



DEPARTMENT OF JUSTICE

CHALLENGES OF THE CURRENT MERGER WAVE

Address by

LAWRENCE R. FULLERTON
Deputy Assistant Attorney General
Antitrust Division
U.S. Department of Justice

Before the

BUSINESS DEVELOPMENT ASSOCIATES
ANTITRUST 1996 CONFERENCE

Washington, DC

Delivered: September 29, 1995

Revised and Released: October 25, 1995

It is a pleasure to be here today. Breakfast is little early in the day for most people for a discussion about merger policy and antitrust, so I appreciate your efforts to be here. I will try to keep this as painless as possible by talking for just a few minutes about the extent and nature of the current merger wave, and the challenges it presents for those of us involved in the merger review program at the Antitrust Division.

We are indeed in the midst of a significant merger wave -- both in aggregate terms and within the particular industries in which the Division often has merger review responsibilities:

- On an economy-wide basis, the number of announced transactions valued at over \$1 million in the first half of 1995 jumped 22 percent over the first half of 1994. The value of such transactions jumped 61 percent, to \$122.8 billion.
- According to one industry CEO, there has been more merger activity in the electric power industry over the last 12 months than there has been over the previous 15 years.

- In the banking area, so far this year, mergers valued at a record \$37.2 billion have been announced. The previous record was \$24 billion, for the entire year 1991.
- Mergers in the information-technology industry jumped 76 percent in the first half of 1995, and their value jumped 53 percent. Transactions in software products and services rose 54 percent.

There are similar stories in the media, health care, and other industries. Following the recent proposed sale of Magnavox Electronic Systems, many analysts are predicting increased acquisition activity in the defense electronics industry, as well.

The reasons for this increased merger activity are numerous:

- One factor is deregulation -- that is certainly a factor in the electric utility and banking industries, where geographic limits on expansion are being relaxed by regulators.

- Technological advances in some industries have increased firms' minimum efficient scale, or created complementarities that can be best exploited through mergers. Some firms are said to wish to control the means of product distribution.
- High and comparatively stable stock prices may be lowering the costs of acquisitions.
- Industries facing increased competition from abroad, or competition from adjacent product markets, are feeling increasing pressure to lower costs. This is certainly the case in the banking industry, where competition from non-banks is intensifying.
- There is also some gamesmanship going on, as well, as mid-sized players try to "bulk up" to avoid being acquired.

These factors suggest that most mergers are designed to capture efficiencies, which can be expected to lower costs, lower prices and improve products for consumers. Such mergers are good, and ought to be allowed to proceed. Other mergers may raise antitrust

concerns, of course, warranting examination by the Division and the FTC.

With all of this activity, we may see even more mergers shortly in the telecommunications industry, as a result of enactment of the telecommunications legislation now pending in Congress. The House bill, in particular, would encourage merger activity by lifting current FCC limits on the number of TV and radio stations a single owner may hold, both locally and on a nationwide basis; and abolish various media cross-ownership rules, such as the rules prohibiting a single entity from owning both a TV and a radio station in a given local market, both a TV station and a newspaper, or both a TV station and a cable system. The bill would also relax restrictions on Bell Operating Company entry into long distance and manufacturing, which may of course lead to their entry via acquisitions. The President has threatened to veto this bill, citing some of these provisions among others.

As you would expect, this increase in merger activity has translated into increased work at the Division:

- The number of transactions reported to us under the Hart-Scott-Rodino Act has jumped from 2,301 in fiscal year 1994 to 2,815 in 1995 -- an increase of over 500 transactions, continuing the steady growth of HSR-reported transactions since 1991.
- The number of merger investigations opened has increased from 105 in fiscal year 1994 to 133 in 1995, the highest number of merger investigations in a decade.
- Second requests increased from 30 to 37, the highest since 1987.
- Finally, the Division will screen over 1,900 bank merger transactions in fiscal year 1995, and furnish around 1,500 competitive reports to bank regulatory agencies.

We are proud of the results we have achieved in fiscal year 1995. Our approach is a surgical one designed to focus only on the anticompetitive aspects of troublesome transactions. We filed formal challenges to a total of nine mergers in court in

fiscal year 1995. We won one at trial, a case involving the combination of the only two local daily newspapers in the Fayetteville, Arkansas metropolitan area.¹ One transaction was withdrawn by the parties after the filing of the complaint; six others were settled with consent orders that blocked only the anticompetitive aspects of the transaction, permitting the rest of the transaction to go forward. One case is still in litigation -- that is our challenge to Engelhard Corporation's acquisition of the attapulgitic clay mining and processing assets of Floridin Corporation.² Seven additional transactions were restructured as a result of the Division's investigation, but before the filing of a formal complaint.

It's not just that the numbers and the average size of mergers are up. The mergers we are seeing today are of a fundamentally different nature, as compared with past merger waves. Mergers today tend to be strategic mergers that involve horizontal competitors, or firms

¹ Community Publishers, Inc. v. Donrey Corp., 892 F.Supp. 1146 (W.D.Ark. 1995)

² United States v. Engelhard Corp., et al (Civ. Action No. 6:95-cv-45, W.D.Ga., Filed June 12, 1995).

with a direct vertical relationship that are designed to better position companies to compete in their markets -- rather than a conglomerate merger or one driven by merely financial considerations. While these types of strategic mergers have the potential in many cases to improve efficiency and lower costs and prices, they are also more likely to present antitrust issues.

Increasingly, our mergers involve international players, and dynamic industries that are advancing technologically. An example is Sprint Corporation's new relationship with France Telecom and Deutsche Telecom, which we challenged and settled with a consent decree designed to guarantee continued access of U.S. long distance carriers to the French and German telecommunications markets.

This trend is matched by a growing sophistication in merger analysis. For all of these reasons, mergers are more difficult and resource-intensive to analyze. We must spend more time and resources than we did before in clearing transactions that we decide not to challenge, as well as more time in analyzing and

preparing to challenge the ones that we do decide are anticompetitive.

The increasing complexity of merger analysis has imposed costs on the parties, as well. The standard second request issued by the Division and the FTC does call for a fair amount of information, although we and the FTC took steps last March to harmonize our second request and reduce burdens.

In general, the Department has attempted to reduce the burdens on private parties -- as well as to conserve our own resources -- to the extent possible consistent with our merger enforcement mission. We have sought to increase the involvement of the Division's Front Office in merger reviews, with a goal of making early decisions on policy issues. We have emphasized the importance of early closing of investigations that we think are unlikely to reduce competition. We have attempted to prioritize and focus investigations. All of these efforts have reduced the burden of merger enforcement.

The Department has also engaged in a program of increased training to improve staff proficiency, to

ensure uniformity of standards across different staffs and sections, and to maintain the high degree of professionalism prevalent at the Department.

Finally, the Department has increased cooperation with State authorities. This increased cooperation has reduced government and private burdens, brought greater uniformity to antitrust enforcement, and provided one-stop antitrust shopping for the business community in some cases.

While the Department has accomplished much, there is still more that can be done. We are working closely with bar associations and business groups, the National Association of Attorneys General, and our Congressional oversight committees to improve our merger program. With this help, we are optimistic for the year ahead.