

Chapter 2

Antitrust Litigation

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Chapter 2

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2.1 Introduction: Recent Developments in Antitrust Law

Several significant antitrust developments occurred in 2001, perhaps the most well-publicized of which was the ongoing *Microsoft* litigation. However, *Microsoft*, while probably acquainting more non-lawyers with antitrust issues and concepts than any other case in recent memory, was only one of many important developments in antitrust law in 2001. Courts continued to address interesting and complex antitrust issues in such areas as intellectual property, securities, and mergers and acquisitions, underscoring that antitrust law remains vital in both the governmental and private legal sectors. Several parallel actions in the United States and the European Commission also reflected the different application of domestic and international competition law by the Department of Justice and the European Union.

Because of the breadth of antitrust law, this summary is intended merely to serve as an overview of some of the legal and policy developments in 2001 in the field of antitrust law. It highlights recent developments in the *Microsoft* litigation and the recent Southern District of New York decision in *U.S.A. v. Visa U.S.A. Inc., et al.*, and then moves to a summary of recent developments in antitrust law, including decisions in the areas of intellectual property, securities, mergers and acquisitions, and international law.

2.1.1 *Microsoft* Continues

On November 6, 2001, nine states — Illinois, Kentucky, Louisiana, Maryland, Michigan, New York, North Carolina, Ohio, and Wisconsin — and the Justice Department accepted the terms of the proposed consent decree filed in the U.S. District Court for the District of Columbia (*U.S. v. Microsoft Corp.*, D.D.C., No. 98-1232 (CKK), 11/6/01; *New York v. Microsoft Corp.*, D.D.C., No. 98-1232 (CKK), 11/6/01). The remaining nine states — California, Connecticut, Florida, Iowa, Kansas, Massachusetts, Minnesota, Utah, and West Virginia — and the District of Columbia opted to continue the litigation. The settlement was reached in November 2001, after remand from the District of Columbia Circuit.

The Decision

In an unanimous en banc per curiam opinion in June of 2001, the Court of Appeals had upheld Sherman Act §2 liability for Microsoft's abuse of monopoly power in the market for Intel-compatible personal computer operating systems, but had reversed §2 liability for attempting to gain a monopoly in the market for Internet browsers due to failure to prove a dangerous probability of achieving monopoly power in that market. The District of Columbia Circuit remanded the §1 claim for tying the browser to its operating system for reappraisal under the rule of reason; instructing the district court, on remand, to "reconsider whether the use of the structural remedy of divestiture is appropriate." In September, the Department of Justice dropped the tying claim and the divestiture remedy from the case. The Court of Appeals directed that the case be assigned to a new judge on remand for consideration of an appropriate remedy, after disqualifying the district judge, Thomas Penfield Jackson. The case was assigned to Judge Colleen Kollar-Kotelly.

Proposed Consent Decree

The proposed consent decree included several provisions that the Department of Justice, in its competitive impact statement, argued would be beneficial to consumers. For example, the proposed decree would specifically prohibit Microsoft from retaliating against a computer manufacturer that either supports or distributes non-Microsoft middleware or operating systems, and Microsoft would be required to provide uniform licensing terms to the 20 largest and most competitively significant computer manufacturers. Further, computer manufacturers would have the freedom to configure the computers they sell to feature and promote non-Microsoft middleware. Developers of these non-Microsoft products would also have the freedom to feature those products on personal computers because Microsoft would be prohibited from restricting computer manufacturers' ability to install and feature alternatives to Microsoft products in a variety of ways on the desktop and elsewhere.

Microsoft would be required to offer necessary related licenses for the intellectual property that it is required to disclose, and Microsoft would be required to disclose all of the interfaces and related technical information that its middleware uses to interoperate with the Windows operating system. Microsoft would further be required to disclose the communications protocols needed for software located on a computer server to interoperate with the Windows operating system. This provision would prevent Microsoft from integrating features or functionality within the Windows operating system which only Microsoft's own servers can interoperate. The proposed decree would also prohibit Microsoft from retaliating against developers or conditioning consideration on a developer refraining from developing, distributing, or writing to software that competes with Microsoft platform software, and Microsoft would be prohibited from entering into agreements that require parties to exclusively, or in a set percentage, promote Microsoft middleware or operating system products.

While it remains to be seen what the outcome of the *Microsoft* litigation or the settlement negotiations will produce, in light of the centrality of Microsoft to the computer industry and of the split postures of the settling and litigating defendants, it is clear that constructing a remedy (or a viable settlement) will be extremely difficult, and will be closely watched by both industry and legal analysts.

2.1.2 Judgment Entered in Department of Justice-Visa Matter

On October 9, 2001, the district court in the Southern District of New York entered judgment in the matter of *U.S.A. v. Visa U.S.A. Inc., et al. (U.S. v. Visa U.S.A. Inc., S.D.N.Y., No. 98 Civ. 7076 (BSJ), 10/9/01)*. The district court ruled that the Antitrust Division proved that exclusionary rules of each association, which allowed member banks to offer both Visa® cards and MasterCard® cards, but not American Express or Discover cards, were anticompetitive and should be abolished. The court also ruled that the government failed to prove its claim that the governance structures of the Visa and MasterCard associations have caused a significant adverse effect on competition or consumer welfare. After considering comments and objections of the parties and others, the district court for the modified the final judgment in the government's antitrust suit against Visa U.S.A. Inc., Visa International Corp., and MasterCard International Inc. (*U.S. v. Visa U.S.A. Inc., S.D.N.Y., No. 98 Civ. 7076 (BSJ), 11/29/01*). The modified final judgment was structured in such a way as to address several key facets of the credit card industry:

Anti-Discrimination Provisions

Since Section III.C. of the Final Judgment "broadly prohibits exclusionary issuing rules," the court rejected an invitation by the government and Discover to adopt specific "anti-discrimination provisions" that would prevent Visa or MasterCard from enacting rules that treats a member bank's equity ownership in the other three general purpose car networks disparately. The specific provisions were unnecessary because such a discriminatory rule or practice would likely be anticompetitive and could thus be challenged under Section III.C., the court ruled.

Dual Issuance of Debit Cards

Visa's motion to modify the final judgment to allow the defendants to bar dual issuance of off-line debit cards, so long as they do not discriminate between the different card networks, was denied. The final judgment allowed each defendant to continue to bargain for exclusivity if that is what a bank chooses, and the district court noted the final judgment "simply prevents Visa from prohibiting its member banks from issuing another network's debit product under penalty of losing its rights to issue Visa debit products." MasterCard did not join in this request to modify the final judgment because it did not have a rule prohibiting dual issuance of debit cards.

Corporate and Small Business Cards

The court denied the defendants' request to exclude corporate cards and small business cards from the remedy. The court ruled that Visa and MasterCard failed to show barriers to entry into corporate cards, rejecting Visa and MasterCard's arguments that the dominance of American Express in this area justified a rule barring Visa and MasterCard member banks from issuing American Express brand corporate or small business cards.

Visa International's Liability

Because Visa International had the power to preempt Visa U.S.A.'s exclusionary rule, but it provided "affirmative encouragement for the illegal bylaw," Visa International "was in part responsible for the illegal bylaw and therefore is liable." The court held that the injunctive provisions against Visa International are "minor and ancillary" and thus "appropriate."

Other Modifications to the Final Judgment

The district court modified the Final Judgment to permit issuers to enter into agreements with American Express and Discovery without penalty, rather than to allow issuers to rescind existing agreements for any reason. The court refused to alter its position that the offending rules must be repealed by the effective date of the final judgment, regardless of whether appeals are taken. However, the district court did clarify that the rescission period was to end either two years from the effective date of the final judgment or, if timely appealed, two years from the final order of the highest-level appellate court. The final judgment was to expire by its own terms 10 years from the date of entry or, if timely appealed, 10 years after the final order of the highest-level appellate court granting all or part of the relief set forth in the final judgment.

Visa and MasterCard have filed their appeals.

2.2 Antitrust and Intellectual Property Law

The Federal Trade Commission and the Justice Department's Antitrust Division announced they will cohost hearings beginning in January 2002 on the relationship of antitrust and intellectual property law. The hearings reflect the fact that the development of intellectual property law, such as the increasing number of patents and the changing scope of patents, will inevitably have implications for competition and innovation. Numerous jurisdictions addressed the intersection of antitrust and intellectual property law in 2001, and this section highlights two such cases in order to underscore the antitrust issues often occurring in intellectual property litigation.

2.2.1 *C.S.U. v. Xerox*: The Federal Circuit and the Ninth Circuit Part Ways

On February 20, 2001, the United States Supreme Court denied certiorari in the case of *CSU v. Xerox*, 203 F.3d 1322 (Fed. Cir. 2000). The Court turned down *CSU*'s appeal from the Federal Circuit's holding that Xerox did not violate federal antitrust law when it unilaterally refused to sell or license its patented parts and copyrighted software and manuals to *CSU*. That holding appeared to put the Federal Circuit in direct conflict with the Ninth Circuit's contrary holding in the *Image Technical Services* case. See *Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997) ("*Image Technical Services*"), cert denied, 523 U.S. 1094 (1998).

In *CSU*, the Federal Circuit had affirmed summary judgment in favor of Xerox, ruling that an intellectual property holder is largely immune from the antitrust laws, except in three narrow situations. Under current Federal Circuit law, a patentee can be liable under the antitrust laws only if the patent is invalid because it was procured through knowing and willful fraud; if the patentee instigates "sham" litigation to cover up direct interference with the business relationships of a competitor; or in the event of "illegal tying." In *CSU*, the Federal Circuit also applied a presumption that a copyright holder's refusal either to license or to license at identical prices was immune from antitrust liability. *CSU*, 203 F.3d at 1329.

CSU argued that cert was appropriate because of the presence of a direct conflict among the courts of appeals over what it characterized as a "recurring question of national importance" between antitrust and intellectual property law. Citing the Ninth Circuit's approach in *Image Technical Services*, where a unilateral refusal to license copyright materials did not yield antitrust immunity but rather a presumption of lawfulness that was rebuttable by proof of anticompetitive "intent", *Petition for a Writ of Certiorari* at p. 13, *CSU* urged the Supreme Court to reconcile the holdings in *CSU* and *Image Technical Services*.

Xerox Corporation opposed the petition for writ of certiorari, dismissing any effect of the Ninth Circuit's holding in *Image Technical Services* and suggesting that the Federal Circuit's opinion was consistent with the established law set forth by the Supreme Court. Xerox observed that six of the seven courts of appeal that have addressed the question have rejected antitrust liability based on a unilateral refusal to license intellectual property, and characterized the Ninth Circuit's opinion in *Image Technical Services* as "aberrant." *Brief in Opposition to Writ of Certiorari* at p.1.

The Solicitor General argued that the *CSU* case was not appropriate to resolve the issues raised by the intersection of intellectual property and antitrust law. The Solicitor General argued that there were substantial ambiguities in the Federal Circuit decision about

the applicability of antitrust law to intellectual property, suggesting that it may not have been the Federal Circuit's holding that no Section 2 claim may ever be based on the unilateral refusal to sell or license such intellectual property.

In the end, the Supreme Court denied cert in *CSU*. However, *CSU* demonstrates the problematic position in which the various appellate decisions now place litigants and district court judges addressing intellectual property and antitrust issues. The Federal Circuit may well grant near antitrust immunity to a patent/copyright holder's unilateral refusal to deal where the Ninth Circuit creates, at best, a presumption that can be rebutted by evidence of "subjective intent" — evidence that nearly guarantees that there will be disputed issues of fact warranting a trial. Moreover, whether a District Court must follow the Federal Circuit or its own regional court of appeals seems to turn on whether the intellectual property issue is raised directly as a cause of action (*CSU*) rather than as a defense to an antitrust claim (*Image Technical Services*).

2.2.2 Threatened Enforcement of Patent Does Not Violate §2 of Sherman Act in *PennPac International, Inc.*

In a decision further emphasizing the intersection of patent and antitrust law, a district court recently held that absent a showing that a patent holder possessed market power or engaged in anticompetitive conduct, threats to enforce a patent for a rotationally molded plastic bulk container did not violate Sherman Act §2 (*PennPac International, Inc. v. Rotonics Mfg. Inc.*, E.D. Pa., No. 99-CV-2890, 5/28/01). The district court accorded immunity under the *Noerr-Pennington* doctrine to the defendant's assertion of patent rights, ruling that there was no evidence of a "sham" and holding that the plaintiff was thus estopped from challenging the validity of the patent at issue by the doctrine of assignor estoppel.

Factual Background

According to the undisputed facts, Rotonics acquired a patent application for the patent at issue when it acquired Plastech International, Inc. in 1992. At the time of the acquisition, PennPac International, Inc.'s founder, Rush Smith, was president and CEO of Plastech, and he owned 27% of Plastech's stock.

As a divisional president for Rotonics, Smith attempted to enforce the patent of the product at issue — a rotationally molded plastic bulk container with an inner flat bottom and having a detachable pallet base. After it matured into Patent No. 5,105,947 (the '947 patent) in April 1992, Smith tried to enforce the patent by writing letters to two companies — Remcon Plastics and Bonar Plastics, Inc. — marketing products that appeared to infringe the '947 patent. In July 1995, Smith formed PennPac to sell rotationally molded products and more specifically, large bulk containers. Two years later, after discovering the alleged infringement, Rotonics sent letters advising PennPac and its customers of the possible '947 infringement. PennPac responded with this suit in June 1999.

The complaint accused Rotonics of violating §2 by monopolizing or attempting to monopolize the market for rotationally molded pallet-based containers in the United States. The alleged anticompetitive conduct was the threatened enforcement of the '947 patent against PennPac's customers. The complaint also alleged various state law claims, including unfair competition.

The Holding

The district court granted summary judgment based on PennPac's failure to introduce specific evidence of Rotonics' market power and PennPac's failure to offer proof of exclusionary or anticompetitive conduct. On the market power issue, Rotonics argued that however the market is defined, PennPac's case was deficient because there was no showing that Rotonics possessed either monopoly power or the market power "to come dangerously close to success" in achieving a monopoly. The district court agreed, citing PennPac's failure "to produce sufficient evidence to determine Rotonics' market share, let alone any other evidence relevant to the determination whether Rotonics possesses the requisite market power."

The district court went on to hold that Rotonics' assertion of patent rights fell within the *Noerr-Pennington* doctrine's immunity for litigation, absent a showing that the litigation was a sham. The court found that Rotonics' threats were not a sham because the validity of the patents was assumed and the uncontested facts demonstrated that Rotonics investigated its infringement claims before it threatened to enforce the patent. Penn Pac responded with evidence that the '947 patent had been challenged. In ruling that this evidence could not support a jury finding that Rotonics' assertion of patent rights was "objectively baseless" and a sham, the court cited a 1987 case for the proposition that an assertion of patent invalidity "cannot be turned into evidence that the patentee knew the patent was invalid."

PennPac International strengthens the position of patent holders seeking to enforce their patents against antitrust challenges, and provides support for patent holders who have investigated infringement claims to assert *Noerr- Pennington* as a basis for immunity from litigation based on threats to enforce their patents.

2.3 Antitrust and Securities Law

The securities industry has drawn increased antitrust attention recently, not only from the Antitrust Division of the Department of Justice but also from private litigants. The Department of Justice has investigated complaints involving both traditional industry practices and conduct by particular individuals. In addition, private litigants have increasingly turned to the antitrust laws in actions for claims for damages caused by allegedly anticompetitive conduct caused by actions in the securities industry.

2.3.1 Antitrust Violations Alleged in IPO “Laddering” Scheme

On March 9, 2001, a putative class action was brought against seven Wall Street investment banks, alleging they colluded in violation of antitrust laws in their allocation of initial public offerings (*Billing v. Credit Suisse First Boston Corp.*, S.D. N.Y., 01 CV 2014, 3/9/01). Credit Suisse First Boston Corp.; Goldman Sachs & Co.; Lehman Brothers Inc.; Merrill Lynch, Pierce, Fenner & Smith Inc.; Morgan Stanley Dean Witter & Co.; Robertson Stephens Inc.; and Salomon Smith Barney Inc. were all named as defendants.

The lawsuit alleged that in return for making large allocations, the investment banks required customers to pay them "dramatically increased brokerage commissions or other brokerage compensation," and to agree to buy IPO shares after the IPO at prices higher than the IPO price--a practice known as a "tie-in purchase." In addition, the class action alleged that the tie-in purchases were made at "specified escalating price levels which were designed

to push up and inflate the price of the [IPO] security to increasingly higher levels." This process is referred to as "laddering a stock," the complaint explained.

The suit charged that the investment banks communicated with one another about their allocation arrangements, and "successfully increased their individual and collective underwriters' compensation and revenues ... to levels above those that would have existed in a competitive market free from defendants' unlawful agreement."

While these lawsuits have yet to make their way through the legal system, utilizing the antitrust laws to challenge alleged "laddering" of stock represents a new approach to challenging the conduct of investment banks in allocating IPOs, and it remains to be seen how courts will treat this legal theory.

2.3.2 Court Finds Antitrust Law Impliedly Repealed by SEC Action

Summary judgment was recently granted to defendants in a class action alleging that stock exchanges and other market-makers and specialists involved in options trading violated federal antitrust law by agreeing to refrain from multiply listing certain options classes. (*In re Stock Exchanges Options Trading Antitrust Litigation*, S.D.N.Y., MDL No. 1283, 2/15/01). The district court ruled that that federal antitrust law has been impliedly repealed in the circumstances presented because the Securities and Exchange Commission, acting pursuant to a specific directive from Congress, actively regulates the challenged conduct. *See Gordon v. New York Stock Exch.*, 422 U.S. 659 (1975).

The court rejected a contention by the SEC and the Justice Department in *amicus curiae* briefs that implied repeal was not warranted because there was no current conflict between antitrust law and SEC regulation. In a settlement order issued last September, the SEC found that the exchanges had improperly limited multiple listing, the charge leveled by the plaintiffs. The agencies argued that implied repeal should be found only when the SEC requires the very conduct proscribed by antitrust law. The SEC, as detailed by the court, had adopted various regulatory approaches at different times, sometimes banning multiple listing and more recently permitting multiple listing subject to SEC oversight. There was "a very real possibility," the district court explained, that an antitrust court might find illegal joint action and "circumscribe the SEC's regulatory authority in this area and hinder the operation of the securities laws."

Challenged Conduct

The defendants in the consolidated class actions were the American Stock Exchange (AMEX), the Chicago Board Options Exchange (CBOE), the New York Stock Exchange, Inc. (NYSE), the Pacific Stock Exchange, Inc. (PCX), the Philadelphia Stock Exchange, Inc. (PHLX), and other market-makers and specialists involved in options trading (Market-Maker defendants). The plaintiffs alleged a conspiracy to confine the listing and trading of certain options to only one exchange at a time, thus stifling competition and increasing transaction costs for the sellers and purchasers of such options. The Justice Department and SEC investigated the same allegations of price fixing. The exchanges moved to dismiss the class actions on the ground that Congress impliedly repealed antitrust law with respect to the conduct at issue by empowering the SEC to regulate options listing. After the SEC and DOJ filed their amicus oppositions, the court converted the defendants' motion into a motion for summary judgment on the issue of implied repeal.

Analysis

From the three cases that establish the framework for analysis of implied repeal issues, the court found that implied repeal was appropriate in two instances: "(1) when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged (the *Gordon* scenario), and (2) when the regulatory scheme is so pervasive that Congress must be assumed to have foresworn the paradigm of competition" (the scenario of *U.S. v. Nat'l Ass'n of Securities Dealers*, 422 U.S. 694 (1975)(*NASD*)).

The court found that implied immunity was mandated under the rationale of *Gordon*, as the SEC extensively regulated in this area and had received "broad, plenary jurisdiction" from Congress. The conflict addressed in *Gordon* occurs whenever defendants might be subject to different standards imposed by antitrust courts and the SEC, the court found, noting that SEC-authorized communications among exchanges might be found to violate antitrust law by an antitrust court. The district court noted that implied repeal "will not leave defendants unchecked," as "the SEC will continue to exercise its regulatory authority, balancing the benefits of competition against its other regulatory aims."

2.4 Antitrust and Mergers & Acquisitions

2000 and 2001 were extraordinarily active years in mergers and acquisitions. Some of the largest mergers in history were reviewed by the FTC over this time period, including AOL-Time-Warner (over \$100 billion), Glaxo Welcome/SmithKline (\$182 billion), and Pfizer/Warner Lambert (\$90 billion). In the antitrust policy area, the most substantial changes to the Hart-Scott-Rodino Act compliance procedures since the Act's inception were announced in 2001, along with the Department of Justice's 2001 revised merger review process, both of which are summarized in this section.

2.4.1 FTC Reveals Changes in Regulations For Hart-Scott-Rodino Act Compliance

On February 1, 2001, significant changes to the filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act, including a new reporting threshold of \$50 million, became effective. In addition to the increased transaction value threshold (up from \$15 million), over which companies must file premerger notification forms, a new tiered fee structure was implemented.

The tiered fee schedule requires companies to pay \$45,000 for transactions valued at less than \$100 million, \$125,000 for transactions valued at \$100 million to less than \$500 million, and \$280,000 for transactions valued at \$500 million or more. The reform legislation requires that the transaction value threshold will increase to over \$50 million, replacing the current threshold of over \$15 million, and the 15 percent size of transaction threshold will be eliminated. No transaction resulting in an acquiring person holding \$50 million or less of assets or voting securities of an acquired person will have to be reported. Transactions valued at more than \$200 million will be reportable without regard to size of person. The current size of person test, which usually requires one side of the transaction to have sales or assets in excess of \$100 million and the other side \$10 million, will continue to

be in place for transactions valued at \$200 million or less. All dollar thresholds will be adjusted each fiscal year — beginning with fiscal year 2005 — to reflect changes in the Gross Domestic Product during the previous year.

A tiered fee structure was implemented, replacing the existing uniform filing fee. At this time, the acquiring person in all reportable transactions must pay a \$45,000 filing fee. The new legislation bases the filing fee that must be paid by the filing person on the value of the voting securities or assets held as a result of the transaction. The fees range from \$45,000 to \$280,000. The waiting period following substantial compliance with a second request for additional information will become 30 days for most transactions, as opposed to 20 days under current law. In addition, the 10-day period for cash tenders and bankruptcy transactions will not change.

These revisions were the most significant changes to the Hart-Scott-Rodino Act since its passage, and dramatically reduced the number of premerger filings while also increasing the filing fees.

2.4.2 Antitrust Division Revises Merger Review Process

Under the Justice Department's new merger review process initiative unveiled on Oct. 12, 2001, the Antitrust Division's staff was given greater latitude in tailoring investigative plans and strategies to suit each proposed transaction, instead of adherence to standardized procedures or models.

Goals of New Merger Review Process

The new program's goals are "to more quickly identify critical legal, factual, and economic issues regarding proposed mergers, facilitate more efficient and more focused investigative discovery, and provide for an effective process for the evaluation of evidence," the Department of Justice explained. The initiative should enable the division to use its investigative resources more efficiently and effectively. Furthermore, where possible, it should reduce the investigative strain on parties proposing transactions.

Proposed Waiting Period

The new merger process initiative addresses the use of the initial 15-day or 30-day waiting period, the issuance of Second Requests, and the post-Second Request period. In releasing the following timeline for reportable transactions, the division noted that the program is completely voluntary for parties proposing mergers:

Initial 30-day waiting period: The staff is encouraged to be as aggressive as possible during the initial 15-day or 30-day waiting period by making voluntary requests for information and through early consultation with the parties;

Issuance of Second Request: The staff will use the knowledge gained within the initial 15-day or 30-day period to tailor the Second Requests as narrowly as possible to the transaction and the goals of the investigation;

Post-Second Request Period: The initiative encourages the staff to engage in regular consultations with the parties and, in appropriate circumstances, commit to procedural agreements in exchange for specific undertakings by the parties regarding their submission of information and compliance with particular investigative requests.

2.5 International Antitrust Law

More and more news stories have recently appeared about U.S. companies facing antitrust scrutiny for their actions in both the United States and Europe. Increasingly, U.S. companies proceed successfully under U.S. antitrust laws, only to be challenged by the European Union ("E.U.") for the same conduct and with different results. A notable recent example is the proposed merger of GE/Honeywell, which was approved in the U.S. but was killed in the E.U. Even now, as Microsoft appears to have largely resolved its antitrust dispute with the U.S. Department of Justice Antitrust Division, the E.U. is maintaining its formal inquiry into the same issues in Europe.

2.5.1 E.U. Commission Prohibits Acquisition Of Honeywell by General Electric

After its staff concluded an in-depth investigation into the aero-engines, avionics, and other aircraft components and systems markets, the European Commission decided on July 3, 2001 to prohibit two U.S. enterprises, Honeywell Inc. and General Electric Co., from consummating the proposal to merge the companies. The deal "would create or strengthen dominant positions on several markets," the Commission determined, and the remedies suggested by GE "were insufficient" to resolve the perceived anticompetitive concerns flowing from the transaction.

The EU Probe

GE and Honeywell informed the Commission of their merger agreement for regulatory clearance in Europe on February 5, 2001. The Commission's staff began the investigation on March 1, 2001. The staff found that GE already had a dominant position in the markets for jet engines for large commercial and large regional aircraft, basing its conclusion on GE's strong market position, GE's financial strength, and vertical integration into aircraft leasing. The investigation also indicated that Honeywell is the leading supplier of avionics and non-avionics products, as well as of engines for corporate jets and of engine starters, a key input in the manufacturing of engines.

In light of the horizontal overlaps in some markets, the extension of GE's financial power, vertical integration of Honeywell activities, and the combination of their respective complementary products, the European Commission was concerned that dominance would have been created or strengthened. Concern arose that such integration would enable the merged entity to leverage the respective market power of the two companies into the products of one another. The Commission projected the elimination of competition in these markets and was concerned this might foreclose potential competition, which would adversely affect product quality, service, and consumer prices.

GE's Proposed Remedies to EU Concerns

On June 14, 2001, GE proposed various solutions to address the Commission's concerns, but its proposals were deemed insufficient to remedy the anticompetitive consequences identified by the staff's inquiry. As a result of the Commission's concerns with the proposed merger and the lack of resolution of all the issues the Commission had raised, the Commission stated that it "had no choice but prohibit the merger."

This was only the 15th time that the Commission had blocked a merger since September 1990, when its merger control regulation covering all acquisitions in Member States became effective. The Commission added that this is only the second deal prohibited involving only U.S. firms.

The Department of Justice's Reaction

The Chief of the U.S. Justice Department's Antitrust Division on July 3 defended his agency's enforcement posture that the proposal for General Electric to acquire Honeywell International Inc. "would have been procompetitive and beneficial to consumers" with the modest and appropriate remedies imposed by the Department of Justice. Assistant Attorney General Charles A. James, Jr., declared: "Our conclusion was based on findings, confirmed by customers worldwide, that the combined firm could offer better products and services at more attractive prices than either firm could offer individually. That, in our view, is the essence of competition."

The European Commission, he observed, "apparently concluded that a more diversified, and thus more competitive GE, could somehow disadvantage other market participants. Consequently, we appear to have reached different results from similar assessments of competitive conditions in the affected markets." U.S. competition policy, he asserted, stands for the proposition that "antitrust laws protect competition, not competitors." James indicated that the decision by the European Union to prohibit the GE/Honeywell consolidation "reflects a significant point of divergence." James pointed out that "there were extensive consultations in this matter [between the EU and DOJ] throughout the entire process. This matter points to the continuing need for consultation to move toward a greater policy convergence."

2.5.2 Microsoft: U.S. Settlement With Microsoft Will Not Deter EU from Complaint

The European Commission indicated in December of 2001 that the terms of settlement reached between Microsoft Corp. and the U.S. government would not be enough for the European Commission to drop its own concerns about Microsoft's alleged anticompetitive conduct, observing that it would be impossible "to transpose" to the EU case the terms of the settlement negotiated between Microsoft and the Justice Department.

While Commission official acknowledged it is possible that Microsoft still could come up with a "remedy" to resolve the Commission's concerns, the Commission's current position was that it was unlikely. The Commission claimed in a lengthy list of objections that Microsoft used its dominant position with its Windows® 95 and 98 operating systems to gain an edge on its competitors in the market for server and audio-visual software. The Commission's list of objections also claimed that Microsoft tried to obstruct the EU antitrust authority's investigation. In its response, Microsoft reportedly warned that there would be an infringement of international intellectual property laws if it is forced to license its codes so that competitors can use them in the server software market.

Microsoft has disclosed that it would prefer to work out a settlement with the Commission.