UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, Plaintiff, v. AKTIEBOLAGET VOLVO, VOLVO TRUCKS NORTH AMERICA, INC., RENAULT S.A., RENAULT V.I. S.A., and MACK TRUCKS, INC. Defendants.	)	Civil No.: 1:00CV03006 Filed: 02/07/01

COMPETITIVE IMPACT STATEMENT

The United States, pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), files this Competitive Impact Statement relating to the proposed Final Judgment submitted for entry in this civil antitrust proceeding.

I.

NATURE AND PURPOSE OF THIS PROCEEDING

The United States filed a civil antitrust Complaint under Section 15 of the Clayton Act, 15 U.S.C. § 25 on December 18, 2000, alleging Aktiebolaget Volvo's ("AB Volvo") acquisition of Renault V.I. S.A. ("Renault V.I."), which includes Mack Trucks, Inc. ("Mack"), from Renault S.A. ("Renault") would substantially lessen competition in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18.

The Complaint alleges the defendants are the two largest producers of heavy duty (class 8), low cab over engine straight trucks ("LCOE Trucks") in the United States. The proposed

acquisition would result in AB Volvo accounting for approximately 86 percent of heavy duty LCOE Truck sales in the United States. The Complaint alleges the transaction will substantially lessen competition in the development, production, and sale of heavy duty LCOE Trucks sold in the United States, thereby harming consumers. Accordingly, the prayer for relief in the Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) a permanent injunction preventing the defendants from carrying out the acquisition or otherwise combining their businesses or assets; (3) an award to the United States of its costs in bringing the lawsuit; and (4) such other relief as the Court deems proper.

When the Complaint was filed, the United States also filed a proposed settlement permitting AB Volvo to acquire Renault V.I., provided AB Volvo divested its Volvo Trucks North America, Inc. ("VTNA") LCOE Truck Business (a term defined in the proposed Final Judgment) to preserve competition. The settlement consists of a proposed Final Judgment and a Hold Separate Stipulation and Order.

The proposed Final Judgment orders the defendants to divest the VTNA LCOE Truck Business to an acquirer approved by the United States. The defendants must complete the divestiture within ninety (90) calendar days after the filing of the Complaint, or five days after notice of the entry of the Final Judgment, whichever is later. The United States may extend the time period for divestiture two additional periods, each not to exceed 30 days. If the defendants do not complete the divestiture within the prescribed time, then, under the terms of the proposed Final Judgment, the Court will appoint a trustee to achieve the divestiture. If a trustee is appointed, the trustee shall have the option of divesting either the VTNA LCOE Truck Business or the Mack LCOE Truck Business (a term defined in the proposed Final Judgment).

The United States and defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate this action, except that the Court would retain jurisdiction to construe, modify or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

II.

DESCRIPTION OF THE EVENTS GIVING RISE TO THE ALLEGED VIOLATION OF THE ANTITRUST LAWS

A. The Defendants and the Proposed Acquisition

1. Aktiebolaget Volvo

AB Volvo is a foreign corporation organized and existing under the laws of Sweden with its corporate headquarters and principal place of business in Gotenburg, Sweden. AB Volvo is an international manufacturer of trucks, construction equipment, and engines. AB Volvo, through its subsidiary, VTNA, is the second largest U.S. manufacturer of heavy duty LCOE Trucks. AB Volvo reported revenue of approximately $14.7 billion in 1999.

2. Volvo Trucks North America, Inc.

VTNA is a corporation organized and existing under the laws of the state of Delaware with its corporate headquarters and principal place of business in Greensboro, North Carolina. VTNA produces trucks in Dublin, Virginia. VTNA's 1999 revenues were approximately $2.39 billion.

3. Renault S.A.

Renault is a foreign corporation organized and existing under the laws of France that has its corporate headquarters and principal place of business in Boulogne-Billancourt, France.

Renault is an international manufacturer of automobiles, trucks, buses, and engines. Renault reported revenue of approximately $39 billion in 1999.

4. Renault V.I. S.A.

Renault V.I. is a foreign corporation organized and existing under the laws of France with its corporate headquarters and principal place of business in Lyon, France. Renault V.I. is a subsidiary of Renault and produces trucks and truck engines.

5. Mack Trucks, Inc.

Mack is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania with its corporate headquarters and principal place of business in Allentown, Pennsylvania. Mack, which is a subsidiary of Renault V.I., produces trucks and engines. Mack is the largest United States manufacturer of heavy duty LCOE Trucks. Mack reported revenues of approximately $2.2 billion in 1999.

B. The Proposed Acquisition

On or about July 18, 2000, AB Volvo entered into an agreement with Renault to acquire Renault V.I. from Renault in exchange for 15% of AB Volvo's outstanding voting security which has an approximate value of $1.8 billion. The proposed acquisition would substantially lessen competition in the heavy duty LCOE Truck segment of the heavy duty truck industry and precipitated the United States' antitrust suit.

C. The Heavy Duty LCOE Truck Business and the Competitive Effects of the Acquisition

1. The Heavy Duty LCOE Truck Market

The Complaint alleges the development, production, and sale of heavy duty LCOE Trucks

is a line of commerce and a relevant product market within the meaning of Section 7 of the Clayton Act. Heavy duty trucks (or "class 8" trucks) are those trucks capable of carrying the heaviest payload capacities or gross vehicle weights, exceeding 33,000 pounds. In addition to payload capacity, heavy duty trucks are distinguished from lighter duty trucks by large powerful diesel engines and other heavy duty components. Heavy duty LCOE Trucks are configured with the cab located over or in front of the engine, and a windshield which is even with the front bumper. This design gives heavy duty LCOE Trucks superior visibility and maneuverability compared to conventional cab, heavy duty, straight trucks which are designed with their engines in front of the cab. Heavy duty LCOE Trucks have a lower entry point to the cab (18 inches), compared to conventional straight trucks (almost four feet).

The design of heavy duty LCOE Trucks makes them uniquely suited to specific applications. Most heavy duty LCOE Trucks are sold to the refuse industry, which requires heavy duty trucks to handle the weight of the waste material being hauled. Refuse companies often attach a mechanical fork lift to heavy duty LCOE Trucks to lift commercial dumpsters over the cab, emptying them into the body of the truck. Such a mechanical fork lift cannot be used with trucks designed with engines in front of the cab because that design has an extended hood which would block the lift's operation. Similarly, the LCOE design provides superior maneuverability and visibility needed in urban and residential streets and alleys. Finally, the low height for entry into the cab makes the LCOE design significantly preferable for refuse use because drivers need to exit and enter the truck often. The ease of cab entry and the superior maneuverability and visibility of heavy duty LCOE Trucks also makes them the truck of choice for various other applications such as home heating oil delivery in the Northeastern United States, concrete

pumping, and aircraft refueling.

There are no good substitutes for heavy duty LCOE Trucks. A sufficient number of purchasers of heavy duty LCOE Trucks would not turn to substitutes in response to a small but significant increase in the price of heavy duty LCOE Trucks to make such price increase unprofitable. Accordingly, the development, production, and sale of heavy duty LCOE Trucks is a relevant product market in which to assess the competitive effects of the proposed acquisition.

The Complaint alleges the United States constitutes the relevant geographic market for the purposes of analyzing the transaction. Virtually all heavy duty LCOE Trucks sold in the United States are manufactured in the United States and almost none are imported. The foreign-headquartered truck manufacturers that sell heavy duty LCOE Trucks in the United States manufacture the trucks at facilities located in the United States. Classifications, standards, and customer preferences for heavy duty LCOE Trucks produced for Asia and Europe differ from those produced for the United States. A small but significant increase in the price of heavy duty LCOE Trucks would not cause a sufficient number of purchasers to switch to trucks manufactured outside the United States to make the price increase unprofitable.

2. Anticompetitive Consequences of the Acquisition

The Complaint alleges that AB Volvo's acquisition of Renault will likely have the following anticompetitive effects: (a) competition generally in the development, production and sale of heavy duty LCOE Trucks would be substantially lessened; (b) the actual and potential competition between Volvo and Renault would be eliminated; and (c) prices for heavy duty LCOE Trucks would likely increase and the quality, level of service, and product improvement of heavy duty LCOE Trucks would likely decline.

VTNA and Mack are the only significant suppliers of heavy duty LCOE Trucks in the United States. In this highly concentrated market, Mack has approximately a 53 percent market share, and VTNA has approximately a 33 percent market share. VTNA and Mack compete directly and aggressively against one another on the development, production, and sale of heavy duty LCOE Trucks which has benefited consumers through lower prices, higher quality, better service, and improved products.

The proposed acquisition would substantially increase concentration in an already highly concentrated market. After the acquisition, the combined firm would account for approximately 86 percent of heavy duty LCOE Truck sales in the United States. Using the Herfindahl-Hirschman Index ("HHI," which is defined and explained in Appendix A of the Complaint), the proposed transaction will increase the HHI by more than 4000 points to a post-merger level of about 7508, far in excess of the level which ordinarily raise antitrust concerns.

The proposed acquisition will raise the combined firms' share of industry sales to the level where it will have the ability and incentive to raise prices unilaterally. The heavy duty LCOE Trucks of VTNA and Mack are significantly differentiated from their other competitors' heavy duty LCOE Trucks in terms of their actual and proven track record for reliability, maintenance requirements, and significant components. Mack's and VTNA's heavy duty LCOE Trucks are the closest substitutes for each other and their customers would not divert a sufficient number of their purchases to competing heavy duty LCOE Trucks to defeat a significant price increase by the defendants following a merger.

The Complaint alleges that entry into the production and sale of heavy duty LCOE Trucks

in the United States is difficult, time consuming, and expensive, and would not be timely, likely or sufficient to deter the exercise of market power by the combined firm in the readily foreseeable future. Entry, even by an established producer of other types of heavy duty trucks, would require a high sunk capital investment in research and development and equipment and facilities. A new entrant would also need to develop an effective dealer network for selling and servicing heavy duty LCOE Trucks and would need to develop a track record for reliability and maintenance before it could attract significant sales from Mack and VTNA. Even an established producer of other types of heavy duty trucks with a dealer network for those trucks would need in excess of two years to design, produce, and gain customer acceptance of a new heavy duty LCOE Truck.

III.

EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The proposed Final Judgment is designed to ensure competition otherwise eliminated as a result of the proposed acquisition is preserved, and to prevent AB Volvo from exercising market power in the heavy duty LCOE Truck market after the acquisition. To maintain competition in the heavy duty LCOE Truck market, Section IV of the proposed Final Judgment orders the defendants to sell the VTNA LCOE Truck Business. The proposed Final Judgment also requires the defendants to negotiate agreements with the purchaser guaranteeing the divested business will meet EPA 2002 emissions standards and, at the purchaser's option, to provide start-up support for the divested LCOE Truck Business for a period of up to two years. The defendants are prohibited by the proposed Final Judgment from taking any action that will impede their dealers from distributing, selling or servicing the divested heavy duty LCOE Trucks.

Under the terms of the proposed Final Judgment, defendants must accomplish the

divestiture within ninety (90) calendar days after the date the Complaint is filed, or five days after notice of entry of the Final Judgment, whichever is later, to an acquirer that, in the United States's sole judgment, has the intent and capability (including the necessary managerial, operational, technical and financial capability) of competing effectively in the development, production, and sale of heavy duty LCOE Trucks. The United States may extend the time period for divestiture two additional periods, each not to exceed 30 days. Defendants must use their best efforts to divest the VTNA LCOE Truck Business as expeditiously as possible and, until the ordered divestitures take place, the defendants must cooperate with any prospective purchasers.

If defendants do not accomplish the ordered divestitures within the prescribed time period, Section VI(A) of the proposed Final Judgment provides that the Court will appoint a trustee, selected by the United States, to complete the divestiture. The trustee may divest either the VTNA or Mack LCOE Truck Business. The trustee has the right, upon notice to the defendants and upon consultation with the United States, to add such other assets and agreements concerning necessary parts and components, in order to ensure the viability, competitiveness, and marketability of the Mack LCOE Truck Business.

If a trustee is appointed, the proposed Final Judgment provides that the defendants must cooperate fully with the trustee and pay all of the trustee's costs and expenses. The trustee's compensation will be structured to provide an incentive for the trustee based on the price and terms of the divestiture and the speed with which it is accomplished. After the trustee's appointment becomes effective, the trustee will file monthly reports with the United States and the Court setting forth the trustee's efforts to accomplish the required divestiture. If the divestiture is not accomplished within six months after the trustee's appointment, the trustee and the United

States will make recommendations to the Court, which shall enter such orders as appropriate to carry out the purpose of the Final Judgment.

Until the divestiture is accomplished, the terms of the Hold Separate Stipulation and Order require the defendants to preserve, maintain, and continue to operate the VTNA and Mack LCOE Truck Businesses as independent, economically viable parts of ongoing competitive businesses, with the management, sales, and operations held separate from the post-merger company's other operations. The defendants will appoint two designated persons to monitor and ensure their compliance with these requirements.

IV.

REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal district court to recover three times the damages the person has suffered, as well as the costs of bringing a lawsuit and reasonable attorneys' fees. Entry of the proposed Final Judgment will neither impair nor assist the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no effect as *prima facie* evidence in any subsequent private lawsuit that may be brought against the defendants.

V.

PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and the defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the

United States has not withdrawn its consent. The APPA conditions entry of the decree upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least sixty (60) days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within sixty (60) days of the date of publication of this Competitive Impact Statement in the *Federal Register*. The United States will evaluate and respond to the comments. All comments will be given due consideration by the Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and the response of the United States will be filed with the Court and published in the *Federal Register*. Written comments should be submitted to:

J. Robert Kramer II
Chief, Litigation II Section
Antitrust Division
United States Department of Justice
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Washington, D.C. 20530

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

VI.

ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

The United States considered, as an alternative to the proposed Final Judgment, a full trial on the merits against the defendants. The United States is satisfied, however, that the divestiture

of either the VTNA or Mack LCOE Truck Business and other relief contained in the proposed Final Judgment will establish, preserve and ensure a viable competitor in the development, production, and sale of heavy duty LCOE Trucks in the United States. Thus, the United States is convinced that the proposed Final Judgment, once implemented by the Court, will prevent AB Volvo's acquisition of Renault V.I. from having adverse competitive effects.

VII.

STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the Court shall determine whether entry of the proposed Final Judgment is "in the public interest." In making that determination, the Court *may* consider--

> (1) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration or relief sought, anticipated effects of alternative remedies actually considered, and any other considerations bearing upon the adequacy of such judgment;
>
> (2) the impact of entry of such judgment upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e). As the Court of Appeals for the District of Columbia has held, the APPA permits a court to consider, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See United States v. Microsoft Corp.*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995).

In conducting this inquiry, "the Court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process."[1] Rather,

> absent a showing of corrupt failure of the government to discharge its duty, the Court, in making its public interest finding, should . . . carefully consider the explanations of the government in the competitive impact statement and its responses to comments in order to determine whether those explanations are reasonable under the circumstances.[2]

Accordingly, with respect to the adequacy of the relief secured by the decree, a court may not "engage in an unrestricted evaluation of what relief would best serve the public." *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988), *quoting United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981); *see also Microsoft*, 56 F.3d at 1458. Precedent requires that

> the balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest.*" More elaborate requirements might undermine the

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[1] 119 CONG. REC. 24,598 (1973). *See United States v. Gillette Co.*, 406 F. Supp. 713, 715 (D. Mass. 1975). A "public interest" determination can be made properly on the basis of the Competitive Impact Statement and Response to Comments filed pursuant to the APPA. Although the APPA authorizes the use of additional procedures, 15 U.S.C. § 16(f), those procedures are discretionary. A court need not invoke any of them unless it believes that the comments have raised significant issues and that further proceedings would aid the court in resolving those issues. *See* H.R. Rep. No. 93-1463, 93rd Cong. 2d Sess. 8-9 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6535, 6538.

[2] *United States v. Mid-America Dairymen, Inc.*, 1977-1 Trade Cas. (CCH) ¶ 61,508, at 71,980 (W.D. Mo. 1977); *see also United States v. Loew's Inc.*, 783 F. Supp. 211, 214 (S.D.N.Y. 1992); *United States v. Columbia Artists Mgmt., Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987).

effectiveness of antitrust enforcement by consent decree.[3]

The proposed Final Judgment, therefore, should not be reviewed under a standard of whether it is certain to eliminate every anticompetitive effect of a particular practice or whether it mandates certainty of free competition in the future. Court approval of a final judgment requires a standard more flexible and less strict than the standard required for a finding of liability. A "proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is 'within the reaches of public interest.'"[4]

Moreover, the court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459. Since the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that the court "is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States might have but did not pursue. *Id.*

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[3] *United States v. Bechtel Corp.*, 648 F.2d at 666 (citations omitted) (emphasis added); *see United States v. BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *United States v. Gillette Co.*, 406 F. Supp. at 716. *See also United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir. 1983), *cert. denied*, 465 U.S. 1101 (1984).

[4] *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C. 1982) (*quoting Gillette*, 406 F. Supp. at 716), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985); *United States v. Carrols Dev. Corp.*, 454 F. Supp. 1215, 1222 (N.D.N.Y. 1978).

VIII.

DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: February _07_, 2001.

Respectfully submitted,

/s/

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