Antitrust and Trade Regulation Bulletin

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Antitrust: 1994 Developments

Introduction

1994 proved to be a year of considerable activity by federal antitrust enforcement agencies.

The Department of Justice issued Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property; the Department of Justice and the Federal Trade Commission jointly released Nine Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust; the Department and the Commission jointly issued Antitrust Enforcement Guidelines for International Operations; and the Department announced the revocation of its Vertical Restraints Guidelines. In a year in which there were no landmark decisions by the United States Supreme Court in the area of antitrust, the antitrust enforcement agencies broke considerable new ground.

During this Administration, the Antitrust Division has opened a New Cases Unit to generate case proposals and a Civil Task Force to prosecute civil matters. One such publicly announced investigation involves the National Association of Securities Dealers (NASD), which administers the NASDAQ Stock Market. In contrast to the Antitrust Division's activity with respect to the issuance of guidelines and the opening of over seventy new civil investigations, the Antitrust Division actually brought few cases to trial last year. The most notable settlement was the *Microsoft* consent decree which limits the duration of agreements between Microsoft and PC manufacturers to one year (with the PC manufacturer having the option to renew for an additional year). The most notable loss was its suit against General Electric Company alleging

a conspiracy with De Beers, the South African diamond giant, to fix prices in the worldwide industrial diamond market.

The Antitrust Division reports that under this Administration it has restructured or halted approximately 24 merger transactions. In the vertical merger context, the Antitrust Division has recognized that a vertical merger may raise anticompetitive concerns, particularly if the effect is to substantially foreclose a market to other competitors. The Division reports that several cases involving vertical restraints are being developed.

Last fall, President Clinton nominated Robert Pitofsky to be Chairman of the Federal Trade Commission for a seven-year term expiring in September 2001. Pitofsky is a former FTC Commissioner nominated by President Carter and a former Director of the FTC's Bureau of Consumer Protection. He served as Dean of Georgetown University Law Center from 1983-1989 and has also been engaged in the private practice of law.

Assistant Attorney General Anne K. Bingaman has publicly stated that antitrust policy under her direction will not be affected by the fact that Capitol Hill will be governed by Republicans for the next two years. She recently stated to members of the American Bar Association's Antitrust Section meeting in Washington, DC: "There has to be core of reasonable, sound, middle-of-the-road enforcement.... We can argue at the fringes, ... but business must have confidence that people in this job are not doing a political job in any way, shape or form." Ms.Bingaman went on to explain that the organizing principle of the United States economy will continue to be free and open markets and that **the economy will have at least two characteristics -- continuing globalization and continuing emphasis on intellectual property.**

Intellectual Property Guidelines

On August 8, 1994, the Department of Justice issued draft Antitrust Guidelines for the Licensing and Acquisition of Intellectual Property. The Intellectual Property Guidelines, which were adopted in final form after a 60-day public comment period, replace the intellectual property portions of the 1988 Antitrust Enforcement Guidelines for International Operations.

The Intellectual Property Guidelines include:

- An antitrust "safety zone" in which the Department will not challenge most restraints

in licensing arrangements where the licensor and its licensees account for no more than 20% of each relevant market affected by the restraints. The Department has indicated that this safety zone seeks to address concerns that small businesses and innovators are hampered by antitrust uncertainty.

- Methods by which the Department, under certain circumstances, will evaluate the impact of a licensing arrangement or acquisition on research and development.

The first section of the Intellectual Property Guidelines defines the relationship between intellectual property protection and the antitrust laws and concludes that the intellectual property laws and antitrust laws share the common purpose of promoting innovation and enhancing consumer welfare. The intellectual property laws do so by providing incentives for innovation through the establishment of enforceable property rights for the creators of new and useful products. The antitrust laws promote innovation and consumer welfare by prohibiting actions that deter competition between firms that serve consumers.

The second section of the Guidelines announces the following general principles:

1. For the purpose of antitrust analysis, the Department regards intellectual property as comparable to any other form of property.
2. The Department does not presume that intellectual property creates market power in the antitrust context; and
3. The Department recognizes that intellectual property licensing is generally procompetitive.

The third general principle is of particular interest. The Department recognizes that licensing, cross licensing or otherwise transferring intellectual property can lead to more efficient exploitation of the intellectual property, benefiting consumers through the reduction of costs and the introduction of new products. The Department also recognizes that field of use, territorial and other **limitations on intellectual property licenses may serve procompetitive ends** by allowing the licensor to exploit its property as efficiently and effectively as possible.

The third section of the Intellectual Property Guidelines deals with modes of antitrust analysis. This section begins with the statement:

> "While intellectual property licensing arrangements are typically welfare-enhancing and procompetitive, antitrust concerns may arise when licensing arrangements impede competition that likely would have taken place in the absence of the license."

The Department will examine a licensing arrangement either under the strict test of per se illegality or under the more flexible rule of reason--that is whether the procompetitive benefits outweigh any anticompetitive effects. The Guidelines explain that the mode of antitrust analysis will turn on more than whether the relationship of the parties to the licensing arrangement is primarily horizontal (e.g. both vendors) or vertical (e.g. vendor and supplier). To determine whether a particular restraint in a licensing arrangement is given per se or rule of reason treatment, the Department will first determine whether the restraint in question can be expected to contribute to an efficiency-producing integration of economic activity by, for example, facilitating the combination of the licensor's intellectual property with complementary intellectual property or other production capabilities of the licensee.

The fourth section of the Intellectual Property Guidelines contains general principles concerning the Department's evaluation of a licensing arrangement under the rule of reason. This is the section where the Department defines the antitrust safety zone, "where the licensor and its licensees collectively account for no more than 20% of each relevant market affected by the restraint." This section also contains a useful analysis of anticompetitive effects. The factors identified are market structure, coordination and foreclosure; whether the licensing arrangement involves exclusivity; whether there are benefits from reduction of competition; and other factors such as the pace of innovation and history of rivalry in the marketplace.

With respect to exclusivity, the licensing arrangement may involve exclusivity in two distinct respects. Generally, an exclusive license which restricts the right of a licensor to license to others is less problematic than "exclusive dealing" which arises when a license prevents or restricts the licensee from using competing technologies.

Section 4 also deals with efficiencies and justifications. If the Department finds that a restraint in a licensing arrangement has an anticompetitive effect, the Department will consider whether the restraint produces offsetting procompetitive benefits, such as by facilitating the efficient development and exploitation of intellectual property. The evaluation of procompetitive efficiencies, of the reasonable necessity of a restraint to achieve them and of the duration of the restraint may depend on the market context.

The final section of the Guidelines illustrates the application of the principles articulated throughout the Guidelines to particular licensing restraints and to arrangements that involve cross licensing, pooling or acquisition of intellectual property. This section includes a discussion of licensing arrangements among horizontal competitors, resale price maintenance (where a licensor of an intellectual property right in a product fixes the licensee's resale price of that product), tying arrangements (conditioning the ability of a customer to license one or more items of intellectual property on the customer's purchase of another item or service), exclusive dealing (when a license prevents the licensee from licensing, selling, distributing or using a competing technology), cross licensing or pooling arrangements (where two or more owners of different items of intellectual property agree to license one another or third parties), grant backs (arrangements under which a licensee agrees to extend to the licensor of intellectual property the right to use the licensee's improvement to the licensed technology) and acquisition of intellectual property rights. With respect to this last item, the Department will analyze such a transaction as an acquisition of assets just as it does any other asset acquisition and will apply the analysis contained in the 1992 Merger Guidelines.

Finally, the Department announces in these Guidelines that it may challenge the enforcement of invalid intellectual property rights as an antitrust violation. Case law supports the Department's position that an objectively baseless infringement action, brought in bad faith, when the complainant knows the intellectual property right to be invalid, may violate Section 2 of the Sherman Act.

Health Care Guidelines

On September 27, 1994, the Department of Justice and the Federal Trade Commission released Nine Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust. These supersede and expand the six Statements of Enforcement Policy issued in September 1993.

The 1994 Health Care Guidelines retain the basic philosophy and approach of the 1993 Guidelines. They expand and define new "safety zones" of conduct in which efficiency-producing joint ventures may proceed without significant risk of challenge from federal enforcement agencies. With respect to conduct falling outside of the safety zones, the new Guidelines set forth the approach of the antitrust enforcement agencies in analyzing such conduct and articulate the principles that will guide an agency inquiry. The 1994 Health Care Guidelines also set forth the procedure for business reviews and advisory opinions by the agencies and commit to prompt responses.

The nine areas covered are as follows:

- Statement 1 - Mergers Among Hospitals

- Statement 2 - Hospital Joint Ventures Involving High Technology Or Other Expensive Health Care Equipment
- Statement 3 - Hospital Joint Ventures Involving Specialized Clinical Or Other Expensive Health Care Services
- Statement 4 - Providers' Collective Provision Of Non-Fee-Related Information To Purchasers Of Health Care Services
- Statement 5 - Providers' Collective Provision Of Fee-Related Information to Purchasers Of Health Care Services
- Statement 6 - Provider Participation In Exchanges Of Price and Cost Information
- Statement 7 - Joint Purchasing Arrangements Among Health Care Providers
- Statement 8 - Physician Network Joint Ventures
- Statement 9 - Analytical Principles Relating To Multiprovider Networks

International Guidelines

On October 13, 1994, the Department of Justice and the Federal Trade Commission issued draft Antitrust Enforcement Guidelines for International Operations. The International Guidelines, which were adopted in final form after a 60-day public comment period, supersede the Department's 1988 Antitrust Guidelines for International Operations. Other portions of those 1988 Guidelines are superseded by the Antitrust Guidelines for Licensing and Acquisition of Intellectual Property discussed above.

The International Guidelines include a summary of antitrust and related international laws which the Agencies believe to have the greatest significance for international transactions. The new Guidelines also include a discussion of the factors considered by the Agencies in deciding whether to exercise jurisdiction to challenge anticompetitive conduct.

The topics covered by the International Guidelines include the Agencies' subject matter jurisdiction over conduct and entities outside the United States and the considerations, issues, policies and processes that govern their decision to exercise that jurisdiction; comity; mutual assistance in international antitrust enforcement; and the effects of foreign governmental involvement on the antitrust liability of private entities. In addition, the International Guidelines discuss the relationship between antitrust and international trade initiatives. Finally, to illustrate how these principles may operate in certain contexts, the Guidelines include a number of examples.

The International Guidelines embody the principle that **anticompetitive conduct that affects United States domestic or foreign commerce may violate the United States antitrust**

laws regardless of where such conduct occurs or the nationality of the parties involved. They expressly rely upon the principles articulated by the United States Supreme Court in *Hartford Fire Ins. Co. v. California,* 113 S.Ct. 2891, 2909 (1993) that, "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States." The Guidelines cite examples of anticompetitive conduct involving imports of foreign products, mergers of foreign firms and other conduct outside the United States that has a direct, substantial and reasonably foreseeable anticompetitive effect within the United States.

With respect to the issue of comity among nations, the International Guidelines state that comity itself "reflects the broad concept of respect among coequal sovereign nations and plays a role in determining 'the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.'" In performing a comity analysis, the agencies take into account all relevant factors, including:

1. the relative significance to the alleged violation of conduct within the United States, as compared to conduct abroad;
2. the nationality of the persons involved in or affected by the conduct;
3. the presence or absence of a purpose to affect United States consumers, markets or exporters;
4. the relative significance and foreseeability of the effects of the conduct on the United States as compared to the effects abroad;
5. the existence of reasonable expectations that would be furthered or defeated by the action;
6. the degree of conflict with foreign law or articulated foreign economic policy;
7. the effect on foreign enforcement; and
8. the effectiveness of foreign enforcement.

The International Guidelines recognize that **foreign governments may be involved in a variety of ways in conduct that has antitrust consequences.** In this regard, the Guidelines discuss the doctrines of foreign sovereign immunity, the doctrine of foreign sovereign compulsion, the act of state doctrine, and the application of the *Noerr-Pennington* doctrine. The doctrine of foreign sovereign immunity provides that a United States court will have jurisdiction if the foreign government has not:

1. waived its immunity explicitly or by implication;
2. engaged in commercial activity;
3. expropriated property in violation of international law;
4. acquired rights to United States property;
5. committed certain torts within the United States or agreed to arbitration of a dispute.

As a practical matter, most activities of foreign government-owned corporations operating in the commercial marketplace will be subject to United States antitrust laws to the same extent as activities of foreign privately owned firms.

The next cited doctrine of foreign sovereign compulsion recognizes the defense that compliance with United States antitrust law would have been in direct conflict with conduct that has been compelled by a foreign sovereign. For this defense to apply, a foreign government must have compelled the anticompetitive conduct in circumstances in which refusal to comply with the foreign government's demand would give rise to the imposition of penal or other severe sanctions. Further, the defense normally applies only when the foreign government compels conduct which can be accomplished entirely within its own territory. If the compelled conduct occurs in the United States, the United States antitrust enforcement agencies will not recognize the defense.

The acts of state doctrine is one of judicial abstention based on considerations of international comity and separation of powers, and applies only if the specific conduct complained of is a public act of a foreign sovereign within its territorial jurisdiction on matters pertaining to its governmental sovereignty. In such cases, the Guidelines recognize that courts have refused to adjudicate claims or issues that would require the court to judge the legality (as a matter of United States or international law) of the sovereign act of a foreign state.

Finally, under the *Noerr-Pennington* doctrine, a genuine effort to obtain or influence action by governmental entities in the United States is immune from application of the Sherman Act, even if the intent or effect of that effort is to restrain or monopolize trade. Therefore, for example, information exchanged by competitors in the course of preparing a joint petition to the government will be considered protected activity if the parties have taken necessary measures to ensure that the information will not be used for anticompetitive purposes. On the other hand, if the information exchange by competitors in the course of preparing a joint petition is incidental to the petition, it will not be subject to antitrust immunity.

The final section of the International Guidelines contains a discussion of personal jurisdiction and procedural rules. This section of the Guidelines recognizes that, in all cases, the exercise of personal jurisdiction must satisfy constitutional requirements of minimum contacts with the

United States, such that the proceeding comports with "fair play and substantial justice."

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