

ANNEX 3-B

THE RELATIONSHIP BETWEEN ANTITRUST AGENCIES AND SECTORAL REGULATORS¹

In a number of sectors, public competition authorities share responsibility for formulating and implementing merger policy with other government agencies. Shared authority appears most often in industries that previously have been the subject of comprehensive regulation that governs entry, exit, and rate making. Prominent illustrations are described below.

Airlines. The Department of Transportation (DOT) has exclusive authority to approve agreements between U.S. airlines and foreign carriers² and to grant antitrust immunity for such agreements.³ In these matters, DOJ plays an advisory role exclusively.

Electric Power. Transactions involving energy companies are subject to competition policy review or challenge by:

- C One of the federal antitrust agencies (both DOJ and the FTC have reviewed transactions involving electric power producers);
- C The Federal Energy Regulatory Commission (FERC);⁴
- C For some transactions, the Securities and Exchange Commission (exercising powers granted by the Public Utility Holding Company Act);⁵
- C The public service commission (PSC) of each state in which the parties do business (although it is not clear under the law of several states whether remedial action can be ordered by a single PSC over a multistate company);

¹ Source: William E. Kovacic, “The Impact of Domestic Institutional Complexity on the Development of International Competition Policy Standards,” (submission of March 15, 1999).

² 49 U.S.C. app. § 41309 (1994).

³ *Id.* at § 41308.

⁴ 16 U.S.C. §§ 791a-828c (1994).

⁵ 15 U.S.C. §§ 79i, 79j (1994).

- C As with other mergers, the attorney general of each state in which the parties do business (the attorney general may develop a policy position independent from and inconsistent with the position adopted by the public service commission); and
- C As with other mergers, private entities, such as competitors to the merging parties.

Review by each of these potential challengers is nonexclusive. Acquiescence in a transaction by any one entity does not preclude a separate challenge by any of the other entities. Approval of a transaction by one entity subject to one set of concessions does not preclude another entity from insisting upon further concessions.

Financial Services. DOJ shares competition policy jurisdiction over mergers involving banks with four federal banking regulators: the Office of the Comptroller of the Currency, which reviews transactions involving national banks; the Federal Deposit Insurance Corporation, which reviews transactions involving federally-insured, state-chartered banks that are not members of the Federal Reserve System; the Board of Governors of the Federal Reserve System, which reviews transactions involving bank holding companies and state-chartered banks that are members of the Federal Reserve System; and the Office of Thrift Supervision which reviews transactions involving savings and loan companies and savings associations.⁶ In general, the banking regulators apply standards similar to those established under § 7 of the Clayton Act and must consider a report filed by DOJ before completing their own assessment of a transaction.

Railroads. Jurisdiction over mergers involving railroads resides solely in the Surface Transportation Board (STB).⁷ The DOJ provides nonbinding advice to the STB, which must consider, but need not heed, DOJ's recommendations.

Telecommunications. Mergers involving telecommunications service providers usually are subject to competition policy review or challenge by:

- C One of the federal antitrust agencies (only the DOJ has jurisdiction to review mergers involving telephone companies; both the DOJ and the FTC have reviewed mergers between cable television firms);
- C The Federal Communications Commission (FCC);⁸

⁶ See II ABA Antitrust Section, Antitrust Law Developments 1233-40 (4th ed. 1997).

⁷ 49 U.S.C. § 11321 (West. 1997).

⁸ See ABA Antitrust Section, Antitrust Law Developments, at 1160-66 (describing allocation of authority established by the 1996 Telecommunications Act).

- C The PSC of each state in which the parties do business (although most state PSCs lack jurisdiction over cable television mergers and some lack jurisdiction over mergers);
- C In the case of cable television, county and municipal authorities with responsibility for granting and overseeing cable franchise agreements;
- C The attorney general of each state in which the merging parties do business; and
- C Private entities such as competitors to the merging parties.

As with mergers involving electric power firms, review by any of these entities is nonexclusive. Approval of a transaction by one entity does not preclude a separate challenge by any of the other entities, nor does it bar another entity from seeking adjustments that exceed concessions that resolved the concerns of other bodies.

A DETAILED ILLUSTRATION: THE CASE OF TELECOMMUNICATIONS

Recent experience with consolidation in the telecommunications sector illustrates the intricacies of merger review with multi-jurisdictional oversight. Major transactions such as AT&T/TCI, Bell Atlantic/NYNEX, Bell Atlantic/GTE, and SBC/Ameritech have engaged the energies of many of the public institutions that formulate telecommunications competition policy and, in some instances, have elicited private challenges. Presented below is a description of the process by which the various institutional gatekeepers would consider a merger between two telecommunications services providers. This example assumes that both parties provide local telephone service.

1. Review by Federal Antitrust Officials

The merging parties ordinarily set the merger review process in motion by filing premerger notification forms with the federal antitrust agencies. DOJ and the FTC allocate the review of specific mergers through a “clearance” process that emphasizes comparative expertise. Since the FTC lacks jurisdiction over common carriers, DOJ would receive clearance to examine the transaction in detail. In reviewing transactions under the Hart-Scott-Rodino premerger notification mechanism, the federal antitrust agencies are subject to statutory time constraints. DOJ and the FTC have authority to attack a merger after the mandatory waiting periods (or timing agreements to extend the waiting periods) have expired, but neither agency has exercised that power for an HSR-reportable transaction since the HSR mechanism took effect in 1977.

When they sue in federal district court to halt mergers, the federal agencies must establish the liability standard of § 7 of the Clayton Act and demonstrate their entitlement to relief by a preponderance of the evidence. The FTC also has the option of initiating administrative litigation, where the Commission’s

decisions are subject to review by the courts of appeals under the deferential standard of review accorded to administrative agencies.

2. Review by the Federal Communications Commission

The parties to a merger requiring FCC approval have discretion to choose when to submit their transaction for the Commission's review. In some instances, the merging parties submit their requests for approval to the FCC at the same time that they make their HSR filings with the federal antitrust regulators. In other cases, they await the results of the federal antitrust agency review before approaching the FCC. No time limits constrain the FCC's analysis of mergers which require the Commission's approval.⁹

For reasons of policy and practical reality, the scope of competition policy review by the federal antitrust agencies is a subset of the scope of competition policy review that the FCC can exercise under its public interest mandate. The FCC applies a public interest standard under the Federal Communications Act in evaluating specific transactions. This test allows the Commission to account for competition policy concerns as well as a host of social and economic policy factors extending beyond the bounds of traditional antitrust analysis. Non-competition policy factors include the impact of the merger on the parties' incentives and ability to serve vulnerable user groups (such as low-income individuals), the parties' commitment to sustain high levels of residential service quality while pursuing business customers, and the parties' willingness to provide service and business opportunities to historically disadvantaged minorities and other social groups. FCC decisions in evaluating competition and non-competition factors are reviewed by the courts of appeals under the deferential standard of review according to administrative bodies.

In examining competition policy factors, the FCC sometimes has the benefit of a completed antitrust agency review of the same transaction. For example, where DOJ and the parties resolve DOJ's competition policy concerns by settlement, the FCC ordinarily will know of the settlement terms when they are published for public comment. The HSR statute bars DOJ from giving the FCC material obtained from the parties as part of the premerger notification and second request process. However, the FCC sometimes insists that the parties provide such material to enable the Commission to perform its analysis of the transaction. As FCC approval is essential for the transaction to proceed, parties typically provide the requested HSR documents. These materials become part of the record of the FCC proceeding and are available for review by those who sign protective orders.

Compared to Clayton Act oversight by the federal antitrust agencies, FCC exercise of competition policy oversight under the Communications Act's public interest standard is potentially more restrictive in several respects. The public interest test seems to impose a more expansive substantive liability standard than the Clayton Act's antimerger provision. FCC officials have stated that, to satisfy the public interest

⁹ Senator Herbert Kohl has proposed legislation that would require the FCC to issue decisions on mergers within six months.

standard, the merging parties must show that a proposed transaction will boost competition. By contrast, federal antitrust officials bring actions to challenge mergers only when, to paraphrase § 7 of the Clayton Act, they may substantially reduce competition. The Clayton Act test imposes no duty on the merging parties to demonstrate that a transaction will increase competition. Since its decisions are reviewed as administrative decisions, whereas the FTC or DOJ bears the burden of proof in an antitrust action, the FCC can avail itself of a more favorable evidentiary standard than DOJ or the FTC can use in a federal district court proceeding.

The FCC's competition policy review also derives distinctive power from the nature of its procedures and time-sensitive quality of many mergers. Because there is no time limit on its review of transactions, parties to mergers under FCC review have stronger incentives to make concessions to the FCC than they have to make concessions to the federal antitrust agencies. This is true even when the FCC relies on analytical concepts of doubtful validity. Mergers often are time-sensitive transactions, and long delays in achieving approval are costly. Among other adverse effects, delay limits the parties' ability to implement new strategies and increases the risk that employees who are uncertain about their future position with the new entity will seek other jobs.

In theory, the parties could elicit an unfavorable FCC decision and challenge questionable enforcement theories before the court of appeals. In practice, the prospect of spending a year or more to obtain a negative ruling from the Commission and then taking an additional year to gain an appellate decision is unacceptable. Consequently, the FCC can rely on debatable competition policy enforcement theories (such as expansive notions of potential competition) safe in the knowledge that such theories are unlikely to be tested before an appellate tribunal.

3. Review by State Sectoral Regulators

The merging parties usually approach state public service commissions at the same time that they begin seeking approval from the FCC. The competition policy reviews conducted by state public service commissions resemble the review by the FCC. State PSCs operate under a public interest standard that embraces a large collection of competition policy factors and other considerations. State PSC reviews ordinarily are not subject to time constraints, and the delay associated with seeking judicial review of PSC decisions tends to impel the merging parties to make desired concessions.

4. Review by the State Attorneys General

The preferences of the state PSC sometimes, but not always, reflect the preferences of the state attorney general. Merging parties must account for the possibility that the state attorney general may insist on concessions that exceed the concessions demanded by the state PSC.

5. Challenges by Competitors

A final element in the calculus for the merging parties is to assess the possibility that a merger proposal will elicit a private antitrust suit by a competitor. Competitors must surmount opposition based on standing and antitrust injury requirements.