Penn State International Law Review

Volume 1
Number 1 *Dickinson International Law Annual*

Article 5

1982

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Cover Page Footnote
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ANTITRUST CONSIDERATIONS IN MAKING FOREIGN INVESTMENTS IN THE UNITED STATES

Thomas L. Vankirk*

I. Introduction

The antitrust laws of the United States have taken on an increasingly significant role with regard to acquisitions and investments generaly, and must be taken into consideration by a foreign investor interested in making foreign investments in the United States. Where the requisite contracts exist to establish subject matter jurisdiction, the antitrust laws of the United States will be applied to all proscribed acts regardless of the nationality of the participants.[1] It is clear that most foreign investment in the United States constitutes the requisite minimum contacts required for jurisdiction.[2]

There are two primary antitrust areas which should be addressed by those counseling foreign investors interested in investing in the United States. First, attention should be given to antitrust matters relating to the initial acquisition of assets in the United States. Second, foreign investors should receive counsel regarding general prohibitions contained in the United States antitrust laws, particularly where United States law applied more stringent or

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1. *See, e.g.*, FTC v. Compagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1330 (D.C. Cir. 1980).

2. *See* Zenith Radio Corp. v. Matsushita Elec. Ind. Co. Ltd., 402 F. Supp. 262 (E.D. Pa. 1975).

3. 15 U.S.C. §§ 1-7 (1976).

different requirements than typical antitrust laws in foreign countries.

Two statutes are of primary concern in this analysis. The Sherman Act,[3] prohibits any contract, combination or conspiracy that creates an unreasonable "restraint on trade,"[4] and restricts monopolies or attempts to monopolize.[5] These provisions apply to all "trade or commerce among the several states or with foreign nations."[6] The Clayton Act,[7] proscribes price discrimination, ties-ins and exclusive dealings, and, of most significance for this analysis, bars the acquisition of stock or assets where the effect is to substantially lessen competition in a line of commerce.[8]

II. Acquisition of American Interests by a Foreign Entity

A. Premerger Notification

Section 7A of the Clayton Act[9] requires parties[10] to acquisitions (meeting certain size requirements), to make a premerger notification filing and observe certain statutory waiting periods before consummating a transaction. Any transaction to which section 7A applies is subject to the filing of prior notification with the United States Department of Justice and the Federal Trade Commission ("FTC"), the statutory waiting period may be extended should either agency request additional information regarding the proposed

4. 15 U.S.C. § 1 (1976).
5. 15 U.S.C. § 2 (1976).
6. 15 U.S.C. § 2 (1976).
7. 15 U.S.C. §§ 12-27 (1976).
8. See, 15 U.S.C. § 18 (1976).
9. 15 U.S.C. § 18(a) (1976) [added to the Clayton Act by Title II of the Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. No. 94-435, title II, § 201, 90 Stat. 1390 (1976)].
10. Parties must meet certain size requirements. See 15 U.S.C. § 18(a) (1976).

acquisition.[11] This section applies to the acquisition of either voting shares or assets.[12] The purpose of section 7A is to enhance the federal government's capability for preventive enforcement of section 7 of the Clayton Act[13] by giving its antitrust enforcement agencies the opportunity for advance screening of substantial acquisitions.

Section 7A applies if the acquiring or acquired person is engaged in commerce or any activity affecting commerce.[14] It should be noted that this commerce requirement is stated in the disjunctive and hence is even less demanding than section 7 of the Clayton Act, which is phrased in the conjunctive.

The rules promulgated by the FTC under section 7A[15] define "commerce"[16] as interstate or foreign commerce as defined in section 1 of the Clayton Act[17] and section 4 of the FTC Act.[18]

Accordingly, section 7A may, by its terms, be applicable to an acquisition by a foreign person[19] having no pre-existing sales into, or presence in, the United States. In fact, the FTC, in its statement of basis and purposes accompanying the promulgation of its notification rules, has taken the position that a domestic acquisition that meets the size tests, and qualifies for none of the other exemptions, will be subject to section 7A when made by a foreign person to the same extent as when made by a domestic

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12. 15 U.S.C. § 18(a) (1976).
13. 15 U.S.C. § 18 (1976).
14. 15 U.S.C. § 18(a)(1) (1976).
15. 16 C.F.R. §§ 801-803 (1982).
16. 16 C.F.R. § 801.2(1) (1972).
17. 15 U.S.C. § 12 (1976).
18. 15 U.S.C. § 12 (1976).
19. Defined to include national persons as well as all forms of partners of legal persons but to exclude the formation of unincorporated joint ventures. 15 U.S.C. § 18A (1976).

acquirer.[20]

Section 7A does not alter the subjective impact of the antitrust laws, but its file and wait provisions purport to apply to reportable acquisitions without regard to the Sherman or Clayton Acts.[21] If jurisdiction can be established, a potential foreign acquirer in violation of section 7A may be subjected to noncompliance civil penalties (up to $10,000 per day) and/or to an injunction pending compliance, whether or not the substantive requirements of section 7 of the Clayton Act were met.[22]

The FTC's rules do contain certain exemptions specifically applicable to acquisitions by "foreign persons"[23] (defined as a person the ultimate parent entity of which is neither incorporated in nor organized under the laws of, nor has its principal offices in, the United States or, if a natural person, is neither a citizen nor resident of the United States).[24] These exemptions are based on the conclusion that the acquisitions will have only minimal impact on United States commerce and, hence, the principle of comity dictates abstension. The exempted acquisitions are:

1. an acquisition of assets located outside the United States;[25]

2. an acquisition of United States-located assets of less than $10 million (not including investment assets -- defined as cash, deposits in financial institutions, other money market instruments and instruments evidencing government obligations);[26]

3. an acquisition of voting securities of a foreign issuer which will confer control of neither (a) an issuer which holds United States-located

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20. _See_, 43 Fed. Reg. at 33498-99 (July 31, 1978).
21. 15 U.S.C. § 18(a) (1976).
22. 15 U.S.C. § 18(g) (1976).
23. 16 C.F.R. § 802.51 (1982).
24. 16 C.F.R. § 801.1(e)(2)(i) (1982).
25. 16 C.F.R. § 802.51(a) (1982).
26. 16 C.F.R. § 802.51(c) (1982).

assets having an aggregate book value of $10 million or more (not including investment assets) nor (b) a United States issuer with annual net sales or total assets of $10 million (not including investment assets);[27]

4. an acquisition where (a) the acquired person is also foreign and (b) neither the combined aggregate annual sales of both the acquiring and acquired persons in or into the United States nor (c) such persons' aggregate United States-located assets, not including investment assets, amount of $110 million.[28]

In any other case, the fact that the acquiring person is foreign has no particular significance in determining the applicability of section 7A, although that fact may affect the amount of date required to be furnished. If the acquisition meets the commerce test and qualifies for no other exemption in section 7A or the FTC rules, the file-and-wait requirements will apply if both of the following size tests are met:[29]

1. SIZE-OF-PERSON TEST.
The acquisition will not be reportable unless it involves (a) an acquired person either (1) engaged in manufacturing and having annual net sales or total assets of at least $10 million or (2) not engaged in manufacturing and having total assets of at least $10 million and an acquiring person with total assets or annual net sales of at least $100 million, or (b) an acquired person with total assets or annual net sales of at least $100 million and acquired person with total assets or annual net sales of at least $10 million;[30]

2. SIZE-OF-ACQUISITION TEST.
The acquisition will not be reportable unless it would result in the acquiring person's holding at least 15% of the voting securities or assets of the acquired person or an aggregate total amount of voting securities and/or assets of the acquired person in excess of $15 million. In addition, subsequent acquisitions will be reportable if they (a) would result in the acquiring person's crossing one of certain higher notification thresholds and (b) do not qualify for an exemption which

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27. 16 C.F.R. § 802.5(b)(1)(2) (1982).
28. 16 C.F.R. § 802.51(d) (1982).
29. 15 U.S.C. § 18(a) (1976).
30. 15 U.S.C. § 18(a)(2) (1976).

> relates to the crossing of a higher threshold within five years of making a duly reported acquisition at a lower threshold. However, under a key exemption, a transaction which would result in the crossing of the $15 million threshold but not the 15% threshold is exempt if it would not result in the acquiring person's holding neither (a) assets of the acquired person valued at more than $10 million nor (b) voting securities that confer control of an issuer which, together with all entities it controls, has annual net sales or total assets of $10 million or more.[31]

The FTC has taken the position that it is not empowered by section 7A to grant ad hoc exemptions to the file-and-wait provisions if an acquisition does not qualify for any of the general classes of exemption set forth in the statute and the rules.[32] The agencies will, however, issue interpretations of section 7A and will entertain applications for early termination of the waiting period once the required notification has been filed.[33]

The initial waiting period imposed by the Hart-Scott-Rodino Act varies with the nature of the acquisition. These periods are as follows:

1. Cash tender offer -- fifteen days following the acquiring person's filing;[34]
2. Acquisitions not requiring negotiation with the acquired person (e.g., open market purchase, private purchase from a third party) -- thirty days following the acquiring person's filing;[35]
3. Any negotiated acquisition (e.g., merger) -- thirty days following both the acquiring and acquired person's filings.[36]

In the first two cases the acquired person has an independent legal obligation to file.[37] Request for additional information extends the period until twenty days (ten days

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31. 15 U.S.C. § 18(a)(3) (1976).
32. 15 U.S.C. § 18(a) (1976).
33. 15 U.S.C. § 18(b)(2) (1976).
34. 15 U.S.C. § 18(b)(1)(B) (1976).
35. 15 U.S.C. § 18(b)(1)(B) (1976).
36. 15 U.S.C. § 18(b)(1)(B) (1976).
37. 15 U.S.C. § 18(g)(1) (1976).

for cash tender offers) following the requesting agency's receipt of the requested information.[38]

If the acquisition is subject to the file-and-wait provisions of section 7A, the filing may be accompanied by voluntary submissions designed to demonstrate that the proposed acquisition poses no substantive antitrust problems and/or a request for early termination of the waiting period.[39]

B. Substantive Clayton Act, Section 7 Analysis

A foreign firm's acquisition of an American firm or its assets is treated and analyzed in essentially the same manner as a wholly domestic acquisition. Thus, an analysis must be made to see if the acquisition will be permitted under section 7, which prohibits the acquisition of all or part of a domestic entity's shares or assets whenever the transaction creates a reasonable probability of a "substantial lessening of competition" in any significant "line of commerce."[40]

For purposes of analysis, there are three broad types of acquisitions:

1. Horizontal. Acquisitions between business competitors, such as manufacturers of the same type products of distributors selling competing products in the same market area.

2. Vertical. Acquisitions between buyer and seller of a particular product.

3. Conglomerate. Merger of corporations which are neither competitors nor potential or actual customers or suppliers of each other. There are three types of conglomerate mergers:

    a. Geographic extension. Merger whereby acquiring firm extends its dominance to an adjacent geographic market.

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38. 15 U.S.C. § 18(e)(2) (1976).
39. 15 U.S.C. § 18(b)(2) (1976).
40. 15 U.S.C. § 18 (1976).

b. _Product extension_. Merger joining of firms with related product markets. Acquired and acquiring companies are functionally related in production and/or distribution but sell products that do not compete directly with each other.

c. _Pure conglomerate merger_. Merger between two firms which operate in unrelated markets having no functional economic relationship.

In applying the antitrust laws to merger and acquisition transactions, the courts have emphasized the above distinctions rather than the foreign-domestic factor. Thus, a foreign firm's acquisition of an American firm is analytically comparable to the purchase of a foreign firm by an American firm.[41] Where a foreign firm already has sbustantial operations in the United States, either directly or through subsidiaries, the acquisition of an American firm will normally be treated as a purely domestic merger.[42]

While the United States had federal statutory limitations on control or ownership in several specified industries (including defense, shipping and communications), there are no general takeover controls in other market sectors. This favorable attitude toward direct foreign investment in the United States is subject to periodic popular shifts. The official Department of Justice position has been, and continues to be, equal and non-discriminatory application of the antitrust laws to domestic and foreign entities. This policy has been demonstrated by various decisions in which courts refused to enjoin foreign takeovers of United States companies. In _Cooperweld Corp. v._

41. _Cf_. B.O.C. Int'l Ltd. v. F.T.C., 557 F.2d 24 (2d Cir. 1977); United States v. Gilette Co., 406 F. Supp. 713 (D. Mass. 1975).

42. _Cf_. United States v. Standard Oil Co., 253 F. Supp. 196 (D.N.J. 1966); Heatransfer Corp. v. Volkswagenwerk A.G., 553 F.2d 964 (5th Cir. 1977).

Imetal,[43] the court stated:

> The arguments [national security limitations on foreign control and economic reciprocal desire for foreign capital] are off-setting and, in any event, this Court shall treat foreign investment exactly like domestic investment in the absence of Congressional guidance.[44]

The greatest risk of antitrust exposure arises out of sizeable mergers between substantial direct competitors that sell the same product in the same market. In such cases, it appears that the substantial lessening of competition will be presumed. Supreme Court decisions dealing with mergers suggest that the burden of justifying such a merger is on the parties to the merger.[45] Where such proof is not advanced, the Court ostensibly presumes that the merger will adversely affect competition. The Court may proceed with this assumption even if the market share of the merged companies is small and entry into the market is easy.[46]

Acquisitions by foreign firms made in the United States are not typically horizontal, since many foreign firms do not operate within the United States. However, United States operations by the subsidiaries of foreign firms can create the prohibited horizontal combination and lessening of competition.

In United States v. CIBA Corp.,[47] the Swiss chemical companies with American subsidiaries that were planning to merge were required by consent decree to divest their competing lines. Likewise, the acquisition by Rhinechem

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43. 403 F. Supp. 579 (W.D. Pa. 1975).
44. Id. at 608.
45. See United States v. General Dynamics Corp., 415 U.S. 486, 497 (1974).
46. See, e.g., United States v. Von's Grocery Co., 384 U.S. 270 (1966).
47. 1970 Trade Cas. (CCH) ¶ 73,269 (S.D.N.Y. 1970).

Corporation, a Bayer A.G. subsidiary, of the Pigments Division of Chemetron was attached by the FTC and enjoined by a district court.[48] Since Rhinechem already competed with Chemetron in the manufacture of organic pigments, the transaction was seen to raise antitrust questions warranting a preliminary injunction pending a determination by the FTC. Faced with lengthy litigation and the risk of an ultimate illegality, the transaction was abandoned.

Vertical acquisitions uniting supplier and distributor also present possible antitrust consequences. These mergers are often referred to as either (1) "upstream" or backward acquisition by a manufacturer of his raw materials or parts supplier or (2) "downstream" or "forward" acquisition by a supplier of his fabricator or distributor. Vertical acquisitions may be held to lessen competition in three ways:

1. by cutting off other independent distributors or fabricators from suppliers by the acquiring firm;[49] or

2. by shutting out or "foreclosure" of the acquired firm's competitors from sales to the acquiring firm or its distributor organization;[50] or

3. by facilitating promotional product differential when the merger involved a manufacturing firm's acquisition of firms at the retail level.[51]

One example of vertical mergers that have run afoul of the antitrust laws is the proposed acquisition by Volkswagen of America of a United States manufacturer of automobile air conditioners.[52]

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48. F.T.C. v. Rhinechem Corp., 459 F. Supp. 785 (N.D. Ill. 1978).

49. 1977-2 TRADE REG. REP. (CCH) ¶ 4510 (1974).

50. 1977-2 TRADE REG. REP. (CCH) ¶ 4510 (1974).

51. 1977-2 TRADE REG. REP. (CCH) ¶ 4510 (1974).

52. Heatransfer Corp. v. Volkswagenwerk A.G., 553 F.2d 964 (5th Cir. 1977).

The proposed transaction was held to be illegal because the acquired firm's competitors were foreclosed from selling air conditioners to the VW organization.

The acquisition of an American aluminum fabricator by Aluminum Ltd., a Canadian primary aluminum producer, was challenged as harmful to the acquired fabricator's independent rivals who would be forced to compete with the newly formed integrated producer/fabricator.[53]

The most common form of merger is the conglomerate merger. In practice, it appears that conglomerate mergers (acquisitions by foreign firms having no product similarities or customer/supplier relations with the acquired American firm) have not been attacked under the United States antitrust laws. The series of cases brought by the Department of Justice in the late 1960's seeking to extend the antimerger laws to large conglomerate acquisitions on the basis of size and concentration of power failed in the trial courts. The courts generally declined to extend statutory antitrust bans beyond acquisitions hostile to competition in a particular market.[54]

Notwithstanding this general attitude, product diversifications or extension by acquisition in related fields have been challenged. Since such transactions do not unite firms competing in the manufacture or sale of the same product, no automatic lessening of competition can be presumed. An illegal impairment of competition may be charged, however, in either of two settings:

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53. United States v. Aluminum Ltd., 1965 Trade Cas. (CCH) ¶ 71,366 (D.N.J. 1965).

54. _See_, _e.g._, United States v. Ling-Temco-Vought Inc., 1971 Trade Cas. (CCH) ¶ 73,607 (W.D. Pa. 1971); United States v. Int'l Tel. & Tel. Corp., 1971 Trade Cas (CCH) ¶ 73,619 (N.D. Ill. 1971), _dismissal vacated and consent decree entered_, 1971 Trade Cas. (CCH) ¶ 73,667 (N.D. Ill. 1971).

1. If "potential competition" between the merging firms in nearby product markets is extinguished by the acquisition[55] or

2. If the acquired firm's dominant competitive position in its own field is "entrenched" through its acquisition by a top or powerful firm in a related field.[56]

The doctrine of potential competition is viable today but will be applied only in concentrated markets. In determining the applicability of the doctrine, the courts have taken into consideration various factors, such as the nature or extent of the relevant market, the nearness of the absorbed corporation to that market, that corporation's eagerness to enter the market, its resourcefulness, and similar circumstances. The controlling issue in most cases is the status of the acquiring company as a potential competitor.

In addition to the general aspects connected with the purpose of preventing the loss of potential competition, the doctrine includes two additional theories: the doctrine of the perceived or fringe effect of potential entry and the doctrine of actual potential entry. The essence of the perceived potential entry doctrine is that the court will analyze whether a company is a potential competitor in the sense that its position on the edge of the market exerted a beneficial influence on the market's competitive conditions.[57]

The doctrine of actual potential entry proscribes the acquisition of a large corporation by a corporation which is probably about to enter the relevant market *de novo* or through a toehold acquisition of a small corporation. This

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55. *See* United States v. Penn-Olin Chem. Co., 378 U.S. 158 (1964).
56. *See* F.T.C. v. Proctor & Gamble, 386 U.S. 568 (1967).
57. *See* United States v. Flagstaff Brewing Corp., 410 U.S. 526, 533-37 (1973).

theory was applied in the area of foreign investment in BOC International Ltd. v. FTC.[58] The court there held that the application of the actual potential entrant doctrine must contain at least some reasonable temporal estimate related to the near future, with "near" defined in terms of entry barriers and lead time necessary for entry into a particular industry. BOC's capability for some "eventual" future expansion into American markets on its own did not show sufficient "potential" competition. "Probabilities" rather than "ephemeral possibilities" was the applicable standard.[59]

In the recent case of Yamaha Motor Co. v. F.T.C.,[60] the actual potential entrant doctrine was again applied. The court based its determination on the likelihood that the foreign entity would itself enter the relevant market should the proposed action be prohibited and whether the entry of the foreign entity itself would have a better effort on competition than would the proposed action (here the creation of a joint venture with an American corporation). The Court of Appeals for the Eighth Circuit affirmed the FTC finding that the United States firm's acquisition of stock in the jointly named company violated section 7 of the Clayton Act and section 5 of the Federal Trade Commission Act as it may have eliminated the foreign firm as an actual potential entrant into the concentrated market.

A similar analysis has been applied with respect to product extension conglomerate mergers. An illegal lessening of competition may be asserted if the acquiring firm was

58. 557 F.2d 24 (2d Cir. 1977).
59. Id. at 28.
60. 1981-2 Trade Cas. (CCH) ¶ 64,202 (8th Cir. 1981).

on the verge of expanding into the acquired firm's product markets, or if its powerful presence "in the wings" or at the edge of the market exerted a perceptible competitive influence on the price levels or on competitive dynamism in the acquired firm's market. The antitrust risks of product extension mergers are exemplified by the U.S. Supreme Court's invalidation of the acquisition of Clorox, the leading American bleach producer, by Proctor & Gamble, the top manufacturer of household detergents,[61] and of the acquisition of S.O.S. the foremost domestic steel wool producer, by General Foods, a large manufacturer of food and grocery products.[62] In both cases, the "entrenched" competitive position of the acquired firm was fortified through its acquisition by a financially potent parent corporation in the related field, with strong advertising and marketing capabilities at its disposal. The same analysis was applied to attempted foreign investment when the FTC attacked the acquisition of Stouffer Foods, the leading American firm in the "quality" frozen food market, by Nestle, the Swiss multi-national food processor.[63]

The principal of potential competition also applies to geographic market extensions as well. In such cases, the acquisition of one leading firm by another leading firm in the same product area but in different geographic markets runs a risk of illegality if the transaction terminates preexisting potential competition by the acquiring firm. An acquiring firm that is on the verge of internal expansion

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61. F.T.C. v. Proctor & Gamble, 386 U.S. 568 (1967).

62. General Foods Corp. v. F.T.C., 386 F.2d 936 (3d Cir. 1967), _cert. denied_, 391 U.S. 919 (1968).

63. _See_ F.T.C. Summary: Nestle Divests Frozen-Food Plant in Settlement (April 27, 1979).

into the acquired firm's markets, or that exerts a substantial perceived competitive influence within those markets, may be viewed as lessening substantial potential competition if it expands by a sizeable acquisition. Nevertheless, substantial market extension acquisitions have been successfully completed.[64]

Entry into a market by means of an acquisition may be deemed to contribute to competition, rather than lessen it, in what are termed "toe-hold" acquisitions. This doctrine asserts that an acquisition of a small firm in an oligopolistic market might enhance competition as well as a de novo entry. Since the small firm was not effective in its competition with the oligopolists, the small firm fortified by the acquiring firm, may become a viable competitor. An acquisition of a firm with a market share of 10% or less in a concentrated industry can be expected to qualify as a toe-hold acquisition.[65]

C. Governmental Guidelines

In 1968, the United States Department of Justice issued its Merger Guidelines,[66] indicating the analysis it would apply in deciding whether to proceed against mergers. These guidelines do not bind the courts but are meant to aid businessman and their advisors in evaluating potential antitrust exposure. These guidelines represent the standards applied by the Department of Justice in determining whether to challenge corporate acquisitions or mergers under section 7 of the Clayton Act. The policy of the current

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64. See, e.g., United States v. Standard Oil Co., 1970 Trade Cas. (CCH) ¶ 62,988 (N.D. Ohio 1970); B.O.C. International Ltd. v. F.T.C., 557 F.2d 24 (2d Cir. 1977).
65. See, e.g., Budd Co., 86 F.T.C. 518 (1975).
66. 1977-2 TRADE REG. REP. (CCH) ¶ 4510 (1968).

administration indicates that these guidelines are conservative and a revision to reflect this change in attitude is under consideration.

The Federal Trade Commission is also involved in the enforcement of section 7 of the Clayton Act. In a statement made before the Senate Judiciary Committee, FTC Chairman James C. Miller stated that "mergers play an important and often procompetitive role in our society."[67] He continued on to reiterate that the Federal Trade Commission will continue to "vigorously pursue" challenges to mergers that create monopoly power and thus adversely affect prices and rate of product improvement.[68]

Chairman Miller indicated that while the government's approach to mergers has been to challenge takeovers because they resulted in increased market share for the merged firms, in the future additional factors would be considered.[69] These factors include efficiencies likely to result from the merger, and the constraints imposed by foreign producers and by producers of closely related products. Thus, it appears that the Federal Trade Commission will be increasingly willing to take into consideration the procompetitive effects of a proposed merger when deciding whether to challenge the merger.

II. Joint Ventures

An alternative to merger or acquisition as a means for foreign entities to enter the United States market is the

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67. Statement made before the Senate Judiciary Committee by James C. Miller, F.T.C. Chairman.
68. Id.
69. Id.

formation of a joint venture. Such enterprises may range from technology exchanges to commercial partnerships. Joint ventures are subject to the Sherman Act's prohibition of unreasonable restraints of trade and the Clayton Act ban on acquisitions that may lessen competition.[70] They may also be challenged by the FTC as an "unfair method of competition".[71]

The creation of a joint corporation and the taking of its shares by the parent corporations will be analyzed under the same principles applicable to other acquisitions.[72] All joint ventures face potential scrutiny since the cooperation of the parent corporations in the joint venture may foster other mutual restraints or anticompetitive or collusive activities on their part.

In assessing the potential antitrust liability involved in the formation of any joint venture, attention should be given to the balance between the competitive necessity of the joint venture or its contribution to additional competition as and its potential for diminishing preexisting or potential competition between the foreign and domestic parents. Research joint ventures should be analyzed under the Department of Justice Guidelines.[73]

The most significant antitrust considerations arise out of joint distribution or sales ventures between foreign and domestic product competitors. These ventures create little or no new competitive activity and end commercial

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70. See, e.g., United States v. Hercules Inc., 1973-1 Trade Cas. (CCH) ¶ 74,530 (D. Del. 1973).

71. See, e.g., Yamaha Motor Co. v. F.T.C., 1981-2 Trade Cas. (CCH) ¶ 64,202 (8th Cir. 1981).

72. Id.

73. UNITED STATES DEP'T. OF JUSTICE, ANTITRUST GUIDE CONCERNING RESEARCH JOINT VENTURES (November, 1980).

rivalry in the United States between the parents of the venture. The safest type of joint venture is the creation of a new entity to develop the foreign entity's new product in a new market which it has no capability of entering alone.

III. Particular Elements of United States Antitrust Laws as to Which Foreign Investors Should Be Advised

A. Section 1 of the Sherman Act[74]

The antitrust laws of the United States involve a more stringent limitation on price fixing than do the laws of many other nations. Violations of these statutes is a felony and, hence, punishable by imprisonment and/or a substantial fine.[75]

Also of significance is the validity of the intraenterprise conspiracy doctrine under the antitrust laws of the United States. This doctrine is not followed in most foreign countries and is specifically excluded from the antitrust law of the European Economic Community. A series of Supreme Court cases suggests that the fact that a parent and its subsidiaries are incorporated separately is sufficient to create the requisite plurality under section 1 of the Sherman Act.[76] The doctrine is applicable especially where the alleged conspirators "hold themselves out as competitors".[77]

While the language of the Supreme Court is very broad so as to permit the conclusion that activities of the parent

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74. 15 U.S.C. § 1 (1976).
75. 15 U.S.C. § 1 (1976).
76. See, e.g., Perma Life Mufflers Inc. v. International Parts Corp., 392 U.S. 134, 141-142 (1968).
77. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons Inc., 340 U.S. 211, 215 (1951).

and its subsidiaries are unprotected entirely from antitrust liability, a number of lower federal courts have sought to limit the application of the doctrine. In Ark Dental Supply Company v. Cavitron Corporation,[78] the Court held that the business decision of the parent to sell only to dealers of a division of the parent corporation did not constitute a conspiracy since the alleged conspirators, the parent and its division did not hold themselves out as competitors. Likewise, no conspiracy was held to exist where the concerted action between the affiliated corporations did not restrain the trade of the third party.[79]

In I. Haas Trucking Corp. v. New York Fruit Auction Corp.,[80] the Court held that there was no anticompetitive motive for the separate corporate status of the defendants. For purposes of section 1, the two defendants were regarded as a single entity and therefore incapable, as a matter of law, of concerted activity, conspiracy or contracting with one another. The Court reasoned that the sole purpose of creating separate corporate identities was to separate the employees of each operation into separate unions with different fringe benefits. Since there was no anticompetitive motive and the two entities were "clearly parts of an integral operation, so unified that they cannot be regarded as separate in any but the most perfunctory and technical manner" the Court held there could be no conspiracy.[81]

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78. 461 F.2d 1093 (3d Cir. 1972).

79. R.E.A. Express, Inc. v. Alabama Great Southern R. Co., 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976).

80. 364 F. Supp. 868, 873 (S.D.N.Y. 1973).

81. Id. See also Grant Paper & Film Corp. v. Albermarle Paper Corp., 430 F. Supp. 981 (S.D.N.Y. 1977) [where the court held no conspiracy existed since the affiliated corporations were, for practical purposes, "a single business unit"].

B. Robinson-Patman Act[82]

Section 2(a) of the Robinson-Patman Act[83] prohibits price discrimination. For section 2(a) to apply, three jurisdictional requirements must be met.[84] First, the seller must be engaged in interstate commerce.[85] Second, one or more of the purchasers involved in the discrimination must be engaged in interstate or foreign commerce.[86] Finally, the commodities sold must be for use, consumption or resale within the United States, its territories or a place under its jurisdiction.[87]

The supposed purpose behind the Robinson-Patman Act is to prevent mass distribution retailers, particularly larger entities, from obtaining discriminatory concessions from manufacturers. Conduct proscribed by the Act usually falls into one of three principal categories. Volume and quantity discounts are concessions made to buyers based on the total volume of purchases during a given period of time or based on the amount bought in a single transaction.[88] The grant of such a discount is not a violation of the Robinson-Patman Act if the discounts are available to all customers on a non-discriminatory basis; this equality of treatment must exist in practice as well as in theory.[89]

The second major category of Robinson-Patman proscribed activity is that of functional discounts. Functional discounts are discounts based on the distributive

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82. 15 U.S.C. §§ 13(a),(b), 21(a) (1976).
83. 15 U.S.C. § 13(a) (1976).
84. 15 U.S.C. § 13(a) (1976).
85. 15 U.S.C. § 13(a) (1976).
86. 15 U.S.C. § 13(a) (1976).
87. 15 U.S.C. § 13(a) (1976).
88. *See, e.g.*, F.T.C. v. Morton Salt Co., 334 U.S. 37 (1948).
89. *Id.* at 42.

services performed by various types of marketing intermediaries, such as warehousing, invoicing or the performance of credit functions.[90]

The courts have generally taken a rather narrow view with respect to the conduct that will be deemed to constitute a functional discount.[91] The concession in price must not exceed the fair value of the function performed; the grant of concessions in excess of such value received will create antitrust liability.

The other common form of price discrimination is selective price concessions in favor of a particular customer.[92] A violation of the Robinson-Patman Act occurs where a seller grants discounts or allowances haphazardly to particular customers where such discounts or allowances would not have been available under seller's announced price schedule.[93] For the proscribed conduct discussed to create liability there must be an adverse effect on competition.

Foreign nations generally do not prohibit price discrimination unless that discrimination is accompanied by a dominant market position.[94]

C. Interlocking Directorates

Section 8 of Clayton Act prohibits a person from being a director in two or more corporations, meeting the jurisdictional requirements, which are competitors.[95] This

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90. F.L.M. Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1091 (2d Cir. 1976).

91. *See, e.g.*, F.T.C. v. Ruberoid Co., 343 U.S. 470 (1952); *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956).

92. *See, e.g.*, Western Grain Co., 49 F.T.C. 983 (1952).

93. 15 U.S.C. § 13(a) (1976).

94. See European Economic Community, Treaty of Rome, Art. 85 & 86, Jan. 1, 1958, ___ Europ T.S. ___.

95. 15 U.S.C. § 19 (1976).

prohibition is aimed at restrictions of competition which may come about if ostensibly competing companies are, in reality, controlled by the same set of people.

In Borg-Warner Corp.,[96] an administrative law judge of the Federal Trade Commission recommended the termination of interlocking directorates between Borg-Warner and Robert Bosch Corporation (a West German parent with United States subsidiaries). The two corporations competed in the market for the sale of automobile replacement parts. An order was issued prohibiting the two corporations from sharing a director with any competitor. The ruling was limited, with respect to Robert Bosch, however, to apply only to corporations doing business in the United States.

IV. Conclusion

As a general proposition, a foreign firm's investing or conducting business in the United States is subject to the United States antitrust laws. The Justice Department has summarized the situation as follows:

> The Department's most important concern is to protect the United States domestic market against restraints on competition -- restraints on entry, pricing and terms of sale. In carrying out this effort, no essential distinction is made between domestic and foreign firms. In general, foreign firms, including state-owned or controlled firms, will be expected to observe the prohibitions of our antitrust laws, and to benefit from the enforcement of those laws in the same manner as domestically incorporated enterprises.[97]

Foreign firms seeking to enter the American market-place by means of the acquisition of assets in the United States

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96. Borg-Warner Corp., ___ F.T.C. ___ (1980) (F.T.C. docket no. 9120).

97. UNITED STATES DEP'T. OF JUSTICE, ANTITRUST GUIDE FOR INT'L OPERATIONS, p.9 (rev. ed. March, 1980).

must be made aware of the nuances of the United States antitrust law. The importance of retaining counsel knowledgeable in the area cannot be overemphasized.