Trade Regulation Reporter, United States v. International Business Machines Corp., U.S. District Court, S.D. New York, 1997-1 Trade Cases ¶71,786, (Apr. 30, 1997)

Federal Antitrust Cases
No. 52 Civ. 72-344 (TPG)
Trade Regulation Reporter ¶71,786

United States v. International Business Machines Corp.

1997-1 Trade Cases ¶71,786. U.S. District Court, S.D. New York. No. 52 Civ. 72-344 (TPG). Entered April 30, 1997.

Case No. 1115, U.S. Department of Justice Antitrust Division.

Headnote

Sherman Act

Department of Justice Enforcement: U.S. Consent Decrees: Termination: Public Interest: Change in Market Conditions: Monopolization: Computers.–
Termination, on a phased-out basis, of a 1956 U.S. consent decree's last remaining provisions, which restricted a manufacturer's marketing practices with respect to mainframe and midframe computers, was in the public interest. The manufacturer's market power had substantially diminished after 40 years. There was no longer any reason to treat the manufacturer differently from other players in the marketplace. Moreover, the phase-out would relieve the manufacturer of certain inefficiencies and increased costs imposed by the decree. This would benefit both the manufacturer and consumers. A specific objection from an organization of computer service companies regarding the termination of provisions forbidding the manufacturer from discriminating in the sale of spare parts and maintenance manuals was rejected. The artificial restraints on the manufacturer's marketing of spare parts did not further the cause of healthy competition.
See ¶8841.75.

Terminating 1956 Trade Cases ¶68,245**.**

OPINION

GRIESA, D.J.: This antitrust action against IBM was brought in 1952. The action was settled by a consent decree entered in 1956 []. Over the years, a few provisions expired or were terminated. However, most of the terms of the decree were still in effect as of 1994, when IBM moved to terminate these remaining portions. The Government and IBM were able to reach agreement to a substantial extent, and the consent decree was greatly modified as of January 1996. However, there remained in effect parts of the following sections:

§IV—requiring IBM to offer computers for sale at terms comparable to those applicable to lessees;

§V—placing limitations on the ability of IBM to reacquire and resell computer equipment originally sold by it;

§VI—forbidding IBM from discriminating in the provision of maintenance services and spare parts in favor of lessees and against purchasers and third party repair companies;

§VII—miscellaneous injunctive provisions, the most important of which for present purposes is §VII(c) which prohibits IBM from requiring that a computer purchaser obtain spare parts or maintenance from IBM;

§IX—requiring IBM to provide maintenance manuals to computer owners as well as lessees;

§XIV—forbidding IBM generally from engaging in marketing allocation or tying.

All of these remaining provisions apply only to “System/390” and “AS/400” computers.

IBM and the Government now jointly move to terminate, on a phased basis, these remaining provisions of the consent decree. A few provisions would end immediately upon the signing of an order granting the motion, or within six months after that order. Certain other provisions would terminate on July 2, 2000, and the remaining provisions on July 2, 2001.

The details about the timing need not be described here, except for a few points. The basic provision about comparable terms for leases and sales contained in §IV is to terminate six months after the order as to AS/400. This provision would remain in effect for S/390 until July 2, 2001. The provisions about spare parts and maintenance in portions of §§VI, VII and IX are to terminate on July 2, 2000 as to AS/400, and on July 2, 2001 as to S/390.

S/390 computers are large, expensive, “mainframe” machines. The current products are the direct successors to a line of mainframe computers manufactured by IBM beginning in the 1960's. The AS/400 is a more recent addition to IBM's product line. It is smaller and less expensive than the S/390.

The only substantial opposition to the current joint motion comes from an organization called Independent Service Network International (“ISNI”), the members of which are computer service companies. ISNI objects to vacating §§VI(c), VII(c), IX(b) and XI(c).

Section VI(c) is the part of §VI dealing specifically with spare parts—that is, the provision forbidding IBM from discriminating in the sale of spare parts in favor of lessees and against purchasers and third party repair companies. Section VII(c) prohibits IBM from requiring that a computer purchaser obtain spare parts or maintenance services from IBM. Sections IX(b) and (c) forbid IBM from discriminating between lessees and purchasers in regard to providing maintenance manuals.

ISNI argues that, in the absence of the relevant provisions in the consent decree, there is a danger that IBM will use market power to curtail or eliminate competition in the market for spare parts and repair services for the S/390 and AS/400 computers. ISNI argues that this would be accomplished by IBM's refusal to sell spare parts to the independent repair companies or by IBM's making purchases of spare parts by such companies slow and inconvenient. ISNI also argues that IBM might engage in tying repair services to the sale or lease of computers, which would prevent its customers from obtaining repair services from independent companies. The principal argument about tying relates to the S/390. It appears that the functioning of the S/390 depends upon a software feature called an “operating system.” IBM licenses the operating systems to the owners and lessees of the S/390 computers. ISNI argues that, in the absence of the pertinent provisions of the consent decree, IBM might require a customer, as a condition of obtaining a license on an operating system, to agree to have all maintenance services performed by IBM.

DISCUSSION

All parties agree that the court cannot grant the joint motion simply because the Government and IBM have reached an agreement. The court must determine whether that agreement is in the public interest. Moreover, the issues relating to the public interest in a case such as this are the issues which arise under the antitrust laws which gave rise to the consent decree—here, §§1 and 2 of the Sherman Act. *United States v. American Cyanamid Co.* [1983-2 TRADE CASES ¶65,656], 719 F.2d 558, 565 (2d Cir. 1983); *see also United States v. Microsoft Corp* [1995-1 TRADE CASES ¶71,027], 56 F.3d 1448, 1460 (D.C. Cir. 1995); *United States v.*

Western Elec. Co. [1993-1 TRADE CASES ¶70,259], 993 F.2d 1572, 1577 (D.C. Cir. 1993). It is in light of these considerations and these decisions that the court proceeds to consider the issue of whether the agreement of the Government and IBM is in the public interest. Of course, the main focus must be on the specific contentions of ISNI.

In preparation for the present motion, the Government and IBM amassed a great deal of information about the current competitive position of IBM in the marketplace. The situation has changed drastically in the 40 years since the time the consent decree was entered. It has been established beyond any real question that, whereas IBM formerly had a great degree of market power in an antitrust sense, that market power has been substantially diminished, and is continuing to diminish, to the point of its disappearance in the sense of a threat of antitrust violation. There is an active competitive market in computers today, the nature and extent of which makes obsolete this 40-year old decree. The Government, in its role as antitrust enforcer, has concluded that there is no further need to subject IBM to a decree which is not imposed upon other players in the marketplace. In other words, the Government concludes that it is time to treat IBM like other computer manufacturers. The extensive record submitted on this joint motion supports these conclusions.

It is now necessary to deal with the specific contentions of ISNI. The record makes it clear that there is at the present time an active market in computer repair services, in which IBM competes with many independent repair companies. of course, these independent companies must be able to obtain spare parts for IBM computers in order to maintain and repair those IBM computers. In this connection, the salient fact is that a market in IBM spare parts exists, and this market is largely independent of the need of buying such parts from IBM. The spare parts in this market are procured in large part by cannibalizing IBM computers owned by parties other than IBM. It should be noted that IBM's ability to compete in this market is limited by a provision in the consent decree (§V(a)) restricting IBM's ability to reacquire computers. The termination of this provision would increase competition in the spare parts market by enabling IBM to do as other companies do and to acquire old computers as sources of spare parts.

To return to the argument of ISNI, it is undoubtedly true that an independent repair company must at times turn to IBM to purchase spare parts. ISNI contends that there is a substantial threat that, in the absence of the consent decree, IBM would unlawfully interfere with the competitive market by refusing to sell spare parts to the repair companies. In this connection, however, it should be remembered that the heart of IBM's business is selling and leasing computers, and that providing maintenance and repair service and selling spares is secondary. Assuming, as we must, that many of its computer customers are desirous of obtaining repair services from independent companies, IBM has a strong disincentive with regard to shutting off those companies from their ability to obtain maintenance and repair services where they desire to do so. IBM's customers are generally well informed about the lifetime cost of a computer (including service) and there are strong indications that they are quite willing to purchase non-IBM computers if the lifetime costs of IBM machines should become excessive. Realistically, the market as it exists today is a powerful deterrent against IBM engaging in monopolistic tactics designed to shut off the supply of parts to independent repair companies. By the same token, IBM has every incentive to compete in the repair market by offering better services and lower costs.

The record shows that, with regard to spare parts, the consent decree has resulted in artificial restraints on IBM's marketing of spare parts, which do not further the cause of healthy competition. At some time in the past IBM established outlets in various parts of the country for the distribution of spare parts. As time went on, certain of these outlets proved excessive. IBM was taking steps to close the excess outlets, but draw back because of complaints or threatened complaints about violations of the consent decree. IBM preferred to keep the outlets open rather than to engage in the cost and trouble of defending against complaints.

In the view of the court, this is an illustration of the kind of leverage which the consent decree can exert upon IBM which is unwarranted under current market conditions. On the specific question of the possible closing of some spare parts outlets, there is no evidence of any substantial detriment to the members of the ISNI from such closings because of the demonstrated willingness of IBM to provide expedited delivery from outlets regardless of precise geographic location.

It is worth noting that the computer owners and lessees who receive service from the ISNI members do not join in the objections of ISNI.

The court concludes that the granting of the joint motion of the Government and IBM, and the consequent phasing out of the remaining provisions of the 1956 consent decree, present no material threat of violation of §§1 and 2 of the Sherman Act. On the contrary, the final phase-out of the decree will relieve IBM of certain inefficiencies and increased costs now imposed by the decree. This will benefit both IBM and consumers. For these reasons, the court holds that the granting of the joint motion is in the public interest.

SO ORDERED.