

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,
Plaintiff,

v.

FIAT S.p.A.,
FIAT ACQUISITION CORPORATION,
NEW HOLLAND N.V.,
NEW HOLLAND NORTH AMERICA, INC., and
CASE CORPORATION,
Defendants.

Civil No: 99-02927 (JR)

Filed: November 19, 1999

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 THE PROCEEDING

On November 4, 1999, the United States filed a civil antitrust Complaint alleging that the proposed acquisition of Case Corporation ("Case") by Fiat S.p.A. ("Fiat"), and Fiat subsidiaries, Fiat Acquisition Corporation ("Fiat Acquisition"), New Holland, N.V., and New Holland North America, Inc. ("New Holland"), would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18. The Complaint alleges that the acquisition likely would substantially reduce competition in the manufacture and sale of four-wheel-drive ("4WD") tractors and large two-wheel-drive ("2WD") tractors, and in the manufacture and sale of small square balers, large

square balers, and self-propelled windrowers (collectively “hay and forage equipment”), in the United States and Canada. The Complaint seeks: (1) a judgment that the proposed acquisition would violate Section 7 of the Clayton Act; (2) injunctive relief preventing consummation of the proposed acquisition; (3) an award of costs to the plaintiff; and (4) such other relief as the Court may deem just and proper.

When it filed the Complaint, the United States also filed a Hold Separate Stipulation and Order and a proposed Final Judgment, which would settle the lawsuit. The proposed Final Judgment permits Fiat and its subsidiaries to acquire Case, but requires divestitures that will preserve competition in the five relevant product markets alleged in the Complaint. The proposed Final Judgment orders defendants to divest New Holland’s Genesis line of 2WD tractors; New Holland’s Versatile line of 4WD tractors and its line of tracked tractors that is currently in development; and Case’s ownership interest in Hay and Forage Industries (“HFI”), a joint venture that makes hay and forage equipment.

Defendants must accomplish the divestitures within one hundred and fifty (150) calendar days after the filing of the Complaint, or five (5) days after notice of the entry of the proposed Final Judgment by the Court, whichever is later, to purchasers acceptable to the United States. If the defendants do not do so within the time specified in the proposed Final Judgment, a trustee appointed by the Court would be empowered for an additional six months to sell those assets. If the trustee is unable to do so in that time, the Court could enter such orders as it might deem appropriate to carry out the purpose of the Final Judgment, which may, if necessary, include extending the trust and the trustee’s appointment by a period requested by the United States.

In addition, under the terms of the Hold Separate Stipulation and Order, defendants must hold specified assets separate and apart from their other businesses until the required divestitures have been accomplished. Until the required divestitures are accomplished, defendants must preserve and maintain the specified assets to be divested as saleable and economically viable ongoing concerns.

The parties have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment would terminate the 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

A. The Defendants and the Proposed Transaction

Fiat is an Italian corporation with its corporate headquarters and principal place of business in Turin, Italy. Fiat is an international automotive, construction and agricultural equipment company that manufactures cars, trucks, construction equipment, tractors, and hay and forage equipment. Fiat reported revenues of \$56.6 billion in 1998.

Among Fiat's subsidiaries are New Holland N.V., New Holland, and Fiat Acquisition. New Holland N.V. produces construction equipment, tractors, hay and forage equipment, and other agricultural equipment; it is the third largest supplier of agricultural equipment in the United States and Canada. New Holland manufactures 4WD agricultural tractors, large 2WD agricultural tractors and hay and forage equipment.

Case is a Delaware corporation with its headquarters and principal place of business in Racine, Wisconsin. Case manufactures 4WD tractors and large 2WD agricultural tractors. Case also owns 50 percent of HFI, a joint venture which produces hay and forage equipment. HFI sells the equipment it manufactures to Case and its joint venture partner for distribution and sale under each company's respective trade names. In 1998, Case reported revenues of \$6.1 billion.

On or about May 15, 1999, Fiat entered into an Agreement and Plan of Merger ("Agreement") to acquire Case for approximately \$4.3 billion. Under the Agreement, Fiat Acquisition and Case will merge, with Case being the surviving entity. New Holland N.V. will subsequently acquire all the issued and outstanding shares of the surviving entity. This transaction, which would eliminate head-to-head competition between Case and New Holland and increase concentration in already highly concentrated markets for tractors and hay and forage equipment, precipitated the government's suit.

B. The Markets

1. Tractors

Agricultural tractors are used primarily on farms for a variety of applications, including pulling implements to till soil and to plant and cultivate crops. Agricultural tractors are produced in a range of horsepower ("hp") and may be either wheeled or tracked. In general, as the size and weight of the implement increases, the horsepower of the tractor required to pull it increases as well. 4WD tractors are high horsepower (205 hp to 425 hp) tractors used mostly for heavy-duty farm applications, including tilling, cultivating, and pulling large implements. Large 2WD tractors are lower horsepower tractors that are typically used to pull medium-sized implements for farm applications that do not require the heavy-duty performance of a 4WD tractor.

2. Hay and Forage Equipment

A self-propelled windrower cuts hay, breaks it up for faster drying and lays it on the ground in long columns called windrows that the hay can dry quickly. Balers collect hay after it has dried in the field, compact it into square bales, tie the bales together with twine, and eject them onto the ground for subsequent collection or transportation. A small square baler produces a bale of hay with a rectangular face less than two square feet in size; a large square baler generally produces an eight-foot long bale of hay with a rectangular face that is more than four square feet in size.

C. Harm to Competition as a Result of the Proposed Transaction

The Complaint alleges that the acquisition would eliminate head-to-head competition between Fiat and Case in markets for 4WD tractors, large 2WD tractors, small square balers, large square balers, and self-propelled windrowers in the United States and Canada. The Complaint also alleges that the acquisition would significantly increase concentration in these markets. As a result of this increased concentration and reduced competition, farmers would likely face higher prices, lower quality, and less innovation in markets for 4WD tractors, large 2WD tractors, small square balers, large square balers, and self-propelled windrowers. Furthermore, entry by new companies would not be timely, likely, or sufficient to prevent these anticompetitive effects.

III. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

A. The Divestiture Requirements

The provisions of the proposed Final Judgment are designed to preserve competition in markets for tractors and hay and forage equipment in the United States and Canada. To preserve

competition in the markets for 4WD and 2WD tractors, Section IV.A of the proposed Final Judgment orders defendants to divest New Holland's Genesis line of large 2WD tractors, New Holland's Versatile line of 4WD tractors, and its line of tracked tractors that is currently in development. To preserve competition in the markets for small square balers, large square balers, and self-propelled windrowers, Section IV.A of the proposed Final Judgment also orders defendants to divest Case's interest in HFI.

B. Short-Term Supply Agreements for Tractors

New Holland produces its Genesis line of large 2WD tractors and Versatile line of 4WD tractors at its Winnipeg, Manitoba, Canada plant. Section IV.A of the proposed Final Judgment requires New Holland to offer the Winnipeg plant for sale. Should the divestiture of either the large 2WD or the 4WD lines be unaccompanied by the sale of the Winnipeg plant, under Section IV.I, the purchaser of the large 2WD or the 4WD line shall be offered a short-term transitional supply agreement, not to exceed two years in length, to manufacture and deliver the purchaser's requirements for Genesis or Versatile series tractors and parts on terms and conditions designed to enable the purchaser to compete effectively with defendants in the sale of 4WD and large 2WD tractors. The terms and conditions of this agreement must be acceptable to the United States in its sole discretion.

Section IV.J of the Final Judgment provides that, under each divestiture, defendants retain the right to negotiate a transitional supply agreement under which the purchaser of the divested assets would manufacture and deliver to defendants in a timely manner defendants' requirements for 4WD and large 2WD tractors and hay and forage equipment. Defendants have independent distributors whose viability may be affected, in the absence of such a supply agreement, by the

unavailability of 4WD and large 2WD tractors and hay and forage equipment during a limited transition period. A purchaser may also find it in its best interest to enter into such a transitional supply agreement to achieve sufficient manufacturing volumes to realize scale economies. The Final Judgment is permissive on this point and does not obligate the purchaser of the 2WD line, the 4WD line, or the hay and forage equipment assets to enter into transitional supply agreements with the defendants.

Any such supply agreements to the defendants shall not include the use of the Versatile or Genesis trade names and shall not last for a term longer than, for 2WD or 4WD tractors, 24 months from the filing of the Hold Separate Stipulation and Order in this case, and for hay tools and forage equipment, 18 months from the filing of the Hold Separate Stipulation and Order in this case. Transfer pricing shall be based on auditable cost data and such agreements shall include terms and conditions reasonably designed to enable the defendants to compete with the purchaser(s) in the sale of 4WD tractors, 2WD tractors, and hay tools and forage equipment. The terms and conditions of any such agreements must be acceptable to the United States in its sole discretion. Such agreements may be amended only with the prior approval of the United States in its sole discretion.

C. General Divestiture Provisions

Under Section IV.A of the proposed Final Judgment, defendants must accomplish the required divestitures within one hundred and fifty (150) calendar days after the filing of the Complaint, or within five (5) days after notice of the entry of the proposed Final Judgment by the Court, whichever is later, to a purchaser acceptable to the United States. Section IV.B of the proposed Final Judgment requires that defendants shall use their best efforts to accomplish said

divestiture as expeditiously as possible. The United States, in its sole discretion, may extend the time period for any divestiture for an additional period of time not to exceed thirty (30) calendar days. Section IV.H requires that the assets to be divested be used by the purchaser as part of a viable, ongoing business engaged in the manufacture and distribution of 2WD tractors, 4WD tractors, and/or hay and forage equipment.

Until the required divestitures have been accomplished, under Section VIII, defendants must take certain steps to ensure that all assets to be divested will be maintained as separate, distinct and saleable assets. Until such divestitures, the defendants shall continue to operate the assets as independent, economically viable, ongoing business concerns in the manufacture and sale of tractors and hay and forage equipment until the required divestitures are complete.

Under Sections IV.C and IV.D of the proposed Final Judgment, defendants shall make known, by usual and customary means, the availability of the assets and provide any prospective purchasers with a copy of the Final Judgment. The defendants are required to offer to furnish any prospective purchaser, subject to customary confidentiality assurances, all information regarding the assets customarily provided in a due diligence process, except such information subject to attorney-client privilege or attorney work-product privilege. Defendants must also permit prospective purchasers to have reasonable access to personnel and to make inspection of physical facilities and financial, operational, or other documents and information customarily provided as part of a due diligence process.

Sections IV.E provides that defendants shall not interfere with negotiations by any purchaser to employ any of defendants' employees who worked at the divested assets. Sections IV.F and IV.G require that defendants not impede the operation of any business connected with

the assets to be divested or prevent any dealer from distributing the divested assets for two years after the divestiture.

D. Trustee Provisions

If defendants fail to divest the assets within the specified period, Section V.A of the proposed Final Judgment provides that the Court shall appoint a trustee, selected by the United States, to accomplish the divestitures. If a trustee is appointed, Section V.C of the proposed Final Judgment requires the defendants to pay all costs and expenses of the trustee. After the trustee's appointment becomes effective, Section V.E provides that the trustee will file monthly reports with the parties and the Court, setting forth the trustee's efforts to accomplish divestiture. Under Section V.F, at the end of six months after the trustee's appointment, if the divestitures have not been accomplished, the trustee must make recommendations to the Court, which shall enter such orders as appropriate in order to carry out the purpose of the trust, including extending the trust and the term of the trustee's appointment.

E. Notification Provisions

Section VI of the proposed Final Judgment assures the United States an opportunity to review any proposed sale, whether by the defendants or the trustee, before it occurs. Under this provision, the United States is entitled to receive complete information regarding any proposed sale or any prospective purchaser prior to consummation of the sale. If there is more than one purchaser of New Holland's tractor lines, they must be simultaneously identified in order that the United States may jointly review the proposed tractor divestitures. Absent written notice from the United States that it does not object to a proposed sale of any of the divestiture assets by the defendants or the trustee, the proposed divestiture may not be completed. Should defendants

object to a divestiture by the trustee on the basis of the trustee's malfeasance, that sale shall not be consummated unless approved by the Court.

Section VII.A of the proposed Final Judgment provides that within twenty (20) calendar days of the filing of the Complaint and every thirty (30) calendar days thereafter until the divestitures have been completed pursuant to Section IV or V of the Final Judgment, defendants shall deliver to the United States an affidavit as to the fact and manner of compliance with Section IV or V of this Final Judgment. Section VII.B of the proposed Final Judgment provides that within twenty (20) calendar days of the filing of the Complaint, defendants shall deliver to the United States an affidavit which describes in detail all actions defendants have taken and all steps defendants have implemented on an ongoing basis to preserve the divestiture assets.

F. Compliance Inspection, Retention of Jurisdiction, and Termination Provisions

Section X requires defendants to make available, upon request, the business records and the personnel of its businesses. This provision allows the United States to inspect defendants' facilities and ensure that they are complying with the requirements of the proposed Final Judgment. Section XI provides for jurisdiction to be maintained by the Court. Section XII of the proposed Final Judgment provides that it will expire on the tenth anniversary of its entry by the Court.

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 court to

recover three times the damages the person has suffered, as well as costs 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 prima facie effect in any subsequent private lawsuit that may be brought against defendants.

V. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The parties have stipulated that the Court may enter the proposed Final Judgment after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry 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 give all comments due consideration and respond to each of them. The United States remains free to withdraw its consent to the proposed Final Judgment at any time prior to entry. The comments and responses 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
1401 H Street, N.W., Suite 3000
Washington, DC 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

As an alternative to the proposed Final Judgment, the United States also considered a full trial on the merits against defendants. The United States is satisfied, however, that the divestitures required by the proposed Final Judgment will facilitate continued viable competition in the manufacture and sale of 4WD tractors, large 2WD tractors, small square balers, large square balers, and self-propelled windrowers, and will effectively prevent the anticompetitive effects that would result from the proposed acquisition.

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-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 Circuit 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*, 56 F.3d 1448, 1458-62 (D.C. Cir. 1995). The courts have recognized that the term "'public interest' take[s] meaning from the purposes of the regulatory legislation." *NAACP v. Federal Power Comm'n*, 425 U.S. 662, 669 (1976). Since the purpose of the antitrust laws is to preserve "free and unfettered competition as the rule of trade," *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958), the focus of the "public interest" inquiry under the APPA is whether the proposed Final Judgment would serve the public interest in free and unfettered competition. *United States v. American Cyanamid Co.*, 719 F.2d 558, 565 (2d Cir.1983); *United States v. Waste Management, Inc.*, 1985-2 Trade Cas. ¶ 66,651, at 63,046 (D.D.C. 1985). 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,

[a]bsent 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

¹119 Cong. Rec. 24598 (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. 93-1463, 93rd Cong. 2d Sess. 8-9, reprinted in (1974) U.S. Code Cong. & Ad. News 6535, 6538.

responses to comments in order to determine whether those explanations are reasonable under the circumstances.

United States v. Mid-America Dairymen, Inc., 1977-1 Trade Cas. ¶ 61,508, at 71,980 (W.D. Mo. 1977).

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. 1981)). See also *Microsoft*, 56 F.3d 1448. 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 effectiveness of antitrust enforcement by consent decree.²

A proposed consent decree is an agreement between the parties which is reached after exhaustive negotiations and discussions. Parties do not hastily and thoughtlessly stipulate to a decree because, in doing so, they

waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and the elimination of risk, the parties each give up something they might have won had they proceeded with the litigation.

United States v. Armour & Co., 402 U.S. 673, 681 (1971).

² *Bechtel*, 648 F.2d at 666 (citations omitted) (emphasis added); see *BNS, Inc.*, 858 F.2d at 463; *United States v. National Broadcasting Co.*, 449 F. Supp. 1127, 1143 (C.D. Cal. 1978); *Gillette Co.*, 406 F. Supp. at 716. See also *American Cyanamid Co.*, 719 F.2d at 565.

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 proposed 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.'"³

VIII. DETERMINATIVE DOCUMENTS

There were 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: November 19, 1999.

Respectfully submitted,

Joan Farragher / JWF

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³ *United States v. American Tel. and Tel Co.*, 552 F. Supp. 131, 150 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983), *quoting Gillette Co.*, 406 F. Supp. at 716; *United States v. Alcan Aluminum, Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985).

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 19th day of November, 1999, I caused a copy of the COMPETITIVE IMPACT STATEMENT to be served by first class mail, postage prepaid, upon the following:

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