WILMERHALE

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Innoveda Sale to Mentor Graphics Reflects New Antitrust Agency Procedures

On April 23, 2002 Mentor Graphics announced it had agreed to acquire Innoveda, Inc. through a tender offer. Both Mentor and Innoveda produce software used in the design of printed circuit boards — commonly called Electronic Design Automation (EDA). Hale and Dorr assisted Innoveda with the necessary pre-merger filings and with the Department of Justice inquiry that arose when the Department learned of the transaction. Under the rules for tender offers, the government had only fifteen days after filing to determine whether or not to extend its review of the transaction and issue a second request. Accordingly, Innoveda had a very limited time in which to persuade the government that the acquisition would not substantially lessen competition. After both sides tendered documents and made presentations to the Department, the DOJ granted early termination of the waiting period, leaving the parties free to close as scheduled.

The transaction provided two interesting insights into the operation of the antitrust agencies. First, the fact that the Department of Justice was conducting the investigation—and not the Federal Trade Commission—showed that, at least toward the end of April, the allocation of industries between the FTC and the DOJ was working. In the past, the FTC has investigated mergers in the EDA industry. However, under the allocation agreement, DOJ was given jurisdiction over software mergers and, therefore, the Innoveda/Mentor transaction went to the DOJ despite the fact that the FTC was, at the time, investigating another previously announced merger in the same industry. Now that the allocation agreement has been scuttled (see infra) it will be interesting to see where the next transaction lands, as both agencies have some recent experience.

Secondly, true to its stated goal, the DOJ made aggressive use of the initial waiting period, foreshortened as it was. As a part of the Hart-Scott-Rodino (HSR) review reforms instituted by Charles James, the new assistant attorney general in charge of the DOJ's Antitrust Division, the DOJ has promised to promptly begin investigations of transactions, with the aim of avoiding unnecessary second requests. A discussion of these reforms can be found in the December 2001 online edition of this newsletter. Our experience with this transaction was consistent with that goal. The DOJ called quickly, sought particularized information and asked to speak with the parties about the transaction. Having received what they had requested, the DOJ quickly reached a determination and granted early termination of the waiting period.

Federal Trade Commission and Department of Justice Bow to Pressure from Congress on Merger Clearance Agreement

On May 20, 2002, Charles James issued a one paragraph statement withdrawing the DOJ from the clearance agreement entered into with the FTC earlier in the year. (A discussion of the agreement can be found in the April 2002 edition of this newsletter.) James blamed the withdrawal on threats by Senator Hollings (D-S.C.), chairman of the Commerce, Justice and

State Appropriations Subcommittee, to disrupt the budget for the entire Justice Department.

The agreement first took fire from Senator Hollings in January when the FTC and DOJ were scheduled to announce the agreement without first consulting Hollings. The agencies postponed their announcement and provided Congress with extensive data and information concerning the clearance process and their proposed agreement. On March 5, 2002, the agencies finally announced the new agreement allocating primary areas of responsibility, on an industry-wide basis, to one agency or the other. The intent of the agreement was to provide certainty as to which agency would be expected to investigate a transaction involving a specific industry, and to significantly reduce the time the agencies were spending on clearance disputes.

The new agreement formalized many long-standing informal industry allocations, and consolidated certain related industries that had traditionally been split between the agencies. The major area concerning Senator Hollings was the media and entertainment industry. The agreement allocated this industry to the DOJ. Hollings continued to voice objections to a predisposed allocation that would prevent the FTC from ever reviewing a transaction in an industry allocated to the DOJ.

Hollings' subcommittee oversees the budget of the DOJ. Hollings indicated that he would include in a supplemental appropriations bill a provision preventing the Department from reallocating funding between divisions without congressional approval. Divisions within the Department include the Antitrust, Civil Rights, Criminal, Civil and Tax Divisions, the United States Attorneys, the Immigration and Naturalization Service, the Drug Enforcement Administration, the Bureau of Prisons and the FBI. James cited this prospect as requiring the Department's withdrawal from the agreement.

The failure of the agreement leaves open the question of what the agencies will do now. Will the agencies return to the prior clearance dispute process? Will the agencies informally restrain themselves from requesting clearance in industries previously agreed to be in the other agency's expertise? A spokesman for Senator Hollings said the senator is willing to work with the agencies to address their concerns with the clearance process.

ABA Antitrust Spring Meeting Highlights

Celebrating the 50th anniversary of the Antitrust Section of the ABA, the annual spring meeting in Washington once again drew record attendance. However, unlike at least some years in the past, there was no major news or announcement made during the three day session.

Of particular interest was the Friday morning leadership roundtable featuring Charles James and Tim Murris, chairman of the FTC, both appearing at this gathering for the first time in their new roles. Murris spoke of his agency's renewed interest in non-merger matters, particularly in light of the reduced merger review load caused by the lagging economy and the increase in HSR reporting thresholds. He suggested that the FTC would devote special attention in the near future to healthcare — especially issues related to the entrance of generic drugs and suspected price-fixing by doctors—the professions and trade associations.

James reported that impediments to the prosecution of hard-core cartels was at the top of his "to-do" list and that he expected that the DOJ would be giving increased attention to joint ventures, strategic alliances and intellectual property licensing issues. Both Murris and James spoke of their respective satisfaction with the merger clearance arrangement which they had succeeded in personally negotiating, an arrangement that was subsequently reversed within days of the closing of the spring meeting (see *supra*).

Another regular feature of the spring meeting in recent years has been a "Breakfast with the FTC Bureau Directors," this year including Joe Simons, director of the Bureau of Competition, J. Howard Beales, director of Consumer Protection and David Scheffman, director of the Bureau of Economics. These three bureaus constitute the working staff of the commission, the Bureau of Competition being the one of particular interest to the readers of this newsletter.

In addition to comments on the "best practices" workshops (see *infra*), Simmons spoke of two areas of renewed bureau interest in light of the fact that the reduction in the number of HSR filings freed up additional staff resources. The first was a focus on non-reportable merger transactions that come to the staff's attention through consumer and/or competitor complaints, and through the FTC's review of the public press. Within the past year, the commission has instituted an action challenging a transaction that had closed long prior to the institution of the litigation (*FTC v. MSC Software Corp., et al.* October 12, 2001).

The second area involved non-merger commission activity. Recently, the FTC brought a complaint against Schering-Plough for having entered into alleged anticompetitive agreements to delay generic entry of the K-Dur 20 drug used to treat patients with low blood potassium levels. Also in this area, the FTC initiated action against a Warner and PolyGram Music Group joint venture alleged to have agreed not to discount or advertise the 1990 and 1994 Three Tenors albums in an attempt to promote the 1998 Three

Tenors concert.

Computer Associates Agrees to Pay $638,000 in Civil Penalties and Desist from “Gun Jumping”

The Department of Justice accepted a settlement from Computer Associates International Inc. (CA) and Platinum technology International inc. (Platinum) to settle the DOJ’s suit alleging anticompetitive conduct in the period between the signing of the CA/Platinum merger agreement and the end of the HSR waiting period. (Additional information about this matter is contained in the December 2001 edition of this newsletter.) The DOJ’s complaint alleged that the merger agreement included anticompetitive requirements that restricted Platinum from offering its regular discounts to customers and from amending standard contract terms without CA approval. The complaint alleged that CA enforced its contract rights by assigning an officer to work at Platinum to review and approve Platinum’s customer contracts. In addition to agreeing to pay the civil penalty of $11,000 a day for the 58 day period of the alleged violation, CA will be prevented from agreeing on prices, approving or rejecting proposed customer contacts and exchanging prospective bid information with all future merger partners.

While this case provides some guidance on “jumping the gun” activity in the period prior to closing, the DOJ has expressed the view that collaborative pre-closing activity between merging competitors falling short of what was alleged in CA can violate both the HSR rules and the Sherman Act. CA had used the disputed contractual language for many years, claiming a legitimate interest in protecting the value of the business and assets it had contracted to acquire during the period before the transaction could be closed. On the other hand, the antitrust laws (and the HSR waiting period rules) require that competitors remain competitors until a merger is closed.

The reconciliation of these two potentially conflicting interests was the subject of an intense panel discussion at the spring meeting of the American Bar Association's Antitrust Section. The government took the position that, notwithstanding the existence of a merger agreement, the parties must remain as competitors and must act in accordance with competition laws until the time of the closing. Any activity involving the parties that "normal" competitors would not engage in is suspect, even though the government conceded that the existence of a merger agreement does change the *status quo* of the parties.

The DOJ has acknowledged that there is uncertainty in this area and has promised to provide further guidance in the near future. Meanwhile, it is clear that the relationship between merging parties who are competitors must be carefully monitored from an antitrust standpoint.

Attempted Restructuring of Merger Fails To Stave Off Preliminary Injunction

Almost exactly a year ago, Libbey, Inc. and Newell Rubbermaid, Inc. agreed to sell Newell's Anchor Hocking subsidiary to Libbey. Both Anchor Hocking and Libbey produce glassware for sale to the food service industry. Libbey is the market leader with nearly a 70% share and Anchor Hocking held the third largest share with 7%. Of significance, however, was Anchor's substantial sales of "Libbey look-alike" glassware which provided a competitive alternative for food service industry purchasers. Because food service glassware is subject to substantial breakage and theft, uniformity of appearance is particularly important. The FTC became convinced that the availability of Anchor's less expensive look-alike products was competitively significant.

Accordingly, in January 2002, the FTC sued Libbey and Newell, seeking a preliminary injunction. A week after that filing, Libbey and Newell announced that they had revised their merger agreement, such that the food service glass business would remain with Newell. Under the revised agreement, the Anchor brand would become Libbey's and Libbey would buy the two Newell glass plants that made the glass for the Anchor product line. The FTC continued to oppose the transaction, arguing that the revised agreement should not be considered by the court and that, even if it were to be considered, it did not solve the competitive problems created by the transaction. Moreover, the FTC noted that the revised agreement would force Newell to seek alternative sources of supply, thereby substantially increasing its costs and making it vulnerable to supply uncertainties. This burden would exacerbate the harm to Newell's competitive viability caused by the loss of the Anchor brand.

On April 22, 2002 a district court judge granted the FTC's motion for a preliminary injunction (Federal Trade Comm'n v. Libbey, Inc. et al., Civil Action No. 02-0060, D.D.C. April 22, 2002). Even as restructured, the court found the FTC to have met its injunction burdens by showing it was likely to succeed in demonstrating harm to competition. The judge accepted the FTC's arguments related to increased costs, loss of control of manufacturing facilities and loss of brand, rejecting Newell's arguments that, despite the changes, it would remain a viable strong competitor.

The court's decision, while favorable to the FTC on the merits, was premised upon the restructured transaction.

Post decision FTC commentary suggests that the commission is considering what it can do to prevent companies from making similar contractual changes during (or after) the HSR review process. Currently, parties must refile their HSR filing in the event they add assets to the transaction, but are not required to make a new filing in the event they exclude assets from the transaction. Commissioner Mozelle Thompson hinted that the FTC may seek to change that rule, but to date the FTC has taken no specific action.

FTC To Convene "Merger Investigation Best Practices" Workshops

The FTC has recently held a series of public workshops regarding merger investigation best practices in the commission's offices in Washington (June 3, June 27 and July 10, 2002). The first session focused on the use and maintenance of electronic records during the merger investigation process, including the use of email and data or information from backup tapes or electronic storage systems, as well as the associated burdens of production on the merging parties. The second session focused on such topics as the best use of the initial waiting period, the content and scope of second requests and the time and expense involved in the HSR process. The last session focused on special issues concerning the development and maintenance of accounting and financial data relevant to the merger review process.

The sessions were open to the public and the FTC seeks input on all of these topics from those who have been involved in the merger review process in the past. Additional general sessions on best practices were held in New York, Los Angeles, San Francisco and Chicago in June.

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