
R.J. Reynolds Tobacco Co. (interlocutory order, Dec. 10, 1986) (purpose of adjudication is "to subject the Commission's complaint to an adversarial test").

role of the Commission as an unbiased decisionmaker.¹⁰

A third scenario is that the case is weak, respondents move to withdraw the matter from adjudication, and complaint counsel file nothing in support of the complaint.¹¹ In such an instance, the Commission may agree with the respondents and dismiss the adjudication, or it may disagree and order that the proceeding continue. There seems no good reason not to have

are enhanced when the Commission retains its discretion to determine the appropriate disposition of a motion to withdraw from adjudication. The shifting of a portion of that discretion in favor of the respondents may appear open-minded, but, in the long term, it will disserve the Commission and the public interest.

On balance, the Commission and the public would be better served if the

¹ As used herein, the term "merger" includes mergers, acquisitions, joint ventures, and equivalent transactions.

² Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. 18a.

¹² See 5 U.S.C. § 552(d); 16 C.F.R. § 4.7.

Consequently, the Commission has concluded that a general policy of requiring prior approval is no longer needed. Narrow prior notice or approval requirements will be retained for certain situations, as described below.

Statement of Policy Concerning Future Orders

The Commission will henceforth rely on the HSR process as its principal means of learning about and reviewing mergers by companies as to which the Commission had previously found a reason to believe that the companies had engaged or attempted to engage in an illegal merger. The Commission believes that in most such situations the availability of HSR premerger notification and waiting period requirements will adequately protect the public interest in effective merger

³ Such a provision is included in some consent judgments in cases brought by the Department of Justice. See, e.g., *United States v. Browning-Ferris Indus. Inc.*, Civ. Action No. 1:94CV02588 (proposed final judgment) (D.D.C., filed Nov 1, 1994).

⁴ Such prior notice orders would require the company to comply with HSR-like premerger notification and waiting periods. From FY 1990 through FY 1994, the Commission undertook enforcement actions against twelve transactions that were not reportable under HSR. Four were hospital mergers, and the others covered a variety of markets including electrical products, scientific equipment, medical products or devices, security equipment, and food products.

¹ Prior approval provisions require the firm under order to obtain the approval of the Commission before making acquisitions in the same market in which the unlawful acquisition occurred.

Early cases enjoined future acquisitions entirely, often together with a divestiture requirement, to

remedy the effects of an unlawful acquisition. Prior approval was introduced as an "escape clause," "[t]o prevent the possibility of the injunction (against acquisitions) having unintended harsh results." *Luria Brothers*, 62 F.T.C. 243, 638 (1963), *aff'd*, 389 F.2d 847, 865-66 (3d Cir.), *cert. denied*, 393 U.S. 829 (1968). Early prior approval clauses varied in length, ranging from perpetual requirements to those with a duration of 5, 10 or 20 years.

² Statement of FTC Policy Concerning Prior Approval and Prior Notice Provisions at 4 (June 21, 1995) (hereafter "Prior Approval Statement").

³ See FTC Staff Bulletin 88-01 (May 18, 1988).

⁴ *The Coca-Cola Co.*, Docket 9707 (June 13, 1994), Commissioners Azcuenaga & Starek recused; *order modified* (May 17, 1995); *appeal dismissed per stipulation* (D.C. Cir. May 18, 1995).

⁵ See, e.g., *FTC v. Starlink, Inc.*, Civ. No. 91-1085 (E.D. Pa. Feb. 10, 1992) (lifetime ban on advertising, marketing or selling information concerning employment opportunities).

⁶ Examples of highly regulatory orders are unfortunately plentiful. See, e.g., Dissenting Statement of Commissioner Mary L. Azcuenaga in *Silicon Graphics, Inc.*, File 951-0064 (published for comment June 9, 1995).

⁷The Antitrust Division of the Department of Justice recently filed a civil antitrust complaint to block a company's second attempt in eight years to acquire its largest competitor. See *United States v. Engelhard Corp.*, Civ. Action No. 6:95-CV-454d (acquire its large its M.D. Ga.d a civJt5competitor.)Tj /F16 1 mtat mtk9 ion No. 6second attempt in eig7.