FOREIGN AND INTERNATIONAL

U.S. DEVELOPMENTS

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Rule Confirmed as Antitrust Chief, Nominee Bork to be Questioned On Antitrust Policy

The Senate has confirmed President Reagan's nomination of Charles Rule, previously the Acting Chief of the Antitrust Division at the Department of Justice, as Chief of the Antitrust Division. Although Mr. Rule's confirmation hearings included serious scrutiny of his stand on pending legislation, the *AT&T* case, horizontal competition, resale price maintenance, and other issues of concern to the Senate Judiciary Committee, the Committee eventually completed action on Rule's nomination. Mr. Rule held his first press conference as Chief of the Antitrust Division on September 3, 1987, and responded to some of his critics. Rule explained:

> Antitrust enforcement is alive, well and thriving. Unfortunately, some have wrongly interpreted a change in enforcement patterns as a failure to enforce the laws.
>
> The truth is, however, that using economic analysis, we have redirected our enforcement efforts towards conduct that truly harms consumers. That economic analysis has also led the courts, as well as this administration, to recognize that some enforcement in the past did more harm to competition and consumers than good.
>
> Particularly in an era of increasing international competition, we can no longer afford to attack American companies that are using innovative techniques to keep costs and prices down.

The nomination of Robert Bork to the United States Supreme Court also has implications for the antitrust laws. Judge Bork, a well-known Chicago-school antitrust theorist, has been an active participant in the development of antitrust theory in the United States. Several Senators, most likely Senators DeConcini and Metzenbaum , are planning to question Mr. Bork on his antitrust views.

Judge Bork's nomination has come under fire from leaders of the National Association of Attorneys General, including the Association's President-Elect, New York Attorney-General, Robert Abrams, who has called Bork "a radical judicial activist" and said "the only type of restraint [Judge Bork] has favoured is the restraint of trade." The primary sources of Judge Bork's views on the antitrust laws are his book, *The Antitrust Paradox*, and his opinions as a judge of the U.S. Court of Appeals of the District of Columbia Circuit. He believes that Congress enacted the antitrust laws to promote "consumer welfare" and the economic efficiencies that provide the basis for consumer welfare. In a 1984 speech to the U.S. Chamber of Commerce, he indicated that the laws have no value "other than economic efficiency". Given the range of issues to which the Senate Judiciary Committee will be sensitive as it considers Judge Bork's nomination, his antitrust views might not receive the most attention, but they will be an important element of future Supreme Court antitrust precedent, should he be confirmed.

Legislative Report

The Senate, on July 31, 1987, approved S. 1068, principally sponsored by Senator Howard Metzenbaum (D., Ohio). S. 1068 will now be taken up by the House of Representatives. It would amend the *Clayton Act* restrictions on interlocking directorates. Under current rules, interlocks are barred at a threshold of $1 million in corporate net worth under the *per se* standard, meaning that the relationship itself is illegal and no showing of anticompetitive effect is necessary. S. 1068 would raise the threshold for corporate net worth to $10 million and also create a number of safe harbours which would allow common directorates of competing corporations if the competitive overlap is small enough to prevent any realistic potential for competitive harm.

One of the antitrust-related provisions of S. 1420, the Senate Omnibus Trade Bill (now in Conference as H.R. 3) is contained in Title IV of the Bill. This title, the so-called "anti-foreign takeover" provisions, originated as an amendment to S. 907, introduced by Senator Exon (D., of Nebraska). Under Title IV, the Commerce Department would be empowered to investigate U.S. national security interests in mergers and acquisitions by foreign companies. The results would be forwarded to the President for consideration. According to Senator Exon, the President currently has the power to halt foreign takeovers on antitrust grounds or by declaring a national emergency. His proposal would increase the President's authority to block mergers on national security grounds. The source of this idea was Senator Exon's opposition to the recent proposal by Japan's Fujitsu Corporation to purchase semiconductor facilities owned by a U.S. company, the Fairchild Semiconductor Corporation. Fujitsu's plan (it was eventually abandoned) was sensitive because Fairchild is a major supplier of computer chips to the Defense Department. In describing the operation of the bill, Senator Exon explained that the purpose of the bill is not to "chill" foreign investment in the United States.

Supreme Court Muddies The Discovery Waters

In *Societe Nationale Industrielle Aerospatiale* v. *United States District Court for the Southern District of Iowa*, 55 USLW 4842 (June 15, 1987), the Supreme Court considered for the first time the role that *The Hague Convention on the Taking of Evidence Abroad* should play in federal court discovery of evidence from foreign litigants over whom the courts have jurisdiction. Relying on the language of the *Convention* and the history of its proposal and ratification by the United States, the Court concluded that the procedures of the Convention were not mandatory. In other words, "the *Hague Convention* did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation." (*Id.* at 4847.) The Court rejected the argument that U.S. courts are compelled to use the *Convention* in seeking evidence abroad. It also rejected the argument that the *Convention* does not apply at all to the production of evidence in a foreign litigant's possession, concluding instead that "the optional *Convention* procedures are available whenever they will facilitate the gathering of evidence by the means authorized in the *Convention*." (*Id.* at 4848.)

The Court recognized that considerations of international comity must play a role in the district court's consideration of a foreign litigant's objections to discovery, but it rejected a rule that would require first resort to the procedures of the *Hague Convention* in every case. Rather, the Court held that the district courts should, in each case, engage in a particularized analysis of the facts at issue, the sovereign interests of both the United States and the foreign nation involved, and the likelihood that resort to the *Convention's* procedures will prove effective. (*Id.* at 4849.) Although the Court did not articulate specific rules to guide the district courts in this case-by-case analysis, the Court did note with approval factors drawn from the *Restatement of Foreign Relations Law of the United States (Revised)* ss. 437 (1) (c) (Tent. Draft No. 7, 1986). As quoted by the Court, those factors are as follows:

(1) the importance to the...litigation of the documents or other information requested;

(2) the degree of specificity of the request;

(3) whether the information originated in the United States;

(4) the availability of alternative means of securing the information; and

(5) the extent to which noncompliance with the request would undermine important interests of the United States or compliance with the request would undermine important interests of the state where the information is located. (*Id.* at 4848 n. 28.)

The Court recognized that some discovery procedures are more intrusive than others. While broad document requests may prove too burdensome or intrusive for a foreign litigant, the Court suggested that district courts could, in many cases, refuse to insist upon the use of *Convention* procedures "before requiring responses to simple interrogatories or requests for admissions." (*Id.* at 4849.) Nevertheless, the Court admonished the district courts to:

> ...exercise special vigilance to protect foreign litigants from the danger that unnecessary, or unduly burdensome, discovery may place them in a disadvantageous position. When it is necessary to seek evidence abroad, however, the District Court must supervise pretrial proceedings particularly closely to prevent discovery abuses. For example, the additional cost of transportation of documents or witnesses to or from foreign locations may increase the danger that discovery may be sought for the improper purpose of motivating settlement, rather than finding relevant and probative evidence. Objections to "abusive" discovery that foreign litigants advance should therefore receive the most careful consideration. (*Id.* at 4849.)

The four dissenting justices agreed with the majority in rejecting arguments either that the *Convention* provided the exclusive means of discovery for evidence located in countries signatory to the *Hague Convention* or that the *Convention* did not apply at all. The dissent concluded, however, that there should be a "general presumption that, in most cases, courts should resort first to the *Convention* procedures." (*Id.* at 4850.)

Recent Revisions To The *Hart-Scott-Rodino* Reporting Requirements

Recent revisions to the federal premerger notification requirements extend those requirements to certain partnerships that formerly were exempt. These changes mean that partnerships engaged in large acquisitions, including some types of real estate acquisitions, should be alert to the possibility that they may have to give prior notification of their contemplated acquisitions to the federal government.

The *Hart-Scott-Rodino Antitrust Improvements Act* (*Hart-Scott-Rodino*), enacted in 1976, requires that entities contemplating certain acquisitions of assets or voting securities give advance notice to the Federal Trade Commission and the Antitrust Division. Both the acquiring party and the party whose stock or assets are to be acquired must give this advance notice. In addition, there is a mandatory waiting period, after the giving of the notice, during which the parties may not complete their transaction. The aim of *Hart-Scott-Rodino* is to allow the government an opportunity to review and, if necessary, enjoin acquisitions that the government deems to be anticompetitive before they are consummated. Only acquisitions of a specified magnitude must be reported under *Hart-Scott-Rodino*.

Acquisitions which are undertaken by partnerships have often been exempt from the reporting requirements, regardless of their size. This is the result of the informal positions that the FTC has taken on two separate issues. First, the FTC has adopted the position that when an acquisition will be made by an entity which does not have a regularly prepared balance sheet (typically, a newly-formed entity), the funds which will be used to make the acquisition generally should not be considered in determining the size to the acquiring entity. This informal FTC rule has had frequent application, since acquisitions often are made by entities which are newly formed for the purpose of the acquisition, and therefore lack regularly prepared balance sheets.

Second, the FTC also formerly took the position that a partnership is not controlled by its partners – that partnership is, in the FTC's words, its own "ultimate parent entity". A corporation, in contrast, is regarded by the FTC as "controlled" by any shareholder who holds 50% or more of the outstanding voting shares, or has the right to designate 50% or more of the directors. This different treatment is significant because, under the *Hart-Scott-Rodino* reporting requirements, a corporation's parent is included in determining the size of the transaction, whereas a partnership's owners would not be.

In the recent revisions to the FTC regulations under which *Hart-Scott-Rodino* is administered, effective in 1987, the first of these two FTC positions has been retained and codified. The regulations now state expressly that, for acquiring entities without a regularly prepared balance sheet, the funds which will be used to make the acquisition should not be taken into account in determining the size of the entity.

The second FTC position has been altered. The FTC's treatment of partnerships is now brought more or less into line with its treatment of corporations. Any partner that has a right to 50% or more of the profits of the partnership (or, upon dissolution, 50% or more of its assets) is deemed to be a "controlling" partner under the revised regulations and is counted in determining the size of the acquisition.