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Tunney Act Complicates Government Decision to Litigate Big Structural Antitrust Cases

by Lloyd Constantine

Judge Stanley Sporkin's recent rejection of the proposed antitrust consent decree between the United States and Microsoft (1995-1 TRADE CASES ¶70,897) has again focused attention on the Antitrust Procedures and Penalties Act of 1974, commonly known as the Tunney Act.

The events that led to passage of the Tunney Act occurred in 1970 and 1971 when representatives of International Telephone and Telegraph Corp. and the inner circle of the Nixon administration, including the President himself, held numerous discussions which resulted in the settlement of three Government antitrust cases against ITT. These communications and allegations of political payoffs for campaign contributions were ultimately aired in the Congressional investigation of President Richard Milhous Nixon.

In one particularly colorful exchange between President Nixon and John Ehrlichman, the President ordered Ehrlichman to fire Assistant Attorney General Dick McLaren in "one hour" and vowed that he would never be a federal judge.

Within weeks McLaren graced the federal bench in Illinois. (See transcript of April 19, 1991, conversation between President Nixon and Special Assistant to the President, John Ehrlichman, prepared by the House Judiciary Committee Impeachment Inquiry Staff.) The

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resolution of these events spawned the Tunney Act.

Public Interest Review

Under the Tunney Act, the U.S. must submit a proposed consent decree settling antitrust litigation to the district court for a public interest review. This review includes a period of public comment and court consideration of a competitive impact statement filed by the Government.

The purpose of this article is *not* to enter the overcrowded public debate on whether Judge Sporkin's decision will be reversed by the Court of Appeals. The answer to this question depends upon the ultimate judicial construction of two phrases in the Tunney Act. First, how broad is the Court's mandate to "determine that the entry [of the consent decree] is in the public interest." 15 U.S.C. §16(e). Second, whether the statutory language permitting the Court to inquire into "any other considerations bearing upon the adequacy of [the consent decree]" is as broad as it seems and thus permits the Court to look outside the Government's complaint in performing the public interest inquiry. *Id.*

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Regardless of the outcome of this appeal, my opinion is that Courts should have such broad powers to review proposed Government antitrust consent decrees.

Whether Judge Sporkin's rejection of the Microsoft decree will survive appellate review is, to this observer, less important then the problem confronting the Government in any massive antitrust investigation — a problem which is made much more difficult by the brooding omnipresence of Tunney Act review.

Effect on Major Cases

It can now be seen that the Tunney Act crucially shaped the ultimate resolution of perhaps the three largest antitrust probes ever undertaken by the U.S.: those involving IBM and AT&T in the 1960's and 1970's and the recent investigation of Microsoft.

In 1982, the Government dismissed its case against IBM after 13 years of litigation. In doing so, Assistant Attorney General Baxter observed that he could have negotiated "a purely cosmetic" consent decree to conclude the litigation, but "to do so would not have been in the best interest of the public." (See memorandum, dated January 6, 1982, from Acting Assistant Attorney General Abbot B. Lipsky, at the direction of Assistant Attorney General Baxter, to the Attorney General regarding U.S. v. IBM). In this respect, Baxter agrees with Judge Sporkin's assessment of what serves the public interest, without necessarily agreeing that the Microsoft decree is merely cosmetic. And while Baxter surely had the public interest in the middle of his field of vision, in the back of his mind was undoubtedly the sobering prospect of confronting District Judge Edelstein and the Tunney Act.

By dismissing the case rather than settling for what he termed "token" relief, the U.S. avoided Tunney Act review. Indeed, Judge Edelstein was so infuriated at the Government's abandonment of a trial over which he had presided for seven years that he tried unsuccessfully to force the U.S. to submit its dismissal to the Court for Tunney Act review.

On the same day that Baxter dismissed the IBM case, he settled the AT&T litigation and set into motion the largest divestiture in the history of this nation. One would not have thought that such a massive divestiture would cause any concern among the parties that Tunney Act scrutiny might lead to a Sporkin-like pronouncement that the consent decree was cosmetic. But, here again, wariness of the Tunney Act led the parties to concoct an elaborate scheme to avoid review. Rather than conclude the eight-year lawsuit with a consent decree, the AT&T case was dismissed and it was proposed that the divestiture of the regional Bell operating companies would be achieved through a modification of a 1956 consent decree between the United States and AT&T.

This avoidance technique almost took a tragic/comic turn when the New Jersey District Court judge, who was assigned the 1956 decree in the lottery, momentarily resisted transferring that case to Judge Harold Greene in the D.C. District Court. Judge Greene ultimately

forced the U.S. to go through the most intrusive Tunney Act review that has ever been conducted. Wielding his Tunney Act powers, Judge Greene forced the parties to significantly reshape the decree and, to this day, he exercises broad powers over the telecommunications industry under the famous AT&T modified final judgment (1982-2 TRADE CASES ¶64,900).

As the FTC and later the Antitrust Division wrestled with the massive Microsoft file, the lessons of IBM and AT&T must have exercised a powerful influence.

Depending on one's perspective, there are many different lessons to be taken from these cases, some involving the Tunney Act.

Futility of High-Tech Litigation

One perspective on IBM, which must have affected the decision to settle Microsoft without litigating, was that big structural cases in high-technology industries are likely to be futile. The juxtaposition of rapidly evolving technology and the glacial pace of litigation suggests that at the end of these cases the original reasons for suing will no longer be a valid basis for structural relief. The mere fact that no Assistant Attorney General is likely to last the length of an IBM type trial is a strong incentive to settle for a "bird in the hand."

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One revisionist view holds that the U.S. inflicted the greatest punishment on IBM by dismissing the case. This view holds that AT&T prospered after the divestiture in its streamlined form while IBM was left bloated, and ultimately dissipated its once dominant positions in a self-destructive quest for monopoly rents.

So, the weight of history and the Tunney Act was on the shoulders of Anne Bingaman at the moment when she had to decide whether to sue, settle, or take a pass as the FTC had after years of investigation and deadlock. Those who know her can hardly conceive that she would seriously consider allowing Microsoft to continue the practice which was at the core of the consent decree.

Microsoft charged computer manufacturers for operating systems on the basis of the total number of computers they manufactured, whether these computers incorporated a Microsoft system or a competing operating system. Given the dominance of Microsoft's "DOS," this practice was clearly exclusionary. Therefore, although doing nothing would have avoided any Tunney Act review, this was not an option, both for reasons of principle and politics.

The easiest and most politically expedient action would have been to file a massive complaint similar to the IBM complaint of 1969 or the AT&T complaint of 1974. Ms. Bingaman would have been committing a significant portion of the Division's resources for years to come, knowing that at the end of the road an IBM-type resolution might occur.

In the end, Bingaman chose neither to duck the issue nor to burden her successors with years of costly and risky litigation. She also chose not to evade or avoid Tunney Act review as her predecessors had in AT&T, IBM, and the tying case against Mercedes-Benz, which was abandoned on the eve of Government victory (See Department of Justice Press Release, dated March 15, 1982).

One tactic that might have secured the same relief from Microsoft, yet avoided a Tunney Act review, would have been for the Government to enter into a letter agreement with Microsoft. This method of settlement, sometimes referred to as an "Assurance of Discontinuance," has been used by the U.S. in other contexts, such as an agreement not to make certain acquisitions. It is frequently used by State Attorneys General exercising their antitrust enforcement powers.

The fact that Bingaman was forthright, courageous, and obviously well-motivated in her ultimate decision may not, however, satisfy the Tunney Act, which she chose not to evade.

Scope of Review

The question for the Court of Appeals was squarely framed in Judge Sporkin's decision. He said:

> If the Court's scope of review is as narrow as the Government claims, the Government could effectively foreclose judicial review

of the decree. For example, the Government could initiate a massive antitrust probe and find significant violations in a large market. *Then, bowing to political or other pressure, the government could write a complaint that alleges only minor anticompetitive practices in a very small market and file it contemporaneously with a decree that addresses those limited violations.* Under the Government's rationale, the Court could only consider whether the decree adequately addressed the alleged violations. If its scope of review were so limited, the Court would have to approve the decree. The Tunney Act as well as common sense dictate that entry of such a decree would not be in the public interest. *(emphasis added) United States v. Microsoft Corp.,* 1995-1 TRADE CASES ¶70,897 (DC D. of C. 1995)

An antitrust consent decree does not begin and end with the parties' negotiations.

Arguably, the Microsoft consent decree (TRADE REGULATION REPORTS ¶50,764) represents this type of scenario. While the Antitrust Division contends that the violations which the Microsoft decree addresses are not minor, these violations represent a modest portion of the anticompetitive practices alleged. Moreover, there were pressures on the Division to reach the resolution it did, including pressure that stemmed from the prospect of a huge, lengthy, and perhaps futile commitment of scarce prosecutorial resources.

On March 14, this virtually unprecedented appeal took another fascinating turn with Judge Sporkin filing what was in effect his own brief in reply to those filed by the U.S. and Microsoft. Issued in the form of an Order to cancel a status hearing previously scheduled for March 16 (1995-1 TRADE CASES ¶70,928), Judge Sporkin addressed not only the arguments in the appellant's briefs but the press statements made by Ms. Bingaman and Attorney General Reno.

Echoing the central thrust of this article, Judge Sporkin noted that "the parties must realize that an antitrust consent decree does not begin and end with the parties' negotiations. Experienced counsel must factor in the judicial approval component. In this regard, it is incumbent on all counsel in their negotiations to consider how they are going to assure the Court that the decree is in the public interest."

It is clear that the Tunney Act further complicates the already difficult problems confronting the government when it contemplates whether to file massive structural antitrust litigation. Win or lose the Microsoft appeal, the Division should be commended for confronting these issues forthrightly and subjecting their conclusions to Tunney Act review. ❑