DOJ-FTC Deal Raises Basic Questions

BY ALBERT A. FOER

As the federal antitrust budget moves inexorably down the track toward a decision by the Senate Appropriations Committee, probably in June, there looms the threat of a damaging train wreck. Much more is at stake than (as some have suggested) personal ego, political pandering, or a partisan power play. Basic questions about the allocation of power are involved, with each side firmly entrenched in its position. A solution will not be easy, but enforcement of the antitrust laws will suffer if a reasonable accommodation cannot be found.

Earlier this year Charles James, assistant attorney general for antitrust, and Timothy Muris, chairman of the Federal Trade Commission, worked out a formal allocation of industries between their agencies for purposes of merger reviews and other antitrust matters. The goal was to reduce the controversy and delay that sometimes occur when the Department of Justice and the FTC wish to investigate the same matter. The arrangement was developed in secret and relied, to some extent, on the advice of an ad hoc group of four respected former law enforcement officials now in private practice. The agreement adds transparency to a process that hitherto had been shrouded. And it gives several important industries that had previously been shared, including energy and health care, to the FTC, while it places media and entertainment exclusively in the hands of the DOJ.

Sen. Ernest Hollings (D-S.C.) objects both to the manner in which the agreement was formulated and to the fact that the media and entertainment sectors were ceded exclusively to the DOJ. More broadly, he believes that it is good for the two antitrust agencies to have concurrent jurisdiction over all industries and that it is the prerogative of Congress, not the agencies, to change this.

Hollings happens to be chairman of the Senate Commerce Committee, which oversees the FTC, and chairman of the Senate appropriations subcommittee with authority over both the FTC and DOJ. He has threatened to mess with their budgets unless they back down.

THE STORY SO FAR

Although the DOJ and FTC have overlapping jurisdiction over most anti-competitive practices, common sense and law require that only one agency investigate a particular violation. Thus, since 1948, there has been a systematic clearance process, developed apparently without congressional involvement. When an agency intends to open an investigation, it notifies the other agency. If both are interested in the matter, negotiations follow, and eventually one agency wins out, usually on the basis of relevant expertise.

Sometimes disputes are not resolved immediately. Most spectacularly, a recent dispute over which agency would investigate joint ventures in the online music business took more than a year to resolve. Prior agency heads had sought to improve the clearance process through a division of industries, but were not able to consummate their efforts. James and Muris, longtime personal friends before ascending to office, were able to reach an agreement.

A press conference was scheduled for Jan. 17 to announce the agreement. Apparently, Sen. Hollings (and others who had been kept in the dark, such as the two FTC commissioners appointed as Democrats) learned about the agreement only shortly before the press did. It was reported that Hollings persuaded Attorney General John Ashcroft to keep James from signing the document that Muris had already signed. The press conference had to be cancelled with the press already in the room, guaranteeing that the remainder of the story would be played out on the public stage.

The American Bar Association’s Antitrust Section on Jan. 23 came out in favor of the concept embodied in the James-Muris agreement, without endorsing any particular industry allocations. This was followed by a similar letter from 11 former antitrust agency heads. It appeared that James and Muris had the backing of the antitrust estab-
lishment, at least in a general way. Consumer groups, on the other hand, were outraged by the allocation and by the fact that they had not been consulted.

The next act took place Feb. 26, when Attorney General Ashcroft testified before Sen. Hollings. Hollings attacked the agreement. Ashcroft defended it. On March 1, Sens. Herbert Kohl (D-Wis.) and Mike DeWine (R-Ohio), the ranking members of the Judiciary Committee’s antitrust subcommittee, wrote a letter generally supportive of the agreement, although not taking a position on the allocation of specific industries. On March 5, James signed the agreement. Two weeks later Muris testified before the Senate appropriations subcommittee and was harshly grilled by Hollings, who explicitly threatened to use his leverage over the FTC to get the agencies’ attention. As of April 5, the Senate Commerce Committee was expecting to receive documents requested from the agencies and was preparing to hold hearings.

**WHAT’S AT STAKE?**

The stakes are high. The president’s antitrust budget for FY 2003 calls for increased funding for both agencies, but this will only pay for the existing number of staff slots. Compared to other agencies and given that the merger wave has come and (at least for the moment) gone, this would not be a bad deal for the federal antitrust mission.

However, the reduced number of mergers puts the agencies in a potentially vulnerable position, because for the last several years, fees paid by companies filing premerger notifications were sufficient to cover both budgets. Now, that fee stream will probably fall short, requiring a congressional decision to take money away from some other agency in order to fully fund antitrust. If ever antitrust enforcers wanted their budgets to sail through without a lot to do, it would be now.

A direct hit on appropriations will damage the federal antitrust mission and probably the consumer protection mission of the FTC as well. Other possibilities that Sen. Hollings is reportedly considering include attacking the salaries of certain executive-level personnel and taking away the FTC’s authority to make adjustments on expenditures within the overall budget. In a situation like this, political log-rolling is likely, and far more substantial harm can occur. It has happened before.

**A BIGGER PICTURE**

Given the apparent unwillingness of anyone to yield, it is clear that there is more at stake than the size of the budgets. Four issues stand out:

- Do the agencies have the right, within their traditional ministerial authority, to apportion industrial sectors between themselves? Or does this countermand a congressional framework that created concurrent jurisdiction? In short, do Congress or the agencies have the overall right to divvy up cases?
- Within the FTC, is a formal agreement of this sort, which cedes jurisdiction over roughly half the economy (even if it only formalizes what has, for the most part, been the long-standing practice), something that the chairman can negotiate and enter into on his own? Or must he bring his colleagues into the process?
- How does one balance the benefits of the limited competition between the two antitrust agencies, inherent in concurrent economywide jurisdiction, against the inefficiencies that such competition can create? Indeed, how beneficial has the competition in practice been, and how significant the inefficiencies?
- Assuming one concludes that some allocation of industry sectors is the best solution to a real and serious problem, how does one handle the sectors, such as media and entertainment, where there is genuine, passionate disagreement about which agency should have jurisdiction?

**WHO GETS THE MEDIA?**

Although several of the industry allocations have been questioned, the allocation that has raised the most concern is media and entertainment to the DOJ. Both Muris and James agree that this is an investigatory field that has overwhelmingly been dominated by the DOJ. Opponents of the agreement challenge this and argue that it is better that sensitive issues involving information and ideas be decided by an independent collegial body than by an agency that falls within the executive branch.

Muris answers that antitrust decision making does not take the First Amendment into account—at either agency—and that because telecommunications (which by statute is not within the FTC’s jurisdiction) and media are very closely interwoven, it generally makes more sense to leave the media to the DOJ.

Some consumer advocates disagree, pointing out that questions about regulated telecommunications can often be separated from other media and entertainment issues. Moreover, they say, the FTC Act does give the commission the responsibility to protect consumer choice and diversity through its mandate to protect competition in the information sector. While the current administration takes a narrow view of the commission’s mandate, this view is not written in stone. If the FTC Act gives government officials exactly the same antitrust powers as the Sherman Act, consumer advocates ask, why was it needed in the first place?

Obviously, we are back to first-order questions of why there is an FTC and what are the best institutional arrangements (executive agency vs. independent commission) for dealing with an industry whose purpose carries a certain constitutional sensitivity. Consumers see an advantage in a commission structure that requires deliberative bipartisan debate in order to take action, especially in an agency that also has a consumer protection function that forces it to think about privacy, fraud, and other issues potentially relevant to the media.

If Congress can be convinced that an allocation of industries is necessary, the question of how to deal with media and entertainment will need resolution. One obvious possibility would be to withdraw media and entertainment from the allocation framework, and leave that area open to concurrent jurisdiction.

But that may not be agreeable to all. The DOJ probably feels that if it doesn’t get all of media and entertainment, why should it give up what it has, for example, in energy and health care? The whole approach might unravel. Moreover, if concurrent jurisdiction is retained, would particular cases be assigned between the agencies based on experience (favoring the DOJ), or random selection, or something else?

Two points stand out in this suddenly heated debate over industry allocation. First, there are no easy solutions. Second, without a solution, the federal antitrust effort will be severely damaged.

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