



The American  
Antitrust Institute

BEFORE THE  
ANTITRUST MODERNIZATION COMMISSION  
1120 G STREET, N.W., SUITE 810  
WASHINGTON, D.C.

Comments of the American Antitrust Institute  
on the Issues to be Included on the Commission's Agenda

and

Supplementary Statement of the American Antitrust Institute  
Concerning Commission Practice and Procedure

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September 30, 2004

## INTRODUCTION

The American Antitrust Institute ("AAI") is an independent non-profit education, research, and advocacy organization, described on our homepage at [www.antitrustinstitute.org](http://www.antitrustinstitute.org). The AAI welcomes this opportunity to present the Antitrust Modernization Commission ("AMC," or "Commission") with an itemization of the issues that AAI recommends for study. In addition to the specific issues or topics recommended for study by the Commission, these Comments also discuss the standards for the acceptance of a topic for study. We suggest specific criteria for the selection of agenda issues.

The questions presented merely identify principal areas of investigation. In an appended "Supplementary Statement of the American Antitrust Institute Concerning Commission Practice and Procedure" ("*AAI Separate Statement*") we recommend that the Commission adopt a methodological approach that depends on a major empirical assessment of how the economy has changed over time. As the Commission proceeds with this "benchmarking," agenda topics and specific questions should be refined as the benchmarking is completed.

## START-UP AND AGENDA BUILDING

The start-up phase should be a period on the order of six months during which the administrative structure of the Commission should be put into place, rules of practice and procedures should be adopted, and the members should determine the overall agenda.

With respect to the agenda, witnesses should be given an opportunity to present suggested topics.

We suggest that the agenda should be formulated as a series of questions that are capable of being answered within the life of the AMC. (The most difficult task will likely be to decide what questions *not* to pursue.)

## STANDARDS FOR AGENDA ITEMS

The Commission will need to establish some standards before it can identify the areas that are central to its investigation, *i.e.*, the topics of the public policy

conversation.<sup>1</sup> On what basis should the topics be selected? The evaluation criteria should include the following:

(a) Is the topic of concern to a significant part of the antitrust community, broadly defined?

(b) Can the topic be stated as a question that is capable of being answered within the time and resources available?

(c) Is it likely that the answer to a question can have an impact on policy?

The Commission should also consider whether it wants to take up one or more topics that are likely to generate significant public attention. For example, if it chooses to focus on the sports industry and its components, an area that is arguably ripe for antitrust reform,<sup>2</sup> hearings would probably turn out the media and result in broader coverage than most of the more specialized topics that are likely to be selected. Although it is not the purpose of the Commission to generate headlines, there are benefits in publicity that include making the public and Congress aware that the Commission exists and creating a higher degree of interest in its ultimate recommendations.

#### **RECOMMENDED AGENDA ITEMS**

##### 1. Clarification of the Objectives of the Antitrust Mission

- What should be the priorities of antitrust-taking into account such arguable objectives as keeping prices low, increasing productivity, providing consumers with a reasonable range of choices, stimulating innovation, maximizing allocational and productive efficiency, providing a level playing field to competitors, and combating centralized economic and political power?

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<sup>1</sup> The AAI *Separate Statement* states: “The Commission can generate questions that it wants addressed by witnesses during the public policy conversation, which would respond to the previously obtained benchmarking information along the model of ‘If X has changed, what does this imply for antitrust policy going forward?’ I refer to this as a ‘conversation’ because it should involve interaction between the Commissioners and the witnesses, with a record that is quickly made available to the public over the Internet so that others might interject their own commentary into the record.

<sup>2</sup> Stephen Ross, a member of the AAI Advisory Board, will be providing the Commission with specific reasons for focusing on sports.

- Where objectives clash, how shall they be weighed?

## 2. The Nature of Market Power

- What is market power?
- What is the relationship between market power and concentration, and does this differ according to whether the parties are buyers or sellers?
- Should the presence of market power always be the pre-requisite of antitrust intervention?
- What role should market concentration play in antitrust analysis?

## 3. Combining Vertical and Horizontal Analysis

- Does antitrust need to develop more sophisticated approaches to the role of vertical relations in terms of their horizontal effects?
- Do the antitrust laws deal adequately with problems created by very large buyers and with atomistic sellers having sunk costs?
- Under what circumstances should price discrimination be considered an antitrust issue?

## 4. Unilateral Conduct

- What differences exist between the European "abuse of dominance" approach and the American anti-monopoly approach to dealing with unilateral conduct and how, if at all, should such differences be bridged?
- What should be the standards for mandating access to bottlenecks, gateways, and essential facilities?

## 5. Intellectual Property, High Technology, and Competition

- Does the evolution of intellectual property rights in recent years raise the risk that protection of monopoly in the name of innovation will unduly reduce the role of competition? Should there be a dedicated court for intellectual property?
- In what way should conflicts between the goals of intellectual property law and antitrust law be resolved? Should the Federal Circuit be abolished or modified?
- Does the growth of network industries require any change in antitrust policy or analysis?

## 6. Globalization and Harmonization

- To what extent should the U.S. support efforts to create an international antitrust regime?
- How can remedies involving conduct that creates damages in multiple jurisdictions be made more effective?
- How can the anticompetitive aspects of trade policy (e.g., the antidumping regime) be reduced?

## 7. Procedural and Remedial Issues

- Are the penalties for antitrust violations sufficiently severe?<sup>3</sup>
- Should structural remedies be utilized with more frequency?
- How can private enforcement be made more effective?

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<sup>3</sup> We call your attention to an AAI Working Paper by John Connor and Robert Lande that carefully examines the literature and cases involving overcharges by cartels, demonstrating that the overcharges are considerably greater than previously assumed and raising questions about whether current policies provide sufficient deterrence against cartels and cartel recidivism. <http://www.antitrustinstitute.org/recent2/342.cfm>.

- How can state enforcement be made more effective?

## 8. Governmental Regulation and Antitrust

- Is the mix of antitrust and regulation working well in transitions from regulation to competition?
- How should competition policy questions be resolved in sectors that are subject to regulation?
- What types of governmental interference with competitive markets should be reconsidered?

**Supplementary Statement of the American Antitrust Institute  
Concerning Commission Practice and Procedure**

**THE AAI AND THE AMC**

The AAI intends to assist in the work of the AMC through a variety of small task forces that will be established after the AMC identifies its primary areas of investigation. We anticipate providing our thoughts and offering our services on an on-going basis throughout the Commission's life. Our resources include our Advisory Board of 67 prominent members of the antitrust community whose assistance we plan to draw on quite heavily in this project.

While the AAI has serious concerns about the representativeness of the panel of experts who have been appointed to serve on the AMC, we praise the Commission and its leadership for making clear its intention to reach out to the public in an aggressive manner. The AAI strongly urges the AMC to protect its own credibility by continuing to make every effort to engage those who have been left on the outside by the appointment process. *This must include, as the Commissioners have said they recognize, making effective use of the Internet to provide a fully transparent forum.* AAI will do its part in bringing to the AMC the facts, analyses, and recommendations that are generated within our constituency. In addition, it is crucial that the AMC provide interested parties sufficient time to comment on any issues or proposals that are being considered.

In a recent law review article<sup>4</sup> I suggested a four-phase agenda for the Antitrust Modernization Commission

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<sup>4</sup> Albert A. Foer, "Putting the Antitrust Modernization Commission into Perspective," 51 Buffalo L. Rev. 1029-1051 (2003), available at <http://www.antitrustinstitute.org/recent2/292.cfm>.

("AMC"). This suggestion grew out of a review of similar blue ribbon antitrust commissions that have been appointed in the past, and my own experience with the commission chaired by your Commissioner, John Shenefield, in the late 1970s. The following comments on the Commission's practice and procedure are organized according to the four phases identified in the law review article: Phase One: Start-up and Agenda Building; Phase Two: Benchmarking the Economy; Phase Three: The Public Policy Conversation; and, Phase Four: Recommendations and Reporting. An Appendix "A" is attached hereto with specific suggestions for the issues that should be considered during the process of benchmarking.

#### **PHASE ONE: START-UP AND AGENDA BUILDING**

The goal of Phase One is the identification of areas of principal investigation to be taken up. In our comments above, we described and commented upon the Commission's start-up and agenda building. The tasks during this phase include setting up the administrative structure of the Commission, adopting rules of practice and procedure, and the determination of the overall agenda.

While the agenda is being considered, staff can begin assembling factual legal and economic material of a background nature. The Commission thus far appears to be acting consistently with our suggested approach, although nothing has yet been determined with respect to the format of the agenda that will be adopted.

#### **PHASE TWO: BENCHMARKING THE ECONOMY**

The title of this Commission should give us pause. *Modernization* implies that something is not modern and needs to be changed in order better to conform to current or perhaps future realities and needs. The logical place to start would be to define where antitrust was, how the relevant world has changed, and what types of broad changes might be appropriate to deal with current and perhaps future needs. Only after this has been accomplished will it make sense to propose and argue about specific changes of the sort that might be incorporated in legislation or in regulatory reform.

The objective of Phase Two is to focus on what has changed over time and to pull in a wide range of



potentially relevant facts, a la the Temporary National Economic Committee ("TNEC"), in order to provide background for specific questions adopted in the agenda. The duration of this phase should be targeted for sixteen months or so, ample time for an extremely important undertaking. A non-exhaustive list of specific changes in the character and organization of economic activity that would be useful to examine in the process of benchmarking is attached hereto as Exhibit "A."

How far back should the AMC look? Initially, of course, we have to look to the legislative history of the antitrust laws. This is where the basic framework of the AMC's undertaking is to be found. If the AMC intends to revisit the framework and to recommend changes in the objectives of the antitrust laws, it should make this decision explicitly and early on. We believe that the legislative history establishes multiple goals for antitrust and that these goals are still relevant.

The current law provides a flexibility that permits both theory and application to adjust to changing economic realities and advances in knowledge, as well as changes in the political landscape. Moreover, we do not believe that the country seeks different or more limited goals (such as allocational efficiency as a single over-riding goal) for antitrust, and therefore we advise against a decision recommending a revised framework.

With this in mind, we suggest that an appropriate starting point for the contemplation of modernization could be 1941, sixty-three years ago, when TNEC issued its landmark report. This was the most recent thorough inventory of our economic structure and performance and was approximately the time at which antitrust was taking its modern shape under the leadership of Thurman Arnold. The TNEC hearings and voluminous reports helped the country understand how the economy worked at that point in time and why there was the need for antitrust. The AMC should take the period of TNEC as a starting point and document how our economy and the issues that are of concern to antitrust have changed.

Alternatively, the Commission could use one of the later blue ribbon antitrust study commissions, such as the 1955 Attorney General's National Committee to Study the Antitrust Laws, as a starting point, but none of these

later commissions attempted to provide an empirical analysis of antitrust's role in the economy.

A third alternative could be to start with an older major academic treatment such as the 1970 edition of F.M. Scherer's classic Industrial Market Structure and Economic Performance.

The thrust of our argument is to have a starting point as a benchmark for describing the changes that have occurred over time, which may (or perhaps may not) give rise to a need to modernize aspects of antitrust. The reason for a wide-ranging examination of the type proposed in the appendix is that antitrust does not and should not stand alone, as if it were something apart from the overall political economy. If it is to play a meaningful role, it must be firmly embedded in American political traditions, evolving political expectations and the evolving overall economy.

#### **PHASE THREE: THE PUBLIC POLICY CONVERSATION**

The Commission can generate questions that it wants addressed by witnesses during the public policy conversation, which would respond to the previously obtained benchmarking information along the model of "If X has changed, what does this imply for antitrust policy going forward?" I refer to this as a "conversation" because it should involve interaction between the Commissioners and the witnesses, with a record that is quickly made available to the public over the Internet so that others might interject their own commentary into the record.

Phase Three could be scheduled for six months of the Commission's life. In this phase, testimony would be taken on the public policy implications of the evidence compiled in the first two phases.

#### **PHASE FOUR: RECOMMENDATIONS AND REPORTING**

Roughly the final eight months (including two months at the end for completing the drafting and editing of the Final Report) should be allotted to preparation of the report of the Commission. This would entail (1) completing assemblage of the principal findings of fact, (2) laying out a summary of the public policy discussions, fairly presenting all sides, (3) debating and voting on

recommendations, and (4) reporting the Commission's findings of fact, majority recommendations and minority statements.

*We recommend formally resolving at the outset that the Commission intends to include in its reports all minority and separate statements by Commissioners, as an assurance that Congress will not be deprived of the variety of views that its legislation stressed was so important.*

**CONCLUSION**

This Commission has the capability of engaging the best minds in the world on these questions and can, within the time allotted, compile an authoritative reference that will influence thinking about antitrust for many years to come.

Respectfully submitted,

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September 30, 2004

Attachment: Appendix:

CHANGES IN THE CHARACTER AND ORGANIZATION OF THE POLITICAL ECONOMY

APPENDIX  
TO SUPPLEMENTARY STATEMENT OF THE AMERICAN ANTITRUST INSTITUTE CONCERNING  
COMMISSION PRACTICE AND PROCEDURE

CHANGES IN THE CHARACTER AND ORGANIZATION OF THE POLITICAL ECONOMY

The following are twelve categories of investigation that could be the basis for benchmarking. (We've added three that did not appear in Foer's Buffalo Law Review article, viz., "other structural changes," "changes in the intellectual framework," and "survey research".) The key concept throughout is "change," although it is always implied that important continuities should also be noted.

•Changes in the general economy since TNEC. Begin by putting the present into perspective.

*Examples of questions to be answered:*

How have the roles of the following factors changed: big business, small business, organized labor, trade associations, corporate governance, concentration of wealth, international trade, major sectors of the economy?

•Aggregate measures of concentration. Look at the past, present, and likely trends.

*Examples:*

Is the economy as a whole becoming more or less concentrated? What about different industrial sectors? What role is played by convergence of industrial sectors? What have been the causes of changes in aggregate measures of concentration?

•Market concentration. Again, look at the past, present, and trends, focusing this time on a variety of narrowly defined (antitrust) markets. The antitrust agencies could pull much of this information from their investigatory files to compile a comprehensive current profile.

*Examples:*

What have been the causes of changes in market concentration? What evidence is there of the benefits

or harms associated with high or increased levels of market concentration?

•Other structural changes.

*Examples:*

In what ways have firms changed in terms of internal structure and vertical relationships? What changes have occurred in channels of distribution, particularly with respect to the introduction of new types of distribution and the disappearance of other types? How has bargaining power changed between various levels within vertical systems?

•Measures of economic performance.

*Examples:*

By various measures (including profits, prices, innovativeness, and productivity), how has the performance of the economy changed, in terms that throw light on the effectiveness of competition? What do we know about the relative efficiency of differently sized and differently structured organizations? What is the relation between competition policy and income distribution? (E.g., do changes in competition policy have an influence? Does competition policy affect the distribution of income among wage and salary earners? Is competition policy allowing substantial organizational slack to be used on executive compensation?)

•Technological change.

*Examples:*

In what ways are technological changes (e.g., computers, telecommunications, transportation) affecting competition? How has the creation of network industries affected competition? How has the relationship between antitrust and intellectual property changed?

•The regulatory environment.

*Examples:*

In what ways are changes in the regulatory environment (e.g., deregulation of sectors, liberalization of international trade, governmental policies involving

intellectual property, taxation, securities, state regulation) affecting competition?

How has the relationship between antitrust and sectoral regulation changed?

•Globalization.

*Examples:*

How do the expansion of transnational commerce and the development of antitrust regimes around the world affect U.S. competition? How has the relationship between antitrust and trade regulation changed?

•Business strategy.

*Examples:*

What changes are occurring with respect to the way businesses conduct themselves as competitors? (E.g., mergers, joint ventures and alliances, power buying, vertical integration or disintegration, information sharing through trade associations and internet, greater availability of current prices, leveraging of market power, price discrimination, standard setting, etc.)

•Antitrust administration and process. Review measures of resources and effectiveness of antitrust (federal, state, and private) over time.

*Examples:*

What types of impact evaluation are available and what do they suggest? Has antitrust become more complex, in terms of the ability of courts and juries to evaluate cases?

•Antitrust enforcement policies. Describe ways in which antitrust enforcement policy has changed over time.

*Examples:*

What types of mergers, single-firm, and multi-firm activities have or have not been challenged? In what ways have trials changed? How have criminal penalties changed? In what ways have civil remedies changed?

•Intellectual framework. Describe how scholarship and academic thinking with respect to antitrust has changed over time.

*Examples:*

How have different schools evolved and where do they appear to be heading?

What has been, or can be, contributed by disciplines other than economics and law, such as political science, psychology, sociology, history, strategic management, marketing? How have the tools of economic analysis changed and what further changes are anticipated by the profession?

• Survey Research. Finally, it seems that little is known about popular attitudes toward antitrust-related issues. It may be worthwhile both to examine past public opinion polling and to conduct current polling or other survey research in order to help ascertain the understanding and desires of the broader American public, to help establish the political context of antitrust modernization, rather than to rely more or less entirely on the knowledge and intuitions of a narrow community of specialists.