FOREIGN AND INTERNATIONAL COMPETITION LAW DEVELOPMENTS

EXPANDING THE ROLE OF STATE ATTORNEYS GENERAL IN MERGERS: AMERICAN STORES AS A DOOR OPENER

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"One-stop shopping" is an entirely unAmerican concept in the merger field. Indeed, U.S. antitrust enforcement against mergers has always seemed like a large legal minefield, especially to those not brought up in the "you can't trust the Government" tradition of American politics. In 1990 - which marks the centennial of the *Sherman Act* - the situation is becoming more uncertain and more complex for merger participants.

One of the main reasons for uncertainty is that there are so many potential prosecutors. Since 1914, two federal agencies (the Justice Department and the Federal Trade Commission) have had overlapping statutory jurisdiction to review and block acquisitions of stocks and, since 1950, acquisitions of assets and mergers. These agencies allocate enforcement responsibility on a case-by-case basis under an informal clearance arrangement, but in principle both could investigate the same transaction. In addition, private plaintiffs - pretentiously labelled "private attorneys general" - have long enjoyed statutory rights to bring suits challenging mergers where injury to both competition and the plaintiff could be shown. The targets of hostile takeovers have proven especially zealous as private attorneys general in recent years. Finally, during the 1980s, state attorneys general have become very active participants in merger enforcement. These officials, who generally are elected politicians, have stepped in to fill what they saw as a federal enforcement vacuum created by the Reagan administration's low antitrust profile by bringing "private" suits under the federal antitrust laws to challenge mergers with local visibility and political appeal. The state attorneys general have also collectively issued a set of merger guidelines that parallel those of the Department of Justice but in some respects are more stringent.[1]

The historic primacy of the federal agencies was weakened substantially during the 1980s, as private takeover targets successfully blocked some very large mergers which the federal agencies would have allowed to go forward (including Mobil-Marathon, LTV-Grumman Aircraft and Minorco-Consolidated Gold Fields).[2] The state attorneys general continued the trend away from federal enforcement by seeking broader relief against various mergers and certain settlements entered into by the federal agencies.

It was one such case, brought by the California Attorney General in 1988, which produced what is probably the Supreme Court's most important antitrust decision of 1990: *California* v. *American Stores, Inc.*, 110 S. Ct. 1853 (1990). This unanimous decision struck a further blow for decentralization of U.S. merger enforcement by holding that a state or private plaintiff could obtain divestiture to "undo" a consummated merger. Prior to *American Stores*, it had been widely assumed that only federal agencies could obtain divestiture of a consummated merger — that a state or private plaintiff was limited to an injunction to bar consummation of the merger. This decision will greatly enhance the practical leverage enjoyed by the state antitrust enforcers in the overall merger enforcement process.[3]

American Stores arose out of a controversy of a type likely to recur in the future. A state attorney general simply took steps to deal with what he thought was an excessively lenient approach by the federal antitrust authorities to a highly visible local merger.

The case primarily concerned the supermarket business in California, the same market which

had produced the government's most populist merger victory in the 1960s, *United States* v. *Von's Grocery Co.*[4] American Stores operated 252 supermarkets in California and was the fourth largest supermarket chain in the state. It was acquiring all voting stock of Lucky Stores, Inc., California's largest supermarket with 340 stores. (Both parties also operated numerous stores outside California and even competed in several midwestern states, but for antitrust purposes the principal focus was California.)

In early 1988, American had notified the federal antitrust agencies of its proposed acquisition of all of Lucky's voting stock, as required under the *Hart-Scott-Rodino Act*. The FTC investigated the deal (the Justice Department having lost interest in supermarkets after its *Von's* victory) and decided to sue. It entered into settlement negotiations with the FTC, and American ultimately agreed to spinoff 24 stores in certain key northern Californian markets, as well as overlapping interest in certain midwestern states (Iowa, Indiana and Illinois), and to accept a broad injunction against future acquisitions without FTC consent in designated California markets.[5] As part of the settlement, the parties also agreed on a "hold separate agreement" which required that American not take control of the Lucky assets until the required divestitures had been completed. (In fact, American had acquired and paid for all the Lucky stock more than two months prior to entry of the consent order.)

The Commission majority wrote, "it is anticipated that the provisions of this Order would resolve the competitive problems alleged in the complaint."[6] Commissioner Mary Azcuenaga reached a different conclusion and dissented from the final consent order, saying that "the order is not sufficiently broad to resolve the potential anticompetitive effects of American's acquisition of Lucky...the Commission should require the divestiture of a greater number of stores to protect competition in markets in which American and Lucky now compete."[7]

The California Attorney General also believed that the FTC's relief was inadequate. Therefore, the day following the entry of the consent decree by the Commission, he filed a preliminary injunction proceeding to require American to continue to hold separate Lucky's assets until the state's antitrust claim had been adjudicated.

The U.S. District Court in Los Angeles, using local geographic markets, sustained the Attorney General's *prima facie* case and entered a preliminary injunction. It found American's average post-merger market share to be 24%, with a range from 15 percent to 38 percent in individual areas, and an average increase of about 5 percent. Relying on the state's expert, the District Court found substantial entry barriers due to economies of scale, capital costs and risks, the difficulty in obtaining desirable store sites, and strategic behavior by incumbent chains. (These are not necessarily the kinds of barriers that federal antitrust agencies or many federal courts would necessarily recognize as being decisive.[8])

The case was determined, however, on the rather technical question of whether California's motion for a preliminary injunction was in fact tantamount to a divestiture order and, if so, whether California (and other private plaintiffs) could obtain such relief under the *Clayton Act*. The Ninth Circuit Court of Appeals (which covers California) had previously held on several occasions that divestiture was not a permissible private remedy and reached the same conclusion in the *American Stores* case. It treated the Attorney General's suggested relief as tantamount to divestiture, and therefore reversed the District Court's injunction.[9]

The Supreme Court unanimously reversed. At issue was a highly technical dispute concerning two provisions of the *Clayton Act*. Section 15 governs suits in equity by the Justice Department and provides that antitrust violations "shall be enjoined or otherwise prohibited." This remedy has always been taken to include divestiture – and indeed, divestiture is generally the preferred remedy in government merger cases. Section 16 governs suits in equity by private parties, including state attorney generals. It uses different language but essentially the same concepts as section 15; it authorizes "injunctive relief...against threatened loss or damage." The Supreme Court was plainly reluctant to draw a sharp line between the two provisions as the Ninth Circuit had done: "the literal text of section 16 is plainly sufficient to

authorize injunctive relief, including an order of divestiture, that will prohibit that conduct from causing that harm." Moreover, the Court emphasized the "private attorney general" tradition - that section 16 "was enacted 'not merely to provide private relief, but...to serve as well the high purpose of enforcing the antitrust laws.'" This led to its ultimate conclusion:

> Section 16, construed to authorize a private divestiture remedy when appropriate in light of equitable principles, fits well in a statutory scheme that favors private enforcement, subjects mergers to searching scrutiny, and regards divestiture as the remedy best suited to redress the ills of an anticompetitive merger.

American Stores is more important for its result than for its reasoning on the specific issue at bar. The Supreme Court's strong decision clearly opens the door for state antitrust agencies to second-guess a federal agency on appropriate relief in any merger case. A negotiated settlement with a federal agency no longer means that the antitrust risk to a merger is behind the parties, but rather that a new hurdle may have been erected. This reality may affect the willingness of merger parties to engage in settlement discussions with a federal agency. In *American Stores*, the state sought and won the divestiture of many more stores than the FTC had determined was necessary to solve the competitive problem it found.

As the facts in *American Stores* demonstrate, timing is always a critical factor. A federal agency normally tries to deal with mergers prospectively, which means that the federal enforcement/negotiating process often goes right down to the wire, ending just within statutory deadlines and extensions provided for in the *Hart-Scott-Rodino Act*. The limitations imposed by these deadlines have in the past effectively frozen the states out of many merger investigations and left them powerless to intercede.

What *American Stores* has done is to allow a state some (perhaps limited) opportunity to come back after consummation of a merger and seek divestiture more extensive than that previously sought by the federal government. Of course, if the state waits very long, it may have a *laches* problem. At the least, it would face a credible argument that the tight time deadlines under the *Hart-Scott-Rodino Act* reflect a congressional policy in favor of prompt actions and reducing uncertainty for proposed mergers. This is the kind of question whose answers lie ahead.

In the short run, *American Stores* may have limited practical implications. Both the FTC and the Justice Department are currently very active in the merger field and are talking tough. There is no general policy difference between the state attorneys general and federal policies. The states will no doubt bring some merger cases that the federal agencies pass over because of high local interest or perceived market impact. However, it is unlikely in today's environment that there will be many state cases of the *American Stores* variety brought against transactions also sued by a federal agency.

The full implications of *American Stores* will come into play whenever the actual level of federal merger enforcement falls below a level that is politically wise or empirically justified, and serious policy differences open up (as in the mid-1980s). It is then that the state attorneys general will storm noisily onto the scene and forage widely through territory that used to be the exclusive province of the Justice Department and the FTC.

Notes

1 National Association of Attorneys General (NAAG), Horizontal Merger Guidelines (1987), reprinted in 4 Trade Reg. Rep. (CCH) at ¶ 13,405.

2 530 F. Supp. 315 (N.D. Ohio), aff'd, 669 F.2d 378 (6th Cir. 1981), cert. denied, 455 U.S. 982 (1982); 665 F.2d 10 (2d Cir. 1981); 698 F. Supp. 478 (S.D.N.Y. 1988), aff'd, 871 F.2d 252 (2d Cir. 1989), cert. dismissed, 110 S. Ct. 29 (1989).

3 Right to divestiture may be substantially less important to private plaintiffs. A takeover target's claim is mooted by consummation. Many of the other private plaintiffs (including most competitors) who might like to see divestiture would not have standing under *Cargill, Inc. v. Monfort of Colorado*, 479 U.S. 104 (1986).

4 384 U.S. 270 (1966) (combined market shares of less than 7%). In late 1987, Von's was allowed to merge with a much larger competitor (Safeway Stores), then the partner (Shopping Boy) which it had been denied in 1966. See 110 S. Ct. at 1856.

5 Consent Order in *American Stores Co.*, Dkt. C-3238 (entered August 31, 1988).

6 *American Stores Co.*, Dkt. C-3238, "Analysis to Aid Public Comment on Provisionally Accepted Consent Order." Interestingly, no similar determination was made in the final FTC order.

7 *Id.*, Dissenting Statement of Commissioner Azcuenaga.

8 See Baker, "The Winds of Change for U.S. Merger Enforcement," *Canadian Competition Policy Record*, Sept. 1990, at 31. The Ninth Circuit in fact indicates skepticism on this point. *California v. American Stores Co.*, 872 F.2d 837, 842-43 (9th Cir. 1989).

9 872 F.2d 837 (9th Cir. 1989), applying *International Tel. & Tel. Corp.* v. *General Telephone & Electronics Corp.*, 518 F.2d 913, 920 (9th Cir. 1975); *Bosse* v. *Crowell Collier & MacMillan*, 565 F.2d 602, 607 (9th Cir. 1977); *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674, 692 (9th Cir. 1976).

INTERNATIONAL COMPETITION LAW

The following articles are taken from "Update", a newsletter published by the International Bar Association's Business Law Section (Committee on Antitrust and International Trade Law).

DENMARK

Mergers and Acquisitions in 1989

In 1989, there were 424 mergers and acquisitions in Denmark with a total acquisition of 470 businesses. The businesses had a turnover of almost DKK 45,000 million and almost 46,000 employees. This transpires from an investigation made by the Competition Council which has just been published.

The investigation does not comprise the financial sector, including the two large bank mergers, which came into effect early in 1990. The Competition Council has, however, made a statement concerning the bank mergers, creating two large banks, Den Danske Bank and Unibank, representing 34 percent and 27 percent, respectively, of the working capital in banks and savings banks in Denmark.

As mergers as such are not regulated by the Danish *Competition Act*, the Competition Council has no authority to interfere with the mergers. As the *Competition Act* has as its purpose to further competition and thus strengthen the efficiency in production and distribution of goods and services, the mergers in the banking sector will for the Competition Council entail further consideration and investigation in relation to agreements, concerted practices, business conditions, price fixings, etc., of the Danish banks.

The majority of takeovers in Denmark, approximately 60 percent, have been horizontal between businesses within the same trade. The number of mergers is above previous years, and the number of acquisitions in 1989 has tripled since 1987. The development is considered part of an adjustment to the internal market within the EEC.

The number of foreign takeovers has doubled since 1987, but the foreign part of the total acquisitions in 1989 is not as significant as in 1987.

More than half of the foreign acquisitions are by Nordic businesses, of which Swedish acquisitions are approximately 40%, while 25% are by businesses within the EEC. The acquisition in Denmark from Nordic countries is considered a wish to be established within the EEC, where Denmark, due to linguistic and cultural reasons, is an obvious choice.

American businesses represent 18% of foreign acquisitions.

EUROPEAN COMMUNITIES

Relationship 85(3) and 86

The newly established Court of First Instance held that the grant of an (block-) exemption under 85(3) does not render art. 86 inapplicable. It is therefore not necessary for the Commission to withdraw the exemption in order to apply art. 86 to companies not complying with it.

Admissibility

The Court of First Instance held that it is not possible to bring proceedings against a letter of the Commission informing the applicant of the

Commission's initial reaction to the applicant's complaint. This would be different if said letter contains a final decision, rejecting the complaint within the meaning of art. 6 and Reg. 99/63.

Telecommunication

The Commission has issued a negative clearance for a consortium set up for the joint bidding for a tender for the development and distribution of a new communication system. In view of the heavy investment and the tight time limits involved, the individual companies could never have competed effectively for this project.

Merger Control

As of September 21, 1990, the Commission has exclusive prior control over mergers with a worldwide total turnover of more than 5 billion ECU and a Community turnover of both the acquiring and the target company of more than 250 million ECU. All such mergers must be notified to the Commission before they are put into effect by means of a special form. Mergers strengthening or creating a dominant position are forbidden.

FRANCE

Price Fixing Agreements Concerning Public Markets

The Court of Appeals of Paris, in a decision on July 4, 1990, relating to the road work industry, has confirmed its severity towards price fixing agreements in the area of public markets.

The Court has confirmed, for most of the firms concerned, heavy pecuniary sanctions imposed by the Conseil de la Concurrence (Conseil).

The Court has allowed the Conseil to put together in one file practices noted on several public markets.

Moreover, the Court has clearly affirmed the legislative value of the provisions in the Order of December 1, 1986 relating to freedom of prices and competition.

The Court has confirmed these principles in a decision made on September 19, 1990, relating to the electrical equipment industry.

Whereas, in the road work industry case, the Court held that the penalty may be calculated on the basis of the turnover of the sole regional management concerned. The Court declared, in the electrical equipment case, that the turnover to take into consideration was the turnover "realized on the national territory by the company".

Moreover, the decision specified that the fundamental criteria of assessment of the amount of the penalty is the damage caused to the economy, and this is a damage "presumed by law as soon as the existence of an agreement is shown".

Definition of the State of Economic Dependence

Article 8 of the Order of December 1, 1986, concerning the freedom of prices and competition, has introduced into French competition law the concept of "abuse of economic dependence".

In the decision of July 12, 1990 (*Sociétés Vincent Gosme, Bodson Jouets et Jean-Pierre Wagnon*), the Court of Appeals of Paris gave for the first time a general definition of the state of economic dependence. This concept may be "analyzed as a lack of a sufficient or practical alternative for one of the involved economic partners".

Concentration in the Purchasing of Advertising Space

In a decision of September 3, 1990, the Minister of the Economy authorized a concentration in the area of the purchasing of advertising space between the firms CARAT and EUROCOM.

These firms together hold 32% of the French market.

The two companies must abstain from merging their activities for the purchasing of advertising space in France.

Yet, "this condition should not be applied in the case where there is proposed for purchasing publicity space asked for by international advertisers covering, at the same time, France and several other countries".

This broad exception does not appear in the opinion issued on July 10, 1990, by the Conseil, who has taken a more restrictive position.

Beyond this precise case, the Conseil leads some investigations in the entire area of the purchasing of advertising space.

Collective Agreements and Competition Law

In the decision No. 90-D-21 of June 26, 1990, in relation to agreements concluded between the artists unions, the organizations of audiovisual communications and certain producers of television broadcasts, the Conseil has specified that the collective agreements, in spite of their particular nature, are subject to legal provisions relating to free competition, for these are not limited themselves to certain categories of agreements nor to certain parties.

SPAIN

The EEC Admonished Spain Because of its International Postal Monopoly

The European Commission addressed to Spain a petition for information about the monopoly situation in the international express mail service of Spain.

The communication was sent to the EEC Spanish Secretary's Office asking for more information about the operation of the postal system. This communication is a stage immediately preceding issuing of proceedings against Spain.

The Commission has consistently stated its opposition to a system of postal monopoly opposed to the spirit of the single European Act, but also resulting in a mediocre service rendered by the post offices of different countries of the European Community.

The Commission has issued similar proceedings against the postal service of the Netherlands, which has been exploited by a private company since 1989.

The Spanish Post Directorate replied by stating that "Spain is not the country with the largest degree of postal monopoly", and that the claims are unjustified.

UNITED KINGDOM

A new criterion has been developed for the referral of proposed mergers to the Monopolies and Mergers Commission (MMC). If a bidder is a state-owned undertaking, it may not be permitted to acquire a United Kingdom private sector undertaking, particularly one that has been denationalised. Three mergers have now been referred to the MMC, apparently solely on this ground. From these references it appears that foreign bidders are likely to be particularly affected, although the Fujitsu/ICL deal was cleared without a reference to the MMC.

The House of Commons Select Committee on Trade and Industry has announced an inquiry into United Kingdom merger policy.

New fees for merger clearance applications, which took effect on October 1, have been announced by the Department of Trade and Industry. These apply to all those who take a controlling interest in another company and who are caught by the market share or assets tests of the *Fair Trading Act 1973*. They range from £5,000 for those qualifying on the market share test alone to £15,000 where assets over £100 million are acquired. There are separate scales for newspaper transfers. No charges are payable where confidential guidance is sought, and it is felt that this may become harder to obtain in the future.

UNITED STATES

Independent Members of "Corporate Family" Liable for Antitrust Conspiracy

In a recent unpublished opinion, the U.S. Court of Appeals in San Francisco ruled that two "sister" corporations could be found liable for conspiring to allocate the worldwide market for their products in violation of federal antitrust law. *McQuillan* v. *Sorbothane, Inc.*, Nos. 89-55326, 89-55329 and 89-55332 (9th Cir. July 3, 1990). The two companies are part of a "family of companies" comprised of about 650 members worldwide and controlled by a United Kingdom holding company. Both companies, which operated as entirely

autonomous independent companies, manufactured and licensed for distribution a viscous elastic polymer. The Court found the finding of conspiracy consistent with prior cases ruling that common ownership and control will not shield intra-enterprise entities from antitrust liability. The result for the terminated polymer distributor who brought the suit: a treble damage award of over $5.2 million, as well as almost $1 million in attorneys' fees, remains intact.

Congress Considers Measures to Ease Antitrust Standards for Joint Manufacturing Ventures

In an effort to boost U.S. competitiveness, the Congress is considering legislation to lessen the threat of antitrust liability for cooperative joint production ventures. The House of Representatives approved a bill last June that would limit antitrust liability to actual damages, rather than the usual treble damages, for joint manufacturing venture partners who notify the government in advance of their venture. The Senate is also considering a related measure that would extend the protections of the *National Cooperative Research Act*, which limits antitrust liability for joint research and development activities, to joint production ventures. These measures are designed to encourage collaborative activity at the production level by reducing the risk of antitrust liability.

The legislative proposals are somewhat controversial. Opponents warn that Congress should not be "panicked" into softening U.S. antitrust laws, and criticise provisions that would limit foreign involvement in protected joint production ventures. Supporters, however, argue that legislation is needed to encourage pro-competitive collaborative activity in U.S. industry and would bring U.S. antitrust law in line with laws in the European Community and Japan. As of this writing, the legislation is stuck in a Senate Subcommittee, which held a hearing in July but has yet to take further action.