KNOCKOUT? – TWO NEW CHALLENGERS THREATEN THE DEPARTMENT OF JUSTICE'S STATUS AS UNDISPUTED KING OF THE ANTITRUST RING

BY SCOTT ABELES

There is little question regarding whose punch has historically packed the biggest wallop in the antitrust ring: the Antitrust Division of the United States Department of Justice ("DOJ"). With a wave of its hand, it grants a pass to those mergers of which it approves. With the back of its hand, it brushes aside the rest, who like "tomato can" boxers of yesteryear are forever relegated to grumbling "I coulda been a contender." As for its criminal role, with a mere flex of its biceps, the DOJ extracts cooperation agreements, guilty pleas, and billions in fines from alleged price-fixers, who seldom have the spirit to put up a full-fledged fracas. While neither alone (the FTC also enforces civil antitrust laws), nor undefeated, the DOJ casts an imposing shadow over antitrust, and generally gets its way.

DOJ's status as antitrust's heavyweight champ brings with it competing concerns. Its status as law firm to probably the most formidable client on earth, the United States government, provides it with tremendous power, while potentially subjecting it to political influence, as well. This status, power, and influence, in turn, can give rise to what some perceive to be (and are now challenging, as discussed below) arbitrary decision making. The very same status, however, also provides DOJ with a degree of immunity, under Separation of Powers principles. Separation of Powers dictates that DOJ's prosecutorial decisions are exclusive to it, and cannot be infringed by other branches. Generally speaking, under Separation of Powers principles, DOJ can be as arbitrary as it pleases in matters of prosecutorial discretion, with the lone check being voters, not judges.

So how does one prevent politics from sneaking the equivalent of "brass knuckles" into what should be a fair fight based on the facts and the law? Congress, though not free from political persuasion itself, may be one mechanism, and indeed has tried to provide an answer through use of the courts, which may be another.

Two recent cases – the *Stolt-Nielsen* case and the Baby Bell merger cases – address these concerns, raising questions as to the *real* extent of DOJ's discretion in both the merger approval, and criminal settlement contexts, as well as the ability of other branches to control that power. For litigators, these cases are worthy of special attention, as they will either limit DOJ's authority or broaden its discretion.

On September 6, 2006, a federal grand jury indicted Stolt-Nielsen S.A. ("Company") for violations of the Sherman Act, capping a long, smashmouth pre-indictment rumble. The Company had been assisting DOJ prosecutors pursuant to an agreement under the Corporate Leniency Program (providing amnesty for confession and cooperation), until the government claimed that the Company had continued its alleged anticompetitive activity longer than first represented. DOJ canceled the agreement, and announced its intent to file charges. Before indictment, the company sued to enforce the agreement and enjoin the impending action.

The District Court sided with the Company, finding that DOJ could not, without judicial sanction, unilaterally withdraw a grant of

conditional leniency. The federal judiciary – not DOJ – would decide prior to indictment whether one of the parties had breached the agreement. In essence, the court held that even the government must abide by its agreements, and cannot resort to unilateral, unchecked "self-help."

The Third Circuit reversed, however, holding that because the executive branch "has exclusive authority and absolute discretion to decide whether to prosecute a case," enjoining future indictments was impermissible. Despite the DOJ's written commitment "not to bring any criminal prosecution" against the Company, the Third Circuit concluded that the amnesty agreement only protected against *conviction*, not indictment and trial. Notably, the Third Circuit deferred the critical underlying question of whether the immunity agreement had been breached. Free to indict, DOJ moved forward with its prosecution. On October 30th, the Supreme Court denied certiorari over the Third Circuit's reversal of the district court.

DOJ's move came on the heels of another big brawl, featuring onetime blood enemies DOJ and AT&T together on the *same* side. This one kicked off in October 2005, when DOJ released its consent agreements in the "Baby Bell Merger" cases, allowing each to proceed with modest divestiture requirements. In July 2006, Judge Emmett Sullivan, overseeing joint Tunney Act proceedings, surprised the participants by proclaiming he was not yet convinced the mergers were in the "public interest." Such a finding is required by the Tunney Act, which was amended recently to provide for increased judicial scrutiny of consent decrees. No one was more taken aback than DOJ, which has historically viewed itself as the very embodiment of the "public interest" when it comes to promoting and protecting competition.

Judge Sullivan further observed that DOJ had produced no evidence – affidavits, declarations, or expert reports – in support of its position that the divestitures were sufficient to maintain competition. He was therefore compelled to issue a bombshell request for briefing on issues relating to (1) the competitive effects of the mergers; (2) the sufficiency of DOJ's evidence; and (3) his authority to address such issues and to modify the Consent Decrees, as necessary. Most interestingly, Judge Sullivan seemed to indicate that, at least on the surface, DOJ was abdicating its role as protector of competition. He noted, given the arguable reconstitution of the old Ma Bell monopoly apparently under way in the telecom sector, that "through the eyes of a layperson, the mergers, in and of themselves, appear to be against public interest given the apparent loss in competition … [W]hy isn't that the case?" *See* Order in *United States v. SBC and AT&T*, No. 03-2512 (D.D.C. July 7, 2006).

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The question itself is provocative, calling forth images of AT&T's "glory days," when it monopolized this nation's telecommunications network. No two people out of earshot could talk, let alone hold a conversation, without paying tithe to AT&T, leading DOJ and the district court to bust the company into seven smaller pieces. With his question, Judge Sullivan also signaled that, while DOJ had long fancied itself Judge, Jury, and either Exonerator or Executioner when it came to matters relating to the public interest, *he* was the one donning the robes.

This was something new. Tunney Act proceedings have historically been little more than "kabuki dances" in which judges rubberstamp DOJ's proposals with a nod and a shrug. But in light of the outcry that followed DOJ's controversial Microsoft settlement, Congress amended the Act in 2004 and commanded judges to conduct real reviews of DOJ deals to protect against undue politicization of antitrust. This was in keeping with recent legislative history intended to strengthen judicial review, and older history undergirding the original act's purpose to stem the tide of "sweetheart" deals cut by the

Nixon-era DOJ. Despite this history, DOJ has fought "encroachment" onto its turf tooth and nail. After opposing entry into the case of every third party with views contrary to its own, it vociferously argued that expansion of the trial judge's traditional Tunney Act role beyond that of a potted plant would infringe on its role as the sole voice of prosecutorial reason. Forced to justify its allegations and conclusions, DOJ instead raised Separation of Powers concerns. It demanded that the Court limit its inquiry to the facts as presented in DOJ's filings; anything else, including Congressional intent to curtail DOJ's prerogatives, was irrelevant.

DOJ's position has validity, but only to a degree. The question is one of both statutory and constitutional interpretation. By statute, the Tunney Act *requires* that the court analyze "the impact of entry of such judgment upon competition in the relevant market ... from the violations set forth in the complaint." DOJ argued in its subsequent pleadings that in its *complaint*, it identified potential competitive problems in isolated geographic markets (single buildings) in which competition would be reduced from two providers to one, post-merger. Because the remedy mandated in its Proposed Final Judgment required divestitures of lines in the offending buildings identified, the remedy precisely fit the contours of the harm alleged (as one might fairly expect, given that the complaint and remedy were filed simultaneously). According to DOJ, that brings the Tunney Act court's inquiry to a close.

But not so fast. The "violations set forth in the *complaint*" in these cases are allegations that, without the required divestitures, the mergers would have violated Section 7 of the Clayton Act. Granted, the DOJ has a theory as to *why* the mergers violated Section 7, and in laying out its theory it defined markets and constructed a theory of competitive harm. But while, like any litigant with a gripe, DOJ is entitled to its theory, it is certainly an open question under the enhanced Tunney Act as to whether *legal theories* deserve deference. Indeed, one can analogize the issue to a district court reviewing a Motion to Dismiss under Rule 12(b)(6) – the court should take the *facts* alleged as true, but need not credit the legal theories or labels attached by counsel when reviewing the sufficiency of the pleading.

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Thus, DOJ's argument that all facts and legal theories encompassed by the complaint should be taken as gospel when Judge Sullivan examines the sufficiency of the remedy appears to stretch the statutory language in a manner that may not do it justice. On the other hand, if the statutory language requires the reviewing court to look beyond DOJ's mere labels to determine whether the remedy adequately addresses competitive harm in the relevant market, then it may be constitutionally untenable under Separation of Powers precedent. It may be that underlying prosecutorial rationale along with the bare decision to prosecute is beyond congressional and judicial interference. But that question is not answered by DOJ's semantics-based argument.

How will these cases shake out? Prosecution of the newly filed Stolt-Nielsen case is under way, and the Company will no doubt offer the same evidence to the district court in a Motion to Dismiss on the deferred question of whether the government breached its amnesty agreement that earned the company a victory over DOJ in the first fight. The outcome will be reviewed by the Third Circuit, and, possibly, the Supreme Court down the line.

In the Baby Bell cases, briefing from the parties is proceeding, and the action has grown testy. At the latest hearing, Judge Sullivan accused DOJ of withholding "significant documents," and reaffirmed that he had no intention of "rubber-stamping" the merger and would only issue a ruling after a thorough, "independent review" of the evidence. When that will be is unknown. Still, the ruling could be favorable to the parties, if their evidence is sufficient. That would end the federal case, though states

and private parties could conceivably challenge these mergers. Presence of these significant antitrust forces does provide support for the argument that if DOJ pulls its punches, others are potentially available to step into the ring and provide the necessary check, as the framers of the antitrust laws envisioned.

If there is an adverse ruling – an attempt by Judge Sullivan to impose further divestitures, a flat-out rejection of the application, or something else – the repercussions would be unclear. DOJ could certainly appeal to the D.C. Circuit, which famously rebuffed former D.C. federal Judge Stanley Sporkin's rejection of an earlier Microsoft Consent Decree in 1995 (years before the Tunney Act amendments). Or, theoretically, it could do nothing. Whatever the extent of judicial powers under the revamped Tunney Act, no court could force DOJ to prosecute the mergers in the first instance, which could go forward without DOJ challenge and, of course, the divestitures. But, given DOJ's pronouncement that without the divestitures, the mergers are not in the public interest, this "bob-and-weave" scenario is unlikely.

Whether the present challengers are contenders or pretenders to the heavyweight title remains to be seen. But it can surely be said that there is more uneasiness in DOJ's corner after some recent counter-punching from tenacious opponents.

ENDNOTES

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