CIVIL ENFORCEMENT AT THE ANTITRUST DIVISION AND FEDERAL TRADE COMMISSION: EMERGING PATTERNS?

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Introduction

Although there were no significant changes in U. S. antitrust enforcement policy during the first full year of leadership by Timothy Muris at the Federal Trade Commission ("FTC") and Charles James[1] at the Antitrust Division of the Department of Justice, the following trends have emerged:

- *Up-Front Buyers.* The FTC has expressed a willingness to permit post-consent divestitures, thereby signaling a potential departure from its previous strong preference for up-front buyers. The FTC's new policy falls more in line with those of the Antitrust Division, which has generally not required up-front buyers in its consent decrees.

- *Enforcement of the HSR Act and "Gun-Jumping."* Both agencies have heightened their efforts to enforce, and seek appropriate punishment for violations of, the requirements of the HSR Act. For example, the FTC sought and received disgorgement of profits from merging parties post-transaction for failure to fully comply with Item 4(c) of the HSR Act. More recently, the Antitrust Division has filed a lawsuit challenging the "gun jumping" activities of the parties in the *Computer Associates* merger.

- *"Unilateral Fix-It-First."* The *Libbey* case is a warning to companies who attempt unilateral "fix-it-first" solutions that do not completely address regulatory objections. Not only did the FTC successfully block Libbey's proposed

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[1] Charles James has recently announced that he will step down from his position to pursue an opportunity in the private sector. His replacement has not yet been named.

acquisition of Anchor Hocking, but it also succeeded in extracting a consent order mandating notification of any future transaction involving Anchor regardless of whether such a transaction would be reportable under the HSR Act.

In addition to these trends, there are two notable initiatives. First, in March 2002, the agencies announced joint proposed clearance procedures that formally allocated primary areas of responsibility to each agency broken down by industry.[2] This agreement was meant to streamline the practices of the two agencies, thereby avoiding the bureaucratic delays and occasionally protracted disputes between them as to which one would review particular matters. The proposed plan met with strong resistance in the U.S. Senate and was subsequently abandoned. However, given that these proposed clearance procedures generally reflect the informal allocation practices of the agencies, it is expected that they will continue to allocate matters in line with the allocations set forth in the proposed clearance procedures.

The second notable initiative is the Antitrust Division's Merger Review Process Initiative, announced in October 2001, which is designed to make more efficient use of the 30-day waiting period under the HSR Act.[3] Although the practical effect of this initiative remains to be seen, practitioners report that the Antitrust Division is attempting to engage in the early consultation recommended in the initiative.

FTC's Position on Up-Front Buyers

The FTC historically has had a strong preference for up-front buyers. Indeed, it announced in the late 1990's that it would require up-front buyers more frequently and by early 2000, the FTC had required up-front buyers in more than half the cases in which a divestiture was required.[4] By contrast, in the same time period the Antitrust Division did not adopt a similar approach, and had not required an up-front buyer in any of its consent decrees.[5] The American Bar Association, as well as antitrust practitioners, criticized the FTC's approach.[6]

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2 The full text of the proposed clearance procedures can be found at http://www.ftc.gov/opa/2002/02/clearance/ftcdojagree.pdf.

3 The text of the Antitrust Division's initiative can be found at http://www.usdoj.gov/atr/public/9300.htm.

4 Deborah Platt Majoras, Deputy Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Houston We Have a Competitive Problem: How Can We Remedy It?* Address before the Houston Bar Ass'n Antitrust and Trade Reg. Section, April 17, 2002, at 6-7 (http://www.usdoj.gov/atr/public/speeches/11112.pdf).

5 *Id.*

6 *See, e.g.,* American Bar Ass'n Section of Antitrust Law, *The State of Federal Antitrust Enforcement – 2001,* Report on the Task Force on Federal Antitrust Agencies.

In a speech in August 2001, Chairman Muris indicated that the FTC might be willing to loosen its strict up-front buyer requirements.[7] The FTC further clarified its stance on the up-front buyer requirement in March 2002 in its Frequently Asked Questions About Merger Consent Order Provisions (the "FAQ").[8] The FAQ states that up-front buyers are not required in all FTC consent orders.[9] Specifically, the FTC has allowed post-consent order divestitures in cases where the parties adequately demonstrate that (1) a buyer acceptable under FTC criteria will emerge; (2) the package to be divested is a stand-alone business; and (3) the assets will be preserved post closing.[10]

However, the FTC will continue to require an up-front buyer in cases where there is a concern about (1) whether the proposed asset package is adequate to maintain or restore competition; (2) whether the proposed asset package is sufficient to attract acceptable buyers; (3) the size of the pool of acceptable buyers; or (4) the potential deterioration of the assets pending divestiture.[11]

In terms of whether the FTC has a preferred type of buyer, it has stated that the "sole requirement" for an acceptable buyer is that such a buyer be ready, willing and able to operate the assets in a manner that maintains or restores competition in the relevant market.[12]

Enforcement of HSR Violations and "Gun Jumping"

For the first time, the FTC used divestiture and disgorgement as a remedy for violations of the reporting requirements of the HSR Act for a consummated merger.[13] In the *Hearst* case,

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7 *See* Timothy Muris, "Antitrust Enforcement at the Federal Trade Commission: In a Word – Continuity" (August 7, 2001) (www.ftc.gov/speeches/muris/murisaba.htm).

8 Federal Trade Commission, Frequently Asked Questions About Merger Consent Order Provisions ("FAQ") (March 15, 2002) (www.ftc.gov/bc/mergerfaq.htm).

9 *Id.* at 3 (Q. 8).

10 *See, e.g., Diageo/Vivendi*, Docket No. C-4032 (http://www.ftc.gov/os/caselist/c4032.htm).

11 FAQ, *supra* note 8, at 3 (Q. 8).

12 *Id.* at 2 (Q. 5). This statement regarding the suitability of buyers regardless of size may be in response to the GAO investigation into FTC divestiture policies. United States General Accounting Office, *Federal Trade Commission Study Needed to Assess the Effects of Recent Divestitures on Competition in Retail Markets,* GAO-02-793, September 26, 2002 (http://www.gao.gov/index.html). This study was prompted, in part, by complaints by smaller market participants that they were effectively shut out of the bidding process for divestiture packages.

13 *Federal Trade Comm'n v. The Hearst Trust, The Hearst Corporation and First Data Bank,* Civ. No. 1:01CV00734 (D.D.C. April 5, 2001). An FTC news release discussing the Hearst case can be found at

the FTC alleged that Hearst illegally omitted several 4(c) documents from a December 1997 HSR filing in which Hearst had acquired a competitor. According to the FTC complaint, the withheld documents analyzed the competitive effects stemming from the acquisition of Laughery's Medi-Span business by a subsidiary of Hearst. The FTC further alleged that the acquisition of Medi-Span substantially lessened competition in the integrated drug information database market and that the withheld documents would have enabled the FTC staff to detect the anticompetitive effects of the transaction before it closed. In settling this matter, the FTC sough and received disgorgement of profits totaling $19 million, as well as the divestiture of Medi-Span. Practitioners should expect the FTC to seek disgorgement of profits to remedy serious violations of the HSR Act in future transactions.

While the FTC sought disgorgement for failing to fully comply with Item 4(c), the Antitrust Division was faced with a more serious violation of both the HSR Act and the Sherman Antitrust Act, namely the pre-closing activities undertaken by the parties to the *Computer Associates/Platinum Technology* merger.[14] *Computer Associates* did not expand the range of impermissible pre-closing activities. Nevertheless, it should serve as a red flag to companies as they work towards combining businesses in advance of closing.

The core of the Antitrust Division's complaint was that certain provisions of the parties' merger agreement effectively ceded control of Platinum Technology (the target firm) to Computer Associates. For example, the merger agreement

- ceded pricing control of Platinum Technology's products to Computer Associates by requiring that all contracts providing for discounts in excess of 20% (when such discounts were common for both Platinum Technology and the industry as a whole) had to be approved in advance by the buyer;
- ceded day-to-day control of Platinum Technology's business to Computer Associates by providing that a vice-president of the buyer would work at the seller's headquarters pre-closing to review and approve all customer contracts and participate in other business decisions;
- prohibited Platinum Technology from entering into contracts for a term of more than 30 days if the contract specified a fixed or capped price for Platinum Technology's services.

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http://www.ftc.gov/opa/2001/12/hearst.htm. Links to the Stipulation, Final Order and Commissioners' statements can also be accessed from this page.

14 *United States v. Computer Assocs. Int'l, Inc. and Platinum Techs. Int'l, Inc.,* Civ. No. 01-02063 (GK) (D.D.C. April 23, 2002). Relevant cases filings are available at http://www.usdoj.gov/atr/cases/indx139.htm.

As a result of these provisions, the Antitrust Division alleged that Platinum Technology had substantially altered its ordinary discounting and contracting practices by cooperating fully with Computer Associates in the review and approval process. Moreover, Computer Associates, by virtue of its unfettered access to Platinum Technology, systematically collected competitively sensitive information relating to Platinum Technology's competitive bids, including the identity of the customer, products and services offered, pricing, and proposed discounts. The Antitrust Division further alleged that Computer Associates passed much of this information on to its own staff to enhance their competitive position in negotiations. Computer Associates was assessed $638,000 in civil penalties.

Computer Associates serves as a useful guide for practitioners seeking to define the permissible boundaries of pre-closing cooperation between merging entities. Notably, among the cooperative conduct unchallenged by the Antitrust Division in *Computer Associates* were

- restrictions on Platinum Technology's ability to assume new debt or financing;
- restrictions on Platinum Technology's ability to issue new voting securities;
- restrictions on Platinum Technology's ability to sell assets.

In contrast to the provisions and actions challenged by the Antitrust Division, these restrictions do not inhibit the target's ability to conduct its business in the ordinary course prior to closing. Thus, while parties may plan for the integration of their assets and businesses, implementation of those plans must await, at least, the expiration of the waiting period.[15]

Efforts by Merging Parties to Unilaterally "Fix-it-First"

The FTC's decision to block the proposed acquisition by Libbey of Anchor Hocking Corporation, a wholly owned subsidiary of Newell Rubbermaid, is an example of the repercussions of structuring a substantively deficient "fix-it-first" remedy.[16]

The FTC's objection to the Libbey merger was that it would substantially lessen competition in the highly concentrated food service glassware market where the only other

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[15] One open question is whether parties may combine assets and operations after the expiration of the waiting period, but prior to closing of the transaction. It is clear that such activities would not be violations of the HSR Act, but still could be violations of the Sherman Act if the parties were competitors pre-closing. In practice, the agencies have declined to enforce the Sherman Act if closing is imminent, however they have not ruled out future enforcement actions where the parties' pre-closing activities could jeopardize the target's ability to compete effectively should the parties not consummate the merger.

[16] *Federal Trade Comm'n v. Libbey*, Civ. Action No. 02-0060 (RBW) (April 22, 2002). Relevant documents relating to this case are available at http://www.ftc.gov/os/caselist/d9301.htm.

major players, Arc International (10%) and Oneida (3%), were deemed insignificant due to their inability to produce replacement Libbey glassware. Indeed, the FTC determined that nearly 80% of food service glassware purchases were replacements of Libbey glassware and, further, that Anchor was the only competitor with the ability to manufacture and sell Libbey look-alikes at prices up to 20% lower than Libbey.

In response to the FTC complaint, the parties attempted to salvage their transaction by adopting a fix-it-first approach which provided that Anchor would transfer, pre-closing, nearly all of its food service glassware assets to Newell's Rubbermaid Commercial Products division. This amended agreement did not alleviate the FTC's concerns primarily because Libbey would still acquire Newell's food service glass manufacturing facilities, thereby leaving Rubbermaid with no independent supply source for its newly acquired glassware assets. While the parties subsequently proposed a supply source in Columbia, the FTC determined that Rubbermaid's cost of goods would increase a minimum of 4.3% by virtue of this foreign supply source. Thus, the FTC concluded that the proposed merger would still result in a price increase in the relevant market.

The district court granted a preliminary injunction in favor of the FTC, finding that both the original and amended merger agreements might substantially reduce competition in the food service glassware market because Rubbermaid would not retain important assets such as Anchor's manufacturing plants, brand name, customer relationships and key employees and thus would not be able to replace Anchor as Libbey's "most formidable competitor." Following the grant of the preliminary injunction, the FTC issued an administrative complaint that ultimately led to the parties' announcement of their decision to withdraw from the merger agreement. However, in settling its administrative action, the FTC extracted a consent decree from Libbey and Newell that obligates Newell to notify the Commission of *any* proposed sale of its food service glassware business to any prospective purchaser during the next five years, regardless of whether the transaction would otherwise be reportable under the HSR Act. In the end, therefore, the parties eagerness to resolve the FTC's concerns unilaterally backfired - given the FTC's statements in Libbey, it is unlikely that Newell will find a buyer willing to risk FTC scrutiny in any subsequent transaction.

Joint Proposal For Efficient Clearance Procedures

In March 2002, the agencies announced a new agreement overhauling the clearance process.[17] The agreement did not limit the jurisdiction of either agency, however it formally allocated primary areas of responsibility between the two agencies by industry. The public announcement of these allocations between the agencies was intended to resolve much of the uncertainty concerning the clearance of transactions and other antitrust matters.

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17 *See supra* note 2.

This proposal met with strong resistance in the U.S. Senate. In the face of this opposition, the agencies abandoned their joint proposal. However, given that the proposal generally reflected the pre-existing informal agreement of the agencies with respect to clearance, it is expected that clearance will continue along the same lines. Specifically, the Antitrust Division has historically taken the lead in investigating transactions involving telecommunications, banking and finance, travel and transportation, beer, computer software, media and entertainment and the defense industry. The FTC has historically investigated health care, pharmaceuticals, satellites, energy, food, retailing and textiles.

The Antitrust Division Initiative

In October 2001, the Antitrust Division announced an initiative designed to make more efficient use of the first 30-day waiting period of the HSR Act.[18] The intent is to get to the core antitrust issues quickly, so that the staff and the parties may reach closure on most or all issues before the end of this initial waiting period. While the announcement does not create new procedures, it does signal a commitment to find practical ways to identify, address and resolve issues within the initial 30-day waiting period or, if closure is not reached, to narrow the scope of any Second Request which may follow.

Specifically, the staff is encouraged to tailor its investigative plans and strategies to the specific issues posed by each transaction, rather than relying on standardized procedures or boilerplate models. The parties may expect the Antitrust Division to be more proactive during the initial 30-day waiting period and may find it to their advantage to reciprocate by proffering key documents beyond those required by a HSR Act filing, anticipating requests for information and availing themselves of opportunities to meet with staff to discuss issues raised by their transaction.

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[18] *See* supra note 3.