace divergent views of the proper goals of antitrust and its role in the Chinese government's overall agenda. Some dissonance is perhaps inevitable in any scheme involving multiple enforcement agencies, as illustrated by recent differences between the U.S. Federal Trade Commission and the Department of Justice Antitrust Division concerning unilateral conduct.¹⁷ The Chinese enforcement authorities, however, may clash on even more fundamental goals and tools of antitrust. Different approaches to defining markets, gauging market power, and weighing the interests of consumers and competitors when applying the many "public interest" exceptions of the AML may lead to inconsistent, if not contradictory results.

To mitigate these risks, the AML calls for the establishment of a new interagency Antimonopoly Commission to coordinate policymaking. China has over a dozen such "advisory and coordinating bodies" to handle issues cutting across ministries. Official media recently confirmed the appointment of Vice Premier Wang Qishan, whose portfolio also includes trade and financial policy, to head the Commission. With robust political support, the Antimonopoly Commission might reconcile the enforcement programs of the three primary enforcement agencies and resolve clashes with other ministries' own priorities.

The Antimonopoly Bureau of MOFCOM has been designated to serve as the secretariat for the Antimonopoly Commission. This may enable MOFCOM to infuse lessons from the last several years of engagement with foreign authorities, scholars, and practitioners into the enforcement decisions of the SAIC and NDRC.

Although the AML focuses on administrative enforcement, it also authorizes judicial enforcement through private actions for damages. The Supreme People's Court (SPC) issued a circular on July 31, 2008, exhorting People's Courts at all levels to study the new AML and stressing the compli-

Different approaches to defining markets, gauging market power, and weighing the interests of consumers and competitors when applying the many "public interest" exceptions of the AML may lead to inconsistent, if not contradictory results.

¹⁶ See Guojia Fazhan he Gaige Weiyuanhui Zhuyao Zhizhe Neishe Jigou he Renyuan Bianzhi Guiding [Regulation on Major Duties of the Internal Structure and Staffing Requirements of National Development and Reform Commission], issued on Aug. 22, 2008, art. 3 (23), available at http://www.ndrc.gov.cn/gzdt/t20080821_231802.htm.

¹⁷ See Press Release, Federal Trade Comm'n, FTC Commissioners React to Department of Justice Report, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act (Sept. 8, 2008), available at <http://www.ftc.gov/opa/2008/09/section2.shtm>.

cated blend of legal and economic issues in competition cases. The SPC also assigned cases involving claims under the AML to the courts that handle intellectual property cases. Although the SPC normally issues quasi-legislative “judicial interpretations” fleshing out the substantive and procedural aspects of new laws, no formal judicial interpretations of the AML have yet been issued. Future interpretations might condition actions for damages on a prior finding of a violation by an enforcement agency. At this point, however, the doors to Chinese courts remain open.

A Tale of Two Rulemakings

On November 24, 2007, Cheng Siwei, Vice-Chairman of the Standing Committee of the NPC, announced that over twenty subsidiary regulations would be forthcoming before August 1, 2008.¹⁸ As of July 31, 2008, no final implementing regulations had come forth. On August 1, 2008, the State Council adopted the Rules of the State Council on Notification Thresholds for Concentrations of Undertakings (Notification Threshold Rules).¹⁹ No other implementing measures have been circulated in draft for public comment or formally issued, and the pace of further rulemaking remains uncertain. The NDRC has, however, reportedly drafted new regulations concerning price-related monopolistic conduct that await State Council approval.²⁰ The course of these two rulemaking initiatives may suggest the path of future implementing measures.

The Notification Threshold Rules debuted on March 27, 2008, when the Legislative Affairs Office of the State Council released draft Rules of the State Council on Notifications of Concentrations of Undertakings (Draft Notification Rules) for public comment.²¹ An unofficial draft of these measures had circulated several weeks beforehand. The Draft Notification Rules tackled many procedural issues left open by the AML: the definition of “concentration,” the designation of the parties responsible for notifying transactions, the handling of “incomplete notifications” and the commencement of the review period, the duty to update notifications, confidentiality, and translation requirements. Nevertheless, commentators readily pointed out areas where the Draft Notification Rules deviated from prevailing international practices or left crucial questions unanswered.²² The State Council whittled the nineteen articles of the Draft Notification Rules down to five brief articles in the Notification Threshold Rules adopted on August 1, 2008. It remains to be seen whether any of the omitted articles of the Draft Notification Rules resurface in future measures or how MOFCOM will eventually deal with the underlying issues.

Even though many questions remain, the new Notification Threshold Rules bring China’s merger review scheme closer to the international mainstream. First and foremost, the final rules omit a previous proposal requiring notification of transactions that would “result in one undertaking hav-

¹⁸ See *Beijing Drawing Up New Rules on Foreign Buyouts*, SOUTH CHINA MORNING POST, Nov 27, 2007.

¹⁹ See Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding [Rules of the State Council on Notification Thresholds for Concentrations of Undertakings], (adopted and effective on Aug. 1, 2008), available at http://www.gov.cn/zwgk/2008-08/04/content_1063769.htm.

²⁰ See *State Council Established Antimonopoly Law Commission*, BEIJING NEWS, Aug. 2, 2008, <http://www.thebeijingnews.com/economy/2008/08-02/011@073825.htm>.

²¹ See Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao de Guiding (Zhengqiu Yijian Gao) [Draft Rules on Notification of Concentrations of Undertakings Issued by the State Council] (released by the Legislative Affairs Office of the State Council on Mar. 27, 2008), available at http://www.china.com.cn/finance/txt/2008-03/28/content_13777686_2.htm.

²² See, e.g., AMERICAN BAR ASS’N, JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW AND PRACTICE ON DRAFT FOR COMMENTS OF THE PEOPLE’S REPUBLIC OF CHINA STATE COUNCIL REGULATIONS ON NOTIFICATIONS OF CONCENTRATION OF UNDERTAKINGS (2008), available at <http://www.abanet.org/antitrust/at-comments/2008/04-08/UndertakingDraft.shtml> [English version at p. 11].

Even though many questions remain, the new Notification Threshold Rules bring China's merger review scheme closer to the international mainstream.

ing a market share of 25% or more within China.” Echoing the recommended practices of the International Competition Network, an explanatory “Q&A” sheet released by the State Council Legislative Affairs Office (SCLAO) explained that notification thresholds should be “objective, clear and easily judged and understood by business operators and authorities” and that revenue-based criteria are “objective and clear.”²³ In relying solely on revenue thresholds, the SCLAO explained, the Notification Threshold Rules adopted the “common international practice.”²⁴

The final notification thresholds are largely modeled on the EC Merger Regulation.²⁵ They require notification of a transaction where: the combined global sales turnover of all parties exceeded RMB 10 billion (approximately US\$1.46 billion) and the turnover from within China of at least two parties each exceeded RMB 400 million (approximately US\$58 million) during the previous year; or the combined sales turnover from within China of all parties exceeded RMB 2 billion (approximately US\$292 million) and the turnover from within China of at least two parties each exceeded RMB 400 million (approximately US\$58 million) during the previous year.²⁶

The SCLAO explained that these revenue thresholds were based on a comparative survey of the notification criteria and economic indicators of foreign jurisdictions conducted by the Quantitative and Technical Economics Institute of the Chinese Academy of Social Sciences and on the 2006 revenues of Chinese enterprises as reported by the National Bureau of Statistics. The SCLAO described the thresholds as commensurate with the scale of China's economy and with “industrial policies aimed at encouraging enterprises to be stronger and bigger.”²⁷

The revised quantitative thresholds bring China within the lower range of quantitative thresholds employed by well-established merger review regimes.²⁸ Indeed, the SCLAO pointed to Germany, France, and Japan as countries with lower thresholds.²⁹

The Notification Threshold Rules call for eventual formulation of “detailed measures on the calculation of turnover” by the enforcement authorities. Such measures may clarify which entities' revenues should be considered in connection with different types of transactions. MOFCOM has generally accepted the notion of aggregating the turnover of all affiliates subject to common control of a single ultimate parent entity in the merger context, but this practice remains uncodified. It is less clear whether China will follow prevailing international practices with respect to acquisitions by focusing on the revenues of the “target” (i.e., the business being sold) rather than “seller” as a whole.

The Notification Threshold Rules call for the calculation of turnover to “take into account the actual circumstances of such special industries and sectors as banking, insurance, securities, futures, etc.” The SCLAO suggested that sector-specific rules would be forthcoming in the future.

²³ See Guowuyuan Fazhiban Fuzheren Jiu “Guowuyuan Guanyu Jingyingzhe Jizhong Shenbao Biaozhun de Guiding” Da Jizhe Wen [The Officials of the Legislation Office of State Council Answering Reporters' Questions Regarding Rules of State Council on Notification Thresholds for Concentrations of Operators], Aug. 4, 2008, [hereinafter SCLAO Q&A], available at http://www.gov.cn/zwhd/2008-08/04/content_1063736.htm.

²⁴ *Id.*

²⁵ See Council Regulation (EC) No. 139/2004 of 20 January 2004 on the Control of Concentrations between Undertakings, 2004 O.J. (L 24) 1, art. 1(2).

²⁶ See Notification Threshold Rules, *supra* note 19, at art. 3.

²⁷ See SCLAO Q&A, *supra* note 23.

²⁸ For example, the RMB 400 million local nexus requirement approaches the United States' screen of transactions involving foreign parties with less than US\$63.1 million (RMB 432 million) in annual U.S. revenues or U.S. assets, and it is higher than the €25 million (RMB 266 million) single party local nexus threshold applied in Germany.

²⁹ See SCLAO Q&A, *supra* note 23.

The Notification Threshold Rules also empower the enforcement authorities to investigate concentrations that do not otherwise trigger notification if “facts and evidence” indicate that the transaction may eliminate or restrict competition. The text implies that such concentrations would then be subject to the suspensive waiting periods pending the investigation. In explaining this provision, the SCLAO pointed to scenarios in which undertakings with low revenues nevertheless enjoy high market shares.³⁰ This concern is legitimate. Given the geographic fragmentation of the domestic markets for many products and services and the stratification of many product areas to reflect the vast disparities in income among consumers, properly defined markets in many sectors may often prove surprisingly small. Indeed, the market-share-based notification criteria were apparently intended to reach transactions creating monopoly positions in tiny markets. On balance, the risk of investigation of non-reportable deals is probably a lesser evil than either the burdens of a general market-share-based notification threshold or the risks that the NDRC or SAIC might otherwise address unreportable transactions as “monopoly agreements.” Nevertheless, foreign commentators highlighted the risks that competitor complaints might hold up deals. Perhaps in response to these comments, the SCLAO stressed that such investigations would have to be based on “facts and evidence collected according to prescribed procedures” to “prevent the authorities’ discretion from being too great.”³¹ As a practical matter, MOFCOM may be unable to divert substantial resources to the investigation of otherwise unreportable transactions for the foreseeable future.

The Notification Threshold Rules reflect receptiveness to prevailing international practices and willingness to consider public comments. It is not certain, however, that future implementing measures will follow the same tack. For example, the NDRC has reportedly drafted implementing measures for price-related violations, with no indication of plans for a public comment period. “Price-related” violations notably include Article 17(2) of AML which prohibits dominant firms from charging “unfairly high” prices. Although Article 82(a) of the EC Treaty likewise prohibits “directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions,” in practice the European Commission does not actively pursue “high pricing” as an abuse of dominance absent any exclusionary or predatory conduct. Nevertheless, the draft NDRC implementing measures reportedly translate the prohibition on unfair pricing into rules barring dominant firms from charging prices 20 percent higher than competitors’ prices or realizing profits over 20 percent on sales. The feasibility of these measures is doubtful. How should monopolists identify relevant competing products? And monitor competitors’ pricing on a rolling basis? Without sliding into collusion? How should costs, expenses, and revenues be allocated to determine the profits on individual sales? Even if these measures are not enacted, their mere proposal demonstrates the gap in perspectives between the NDRC and colleagues in the SCLAO and MOFCOM.

National Security Review: Sideshow or Subplot?

National security has long figured in the Chinese government’s review of foreign investments, but growing apprehension about foreign influence in sensitive sectors and indignation at the failure of China National Offshore Oil Corporation’s 2005 bid for UNOCAL have brought the issue to the foreground.³² The Carlyle Group’s proposed investment in Xuzhou Construction Machinery,

³⁰ *See id.*

³¹ *See id.*

³² *See* Harry L. Clark & Lisa W. Wang, *Foreign Investment and National Security*, CHINA BUS. REV., Jan.–Feb. 2008, at 52; *see also* *Foreign M&As in China Take a Tricky Turn*, CHINA KNOWLEDGE PRESS, Nov. 13, 2007, 2007 WLNR 22379812.

China's largest construction equipment manufacturer and an SOE, appears to have foundered on national security and industrial policy concerns.³³

The 2006 revisions to the M&A Rules introduced requirements for foreign acquisitions of Chinese firms that "result in actual control by the foreign investor" and "involve key industries, have factors imposing or possibly imposing a material impact on the economic security of the State, or would result in transfer of actual control in a domestic enterprise which owns any well-known trademarks or Chinese historical brands."³⁴ MOFCOM, "together with other relevant departments," may act to block, modify or unwind unreported transactions with actual or potential "material impact" on the "economic security of the State."³⁵ These provisions are separate from the antitrust provisions of the M&A Rules; indeed, the 2006 revisions deleted a reference to "national security" from the original 2003 rules as a consideration in antitrust review.

The AML likewise severs antitrust review of reported transactions from national security review. Article 31 provides that where a foreign investor merges with or acquires an enterprise within China or where any other form of concentration "concerns national security," the transaction will be subject to separate review on national security grounds "in accordance with relevant regulations of the State." This bifurcation was consciously modeled on the U.S. practice of separating antitrust review from the separate national security review by the Committee on Foreign Investment in the United States.³⁶

In August 2008, the NDRC and MOFCOM released measures suggesting that they would join other "relevant departments" to establish a "Joint Ministerial-Level Meeting for the Security Review of Merger & Acquisitions of Domestic Enterprises by Foreign Investors." This interagency body will review foreign acquisitions or mergers with domestic enterprises having national security implications under the M&A Rules, as well reviewing new foreign direct investment projects with national security dimensions. The precise mechanics of this new interagency clearance process remain murky.

Broad interpretations of "national security" might encompass industrial policy interests with scant relevance to military or security policy. In such cases, contests between "competition policy" and "industrial policy" would be cloaked in the rhetoric of national security. The comments of NPC Vice-Chairman Xu Jialu illustrate this slippage:

State security includes national defense security, information security, environmental security, and economic security. Western multinationals have now reached out to seize China's leading manufacturing enterprises. . . . These large state-owned enterprises have much proprietary intellectual property and represent China's leading-edge manufacturing technology. Control by foreign countries will pose a big obstacle to our future innovation.³⁷

³³ See *Carlye Fails to Secure Stake in China Firm*, Asia Wall St. J., July 23, 2008.

³⁴ See M&A Rules, *supra* note 6, at art. 12.

³⁵ *Id.*

³⁶ See Zhengguo Wu, *Perspectives on the Chinese Antimonopoly Law*, 75 ANTITRUST L.J. 73, 101 (2008); see generally 50 App. U.S.C.A. § 2170 (2007).

³⁷ See Jiaqiang Qiye Binggou De Jiandu Fangzhi Lanyong Xingzheng Quanli Paichu Xianzhi Jingzheng [Enhancing Supervision of Mergers and Acquisitions, Preventing Abuse of Administrative Power to Exclude and Restrict Competition], available at <http://www.npc.gov.cn/zgrdw/common/zw.jsp?label=WXLK&id=371691&pdm=110106>. (Unofficial translations available from the author); see also *PRC Analysts Comment on Antimonopoly Law*, WORLD NEWS CONNECTION (NEWSWIRE), Sept. 4, 2007 (translating Xinhua article describing concern about "malicious" foreign investment jeopardizing national security, available at http://news.xinhuanet.com/newscenter/2007-08/30/content_6635146.htm).

A greater risk to sound competition policy, however, would be for national security concerns to seep into the ostensibly separate merger review process. Pressures on MOFCOM to consider national security may be greatest where an offshore transaction falls outside the technical scope of national security review.

The Rising Action: Test Cases

Several high-profile transactions will test the new antimonopoly enforcement authorities' antitrust acumen and their political stamina.

Even if China's

competition authorities

advance "default"

antitrust rules

consistent with

prevailing international

practices, competing

policies and political

interests may often

override them.

- On September 3, 2008, Coca-Cola Co. announced plans to acquire Huiyuan Juice Group Ltd., China's leading fruit juice company.³⁸ Huiyuan was founded in China by entrepreneur Zhu Xinlin in 1992. Huiyuan's Chinese operating companies are ultimately owned by China Huiyuan Juice Group Limited, a BVI company listed in Hong Kong. Its chief shareholders include Zhu Xinlin (41%), Danone (23%), Fidelity International Ventures (7%), ABN AMRO Bank (7%), with the remainder actively traded in Hong Kong.³⁹ Although Huiyuan's ownership structure has already passed overseas with its listing in Hong Kong, the deal has touched a nationalist nerve, provoking public outrage that a foreign multinational would swallow a homegrown brand. Ironically, the provisions of the 2006 M&A Rules concerning control of China's "famous brands" appear inapplicable,⁴⁰ because the transfer of shares in Hong Kong would not technically qualify as a "merger/acquisition of a domestic enterprise by a foreign investor" subject to such review.⁴¹ Nevertheless, Coca-Cola spokespersons have confirmed that it notified the transaction for review under the AML, and Chinese juice companies are clamoring for a hearing of the case.⁴² MOFCOM's handling of the Huiyuan transaction may indicate MOFCOM's capacity to focus on core competition issues in the face of substantial political pressure.
- BHP Billiton's bid for Rio Tinto has agitated China's steel makers and other industries.⁴³ Intervening in this wholly offshore deal would be a path breaking exercise of extraterritorial jurisdiction for China.
- A Chinese lawyer has requested an investigation of Microsoft for violating the rules against unfairly high pricing by dominant firms.⁴⁴ The complaint has been acknowledged, but no formal investigative steps have been publicized.

³⁸ See <http://news.brandcn.com/pinpaipinglun/200809/152406.html>.

³⁹ See Kekou Kele Baojia 23 yi Meiyuan Shougou Huiyuan Guoji [Coca-Cola Buying Huiyuan at US\$2.3 Billion], available at <http://news.hexun.com/2008/kekoukelesghy/>.

⁴⁰ See M&A Rules, *supra* note 6, at art. 12.

⁴¹ See *id.* at art. 2.

⁴² See Huiyuan Binggouan Jinru Fanlongduan Shencha Chengxu [Huiyuan Merger Case Entered into Anti-Monopoly Review Process], Sept. 22, 2008, http://www.eeo.com.cn/industry/med_consum_goods/2008/09/22/114440.html; see also Coca-Cola Files Anti-Monopoly Review Application, Sept. 22, 2008, <http://www.cctv.com/program/bizchina/20080922/102011.shtml>; Shangwubu Jiangyi Shichang Jingji Yuanzhe Chuli Huiyuan Binggouan [Ministry of Commerce Will Handle the Acquisition of Huiyuan According to Market Economy Rules], available at <http://www.competitionlaw.cn/show.aspx?id=4101&cid=5>; Official: China to Insist on Principle of Market-Oriented Economy on Huiyuan-Coca-Cola Union, Sept. 10, 2008, available at http://news.xinhuanet.com/english/2008-09/10/content_9904527.htm; Shangwubu Jiangkai Shougou Huiyuan Tingzhenghui [MOFCOM Will Hold a Hearing for the Acquisition of Huiyuan], Sept. 16, 2008, <http://www.21food.cn/html/news/35/368957.htm>.

⁴³ See China's Steel Association Opposes BHP Billiton, Rio Tinto Merger, Aug. 3, 2008, available at http://news.xinhuanet.com/english/2008-08/03/content_8923258.htm.

⁴⁴ See Liangbuwei "Huishen" Weiruan Longduan, Shangdai Gongshang Zongju [Two Ministries Jointly Investigate Microsoft, Waiting for SAIC], available at <http://www.competitionlaw.cn/show.aspx?id=4051&cid=42>; see also China to Investigate Microsoft Under New Anti-Monopoly Law, Aug. 26, 2008, available at <http://www.interfax.cn/news/5134/>.

- Four private technology firms filed suit against the General Administration of Quality Supervision, Inspection and Quarantine of the People's Republic of China ("AQSIQ"), a governmental body.⁴⁵ The plaintiffs allege that AQSIQ abused its administrative power in violation of the AML by requiring companies to pay annual fees to register for an online quality monitoring network administered by a commercial company in which AQSIQ holds a 30 percent ownership stake. The case presents novel questions about the amenability of government entities to private lawsuits under Article 50 of the AML, which authorizes suits against "business operators."

Following the Plot

China's new competition authorities will likely spend the coming months grappling with novel live cases, implementing measures, and each other. Many key developments will unfold behind closed doors, and the public record of enforcement activity may be sparse. The AML requires the publication only of written decisions to block or impose conditions on concentrations; publication of other enforcement decisions is at the authorities' discretion. Even those decisions that are published may not fully or accurately articulate the underlying reasoning. Chinese administrative and judicial decisions are often formulaic and conclusory, shedding little light on the underlying analysis.⁴⁶

Even if China's competition authorities advance "default" antitrust rules consistent with prevailing international practices, competing policies and political interests may often override them. Given the dynamics and opacity of Chinese policymaking, administrative decisions, and judicial rulings, it may be difficult to distinguish the progressive development of China's default antitrust rules from episodes of politicized decision making. The plotlines of Chinese Antitrust Act II may prove intricate, intriguing, and difficult for the audience to follow. ●

⁴⁵ See Shijia Fangwei Qiye Xiang Guojia Zhijian Zhongjiu Tiqi Fanlongduan Susong [Four Anti-Fake Enterprises Brought an Antimonopoly Suit Against AQSIQ], Aug. 3, 2008, <http://www.competitionlaw.cn/show.aspx?id=3961&cid=42>.

⁴⁶ See U.S.T.R., 2007 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 33 (2007) (noting procedural shortcomings and lack of transparency in Chinese antidumping proceedings); Stanley Lubman, *Looking for Law in China*, 20 COLUM. J. ASIAN L. 1, 30 (2006).

Waivering on Waivers: The Filip Policy and the Possible Demise of “Coerced” Corporate Privilege Waivers

Joann Kahn

“The name of the game in corporate fraud prosecutions now is cooperation.”¹ That notion took root in the early to mid-1990s, but became firmly entrenched in our legal system in the aftermath of the Enron and Worldcom corporate scandals. Over the past decade, the Department of Justice has adopted policies to help prosecutors aggressively combat corporate wrongdoing and corruption. In June 1999, Deputy Attorney General Eric H. Holder issued a policy memorandum entitled “Federal Prosecution of Corporations” (Holder Memo).² The Holder Memo, although advisory, set forth standards by which a corporation (as opposed to individual employees or officers) would be judged cooperative in a federal criminal investigation. Its progeny, the Thompson and McNulty Memos, so-named after Deputy Attorneys General Larry Thompson and Paul McNulty, respectively, gained notoriety for promulgating policies that were designed to induce corporations to waive applicable attorney-client and work product protections in criminal prosecutions.³

The Thompson and McNulty Memos were widely panned for “compelling” corporations to waive privilege protections in order to either avoid indictment or secure leniency. Detractors complained that these policies fomented a “culture of waiver,” which eroded the attorney-client privilege, chilled dialogue between company employees and in-house attorneys, and undermined a lawyer’s ability to counsel compliance with the law. In an effort to blunt legislation designed to address these concerns, Deputy Attorney General Mark Filip released revised corporate charging guidelines on August 28, 2008 (Filip Policy).⁴ The Filip Policy retreats dramatically from the waiver policies of its predecessors by effectively barring federal prosecutors from requesting corporate waivers and from considering a company’s refusal to furnish a waiver when deciding whether to press charges. Nevertheless, skepticism abounds in the legal community, as critics clamor for legislators to put an end to ever-shifting DOJ policies and enact lasting change.

Given the recent promulgation of the Filip Policy, however, it may be premature for legislators to take action. The efficacy of the Filip Policy in satisfying the twin goals of arresting further ero-

¹ David Anders, Former Ass’t U.S. Attorney for the Southern Dist. of NY, Securities Fraud Unit, Speech at the University of Maryland School of Law’s Roundtable on the Criminalization of Corporate Law (Apr. 21, 2006), *reprinted in* 2 J. Bus & TECH. L. 71, 72 (2007).

² Memorandum from Eric Holder, Deputy Att’y Gen., U.S. Dep’t of Justice, to Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999) (Holder Memo), *available at* <http://www.usdoj.gov/criminal/fraud/docs/reports/1999/chargingcorps.html>.

³ Although the series of memos discussed here contain multiple factors prosecutors should consider in determining whether to charge a corporation, the sole focus of this article will be on the guidelines bearing on waiver of the attorney-client privilege.

⁴ The revised principles are set forth, not as a memo, but in the United States Attorneys’ Manual. *See* Mark R. Filip, Deputy Att’y Gen., U.S. Dep’t of Justice, Remarks Prepared for Delivery at Press Conference Announcing Revisions to Corporate Charging Guidelines (Aug. 28, 2008), *available at* <http://www.usdoj.gov/dag/speeches/2008/dag-speech-0808286.html>; *see also* UNITED STATES ATTORNEYS’ MANUAL §§ 9-28.000 to 9-28.1300 (2008) (incorporating revisions).

sion of the attorney-client privilege and stamping out corporate malfeasance is unknown. Further, given the current economic downturn and the renewed public outcry against corporate greed, the incoming administration may be loathe to take action that could appear “soft” on corporate crime.

Although most of the analysis and criticism of the DOJ waiver policies have arisen in securities fraud and accounting fraud investigations, those policies govern all prosecutors and apply to all areas of criminal enforcement, including criminal antitrust investigations. However, the Filip Policy, much like its predecessors, cautions that the practices and policies of some of the Department’s divisions may override its own. For example, the Antitrust Division has established its own “Corporate Leniency Policy” (Amnesty Program), which was designed to encourage cartel members to make voluntary disclosures and to cooperate with government investigations. The Amnesty Program provides complete immunity only to the first company to report the illegal activity. Because this “first in” incentive rewards only the first company to come forward and cooperate, the cooperativeness of the remaining cartel members may have little bearing on whether they are charged. In this regard, the Amnesty Program deviates from DOJ policies, which would consider the cooperation of each defendant in making a charging decision, and not just that of the first confessor. Even so, the Filip Policy is still germane to antitrust investigations. Because antitrust immunity to the first corporate confessor is contingent upon its full disclosure and cooperation, the Filip Policy may limit the type of cooperation the government may demand from companies seeking amnesty.

Because antitrust immunity to the first corporate confessor is contingent upon its full disclosure and cooperation, the Filip Policy may limit the type of cooperation the government may demand from companies seeking amnesty.

The Progenitor: The Holder Memo

The Holder Memo, which established internal guidelines for federal prosecutions of corporations, stated that prosecutors “should consider” certain factors in determining whether to charge a corporation, including, among other things, “its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges.” Although these factors were non-binding, the waiver policies were significant. The DOJ had formally linked a company’s cooperation in a government investigation with its willingness to waive the attorney-client and work product privileges. From a more symbolic standpoint, the Holder Memo constituted the DOJ’s first attempt to develop a uniform approach to corporate investigations, and it reflected the government’s heightened resolve to vigorously combat corporate malfeasance.

Despite issuance of the Holder Memo, the number of criminal prosecutions of business organizations “remained fairly steady,”⁶ and a spate of subsequent corporate scandals paved the way for a more aggressive and, ultimately, more controversial DOJ policy.

A More Aggressive Stance: The Thompson Memo

In January 2003, in the wake of the Enron and Worldcom investigations, Congress rallied for stronger enforcement measures to stamp out corporate wrongdoing. In response, Deputy Attorney General Larry Thompson issued a new memo (Thompson Memo), aimed at “increas[ing] empha-

⁵ Holder Memo, *supra* note 2.

⁶ Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1100 n.19 (2006).

⁷ See Memorandum from Larry D. Thompson, Deputy Att’y Gen., U.S. Dep’t of Justice, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations 1 (Jan. 20, 2003) (Thompson Memo), available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

sis on and scrutiny of the authenticity of a corporation's cooperation."⁷ The Thompson Memo restated the prosecutorial guidelines of the Holder Memo, but placed a heavier emphasis on waiver of privilege as a measure of corporate cooperation. "Such waivers," the Thompson Memo explained, "permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."⁸ Therefore, prosecutors were encouraged to "request a waiver in appropriate circumstances."⁹ Although waiver was not an absolute requirement, the Thompson Memo nevertheless made clear that "the willingness of a corporation to waive such protection" was a key factor for prosecutors to consider in evaluating a company's cooperation.¹⁰

Over the next three years, the Thompson Memo faced mounting attacks from defense counsel, former Justice Department officials, legal commentators, bar associations, and legislators alike.¹¹ Critics complained that companies were routinely coerced into waiving the attorney-client and work product protections in order to obtain maximum cooperation credit from prosecutors and therefore avoid indictment or secure leniency.¹² These "compelled" waivers were troublesome because they had a deleterious effect on the attorney-client privilege. Companies were discouraged from consulting with company lawyers, thereby damaging the relationship between companies and their lawyers. Advocates for the protection of these privileges argued that absent candid dialogue between companies and their attorneys, the lawyers' ability to counsel compliance with the law was materially impeded. The effectiveness of internal compliance programs was thereby compromised, making it more difficult for corporations to detect misconduct and respond effectively. Corporations, their employees, and investors alike suffered from the erosion of the attorney-client privilege.¹³

A Tactical Retreat: The McNulty Memo

To address the concern that the policies of the Thompson Memo were "discouraging full and candid communications between corporate employees and legal counsel," Deputy Attorney General Paul McNulty "adjust[ed]" certain aspects of the memo and issued revised policy guidelines in December 2006.¹⁴ The McNulty Memo, while imposing certain restrictions on the ability of prosecutors to request corporate waivers, did not preclude prosecutors from considering a company's waiver of the privileges in assessing corporate cooperation.¹⁵ Indeed, voluntary, unsolicited waivers were favorably treated, thus creating tacit pressure on companies to waive their protections.¹⁶

⁸ *Id.* at 7.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Elkan Abramowitz & Barry A. Bohrer, *Justice and Corporate Prosecutions: The Continuing Saga*, N.Y.L.J., Sept. 2, 2008, at 1–2.

¹² See *id.* at 1.

¹³ See *Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege under the McNulty Memorandum*, Hearing Before the S. Comm on the Judiciary, 110th Cong. (2007) (statement of the American Bar Association) [hereinafter Statement of the ABA], available at http://www.abanet.org/poladv/priorities/privilegewaiver/20070918_mcnulty.pdf.

¹⁴ See Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations 1–2 (Dec. 12, 2006) (McNulty Memo), available at http://www.usdoj.gov/dag/speeches/2006/mcnulty_memo.pdf.

¹⁵ See *id.* at 9–10.

¹⁶ See *id.* at 11.

The limitations imposed on prosecutors were twofold. First, prosecutors could only request a waiver when there was a “legitimate need for the privileged information.”¹⁷ Second, prosecutors were required to obtain written authorization from the United States Attorney before seeking such a waiver.

If a legitimate need for a corporate waiver existed, prosecutors were directed first to request purely factual information, relating to the underlying conduct (Category I).¹⁸ If Category I information was deemed insufficient to conduct a thorough investigation, then prosecutors were permitted to request attorney-client communications or non-factual attorney work product (Category II).¹⁹ Waivers for this latter category of information could be sought only in “rare” circumstances.²⁰

A corporation’s response to the government’s request for a waiver of Category I information could be considered by prosecutors in determining whether a corporation was cooperative. Prosecutors were prohibited, however, from considering a corporation’s refusal to waive privilege of Category II information in making a charging decision. Regardless, the pressure to furnish such a waiver remained. The McNulty Memo specifically authorized prosecutors to “always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.”²¹ Companies, moreover, could receive credit for unsolicited waivers of the attorney-client privilege and work product protection. The result has been that corporations, fearful of being perceived as uncooperative, continued to waive their attorney-client privilege for Category I materials as a matter of course.²²

Consequently, despite the McNulty Memo’s retreat from the unpopular policies of the Thompson Memo, it fared little better than its predecessor. Although the DOJ insisted that it had not granted authorization for Category II waiver requests since the inception of the McNulty Memo,²³ prosecutors continued to *informally* demand waivers, so as to circumvent the memo’s procedural requirements.²⁴ Companies, moreover, continued to feel that such waivers were implicitly expected, regardless of whether they were actually solicited. As a result, most of the legal community viewed the McNulty Memo as little better than its predecessors.

¹⁷ *Id.* at 8. Whether a legitimate need for a waiver existed depended on four factors: “(1) the likelihood and degree to which the privileged information will benefit the government investigation; (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver; (3) the completeness of the voluntary disclosure already provided; and (4) the collateral consequences to a corporation of a waiver.” *Id.* at 8–9.

¹⁸ Key documents, witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports containing investigative facts documented by counsel fall into this category. *See id.* at 9.

¹⁹ Attorney notes, memoranda or reports containing counsel’s mental impressions and conclusions, legal determinations reached as a result of internal investigation, or legal advice given to the corporation fall into this category. *See id.* at 10.

²⁰ *Id.*

²¹ *See id.* at 10.

²² *See Editorial, Is the Thompson Memo Dead? Not Yet*, 17 N.J. LAW.: WKLY. NEWSPAPER 1638, Aug. 25, 2008.

²³ Letter from Mark Filip, Deputy Att’y Gen., U.S. Dep’t of Justice, to Patrick J. Leahy, Chairman of the Comm. on the Judiciary, and Arlen Specter, Ranking Member on the Comm. on the Judiciary (July 9, 2008).

²⁴ *See Statement of the ABA, supra* note 13, at 10 n.23; *see also* Letter from Norman Veasey, Former Del. Chief Justice, to Patrick J. Leahy, Chairman of the Comm. on the Judiciary, and Arlen Specter, Ranking Member on the Comm. (Sept. 13, 2007), available at <http://www.abanet.org/poladv/priorities/privilegewaiver/cjveaseyletter.pdf>.

An Attempt to Override DOJ Policies : Proposed Legislation

Senator Arlen Specter, the ranking Republican on the Senate Judiciary Committee, and a staunch critic of the DOJ's guidelines on the attorney-client privilege, introduced the Attorney-Client Privilege Act of 2006 (S. 186) to combat the DOJ's perceived coercion of corporate waivers.²⁵ The proposed bill prohibited any agent of the United States from (1) requesting information protected by the attorney-client privilege or the work product doctrine and (2) conditioning an assessment of cooperation on whether a corporation made a valid assertion of those protections, among other things.²⁶ Although the House version of the bill passed on November 13, 2007, the bill stalled before the Senate Judiciary Committee.

In June 2008, Senator Specter introduced the Attorney-Client Protection Act of 2008 (S. 3217), a modified version of its predecessor.²⁷ S. 3217 prohibits any agent of the United States from (1) asking a corporation to waive the attorney-client and work product protections, and (2) threatening adverse treatment or penalizing a corporation for refusing to waive those protections.²⁸ The new bill goes one step further than S. 186 by precluding federal prosecutors who are making a charging decision from considering whether a corporation has asserted the attorney-client privilege or work product protection.

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Further Retreat, Possible Defeat: The Filip Policy

The DOJ tried once again to mollify complaints “from a broad array of voices” that its “position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all.”²⁹

On August 28, 2008, Deputy U.S. Attorney General Mark Filip, in an effort to arrest movement on S. 3217, unveiled new charging guidelines³⁰ that retreated even further from the waiver guidelines set forth in the McNulty Memo. Most notably, the Filip Policy emphasizes that disclosure of relevant *facts*—not waiver of the attorney-client privilege and work product protection—is the hallmark of cooperation.³¹ Therefore, corporations that timely disclose relevant facts may receive credit for cooperation, regardless of whether they waive the attorney-client privilege or work product protection. In another marked departure from its predecessors, the Filip Policy prohibits prosecutors from requesting waivers and even from considering whether they are given, in assessing a corporation's level of cooperation.³² The Filip Policy also bars prosecutors from requesting not only waivers, but also certain protected information.³³

²⁵ Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007).

²⁶ *See id.*

²⁷ Attorney-Client Privilege Protection Act of 2008, S. 3217, 110th Cong. (2008).

²⁸ *See id.*

²⁹ UNITED STATES ATTORNEYS' MANUAL, *supra* note 3, § 9-28.710.

³⁰ *See* Filip, *supra* note 3; *see also* UNITED STATES ATTORNEYS' MANUAL, *supra* note 3, §§ 9-28.000 to 9-28.1300 (incorporating revisions).

³¹ *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 3, § 9-28.720 (“Has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—not whether the corporation discloses attorney-client or work product materials.”).

³² *See id.* § 9-28.710 (“[W]hile a corporation remains free to convey non-factual or ‘core’ attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so.”).

³³ *See id.* § 9-28.720 n.3 (“To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers’ interviews.”); *see also id.* § 9-28.720(b) (“[A] corporation need not disclose and prosecutors may not request” legal advice regarding the misconduct at issue or attorney work product, i.e., an attorney’s mental impressions or legal theories, as a condition for the corporation’s eligibility to receive cooperation credit.”).

Though lauded as a “clear and substantive improvement,”³⁴ detractors contend that the Filip Policy fails to resolve the problem of “coerced” corporate waivers. In an unlikely and ironic convergence of opinion, former deputy Attorney General Paul McNulty (now in private practice) and Senator Specter have criticized the Filip Policy on similar grounds. They assert that companies will continue to feel pressure to furnish waivers whenever they have relevant factual information covered by attorney-client privilege. “The key problem,” according to McNulty, “is when you have factual information that can only be provided by waiving [privilege]—what happens then? . . . If the answer is you don’t provide it, then you don’t get [the government’s] full cooperation credit.”³⁵ Therefore, so long as companies can obtain cooperation credit by furnishing the government with privileged information, companies will feel pressure to waive the attorney client privilege in order to garner favorable treatment.

Though the Filip Policy will be binding on all federal prosecutors within the Department of Justice (including the Antitrust Division), it is not binding on other federal agencies with enforcement powers, such as the EPA and IRS, all of which may request privilege waivers during official investigations.³⁶ As Senator Specter has observed: “The new guidelines expressly encourage corporations to comply with the waiver and disclosure programs of other agencies including the SEC and EPA.”³⁷ Another problem is that Filip’s new policies are not permanent and could be revised or rescinded by a subsequent attorney general.

For these reasons, critics of the DOJ’s policies on the attorney-client privilege, including Senator Specter, continue to insist that only legislation can remedy the problem. As one interest group explains: “The Justice Department’s track record of 5 different policies in 10 years cries out for a permanent legislative solution that cannot be revised at the whim of each new deputy attorney general. The only way to ensure compliance is to make the policy law.”³⁸ Moreover, “[l]egislation . . . would bind all federal agencies and could not be changed except by an Act of Congress.”³⁹

The Impact of DOJ Waiver Policies on Antitrust Investigations

The Holder-Thompson-McNulty Memos applied to all federal criminal enforcement actions, including antitrust investigations. The effect of the Memos’ waiver policies on criminal antitrust actions has not generated much discussion, however. This is undoubtedly because of the Antitrust Division’s own amnesty program, which embraces cooperation as a means for securing leniency, and which trumps certain facets of the foregoing Memos. Indeed, given the unique nature of

³⁴ Federal Ruling: Attorney Talk Confidential, Aug. 28, 2008, http://money.cnn.com/2008/08/28/news/companies/corp_prosecutions (quoting the Coalition to Preserve Attorney-Client Privilege).

³⁵ Brian Baxter, *With Thompson Trashed & McNulty Moot, Filip Memo’s Time Has Come*, AM. L. DAILY, Aug. 28, 2008, available at <http://amlawdaily.typepad.com/amlawdaily/2008/08/with-thompson-t.html>.

³⁶ Posting of the National Association of Criminal Defense Lawyers, <http://www.nacdl.org/public.nsf/PrinterFriendly/2008mn20?open> (Aug. 28, 2008). The SEC, however, may have followed the DOJ’s lead on waiver and privilege issues. Recently, the SEC released its enforcement manual, which, in language markedly similar to that of the Filip Policy, prohibits SEC staff from requesting a waiver of the attorney-client and work product protections. See Marcia Coyle, *SEC Changes Tune on Privilege*, NAT’L L.J., Oct. 20, 2008, available at <http://www.law.com/jsp/article.jsp?id=1202425367396&rss=newswire>.

³⁷ Press Release, Sen. Arlen Specter, Specter Responds to DOJ’s Revisions of Attorney-Client Privilege Guidelines (Aug. 28, 2008), available at http://specter.senate.gov/public/index.cfm?FuseAction=NewsRoom.NewsReleases&ContentRecord_id=0aa887f0-f40c-f557-5dbb-4aef8032b8f9.

³⁸ Federal Ruling: Attorney Talk Confidential, *supra* note 34 (quoting the Coalition to Preserve Attorney-Client Privilege).

³⁹ Press Release, Sen. Arlen Specter, *supra* note 37.

antitrust conspiracy cases, each Memo acknowledged the variable role cooperation may play in the Amnesty Program, and that the Antitrust Division's treatment of cooperation may diverge from, and override, its own.⁴⁰

Created in 1978, and expanded in 1993, the Amnesty Program provides immunity to the first corporation to confess its role in illegal cartel activities, fully cooperate with the Antitrust Division, and meet other specified conditions.⁴¹ Because such leniency is generally not afforded to subsequent confessors, regardless of the cooperation offered, the Amnesty Program creates a powerful incentive for corporations participating in a conspiracy to be the first to self-report. Immunity to the first confessor, however, is contingent on its "full, continuing and complete cooperation."⁴² In gauging cooperation, the Amnesty Program departs from the waiver policies of the Holder-Thompson-McNulty Memos. Where those Memos tie cooperation credit, in varying degrees, to waiver of privileges, the Antitrust Division has made clear that it "will not consider disclosures made by counsel in furtherance of the amnesty application to constitute a waiver of the attorney-client privilege or the work-product privilege."⁴³ The Amnesty Program, in other words, negates waiver of privilege as a measure of a company's cooperation.

Since waiver is not a factor bearing on the Antitrust Division's decision to indict a corporation, the waiver policies promulgated through the Holder-Thompson-McNulty Memos may not have significantly affected the Division's approach to corporate cooperation. That does not mean, however, that the Amnesty Program is free of privilege-eroding effects. Indeed, because the Filip Policy and Amnesty Program mirror one another in a key regard, the shortcomings of the former will be reflected, to an extent, in the latter.

The Amnesty Program's emphasis on the disclosure of information, and not the waiver of privileges, echoes the cooperation policy of the Filip Policy. Unlike the Filip Policy, however, nothing in the Amnesty Program bars its prosecutors from seeking out or considering privileged information in assessing cooperation; it merely provides that disclosure of such information will not result in a waiver of privilege. Regardless of whether a waiver occurs, the bottom line is that production of privileged information may still be demanded and expected. Arguably, the Amnesty Program

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⁴⁰ "[P]rosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate." Holder Memo, *supra* note 4, § VI(B); Thompson Memo, *supra* note 7, at § VI(B); McNulty Memo, *supra* note 14, § II(B)(1); *see also* UNITED STATES ATTORNEYS' MANUAL, *supra* note 3, § 9-28.750. While "it is entirely proper . . . to consider the corporation's pre-indictment conduct, e.g., voluntary disclosure, cooperation . . . in determining whether to seek an indictment . . . this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation's business and for which the Antitrust Division has therefore established a firm policy . . . that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government." Holder Memo, *supra* note 4, § III(B); Thompson Memo, *supra* note 7, § III(B); McNulty Memo, *supra* note 14, § IV(B); *see also* UNITED STATES ATTORNEYS' MANUAL, *supra* note 3, § 9-28.400(B).

⁴¹ Leniency will be granted to a corporation reporting illegal activity before an investigation has begun, if the following six conditions are met: (1) At the time the corporation comes forward to report the illegal activity, the Division has not received information about the illegal activity being reported from any other source; (2) the corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; (3) the corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; (4) the confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials; (5) where possible, the corporation makes restitution to injured parties; and (6) the corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or originator of, the activity. *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIV., CORPORATE LENIENCY POLICY (1993), *available at* <http://usdoj.gov/atr/public/guidelines/0091.pdf>.

⁴² *Id.* § A(3).

⁴³ Gary R. Spratling, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Corporate Leniency Policy: Answers to Recurring Questions § IV (Apr. 1, 1998), *available at* <http://www.usdoj.gov/atr/public/speeches/1626.htm>.

intensifies the pressure on companies to disclose protected information because the primary obstacle to obtaining such information—a company's refusal to waive privilege—is no longer relevant. Companies would have fewer grounds for withholding protected information, if such information were requested. In that regard, the Filip Policy could actually constrain the Antitrust Division, by preventing its prosecutors from requesting privileged materials that they would otherwise be at liberty to request under the Amnesty Program.⁴⁴

Nor are waiver issues entirely eliminated by the Amnesty Program. Even if the Antitrust Division does not assert that a waiver has occurred, nothing prohibits third parties from asserting to the contrary. Privileged information disclosed to the government might still be discoverable by third parties.⁴⁵ Further, the Amnesty Program and the Filip Policy's emphasis on disclosure of relevant facts, and not waiver of privilege, fails to remedy a core concern underlying the culture of waiver—that is, the curtailment of frank dialogue between attorneys and their clients. If employees of a corporation are aware that information provided to in-house lawyers may be turned over to the government, they may be less likely to seek out legal advice, thereby undermining the ability of attorneys to counsel compliance and prevent illegal conduct from occurring or progressing. So long as cooperation is gauged, in any way, by the production of privileged information, companies will most likely feel pressure to disclose that information, regardless of whether a waiver is requested or deemed to have occurred.

Conclusion

If the core problem is one of remedying DOJ policies that encourage “coerced” waivers, then the Filip Policy has retreated almost as far as it reasonably can. Prosecutors are forbidden from requesting waivers, and from considering a waiver, or a refusal to furnish one, in their assessment of cooperation. Nor are prosecutors allowed to circumvent these prohibitions by requesting the production of privileged materials. The proposed legislation, S. 3217, apart from making such policies binding and permanent, contains nearly the same prohibitions on prosecutors as the Filip Policy. The Filip Policy and S. 3217, in other words, mirror one another in material respects. Therefore, while legislation may well be in order to establish uniformity and a sense of stability in the business and legal communities, it will not stamp out the tacit expectation of waiver.

The Filip Policy and S. 3217 are inadequate, not because they lack appropriate protections for the attorney-client privilege, but because they skirt the underlying source of the problem. An inherent tension exists between the cooperation expected from a corporation under investigation and the right of the corporation to guard information that is protected by the attorney-client privilege and work product protection. McNulty captured the essence of the dilemma best when he

⁴⁴ Given that the Filip Policy cautions prosecutors to heed the specific policies of the Antitrust Division, it is unclear whether the Filip Policy's prohibition on requesting privileged materials will circumscribe the ability of prosecutors to do so in the antitrust context.

⁴⁵ In *In re Columbia/HCA Healthcare Corp. Billing Practices Litigation*, 293 F.3d 289, 292 (6th Cir. 2002), a health care fraud case, Columbia/HCA turned over privileged documents to the DOJ after reaching an agreement that doing so “does not constitute a waiver of any applicable privilege or claim under the work product doctrine.” After a settlement was reached, private parties brought suit against the company and sought access to the privileged documents voluntarily disclosed to the DOJ. Rejecting the doctrine of selective waiver, the Sixth Circuit affirmed the trial court's order to produce the materials, and held that the company's voluntary disclosure of privileged material to the DOJ waived the attorney-client privilege and work product protection as to the materials produced. *See id.* at 294–307. The *Columbia/HCA* case demonstrates the adverse consequences a company may face by producing privileged materials to the government, notwithstanding the government's concession that doing so will not be deemed a waiver.

remarked: “I don’t know if there’s a policy that anybody can develop that will really take that pressure away, other than not expecting corporations to cooperate as much.”⁴⁶

So long as cooperation is “the name of the game” in corporate fraud investigations, companies will most likely continue to feel pressure to furnish waivers to secure favorable treatment. That pressure will persist, regardless of whether waivers are requested, or official cooperation credit may be earned, and regardless of DOJ proclamations or legislation designed to ameliorate that pressure. This is particularly true in the antitrust context, where the remarkable success of the Amnesty Program suggests that the era of corporate cooperation is far from over.⁴⁷ ●

⁴⁶ Baxter, *supra* note 35.

⁴⁷ Gary R. Spratling, Deputy Ass’t Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Making Companies an Offer They Shouldn’t Refuse; The Antitrust Division’s Corporate Leniency Policy—An Update (Feb. 16, 1999) (stating that the Amnesty Program is “the Department’s most successful leniency program” and that applications for leniency had increased twenty-fold since 1993, when the Amnesty Program was revised and expanded).

The *Labatt/Lakeport* case: Implications for Canadian Merger Review

D. Jeffrey Brown

In Canada, *the* story in the world of competition law in the past year has been the *Labatt/Lakeport* merger. The unsuccessful attempt by the Commissioner of Competition (Commissioner)¹ to persuade the Competition Tribunal (Tribunal) to prohibit the Labatt Brewing Company Limited (Labatt) from completing its acquisition of the Lakeport Brewing Income Fund (Lakeport) in order to give the Competition Bureau (Bureau) more time to complete its review of the transaction generated tremendous attention. Labatt's subsequent successful challenge of the Commissioner's use of her formal information-gathering powers added to the case's notoriety.²

Beyond the headlines, what does the *Labatt/Lakeport* case mean? Does it, as some have suggested, signal a "new paradigm" for merger review in Canada? Will it prompt a "re-think" of the Bureau's use of the Commissioner's formal information-gathering powers or encourage broader changes to Canada's merger review regime, including greater harmonization with its U.S. counterpart? Or will *Labatt/Lakeport* be distinguished by the unique circumstances underlying the case, such that its impact on future merger reviews will be more limited?

The *Labatt/Lakeport* Transaction

Labatt announced its offer to acquire Lakeport on February 1, 2007. It had previously sought to acquire Sleeman Breweries Ltd. (Sleeman), Canada's third largest brewer, but Japan's Sapporo Breweries Ltd. (Sapporo) purchased Sleeman before Labatt could satisfy the Bureau that its acquisition would not be anticompetitive. With this experience still fresh, Labatt devised a strategy to prevent the Bureau's review of its Lakeport acquisition from providing a repeat of its experience with Sleeman.

Owing to the size of the parties' businesses in Canada, Labatt could not acquire Lakeport without both parties complying with the pre-merger notification provisions of the Competition Act. Labatt and Lakeport filed long-form pre-merger notifications on February 12, 2007, thereby triggering a forty-two day statutory waiting period (SWP).³ Three days later, on February 15, 2007, the Commissioner initiated a formal inquiry pursuant to section 10 of the Competition Act, thereby

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D. Jeffrey Brown is a partner in the Competition Group of Stikeman Elliott LLP in Ottawa, Ontario, Canada. The author gratefully acknowledges the comments of Randall J. Hofley and Susan M. Hutton. Stikeman Elliott LLP acted as legal counsel to the Lakeport Brewing Income Fund for the *Labatt/Lakeport* transaction.

¹ The Commissioner, who heads the federal Competition Bureau, is Canada's chief competition enforcement official.

² See, e.g., Janet McFarland et al., *Judge Rebukes Watchdog in Labatt Takeover*, GLOBE & MAIL, Jan. 28, 2008; Jim Middlemiss, *Suds All in a Lather: Brewers Frustrated by Competition Bureau Tactics*, NAT'L POST, Feb. 2, 2008; Jim Middlemiss, *Competition Bureau Under Fire Over Beer*, NAT'L POST, Feb. 6, 2008; Jacquie McNish, *Competition Bureau Under Siege*, GLOBE & MAIL, Feb. 6, 2008; see also Susan M. Hutton, *Brian Gover Appointed to Advise Bureau on Section 11*, COMPETITOR, Apr. 24, 2008, available at <http://www.stikeman.com/cps/rde/xchg/se-en/hs.xsl/11083.htm>.

³ The parties could have filed short-form pre-merger notifications, which trigger a shorter, fourteen day SWP. Short-form pre-merger notifications, however, carry the risk of being "bumped" to a long-form filing prior to the expiration of the fourteen day SWP, with a new forty-two day SWP commencing after both parties have filed their long-form notifications.

enabling use of the Commissioner's formal powers, contained in section 11 of the Competition Act, to compel the production of records and written returns.

Anticipating that the Bureau's review could exceed the applicable forty-two day SWP, Labatt advised the Commissioner that it intended to complete the transaction upon expiration of the SWP. The Bureau's review remained incomplete as the end of the SWP approached, thereby presenting it with two options: (1) let Labatt complete the transaction, while putting it on notice that its review was incomplete and that Labatt would be closing at its own risk;⁴ or (2) file an application with the Tribunal requesting an order under section 100 of the Competition Act prohibiting Labatt from completing the acquisition for a further thirty days,⁵ thereby allowing the Bureau additional time to complete its review. Opting for the latter, the Commissioner filed a section 100 application on March 22, 2007.

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The Section 100 Application

Until 1999, section 100 had required that the Tribunal be satisfied that a proposed merger was "reasonably likely to prevent or lessen competition substantially" before it could issue a section 100 order. In 1999, this language was replaced with a requirement that the Tribunal be satisfied that, in the absence of an order, the parties were likely to take some action that would "substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition . . . because that action would be difficult to reverse." At the time of its enactment, it was widely believed that this amendment would lower the threshold to be met by the Commissioner to obtain a section 100 order.⁶

The Tribunal dismissed the Commissioner's section 100 application on March 28, 2007.⁷ In its reasons, the Tribunal clearly rejected the notion that it should "rubber stamp" the Commissioner's decision that the Bureau needs more time to review a transaction. While acknowledging that the 1999 amendment to section 100 was intended to make the process of obtaining section 100 orders "less onerous," the Tribunal noted that the amendment also coincided with a doubling of the SWPs associated with pre-merger notifications, thereby "creat[ing] a heightened expectation that 42 days should be sufficient to complete a merger review."⁸ Accordingly, the Tribunal concluded that Parliament had maintained the "significant" requirement that "the Commissioner establish that the Tribunal's ability to remedy the effect of a proposed merger would be substantially affected if the proposed merger (or another action) were difficult to reverse."⁹

⁴ Absent the issuance of an advance ruling certificate pursuant to section 102 of the Competition Act, the Commissioner has three years after closing to file an application with the Tribunal in respect of a merger.

⁵ The Tribunal may extend the initial term of a section 100 order by up to 30 additional days (to a maximum of 60 days in total) on further application by the Commissioner (on 48 hours' notice to the parties) if it is satisfied that the Commissioner is unable to complete the inquiry within the initial period "because of circumstances beyond [her] control."

⁶ In fact, until Labatt filed its application, there were many who believed that the threshold for the Commissioner to obtain a section 100 order was low, or even minimal. The principal basis for this view was that closing of a transaction, other than in circumstances where parties had agreed to an appropriate "hold separate arrangement," would in and of itself "substantially impair" the Tribunal's ability to remedy the effect of a proposed merger by "scrambling the eggs." The Federal Court of Appeal, however, cast doubt on this view in a 2000 decision involving section 104 of the Competition Act (which is closely related, but not identical, to section 100), stating that "a merger is not like scrambled eggs" since "[it] can be broken up, competition can be restored, though it may be difficult to do and inconvenient." *Canada (Commissioner of Competition) v. Superior Propane Inc.*, [2001] 3 F.C. 175 (C.A.).

⁷ *Commissioner of Competition v. Labatt Brewing Co.*, 2007 Comp. Trib. 9 (Mar. 30, 2007).

⁸ *Id.* ¶ 28.

⁹ *Id.* ¶ 29.

The Tribunal's rejection of the Commissioner's section 100 application allowed Labatt to complete its acquisition of Lakeport, which it did on March 29, 2007. The Commissioner appealed the Tribunal's decision to the Federal Court of Appeal, which rejected the Commissioner's appeal on January 22, 2008.¹⁰

Given that *Labatt/Lakeport* was the first case to consider the revised language in section 100, it is unfortunate that certain positions taken by the Commissioner enabled the Tribunal to deny the Commissioner's application without engaging in a detailed analysis of the test to be met in a section 100 application. Of particular note are deficiencies in the evidence filed by the Commissioner respecting her ability to remedy the effects of the merger. As noted by the Tribunal, evidence from the Commissioner's "principal expert on issues of the implications of mergers" suffered from "the infirmity of addressing all issues from the perspective of U.S. law, which aims at restoring competition to pre-merger conditions" (in contrast to the Canadian legal standard, set out in *Canada (Director of Investigation and Research) v. Southam*,¹¹ of restoring the market to the point at which competition ceases to be lessened or prevented substantially).

The Tribunal did, however, summarize what must be established by the Commissioner in a section 100 application:

The Commissioner must establish that the impairment to the Tribunal's ability to remedy is substantial. The nature and the level of proof will be dictated by the circumstances of the case, but it is not sufficient to say that pre-merger conditions cannot be restored or compensated. The Commissioner must establish that absent an order, the Tribunal's remedies post-merger would not be effective to eliminate the [substantial lessening of competition].¹²

In affirming the Tribunal's decision on appeal, the Federal Court of Appeal similarly identified several relevant considerations for a section 100 application:

an understanding of the nature of the potential lessening of competition that prompted the [Commissioner's] inquiry, the kinds of remedies that might be sought by the Commissioner in the event the inquiry resulted in a section 92 application, the action sought to be forbidden, what would be required to reverse that action, and the potential effectiveness of the available section 92 remedies with and without an interim order.¹³

For the most part, therefore, the Tribunal and the Federal Court of Appeal left it to future cases to flesh out the requirements of a section 100 application.

The Section 11 Challenge

The Bureau continued its review of the *Labatt/Lakeport* transaction following its implementation on March 29, 2007. As part of its continued review, the Commissioner sought and obtained, on November 8, 2007, ex parte orders from the Federal Court pursuant to section 11 of the Competition Act requiring Labatt and Lakeport, as well as several other parties, to provide documents and other information relevant to its review.¹⁴

¹⁰ *Commissioner of Competition v. Labatt Brewing Co.*, 2008 FCA 22 (Jan. 22, 2008).

¹¹ *Canada (Director of Investigation and Research) v. Southam*, [1997] 1 S.C.R. 748, at ¶ 85.

¹² *Commissioner of Competition v. Labatt Brewing Co.*, 2007 Comp. Trib. 9 (Mar. 30, 2007) at ¶ 48.

¹³ *Commissioner of Competition v. Labatt Brewing Co.*, 2008 FCA 22 at ¶ 17 (Jan. 22, 2008).

¹⁴ Including Labatt and Lakeport, the Court issued a total of fifteen section 11 orders.

The Bureau's need for information to complete merger reviews is legitimate and its efforts to inform itself about the competitive effects of mergers inescapably impose a burden on those from whom the Bureau requires information.

Many (eight) of the parties, including Labatt and Lakeport, targeted by these orders had already been the subject of such orders in February 2007.¹⁵ Labatt and Lakeport filed an application seeking to have the second order against them set aside or varied. Madam Justice Mactavish granted the application on January 28, 2008, setting the order aside on the basis that the “disclosure made by the Commissioner’s office on the ex parte application was . . . misleading, inaccurate and incomplete.”¹⁶ Weighed against the high burden to be met by an applicant seeking an ex parte order, Justice Mactavish said that she would not have issued the order in the form that she did had proper disclosure been given.

The Bureau’s need for information to complete merger reviews is legitimate and its efforts to inform itself about the competitive effects of mergers inescapably impose a burden on those from whom the Bureau requires information. However, by relying on section 11 of the Competition Act, the Bureau imposes a formality on the information-gathering process that, according to critics, is unnecessary in most cases. Justice Mactavish’s decision reflected concerns raised about the Bureau’s increasing propensity toward the use of section 11 orders (as opposed to voluntary information requests) in merger cases, and about the overly broad scope of such orders, due in part to the ex parte nature of section 11 applications and the Bureau’s refusal to engage in prior consultations with parties about the contents of such orders.¹⁷

While the Bureau’s use of section 11 orders has been the subject of debate for some time,¹⁸ Justice Mactavish’s decision had the effect of elevating the issue to the political level. The federal Minister of Industry, the Honorable Jim Prentice, described the Court’s comments about the

¹⁵ In the case of Labatt, it had already provided (in addition to the 10,000 pages of records information provided with its long-form pre-merger notification) 7,432 documents consisting of over 138,620 pages in response to the first of these orders, and incurred external costs of approximately \$750,000 to do so.

¹⁶ *Commissioner of Competition v. Labatt Brewing Co. Ltd.*, 2008 FC 59 at ¶ 3 (Jan. 28, 2008). Among the deficiencies cited by the Court were:

- a failure to disclose prior representations to the Court that the extensive information sought in the earlier (February 2007) orders “would be sufficient for the purposes of the Commissioner’s inquiry”;
- written submissions of the Commissioner’s counsel stating that “none of the records or information sought has previously been requested,” when in fact the Court, with Labatt’s assistance, identified several areas of overlap between the orders (with Labatt providing evidence that 7,432 records that it produced in response to the February order were also responsive to the November order); and
- a failure by the Commissioner to inform the Court of the concerns previously communicated by Labatt about the nature and scope of the February 2007 demands and their implications for the November 2007 order.

Id.

¹⁷ See COMPETITION BUREAU, INFORMATION BULLETIN ON SECTION 11 OF THE COMPETITION ACT 7 (Nov. 2005), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/01995e.html>.

¹⁸ See, e.g., Bruce C. Caughill & D. Jeffrey Brown, *The Use of Formal Investigatory Powers in Merger Examinations by the Director*, 16 CAN. COMPETITION REC. No. 4, at 27 (1995–1996). More recently, the Bureau issued an *Information Bulletin on Section 11 of the Competition Act* (Nov. 2005), *supra* note 17, which the Bureau described as “a summary designed to give basic information regarding section 11 of the Act.” Notwithstanding the Bureau’s more usual practice in recent years of releasing such bulletins in draft form for public consultation, the Bureau released the section 11 information bulletin as a *fait accompli*. The Competition Law Section of the Canadian Bar Association, by way of a letter dated February 6, 2007 (available at <http://www.cba.org/CBA/submissions/pdf/07-08-eng.pdf>), submitted comments to the Bureau in any event, noting, among other things, the desirability of prior consultation given the controversy surrounding the Bureau’s use of section 11:

The Bureau’s past resort to section 11 orders has not been without controversy. In view of the significant burden placed on recipients of a section 11 order, stakeholders have significant concerns about the circumstances in which these orders are secured, the scope of the information requested in the orders, and, at times, the execution of the orders. Though the Bulletin provides a useful guide to the Bureau’s thinking on some aspects of the section 11 process, broad formal public consultation prior to issuance might have been helpful, and should be considered with respect to any subsequent versions of the Bulletin.

Labatt/Lakeport could effect, as some have suggested, a “paradigm shift” for the merger review process under the Competition Act—especially if it encourages purchasers to take a more aggressive stance with the Bureau in terms of closing (or threatening to close) transactions before the Bureau has completed its review.

Bureau’s inadequate disclosure as “quite serious” and sought assurances from the Commissioner that the Bureau is “taking the situation in hand.”¹⁹ Mr. Prentice later announced the additional step of appointing a third-party reviewer to lead an independent probe into the process used by federal Department of Justice lawyers in seeking section 11 orders on an ex parte basis.²⁰

On March 3, 2008, the Commissioner and the Deputy Minister of Justice requested Mr. Brian Gover, a Toronto lawyer, to conduct this review, with a mandate to complete the review and report to them within ninety days.²¹ Mr. Gover provided the Bureau and the Department of Justice with an (unpublished) interim report on June 10, 2008, and submitted his final report, in the form of an opinion letter, on June 19, 2008 (although it was not released publicly until August 12, 2008).²² Mr. Gover’s findings, and the Bureau’s response, are discussed in greater detail below.

***Labatt/Lakeport* Lessons: What Does It Mean for Canadian Merger Review?**

What are the practical implications of the *Labatt/Lakeport* case for the merger review process in Canada? To answer this question, it is necessary to separate the two issues that arose from the case: the timing of merger reviews under the Competition Act; and the Bureau’s use of section 11 of the Competition Act.

Merger Review Timing. Prior to *Labatt/Lakeport*, it was widely believed that the bar was low for the Commissioner’s use of section 100 to prevent parties from closing a transaction while it completed its review. To the extent that the Tribunal’s section 100 decision raises this bar, *Labatt/Lakeport* could effect, as some have suggested, a “paradigm shift” for the merger review process under the Competition Act—especially if it encourages purchasers to take a more aggressive stance with the Bureau in terms of closing (or threatening to close) transactions before the Bureau has completed its review.²³

As a practical matter, however, timing will not change for the overwhelming majority of mergers since very few give rise to significant competition law issues.²⁴ Even for those mergers where such issues do arise, the potential impact of *Labatt/Lakeport* could be limited if purchasers decline to take aggressive positions of the sort taken by Labatt or if *Labatt/Lakeport* is distinguished from other mergers in future section 100 proceedings as the product of a rare combina-

¹⁹ Jim Middlemiss, *Competition Chief Called on Carpet by Prentice*, NAT’L POST, Jan. 30, 2008.

²⁰ Jim Middlemiss, *Ottawa Probes Competition Law Disclosures*, NAT’L POST, Feb. 16, 2008.

²¹ Competition Bureau, Expert Appointed to Advise on Section 11 Process, Mar. 3, 2008, available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02587e.html>.

²² Letter from Brian Gover to John H. Sims, Deputy Minister of Justice, and Sheridan Scott, Commissioner of Competition (June 19, 2008) [hereinafter Gover Report], available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02709e.html>.

²³ See, e.g., Julius Melnitzer, *Competition Decision Means Faster Mergers*, NAT’L POST, Jan. 30, 2008.

²⁴ The Bureau, for administrative purposes, classifies mergers on the basis of their complexity. “Non-complex” mergers involve little or no competitive overlap between the parties, whereas “complex” and “very complex” mergers raise serious (or potentially serious) competition concerns that may require remedial action and/or legal proceedings. Based on these classifications, the Bureau endeavors to complete its review of the merger within a designated “service standard period” running from the day after the Bureau is satisfied that it has all of the information it requires to complete its review. For non-complex mergers, the service standard period is up to fourteen days, with the corresponding periods for complex and very complex mergers being ten weeks and five months. With this in mind, the overwhelming majority of mergers reviewed by the Bureau are non-complex (on average, 87 percent of mergers reviewed by the Bureau during the years 2000–2001 to 2006–2007), in contrast to an average of only 11 percent for complex mergers and only 2 percent for very complex mergers. See COMPETITION BUREAU, MERGER REVIEW PERFORMANCE REPORT (June 14, 2007), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02362e.html>.

tion of facts. *Labatt/Lakeport's* potential to effect a paradigm shift, therefore, must be assessed in the context of the specific facts of the case, including the following:

- Labatt was a highly motivated purchaser willing to assume the risk that the Bureau might challenge the acquisition post-closing. Such purchasers have been rare, with most purchasers seeking some form of affirmative clearance from the Bureau before closing a notifiable merger transaction.²⁵
- *Labatt/Lakeport* was a purely domestic merger. Multi-jurisdictional mergers are subject to the same rules and procedures as domestic mergers, but the timing of merger reviews in other jurisdictions can provide a significant discipline on the Bureau's timing as regards its review of a transaction insofar as the Bureau may prefer to avoid being the cause of delay in implementation of a multi-jurisdictional merger.
- Unlike many parties, Labatt was willing to enter into a hold separate arrangement (HSA). When combined with the Tribunal's view that it could not "assume . . . that the [HSA] would be breached," it became difficult for the Tribunal to conclude that closing of the transaction would "substantially impair the ability of the Tribunal to remedy the effect of the proposed merger on competition."
- While not expressly stated in the Tribunal's decision, the Sleeman transaction and other background to the case may have influenced (or in any event may be perceived as having influenced) the Tribunal's decision to deny the Commissioner's section 100 application order. In addition to identifying "deficiencies" in the Commissioner's evidence, the Tribunal suggested that the Bureau was less diligent than it ought to have been in conducting its review of the *Labatt/Lakeport* transaction.²⁶

Notwithstanding these unique facts, it is clear that the Bureau cannot rely on the Tribunal to "rubber stamp" the Commissioner's decisions to seek a section 100 order. At the same time, with the Tribunal and the Federal Court of Appeal having provided only general guidance on section 100's applications, it remains to be seen just how high the threshold for such a section 100 order has become, and how the application of the provision will vary according to the circumstances of a particular case.²⁷

²⁵ The tendency of merging parties, and purchasers in particular, to seek affirmative clearance is reinforced by the Bureau's practices with respect to merger remedies, as set out in its *Information Bulletin on Merger Remedies in Canada*. COMPETITION BUREAU, INFORMATION BULLETIN ON MERGER REMEDIES IN CANADA (Sept. 22, 2006), available at <http://www.competitionbureau.gc.ca/epic/site/cb-bc.nsf/en/02170e.html>. For example, in the event of a merger with respect to which the Bureau determines that a remedy is required to eliminate an alleged substantial prevention or lessening of competition (and in respect of which the parties/purchaser opt to enter into a consent agreement with the Commissioner rather than contest the matter by way of litigation), the Bureau will typically allow a purchaser only 3–6 months in which to complete a divestiture, after which point a trustee is appointed to effect the divestiture, at "firesale" prices if necessary.

²⁶ See *Commissioner of Competition v. Labatt Brewing Co.*, 2007 Comp. Trib. 9 (Mar. 30, 2007) at ¶ 52:

The Tribunal is mindful that the Commissioner has been involved with this industry recently and over an extended period [an apparent reference to an earlier statement, in ¶ 34 of the decision, that "the Commissioner has been involved in reviewing this industry until at least late 2006" and that she "has evidence on the structure of the market, its operation and facilities and its participants."]. The Commissioner has now had more than 40 days to review this specific transaction, yet there is insufficient evidence presented as to market structure and conditions to establish the impairment of the Tribunal's ability to remedy in accordance with Canadian law.

²⁷ In this latter regard, it is interesting to compare an application filed by the Commissioner under section 100 shortly after the Federal Court of Appeal rendered its decision in the *Labatt/Lakeport* case. The application, which involved a proposed merger of two scrap metal processors in eastern Canada, generally adhered to the considerations identified by the Federal Court of Appeal as relevant to a section 100 application and, moreover, included specific reference to facts respecting the Bureau's limited knowledge of the industry, the limited amount of disclosure by the parties to the Bureau and the Bureau's efforts to inform itself about the industry in question, thereby proactively differentiating its position in the case from that which existed in *Labatt/Lakeport*. One day after the Commissioner filed her application, the par-

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Section 11 Orders. In contrast to section 100, the practical impact of *Labatt/Lakeport* on the Bureau's use of section 11 of the Competition Act will likely be more significant. *Labatt/Lakeport* engaged a number of issues that have been the subject of debate for some time. For example, section 11 of the Competition Act provides for section 11 orders to be issued on an ex parte basis, but it does not necessarily follow that these orders should be sought ex parte as a matter of course, as had come to be the case with the Bureau.²⁸ Moreover, as the private competition law bar in Canada has argued,²⁹ there are compelling policy reasons for consulting with the parties targeted by section 11 orders, including contributing to a narrowing of the order to what is truly relevant to the Bureau's review, thereby minimizing the burden of such orders on both the target parties and the Bureau. These questions rose to prominence with the Minister's decision to appoint a third-party reviewer to lead an independent probe into the process used by federal Department of Justice lawyers in seeking section 11 orders on an ex parte basis.³⁰

While some have viewed the Gover Report³¹ as vindication of the Bureau's practices regarding section 11 of the Competition Act, it does not constitute a full endorsement of these practices. In fact, the Gover Report recommended several key changes that had long been advocated by the private bar, including:³²

- Mr. Gover recommended that the Bureau engage in "pre-application" and "post-order" dialogue with respondent parties, something which he recognized had been pushed by the private competition law bar for some time but resisted by some at the Bureau, including in par-

ties filed a consent agreement with the Tribunal that permitted the parties to close on the strength of a 60-day hold-separate period (which appears to have been driven by "serious financial difficulty" on the part of the target), thereby obviating the need for the Tribunal to hear the Commissioner's section 100 application. *Commissioner of Competition v. American Iron & Metal Co.*, CT-2008-001 (Jan. 28, 2008).

²⁸ In principle, ex parte orders are normally reserved for cases of urgency or where there is a genuine concern of document destruction in the event that notice is given—concerns that do not typically arise in the context of mergers, and certainly not in the context of completed mergers. In any event, giving notice to respondent parties need not create significant delay in the issuance of section 11 orders. Motions can be brought and heard on an extremely expeditious basis, i.e. on two day's notice to the affected party (or parties).

²⁹ See, e.g., Caughill & Brown, *supra* note 18.

³⁰ Competition Bureau, *supra* note 21.

³¹ Gover Report, *supra* note 22.

³² While it was prompted by Justice Mactavish's criticism of the Bureau in quashing the second section 11 order against Labatt and Lakeport, the Gover Report concluded that "the Bureau conducts its role responsibly under s. 11 and [that] it properly balances the burden on respondents, particularly third parties, against the need to obtain the information necessary for an inquiry." *Id.* at 3. Indeed, Mr. Gover went one step further, stating that "the conclusions of the Federal Court in *Labatt* were not warranted and the Court erred in exercising its discretion to vacate the November 2007 s. 11 order." *Id.* at 20. Mr. Gover also criticized the Canadian competition law bar, suggesting that "it became apparent [during his review] that the private competition law bar's main criticism was levelled at the existence of a s. 11 power itself." *Id.* at 3.

The Bureau did not respond to the Gover Report's conclusions (although one official was quoted as saying that "the report speaks for itself"). Janet McFarland, *Review Exonerates Competition Bureau*, *GLOBE & MAIL*, Aug. 13, 2008. Members of the Canadian competition law bar, in contrast, have been highly critical of the report, with criticisms including that: Mr. Gover's consultations were heavily skewed in favor of the Bureau; Mr. Gover erred in his suggestion that members of the bar question "the existence of s. 11 power itself"; and it was inappropriate for Mr. Gover to criticize the Federal Court's decision vacating the second Labatt and Lakeport section 11 order (which decision the Bureau chose not to appeal). See, e.g., *id.*; Jim Middlemiss, *Report Light on Consultations with Private Bar*, *NAT'L POST*, Aug. 13, 2000; Jim Middlemiss, *Competition Bureau Review Draws Flak*, *NAT'L POST*, Aug. 12, 2008. The Canadian Bar Association even took the step of responding publicly to the report. It identified a number of aspects of the Gover Report that "warrant[ed] an immediate response," and expressly questioned the independence of the report and the meaningfulness of the consultations on which it was based. Letter from James Musgrove, Chair, National Competition Law Section of the Canadian Bar Association, to John Sims, Deputy Minister of Justice and Sheridan Scott, Commissioner of Competition (Sept. 4, 2008) [hereinafter CBA Response], available at [http://www.cba.org/CBA/sections_Competition/pdf/08-51-eng\[1\].pdf](http://www.cba.org/CBA/sections_Competition/pdf/08-51-eng[1].pdf).

ticular its Mergers Branch.³³ According to Mr. Gover, such dialogue should be “the norm” and will “reduce the burden of responding to s. 11 orders on respondents and make the s. 11 process more efficient.”³⁴

- While an advocate of pre-application dialogue, Mr. Gover nevertheless believes section 11 orders should continue to be obtained on an ex parte basis. Mr. Gover rejected arguments that section 11 is “permissive” on this point insofar as it contemplates that the Commissioner “will” apply ex parte.³⁵ At the same time, Mr. Gover acknowledged that a respondent might be permitted to attend and make submissions before the issuance of an order in “special circumstances,” although this could occur only where the Court—not the Commissioner—so permits through the issuance of a “special order.”³⁶ Moreover, Mr. Gover recommended that formal notice be given to respondents where a previous section 11 order has been successfully varied or set aside in the same inquiry, and that the Bureau consider giving formal notice where there is a previous section 11 order against the same respondent and a challenge to a further section 11 order is likely.
- Mr. Gover endorsed a “move away from [the Bureau’s prior practice of] making applications in writing without a personal attendance of counsel for the Commissioner.”³⁷ Such personal attendance, Mr. Gover noted, “should go some way towards addressing the concern that the Federal Court is used as a ‘rubber stamp’ on s. 11 applications.”³⁸ While, again, falling short of the private competition law bar’s desire for formal notice to respondents of section 11 applications, personal attendance could expose applications to greater scrutiny by the Court.³⁹

Perhaps most controversially, notwithstanding that Mr. Gover was asked only to examine the process used to seek section 11 orders on an ex parte basis, the Gover Report went further and questioned whether section 11 is an appropriate mechanism for meeting the Bureau’s information gathering needs in a merger review context. According to Mr. Gover (who did not raise the issue when he met with Canadian Bar Association representatives),⁴⁰ the Bureau “would be assisted considerably in carrying out merger review if it had at its disposal an investigation tool similar to a [U.S.] Second Request . . . , which would automatically extend the waiting period for closing the transaction.”⁴¹ A similar recommendation was made by the federally appointed Competition Policy

³³ Indeed, as noted previously, the Bureau’s policy has been not to negotiate the contents of section 11 orders. See COMPETITION BUREAU, *supra* note 17.

³⁴ Gover Report, *supra* note 22, at 4–5.

³⁵ *Id.* at 9–10.

³⁶ *Id.*

³⁷ *Id.* at 34. More specifically:

As a rule, counsel should attend before the Court with the person who swore the affidavit . . . to provide clarification based on the affidavit. Where the trial judge elicits information not in the affidavit, the affiant should swear a supplementary affidavit, if the additional information is minor, or withdraw the application in order to amend the affidavit, if the additional information is more significant.

Id.

³⁸ *Id.* at 35.

³⁹ Another potentially significant recommendation of Mr. Gover was that section 11 orders should include language permitting the Commissioner to “read down” the scope of production ordered by accepting less information or fewer documents than directed in the order. Such flexibility, however, should be limited, Mr. Gover said, so as to avoid an impermissible delegation of the judicial oversight function. Mr. Gover recommended against allowing the Commission to “read across” an order, i.e., by allowing substitution of information contained in other documents not requested in the order without seeking an amendment of the order from the Court. *Id.* at 40.

⁴⁰ See CBA Response, *supra* note 32.

⁴¹ Gover Report, *supra* note 22, at 31.

Review Panel in its recently published report to the Minister of Industry (as part of a broader recommendation that Canada harmonize its merger review process with that in the United States),⁴² and is believed to enjoy the political support of the Minister.⁴³

If enacted, a U.S.-style Second Request mechanism would be a major departure from the current choice between voluntary information requests and judicially sanctioned section 11 orders.⁴⁴ As Mr. Gover suggests, such a reform would certainly enhance the Bureau's information-gathering powers. It would do so, however, at the expense of the objectives underlying Mr. Gover's various recommendations to improve the existing section 11 application process in order to render the process more efficient by enhancing rather than reducing private parties' participation and exposing the Bureau's use of section 11 to greater rather than less judicial scrutiny than currently exists. If combined with the U.S. rule of suspending the waiting period until the parties "substantially comply" with the (often onerous) complete information request, it would also obviate the need for the Bureau to apply to the Tribunal for an injunction to prevent closing after expiry of the waiting periods, thereby turning both of the Commissioner's defeats in *Labatt/Lakeport* on their heads.

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orders.

Conclusion

The *Labatt/Lakeport* case could, as some have noted, raise the bar for the Bureau to prevent parties from closing transactions while it completes reviews. However, timing will not change for the overwhelming majority of mergers since very few give rise to significant competition law issues. If *Labatt/Lakeport* effects a "paradigm shift" in this regard, therefore, it will be a narrow one.

Conversely, the practical impact for the Bureau's use of section 11 orders could be considerably broader. Viewed in conjunction with the Gover Report, *Labatt/Lakeport* may not affect the Bureau's propensity to resort to section 11 orders or its practice of seeking such orders *ex parte*, but it could lead to more frequent pre-application dialogue and expose section 11 applications to greater judicial scrutiny by ending the practice of seeking such orders without personal attendance. On the other hand, the Gover Report could contribute to a move toward harmonization of Canadian and U.S. merger review procedures, including the replacement of section 11 of the Competition Act with a U.S.-style Second Request information-gathering mechanism, which would remove both the content of information requests and (for practical purposes) the timing of Bureau merger reviews from judicial (or quasi-judicial, in the case of the Tribunal) oversight. Such a result would be ironic (and, indeed, a possible step backward), setting aside process reforms recommended by Mr. Gover (and to a significant extent advocated by the private competition law bar) in favor of a new mechanism that could empower the Bureau to an even greater degree than the "unreformed" section 11 process. ●

⁴² COMPETITION POLICY REVIEW PANEL, COMPETE TO WIN: FINAL REPORT 56, 60, 126 (June 26, 2008).

⁴³ See Jacquire McNish, *Beneath the Noise, Worries over U.S.-Style Rules*, GLOBE & MAIL, Sept. 10, 2008.

⁴⁴ Whether such a reform will be enacted is, at this time, unclear. A federal election on October 14, 2008 resulted in no change of government, but the current Minister of Industry will not necessarily retain his current portfolio. Moreover, it would remain to be seen whether amendments to the Competition Act generally, and this amendment in particular, would be a priority for the new government.

A Price-Fixer's Memoir—Exculpation and Revenge While Confronting the Antitrust Abyss: *An Essay on Threshold Resistance* by Alfred Taubman

Arthur D. Austin

I. A Short Prologue

"Hey, I wasn't guilty. And I wasn't about to beg for mercy. Sure, I was sorry all this happened. Sorry I had ever met with Sir Anthony Tennant. Sorry I hadn't listened to my closest partners when they warned me about Dede Brooks. Sorry Judge Daniels and the Justice Department had made it impossible for me to get a fair trial." (Alfred Taubman, Chairman, Sotheby's)¹

*United States v. Taubman*² was a class-driven trial with a Henry James-Norman Mailer template: high art descends to the shopping mall. A *Wall Street Journal* article on the case was even entitled, *To Sotheby's Boss, Selling Art Is Much Like Selling Root Beer*,³ a reference to the source of Sotheby's chairman Alfred Taubman's considerable wealth, shopping malls. Instead of testimony from accountants and economists duking it out over bookkeeping ploys and arcane marketing strategy, the public got haughty exchanges from specialists in wheeling and dealing Monets, Renoirs, and Warhols, while discussing price strategy. In 2005 I published an essay discussing Sotheby's implications for the price-fixing narrative.⁴ Using Adam Smith's commentary as the anchor, I focused on conspiracy—the most troublesome issue in the pricing conundrum. Two years later Taubman has published a candid account of his experiences, *Threshold Resistance*—a raw glimpse into his reactions to a conviction as one of the alleged instigators of the most pernicious form of commercial deviancy. This Essay seeks to fathom the psychology and tactics of the hunted as he responds to the accusations of a trusted colleague while coping with what Justice Holmes called a "foolish law."⁵

Taubman's revenge motive owes a considerable debt to Dominick Dunne's *People Like Us* (1988), a best selling *roman à clef* that anticipated Taubman's problems through the fictional persona of Elias Renthal. Like Taubman, Renthal is a nouveau riche from the Midwest, barging into New York Society, inciting disdain as a "vile" person who "has no patience whatever for people who were not as concerned with the desire to make money as he was."⁶ Taubman committed a

¹ ALFRED TAUBMAN, *THRESHOLD RESISTANCE* 170 (2007).

² *United States v. Alfred Taubman*, No. 01 CR 429, 2002 U.S. Dist. LEXIS 6251 (S.D.N.Y. Apr. 11, 2002), *aff'd*, 297 F.3d 161 (2d Cir. 2002).

³ Megan Cox, *To Sotheby's Boss, Selling Art Is Much Like Selling Root Beer*, WALL ST. J., Sept. 18, 1985. The most extensive coverage of the tactics, strategy, and events of the litigation is CHRISTOPHER MASON, *THE ART OF THE STEAL* (2004).

⁴ Arthur Austin, *Adam Smith and the Inevitability of Price Fixing*, 55 CASE W. RES. L. REV. 501 (2005).

⁵ Holmes added: "I have little doubt that the country likes [the Sherman Act] and I always say . . . that if my fellow citizens want to go to Hell I will help them." HOLMES-LASKI LETTERS 248-49 (Mark DeWolfe Howe ed., 1953).

⁶ DOMINICK DUNNE, *PEOPLE LIKE US* 73 (1988).

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Arthur Austin is Edgar
A. Hahn Professor
of Jurisprudence,
Case Western Reserve
University School of
Law, Cleveland, Ohio.

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similar affront by acquiring Sotheby's, one of only two major full service art auction houses in the world. (The other, Christie's, is a relative newcomer, dating to 1766, compared to Sotheby's 1744 pedigree.) Chagrined at the book's deprecatory portrayal of Elias, Taubman demanded Dunne make changes.⁷ If Dunne did so, they were modest and did not include the final embarrassment—Dunne's anticipation of Taubman's downfall: both Elias and Taubman were convicted of the most contemptible forms of commercial skullduggery—insider trading and price-fixing. A federal judge told Taubman that "[t]he law does not countenance a robbery,"⁸ echoing Elias' rebuke: "Criminal behavior such as yours cannot go unchecked."⁹

The Taubman trial was a classic New York Foley Square Event. Dede Brooks testified that Alfred Taubman, her boss and mentor, fixed auction commissions, a scheme she helped implement with her counterpart at Christie's. Both Chairmen refused to testify. (Sir Anthony Tennant was beyond the U.S. court's jurisdiction; Taubman, much to his later regret, opted not to take the stand). In the meantime the media peppered readers daily with tantalizing gossip, such as actress Sigourney Weaver's attendance to get pointers on how to play Brooks in an upcoming movie.¹⁰ Taubman writes of "unconfirmed rumors" that Brad Pitt was to portray him.¹¹ Mr. Dunne made sporadic visits in the role of trial social chairman.

Taubman's downfall was orchestrated by government lawyers who instigated a bitter brawl between Sotheby's and Christie's by invoking "amnesty," a strategy that favors the first conspirator willing to spill the beans on the others in exchange for the possibility of a favorable plea bargain. The objective is to energize a Fink versus Fink confrontation in which the only winner is the government.¹² It is a practical application of the street wisdom that there is no honor among thieves—especially price-fixers.

Taubman's narrative is driven by the author's tenacious efforts to achieve total exculpation. He begins by describing his prowess in "threshold resistance," "the force that keeps your customer from opening your door and coming in over the threshold."¹³ The importance of the *Threshold* motif was validated when, during the M & A binge of the 80s, Taubman outmaneuvered rival corporate raiders to buy Sotheby's. He took title to what he called a "rude, unresponsive, and often condescending" collection of art poseurs too jejune to deal with the challenges of changes in market techniques.¹⁴ Drawing on his shopping mall successes, Taubman set out to change the "rules of the game."¹⁵ For example, under Taubman, Sotheby's bypassed dealers to go directly to rich customers who were seduced by "celebrity" auctions. Taubman revised what had become standardized terms of credit—further subverting the established art auction process. His bourgeois

⁷ "Some details were so apt that Mr. Taubman demanded changes by Mr. Dunne." Leslie Eaton, *Knight Errant or Erring? Sotheby's Tale*, N.Y. TIMES, Apr. 27, 2000, at C1.

⁸ Carol Vogel & Ralph Blumenthal, *Ex-Chairman of Sotheby's Gets Jail Time*, N.Y. TIMES, Apr. 23, 2002, at B1.

⁹ DUNNE, *supra* note 6, at 401.

¹⁰ John Walsh, *How the Stage Fell in Love with the Art Trade*, THE INDEPENDENT, Apr. 2, 2002.

¹¹ TAUBMAN, *supra* note 1, at 162.

¹² The objective is to "create a prisoner's dilemma whereby each player shares the same dominant strategy: to confess their participation in the cartel and turn state's evidence against their former cartel partners." The bait is amnesty to the first to reveal the illegal conduct. Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 454 (2006).

¹³ TAUBMAN, *supra* note 1, at ix.

¹⁴ *Id.* at 89.

¹⁵ *Id.* at 103.

tactics incited the ire of traditionalists. “I was accused of turning Sotheby’s into Bloomingdale’s.” He was, they charged, “malling the art world.”¹⁶

II. Taubman Establishes His Antitrust Credentials

“Al, have you heard what’s going on? Christie’s is admitting to price-fixing with Sotheby’s.”¹⁷ It was, according to Taubman’s script, an unexpected affront to a distinguished career. When he confronted Dede Brooks about the *Financial Times* report she dismissed it “with subdued confidence.”¹⁸ Brooks was like family; her impressive pedigree—Yale, investment banking, ambition—was in tune with Taubman’s marketing vision. Later, as reality registered, Taubman summed up: “All would be placed in jeopardy because of my misplaced trust in a key executive.”¹⁹

What more persuasive way to distance oneself from the crime scene than by expressing shock at Christie’s confession and Brooks’ perfidy. To improve the credibility of his dismay at the seriousness of the accusations, Taubman sought to establish his antitrust credibility by bragging that “The Sherman Act was no mystery to me.”²⁰ He emphasized his antitrust sophistication with a tale of making “quite a scene” when he encountered members of a trade association exchanging sensitive information. He challenged the government’s smoking gun evidence, his twelve private meetings with Sir Anthony Tennant, Chairman of Christie’s, over a four-year period. The government presented these meetings to the jury as the connection between the two Chairmen to the implementers of the scheme—Dede Brooks and Chris Davidge, Brooks’ counterpart at Christie’s. Taubman correctly identified the charges as “conscious parallelism” together with “plus factors.”²¹ Taubman claimed, however, that after he cautioned Sir Anthony on the dangers of any discussion referencing pricing, the latter “agreed immediately with my insistence that we stay far away from the subject of pricing. That was off the table.”²² Hence, by Taubman’s account there were no plus factors.

Taubman failed to recognize that as duopolists Sotheby’s and Christie’s enjoy the same access to information about pricing, consumers, source of customers and art, identity of costs, while operating under circumstances conducive to collusion.²³ “I don’t see why there had to be a conver-

¹⁶ *Id.* at 106.

¹⁷ *Id.* at 146.

¹⁸ *Id.* at 147.

¹⁹ *Id.* at 140.

²⁰ *Id.* at 141.

²¹ “However, parallel pricing, without more, does not itself establish a violation of the Sherman Act. Courts require additional evidence which they have described as ‘plus factors.’ Examples of these ‘plus factors’ include actions contrary to a defendant’s economic self-interest, product uniformity, exchange of price information and opportunity to meet, and a common motive to conspire or a large number of communications.” *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1168 (6th Cir. 1995) (internal citations omitted).

²² TAUBMAN, *supra* note 1, at 143.

²³ “[C]onscious parallelism is devoid of anything that might reasonably be called agreement when it involves simply the responses of a group of competitors to the same set of economic facts—independent in that each would have made the same decision for himself even though his competitors decided otherwise. But the consciously parallel decisions of oligopolists in setting their basic prices, which are interdependent in that they depend on competitors setting the same price, are not nearly so easily disposed of on the ground that no agreement is involved.” Donald F. Turner, *The Definition of Agreement Under The Sherman Act: Conscious Parallelism and Refusal to Deal*, 75 HARV. L. REV. 655, 663 (1962). Moreover, there is the “sand” from Footnote 59: “And it is likewise well settled that conspiracies under the Sherman Act are not dependent in any overt act other than the act of conspiring. It is the ‘contract, combination . . . or conspiracy in restraint of trade or commerce’ which § 1 of the Act strikes down, whether the concerted activity be wholly nascent or abortive on the one hand, or successful on the other.” *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940) (internal citations omitted).

Another puzzle in Taubman's narrative of innocence is his failure to require Sotheby's employees to sign nonaccountability agreements. A contractual commitment not to violate the antitrust laws would have provided Taubman's lawyers with a basis for countering Brooks' testimony.

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sation at all," opined a Sotheby's executive; "it's like two people selling tomatoes on the street. If one person raises or lowers their prices, the other one's going to follow."²⁴ And in this duopoly the Government had the ultimate proof of "plus" in the testimony of Brooks and Davidge connecting the two firms.

Another puzzle in Taubman's narrative of innocence is his failure to require Sotheby's employees to sign nonaccountability agreements. A contractual commitment not to violate the antitrust laws would have provided Taubman's lawyers with a basis for countering Brooks' testimony.

III. "The Sotheby's trial that began in November 2001 was one of the more elaborate legal he-said-she-said contests in corporate history."²⁵

The Elias Renthal-Alfred Taubman parallel ended when, unlike Elias, Taubman pleaded innocent.²⁶ To Taubman, it was a simple one-witness trial with a verdict riding on the testimony of former protégé Dede Brooks and the support of her Christie's counterpart. Brooks' credibility was undermined because "Alfred Taubman [was] Dede Brooks' get out of jail free card."²⁷ (It worked—she got six month's house arrest plus a \$350,000 fine).²⁸ The obvious strategy for the defense would be a cross-examination emphasizing the questionable credibility of a turncoat employee—and one who owed her high profile career to the generosity of the accused. There was, however, a critical qualification: the success of this tactic depended on Taubman, the victim of the disloyalty, taking the stand to contradict the turncoat's accusations. This tactic was especially necessary because the case hinged on testimony about twelve private and unrecorded meetings.

IV. "The question was whether they [the jury] credited the testimony of the two conspirators that their principals met and agreed to fix seller's commission rates, and directed them to implement the details of such an agreement."²⁹

The decision to testify became more difficult, however, when it became apparent to Taubman's lawyers that their eighty-year-old client was having memory lapses, hearing problems, and instances of confusion.³⁰ This concern was compounded when the prosecution requested at least three days for cross-examination. Such a prolonged interrogation increased the risk that Taubman would display incriminating mental lapses. On the other hand, the defense was confident that their witnesses had undermined Dede's credibility by planting the "walking reasonable doubt" seed with the jury to justify a verdict for Taubman. Their surmise was endorsed by two mock jury trials conducted without Taubman's appearance that resulted in not guilty verdicts.³¹

According to one defense lawyer, "it was a very close call" that was ultimately settled by a jury expert who reasoned that "you can only hurt yourself . . . The jury likes him."³² In other words, do

²⁴ MASON, *supra* note 3, at 263.

²⁵ Alexandra Peers, *Tales of a Retailer: Doing Business with Conviction*, WALL ST. J., Apr. 4, 2007, at D9.

²⁶ "The probation officer's report recommended no jail time, just probation and a fine. So I respectfully declined Judge Daniel's kind offer and kept my thoughts to myself." TAUBMAN, *supra* note 1, at 170.

²⁷ *Id.* at 8.

²⁸ MASON, *supra* note 3, at 364.

²⁹ TAUBMAN, 2002 U.S. Dist. LEXIS 6251, at *35.

³⁰ MASON, *supra* note 3, at 335.

³¹ *Id.* at 336.

³² *Id.*

not take a chance on a poor performance subverting the positive aura that his mere presence at the defense table had engendered. The jurors referred to the defense's jury consultant as "Eagle Eye" because of her role as an "expert" in jury selection.³³ She had the responsibility for analyzing the faces and mannerisms of the jurors "to detect whether they believed the prosecution's case or whether they were leaning toward the defense."³⁴ Like most jury experts she "prided herself on rarely losing a case."³⁵ Taubman's response: "I can't believe it's adequate for me not to take the stand and look them in the eye and tell them I didn't do it."³⁶

As the architect of a \$512 million private antitrust settlement from Sotheby's and Christie's based on the same script the Government was following, David Boies was a certified shadow expert, who, when asked how he would have handled the defense, advised the use of experienced executives to acknowledge the constant exchanges between CEOs.³⁷ Confronted with the twelve meetings between the two Chairmen: "You've got to have an explanation. It's like a morality play."³⁸ To Boies, a jury trial "is different."³⁹ He is right, with a modification: An *antitrust* jury trial is an abyss, with the ultimate verdict packaged in speculation.

The abyss begins with an enigma—the 1890 Sherman Act that prompted Chief Justice White to interpret the prohibition of "every contract . . . in restraint of trade" to apply only to "unreasonable restraints" as defined by the "rule of reason."⁴⁰ The statute has a generality that encourages, or at the least tolerates shifting ideology-changing fashions of economic theory, the irrepressible seductive lure of populism, the landmines of state regulation, societal antitrust,⁴¹ hip heterodoxy,⁴² etc.—all infecting dialogue with mazy interpretations. As a respected judge once observed, "it is delusive to treat opinions written by different judges at different times as pieces of a jigsaw puzzle which can be, by effort, fitted correctly into a single pattern."⁴³ An indeterminate system even when stabilized by experienced judges descends into the abyss when a jury is added to the mix.

My experience in conducting four antitrust post-trial jury surveys has taught me that accurate predictions of jury verdicts are unattainable.⁴⁴ There are too many obstacles and imponderables. Comprehension is impeded by the intersection of competing voices, esoteric legal vocabulary,

*An antitrust jury trial
is an abyss, with the
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³³ *Id.*

³⁴ *Id.* at 320.

³⁵ *Id.*

³⁶ *Id.* at 336.

³⁷ See DAVID BOIES, *COURTING JUSTICE* ch. 9 (2004).

³⁸ MASON, *supra* note 3, at 348 (quoting Boies).

³⁹ *Id.*

⁴⁰ *Standard Oil Co. v. United States*, 221 U.S. 1, 60, 64–65 (1911).

⁴¹ See Arthur Austin, *The Emergence of Societal Antitrust*, 47 N.Y.U. L. REV. 903 (1972).

⁴² Christopher Hayes, *Hip Heterodoxy*, THE NATION, June 11, 2007, at 18.

⁴³ *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 342 (D. Mass. 1953). Judge Wyzanski relied on the expert counsel of economist Carl Kayser, who subsequently published his analysis in CARL KAYSER, *UNITED STATES V. UNITED SHOE MACHINERY CORPORATION* (1995).

⁴⁴ I have discussed these trials and surveys in *COMPLEX LITIGATION CONFRONTS THE JURY SYSTEM: A CASE STUDY* (1984). See also Austin, *Second Trials*, LITIG., Winter 1984, at 34.

Juror surveys in *New Mexico and North Carolina (N. M. Natural Gas Antitrust Litg. v. S. Union Corp.*, 607 F. Supp. 1491 (D. Colo. 1984); *Liggett Group, Inc. v. Brown & Williamson Tobacco Corp.*, 1990-2 Trade Cas. (CCH) ¶ 69,182 (M.D.N.C. 1990)) are discussed in Austin, *The Truth-and-Consequences of Jury Bonding*, Special Supplement to the N.J. L. J. (135 N.J. L. J.), Oct 4, 1993, at 26; *Another Viewpoint on Juries*, NAT'L L.J., Mar. 22, 1993, at 15; *How the Dominant Juror Dominates*, 21 TRIAL L.Q. 23, 23–24 (1991); and *The Jury System at Risk from Complexity, the New Media, and Deviancy*, 73 DENV. U. L. REV. 51 (1995).

boredom, and what every litigator dreads: the unanticipated. In one case I studied, “a jury saw a lawyer writing a letter to his mother while a colleague was conducting an examination of a witness. From then on the entire jury disdainfully remembered this as the ‘Dear Mom’ incident.”⁴⁵

What do jurors expect from the marketplace and can those expectations permit a unanimous decision about alleged price fixing? The spectrum runs from left to right: from populism to a free market model, with contested hot points between. My first survey involved what I learned was an orthodox antitrust jury—a blue collar jury of high school, or less, academic profile. They hung five to one. The sole hold-out for acquittal was a staunch free enterpriser; her colleagues were dedicated populists. Hence the unpredictable composition from jury selection dictated the result. The second trial was a unanimous verdict by a united group of free market types. In all the surveys, jurors connected with the testimony by contouring the “facts” into their expectations of a “workable” market defined by ideological inclination.

In all the surveys, jurors connected with the testimony by contouring the “facts” into their expectations of a “workable” market defined by ideological inclination.

In the Sotheby’s trial, there were several blue collar jurors—a postal worker, an aircraft mechanic, a subway token clerk, a forklift operator, a welfare worker, and a health care worker—but also a doctor, a gourmet store owner, and a Web site designer.⁴⁶ The profile reflects a populist, union perspective, guided by New York City “street” savvy. It was “not exactly a jury of [Taubman]’s peers.”⁴⁷ One might nevertheless have expected the jury to sympathize with Taubman as the target of a government amnesty deal that allowed one crook to avoid jail by snitching on a former colleague. Taubman suffered the indignity of an Ivy League yuppie—his protégé—playing the role of the main prosecution snitch. To magnify the apparent unfairness, Taubman’s alleged co-conspirator, Sir Anthony Tennant, was beyond the court’s jurisdiction, leaving Taubman to take the hit. (Tennant denied in an interview with Mason that he—or Taubman—instructed anyone to fix prices.)⁴⁸ Because of his strategic importance, the Government maintained leverage over Tennant by not granting immunity, thereby assuring his refusal to enter U.S. jurisdiction to testify.

Nevertheless, a scan of the heavy media coverage suggests the conclusion that a populist jury rejected this interpretation, instead viewing Taubman as a stereotypical capitalist who “malled” the country then retired to acquire status in New York Society by using his mall profits to acquire Sotheby’s. For Taubman the Art-Society mask provided quick access to “a patina of culture.”⁴⁹ The class factor, hyped on a daily routine by the Page Six New York press and reinforced by a flow of aesthete witnesses unleashed the populist attitudes of the jury.

He describes the jury’s resentment in terms of *Threshold Resistance*:

I could feel it every day . . . I saw it in their eyes as they glared at me from the jury box. They didn’t like me or relate to me. They mistrusted everything about the auction business. The prosecutors had done an excellent job of making the selling of art sound downright sinful. I was not a legal expert, but I was pretty good at sizing up people and assessing threshold resistance. There was plenty of work to do before these folks could ever rule in my favor.⁵⁰

⁴⁵ Austin, *Second Trials*, *supra* note 44, at 36.

⁴⁶ MASON, *supra* note 3, at 320.

⁴⁷ *Id.*

⁴⁸ *Id.* at 348–52. He also rejected the Government’s interpretation of a certain April 30 memo: This group of papers couldn’t possibly constitute instructions, because it doesn’t say go out and do anything. It’s not addressed to anybody. *Id.* at 351.

⁴⁹ JOHN TAYLOR, *CIRCUS OF AMBITION* 64 (1989).

⁵⁰ TAUBMAN, *supra* note 1, at 165.

Jurors gravitated to the sanctuary of their experience and intuition, following the logic of the “shadow witness” Adam Smith, who, the prosecution told them in closing argument, had observed in 1776 that when rivals get together, whatever the context, the conversation turns to conspiracy—or in “some contrivance to raise prices.”⁵¹ Taubman was furious when the judge “allowed the off-the-wall, prejudicial quote [from Smith] to be read to the jury.”⁵² The trial court determined that the quote was of no consequence because the issue of “pluses” from the direct testimony of Brooks and Davidge was clearly before the jury.⁵³ While that is a correct statement of the plaintiff’s burden of proof for “conscious parallelism plus,” it overlooks the problem that the Smith reference could sway a jury confronted with blurred evidence on a “plus” issue. The Second Circuit recognized the potential implications of the issue with a warning:

Indeed, were this a case where the Government asked the jury to infer the existence of or a defendant’s participation in a price-fixing conspiracy, we might well have vacated the conviction and remanded for a new trial. We now consider the Government to be on notice that future uses of a quotation such as the one used in this case might well prove fatal to its case. In the instant case, however, the Government relied on the overwhelming direct evidence of Taubman’s knowledge of and participation in the conspiracy, as noted above. Accordingly, we conclude that, in the particular circumstances of this case, the inclusion of the Adam Smith quotation in the Government’s summation was harmless.⁵⁴

Nevertheless, Taubman missed the irony that he had created an Adam Smith trap for himself by participating in twelve clandestine meetings with a fellow duopolist. The fact that the contacts occurred created an aura of mystery and a subliminal message that orthodox antitrust jurors would pick up. “If you meet twelve times,” the Sotheby’s jury foreman said, “you must be up to no good. It’s common sense.” “No it’s not,” the lone hold-out persisted, “We’re not moving from this room until it’s a not-guilty verdict.” The response: “If they weren’t doing anything wrong, they should have had someone in the room.”⁵⁵

⁵¹ “Now, a long time ago, a famous economist by the name of Adam Smith wrote in an economic textbook, and that was around the time that Sotheby’s and Christie’s were getting into business, he wrote: ‘People in the same trade seldom meet together even for merriment or diversion, but the conversation ends in a conspiracy against the public and in some contrivance to raise prices.’ The Government went on to say: Now, Mr. Smith is not a witness here obviously, but the truth of his insight is demonstrated by the actions of Taubman and Tennant in this case. Focus on the evidence we put before you. It established the three things that the court will instruct the government must prove: that the conspiracy existed, that Taubman knowingly and intentionally was a member of it, and that the intent was to unreasonably restrain interstate trade.” *Taubman*, 2002 U.S. Dist. LEXIS 6251, at *49 (internal citations omitted).

⁵² TAUBMAN, *supra* note 1, at 166.

⁵³ “The only disputed element of the charged offense was whether the defendant A. Alfred Taubman knowingly and intentionally became a member of that conspiracy. The direct evidence presented by the Government was testimony of both Brooks and Davidge that Taubman and Tennant, the chairmen of Sotheby’s and Christie’s respectively, met with one another on several occasions and agreed to eliminate competition on a number of levels, including fixing sellers’ commission prices. Both Brooks and Davidge unequivocally testified that they were directed by their respective chairmen to work out the specifics of the illegal agreement.” *Taubman*, U.S. Dist. LEXIS 6251, at *3.

⁵⁴ *United States v. Taubman*, 297 F.3d 161, 166 (2d Cir. 2002).

⁵⁵ MASON, *supra* note 3, at 343.

V. “With a sliding scale based on value, there should be no problem because you cannot price-fix a unique object.” (Sir Anthony Tennant)

“Social gatherings are an occasion for one of the least structured, but not ineffective, forms of collusion.”⁵⁶

Taubman’s thought of antitrust was aimed only at hard core cartels.⁵⁷ According to Taubman’s Antitrust, so long as direct discussion of pricing was off limits, he could “welcome” Sir Anthony to my London flat . . . with tea, orange juice, scones, and a clear conscience.”⁵⁸

Tennant and Taubman both were successful Capitalists, Tennant the Chairman of Guinness brewing “ and Taubman a shopping mall titan. But both had gravitated to Art, not as a business endeavor, but to assuage a passion to achieve success in a field transcending ordinary commerce, “[w]here everything is an individual work of art.”⁵⁹ While capitalists may fix prices, devotees of Art seek beauty.

Antitrust, as a product of industrialization and smoke filled rooms was irrelevant to the Art.⁶⁰ There were, for the two Chairmen, no antitrust issues because, as Tennant observed: “you cannot price-fix a unique subject.” And, in a market with only two major players, “one had to meet.”⁶¹ To the bitter end Tennant asserted that the meetings were lawful and his duopolist friend was innocent. Neither of the hardnosed capitalists expected the catastrophic effects of testimony from the grave. It was a replay of the Gary Dinners, 1907–1911, which, under Judge Gary, President of U.S. Steel, rivals met monthly “to maintain to a reasonable extent the equilibrium of business, to prevent utter demoralization of business and destructive competition.”⁶² It was a cooperative arrangement, i.e., Gary mentioned a price and the “guests” followed, “fully realizing that cooperation was more profitable than competition.”⁶³

IV. Conclusion

Taubman’s demise was assured when he elevated Dede Brooks to CEO, despite questions about her character. She was thus positioned to play a self-serving role in dealing with the antitrust investigation. By the time of a possible trial appearance, Taubman’s health was too suspect to chance a strenuous rebuttal session on the stand enabling Brooks to throw him under the bus in exchange for a modest six-month home detention. ●

⁵⁶ F. M. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 159 (1970).

⁵⁷ See TURNER, *supra* note 23.

⁵⁸ TAUBMAN, *supra* note 1, at 143.

⁵⁹ MASON, *supra* note 3, at 151.

⁶⁰ *E.g.*, The incorporation of people into “living art.” For example, in one exhibit, three men were suspended from harnesses attached to a wall. In front of an audience they spray painted themselves with car paint. The philosophy: “You see . . . the traditional relationship of the viewer to a work of art is ‘I can make any assumption I want to, critical of the work or the artist.’ This piece challenges that view. You look at the paintings critically. They look at you the same way.” Treban, *Not So Still Life*, VILLAGE VOICE, Feb. 16, 1988, at 16 col. 2.

⁶¹ MASON, *supra* note 3, at 349.

⁶² WALTER ADAMS, THE STRUCTURE OF AMERICAN INDUSTRY 150 (rev. ed 1954). See *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920).

⁶³ ADAMS, *supra* note 62, at 151 (quoting Adam Smith). “Judge Gary once explained that the ‘close communication and contact developed at these dinners generated such mutual respect and affectionate regard’ among steel industry leaders that all considered the obligation to cooperate and avoid destructive competition’ more binding . . . than any written or verbal contract.” SCHERER, *supra* note 56, at 159.

Paper Trail: Working Papers and Recent Scholarship

Editor's Note: In this edition, we note a working paper that examines what form of organization is best suited for providing sound recommendations by economists to agency decision makers, and another that uncovers an emerging definition of concerted agreement in the post-Twombly pleading standards case law that focuses on communication among rivals. Send suggestions for papers to review, or comments, to: page@law.ufl.edu or jwoodbury@crai.com.

—WILLIAM H. PAGE AND JOHN R. WOODBURY

Recent Papers

Luke Froeb, Paul A. Pautler, and Lars-Hendrik Röller, The Economics of Organizing Economists (Vanderbilt Law and Economics Working Paper Number 08-18)

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1155237

This short paper is not about unionizing economists (which would probably be futile in any event), but about organizing economists within the agencies—what form of organization is best suited for providing sound recommendations by economists to agency decision makers, whether they be the FTC commissioners, the FCC commissioners, or the Assistant Attorney General for Antitrust. The authors are certainly well positioned to consider that issue—Froeb spent time as Director of the FTC's Bureau of Economics and as a key staffer at the Justice Department; Pautler is a long-time member of the Bureau's front office, and Röller was the first Chief Competition Economist for the European Commission.

The focus of the paper is on how to best integrate the economic and legal analysis performed at the agencies. But the paper also reflects an underlying current of past and present tension between economists and lawyers at the agencies. So in a sense, the underlying question is whether economists and lawyers can ever just get along. A long note 16 in the paper describes how this tension has existed for at least the past forty years or so. It concludes that debates about the relative value of economists and lawyers “will likely never end so long as a substantial number of each profession remains at the agency.” And our big disadvantage at the agencies (speaking, of course, as an economist) is that we are seriously outnumbered.¹ In any event, this paper assumes that agency decision makers are interested in implementing the most efficient way of providing economic advice to them, but that a difference in views between economists and lawyers affects the costs and benefits of different organizational forms.

The first sentence of the paper begins by noting that in February of this year, the Swedish Competition Agency abolished its Department of Economic Analysis, dispersing the economists

¹ I am surprised that the authors didn't discuss more explicitly whether and the extent to which differences in incentives between the agency's lawyers and economists contribute to these tensions. It may well be that the agency lawyers have greater incentives than agency economists to litigate (because litigation increases the value of lawyers to outside law firms more than it increases the value of economists to academia, consulting firms, or law firms).

to the various legal divisions. I suspect that upon reading that first sentence, many if not most economists would immediately have felt a disturbance in the force, concluding that such a move signals the end of days for economic analysis at the Swedish Competition Agency. While this paper manages to maintain a balanced analysis of a centralized vs. a decentralized role for economic analysis, the discussion almost inevitably leads to the conclusion that such fears are justified.

The paper briefly describes the organizational evolution of the economists at the FTC and the Antitrust Division. Particularly interesting are the swings in the FTC's organization chart. The paper also describes the changed organizational role of economists in the EC with the appointment of a Chief Competition Economist with his own staff. As I note below, this discussion is all too brief.

Against that background, the paper compares two organizational models. The "functional" model is one that assigns economists to a single unit, such as the FTC's Bureau of Economics and the Antitrust Division's Economic Analysis Group. The second is the "divisional" model, which assigns economists to enforcement divisions or sections headed by lawyers, such as the change in organization that apparently occurred in Sweden. Arguably, this is the model currently in vogue at the FCC.

The paper relies on an organizational textbook to characterize the advantages and disadvantages of each, but I think that was probably unnecessary baggage for their discussion. These authors don't need a text to validate their characterizations.

One key advantage of the functional model is specialization. EAG and BE can "afford" to hire theoretical and empirical specialists (e.g., for demand estimation and merger simulation) because they can be used across a wide variety and a large number of different matters.

A second advantage is in the recruitment and retention of economists. For economists, there is an "academic" flavor to life at EAG and BE—agency economists are expected to demand rigor in analysis, to be familiar with modern analytic tools, and to freely criticize the work of colleagues to better identify the shortcomings of any particular case theory or approach (as well as to maintain the quality of analysis). That academic flavor, in turn, facilitates the hiring of new, high-quality Ph.Ds and keeps experienced and stellar veterans interested in working for the agencies, and facilitates the hiring of nationally prominent economists to serve as the leader of the group of economists. The new hires would be coming into an environment that shares lots of attributes with their previous academic life.

Two other advantages of the functional form are worth noting. One is that the extent of quality control over the work of the agencies' economists will be substantial—the work of the staff economists is overseen by other economists whose reputation and credibility will fall with shoddy analysis. So, in this sense, there is an alignment of incentives between the staff and their supervisors. In addition, the authors argue that the functional mode encourages innovation because "innovation in antitrust enforcement is driven largely by advances in economic learning . . . as economists apply and develop methodological innovations to the problem of enforcement." (p. 12) I generally agree with this point, although I'm not sure that all lawyers would agree that innovation is so one-sided. After all, innovation in the economics of antitrust usually must be supported by innovations in enforcement policy and in court decisions.

The paper describes the "main disadvantage" of the functional approach as a tendency to focus on narrower economic issues as opposed to addressing issues that are of critical importance to decision makers, "probative questions, like market delineation, whose answers might be crucial to the enforcement decision." (p. 6) I'm somewhat surprised by this particular example. Economists for years have argued that market definition is only a tool for evaluating competitive effects. If an economist were to exert much more effort on market definition rather than on com-

petitive effects, the risk of enforcement error could be substantial. And, in my experience, lawyers have become more accepting of this view, particularly during the merger review process. But certainly, there may be times when economists become fascinated with one particular aspect of the case in order to try new theories and methodologies rather than having a laser-like focus on the central competitive issues or the legal issues required for a successful court challenge.

In any event, focusing on and analyzing issues of concern to the lawyers is a key “advantage” of the divisional model, where economists work as a team with the lawyers. Nonetheless, the authors are quick to point out that “by framing the questions for the economists, the attorney managers also risk [pre-]determining the answers.” (p. 15)

The divisional approach also promises faster decision making because it would eliminate the “need” for multiple recommendations on the disposition of any particular matter. But again, the authors are quick to note that the decision makers then never see any substantial difference in either fact interpretation or in how those facts are translated into competitive effects because those disputes are resolved before a recommendation is made to the decision maker. Even if the divisional model didn’t preclude economists and lawyers from making separate recommendations, it’s unlikely that a lawyer-manager would be able to exercise the same degree of quality control as an economist-manager. And there are too few lawyers who also have advanced economics training to serve as effective quality-controllers, although there are many lawyers who understand and appreciate our expertise.

It’s no surprise that in an either-or world, the paper seems to lean towards the functional approach while encouraging exploration of greater cooperation with lawyers. The paper does mention the “hybrid” EC approach, where some economists work within enforcement divisions and others work directly for the Chief Economist and are assigned to the case teams. It also mentions relatively recent efforts at the FTC to better align the case analysis of economists and lawyers.

This is a worthwhile paper because it deals with issues that are at the heart of the role of economists at the agencies. I would like to have seen how (in the authors’ view) the various organizational changes within the DOJ and the FTC affected the voice of the economists. And it would be useful if the authors expanded the discussion of the EC approach in particular as a way of bridging the “focus” gap between the functional and divisional models, and the efficacy of that approach.²

I am surprised that the paper doesn’t ask whether any market tests would indicate which approach is more efficient. In particular, my impression is that there are very few “in-house” economists at law firms—they rely on outside consulting firms that specialize in economics. To be sure, there may be greater incentives by the consulting firm economists to avoid being distracted by ultimately irrelevant matters, but I think the analogy between specialized expertise in the consulting firm and the functional approach is largely intact. The market test suggests that the functional approach is the more efficient.³

² Let me note in passing that arguably, the EC model is close to the FCC model. While there are economists who work within the various FCC bureaus (e.g., Wireline, Wireless, and Media), there is also a separate, independent “division”—the Office of Strategic Planning and Policy Analysis—that houses both the Chief Economist of the FCC and other economists. My understanding is that these economists are involved in major case work.

³ My editor-colleague Bill Page reminds me that the agency economists (and attorneys) do more than prepare for litigation—they also advise decision makers on broad policy questions, such as revisions to the Merger Guidelines and what Section 2 means for antitrust oversight, and they conduct research into broad antitrust questions, such as tying and bundling. These other non-case focused activities do limit the scope of my market-test, which is all case-focused. But case-related activities do encompass much of the work of agency staffs and so I think the analogy is still meaningful. While the paper doesn’t make a distinction between litigation-focused and policy-focused advice to decision makers, I suspect that adding the policy-focused dimension would be an even more compelling reason for a functional approach.

Finally, the importance of organization to the voice of economists needs to be evaluated in the context of other factors. The paper observes that “the optimal [organizational] form depends on what you want your economists to do. If the answer is ‘not much,’ then either of the organizational forms . . . would work well. Either make the economists report to an attorney who does not appreciate economic analysis; or isolate economists within their own bureau, with few links to the attorneys.” Put differently, the disciplinary biases of the decision makers can play a key role in how economists are used. One who appreciates economic analysis will set cues that work to elevate the role of economists in case analysis; one who doesn’t will set cues that will discourage their use. And in my experience scattered over more agencies than I care to count, it is that decision maker who has the greatest impact on amplifying or muting the economists’ voice.

—JRW

William H. Page, *Twombly* and Communication: The Emerging Definition of Concerted Action Under the New Pleading Standards

http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1286872

In *Bell Atlantic Corp. v. Twombly*,⁴ the Supreme Court required plaintiffs alleging a Sherman Act agreement to plead more than conscious parallelism and an unspecified “conspiracy.” Under *Twombly*, plaintiffs must now plead sufficient facts to make it plausible to infer that the defendants formed an unlawful agreement. Interestingly, however, the Court did not explain what sort of conduct distinguishes concerted action from consciously parallel action. In this article, I examine nineteen federal court decisions applying the *Twombly* standard. I argue that these cases, explicitly or implicitly, apply a definition of agreement that focuses on communication among rivals.

Oligopolists can, under certain conditions, set a noncompetitive market price by consciously parallel conduct. If there are four gas stations at the same corner in a remote town, for example, one station might increase prices in hopes that the others would follow suit; the others might keep prices low and increase their sales, but they also might choose to match the higher price. If they choose the latter course, they have arguably formed a kind of agreement: the first price increase is an offer and the others are acceptances. Thus, so far as the literal language of the Sherman Act is concerned, this scenario could amount to an unlawful agreement in restraint of trade.

The scenario would also seem to meet the Supreme Court’s traditional definitions of a Sherman Act agreement—a “conscious commitment to a common scheme” or “meeting of the minds.” The courts, however, have come to agree with Donald Turner’s argument that, in scenarios like this, the rivals have not agreed within the meaning of Section 1 because they have done nothing culpable (they have only taken account of each other’s likely actions) or regulable (courts could not enjoin the conduct without direct price regulation).

The courts first reached this result in formulating standards for summary judgment in antitrust cases. Under *Matsushita*,⁵ to avoid summary judgment, a plaintiff must produce evidence that tends to exclude the possibility that the defendants were engaging in mere consciously parallel conduct. The plaintiff must offer a “plus factor,” that is, some evidence that is consistent only with agreement. *Twombly* reached a comparable result in framing its pleading standard. Although the Court did not require the plaintiff to plead a plus factor, it did require the plaintiff to plead

⁴ 127 S. Ct. 1955 (2007).

⁵ *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986).

“grounds,” “context,” “circumstance,” or “fact” sufficient to make a claim of agreement “plausible.” The Court justified its standard by its fear of the costs of discovery: “it is only by taking care to require allegations that reach the level suggesting conspiracy that we can hope to avoid the potentially enormous expense of discovery in cases with no reasonably founded hope that the [discovery] process will reveal relevant evidence to support a § 1 claim.” Significantly, however, the Court in *Twombly* offered no new guidance on the nature of a Sherman Act agreement.

I have argued elsewhere⁶ that the lower federal courts, in deciding under *Matsushita* whether to grant summary judgment, have moved toward a definition of agreement that focuses on communication among rivals. I suggested that this trend is consistent with the definition of agreement proposed by Oliver Black:⁷ in conscious parallelism, firms share a common goal and act in pursuit of that goal, relying on one other to do the same; the firms’ actions become concerted if they achieve the goal in part by communication of their intent and reliance. I argue that communications are more likely to meet these conditions if they are private and repeated. This definition is not compelled by economic theory, but it is consistent with the views of most informed antitrust economists that communications are essential to any successful cartel.

In the present article, I argue that the nineteen post-*Twombly* pleading cases reveal a similar focus on communication. The cases do not hold that the plaintiff must specifically plead communication. *Twombly* itself suggested that it might be possible to plead an agreement by alleging “complex and historically unprecedented changes in pricing structure made at the very same time by multiple competitors, and made for no other discernible reason.” This passage suggests that there may be scenarios so unusual that they could only be explained by inferring that the defendants communicated among themselves. In practice, however, only one post-*Twombly* case upheld a complaint on this ground, and that one appears to be inconsistent with *Twombly*.⁸

Most of the cases in which the plaintiffs failed to allege communications held that the defendants each had reason to act as they did regardless of what course their rivals took. Other cases recognized that the defendants’ actions only made sense if all of them acted in the same way, but hold that the defendants could have achieved the result by interdependent conduct. In the *Travel Agent* litigation,⁹ for example, the airlines had successfully, by parallel actions, reduced the commissions they paid travel agents for ticketing. The court concluded that these actions were explicable as consciously parallel conduct. It quoted with approval the deposition testimony of one airline executive who admitted that his airline’s cut in commissions could only have succeed if the other airlines matched it. He went on to say however, that “[a]ll I care about is how people behave if I do something or how I believe if they do something. To me that’s not consensus. That’s taking a common action after the fact which is to me a lot different than consensus.”

Most plaintiffs alleged communications, but not all the complaints that did so were found to be sufficient. Some communications, like those that normally occur in a trade association, were considered benign. Moreover, the courts treated bare allegations that the defendants held “secret

⁶ William H. Page, *Communication and Concerted Action*, 37 LOYOLA UNIV. CHI. L.J. 405, 411–12 (2007); William H. Page, *Facilitating Practices and Concerted Action Under Section 1 of the Sherman Act*, in ANTITRUST LAW AND ECONOMICS (Keith Hylton ed., forthcoming 2009).

⁷ OLIVER BLACK, CONCEPTUAL FOUNDATIONS OF ANTITRUST 185–87 (2005).

⁸ *In re Pressure Sensitive Labelstock Antitrust Litig.*, No. 3:03-MDL-1556, 2008 WL 2563358 (M.D. Pa. June 24, 2008). The court appeared to assume that the alleged conduct plausibly suggested an agreement simply because it was only profitable if all of the defendants acted in the same way. But that condition is fully consistent with interdependence.

⁹ *In re Travel Agent Commission Antitrust Litig.*, No. 1:03 CV 30000, 2007 WL 3171675, at *10 (N.D. Ohio Oct. 29, 2007).

meetings” as too vague to raise the necessary inference. Courts generally required plaintiffs to allege the circumstances and the content of the communications with some specificity.

The courts’ preference for specific allegations of secret communications seems troubling because that kind of information is normally within the control of the defendants. This result seems to confirm the fears of the dissent in *Twombly* that antitrust plaintiffs may lose on the pleadings under the Court’s new standard because they cannot use discovery to acquire the information they need to plead the agreement with adequate specificity. Interestingly, however, many of the post-*Twombly* cases—like the *Travel Agent* litigation mentioned earlier—did allow some discovery on the merits before resolution of a motion to dismiss for failure to state a claim. I argue that narrowly focused discovery in aid of pleading is appropriate as means of mitigating the possible harshness of the courts’ insistence on communications. ●

—WHP