BACKGROUND MATERIALS ON PREMERGER COORDINATION

To Accompany
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Over the past decade the Federal Trade Commission and the U.S. Department of Justice have brought six "gun-jumping" cases, which are described below. These Background Materials do not address other cases brought under Section 1 of the Sherman Act, Section 5 of the FTC Act, or Section 7A of the Clayton Act.

United States v. Titan Wheel International, Inc.

- No. 96-01040, 1996 WL 351143 (D.D.C. May 10, 1996).
- Press Release, Federal Trade Commission, Titan to Pay Maximum $130,000 Civil Penalty to Settle Federal Charges over Acquisition from Pirelli Armstrong (May 7, 1996), *available at* http://www.ftc.gov/opa/1996/05/titan.htm.

Titan Wheel entered into an agreement to purchase a tire plant from Pirelli Armstrong, effective on July 17, 1994. On that same day, Titan Wheel took control of the plant, as well as its inventory, equipment, and machinery. In addition, Titan Wheel took control of Pirelli Armstrong's lists of customers and suppliers, proprietary information that rivals generally view as competitively sensitive. With this basis, Titan assumed some critical management functions, such as negotiating a key labor agreement.

Titan Wheel proceeded with this acquisition not only before the Hart-Scott-Rodino waiting period expired, but also three days before the parties even notified the FTC and DOJ of the transaction. When the FTC learned of the agreement and objected, Titan Wheel transferred the plant and assets back to Pirelli Armstrong, effective July 29, 1994, and agreed to pay the maximum penalty under Section 7A for each of the thirteen days it was in violation. Although the FTC did not challenge the agreement on substantive antitrust grounds, the parties abandoned the transaction.

In re Insilco Corp.

- 125 F.T.C. 293 (1998).
- File No. 961-0106 (F.T.C. June 1997), 1997 WL 530775.

Insilco agreed to purchase Helmut Lingemann's U.S. facilities for manufacturing aluminum tubing for automobiles, Helima-Helvetion, International. This transaction would have made Insilco the sole North American supplier of large welded aluminum tubes. It would also have given Insilco a 90% market share for small welded aluminum tubes, leaving only one small rival in that market. Prior to receiving regulatory clearance for this transaction, Helima provided Insilco with customer-specific price information, current and future pricing plans, competitive strategies, and price formulas.

The FTC challenged both the acquisition itself under Section 7 of the Clayton Act and Section 5 and the data exchange under Section 5. In a consent agreement, Insilco agreed to divest itself of two Helima mills plus ancillary assets. In addition, Insilco agreed to provide the purchaser of the divested mills with needed training help to ensure that it could become a viable competitor. Insilco also agreed to an injunction prohibiting it from receiving non-aggregated, customer-specific information prior to the closing of future transactions.

In re Commonwealth Land Title Inurance Co.

- FTC Docket No. C-3835 (Nov. 1998), 1998 WL 784323.
- 126 F.T.C. 680 (1998).
- FTC File No. 981-0127 (Aug. 1998), 1998 WL 538814.

Commonwealth and First American operated the only two title facilities in the Washington, D.C. area. The companies signed a letter of intent to establish a joint venture within which they could consolidate their facilities, and Commonwealth moved its title plant to First American's premises. The companies then terminated their separate customer agreements and required their customers to sign new "Interim Plant Use Agreements" with identical prices, terms, and conditions to govern the companies' provision of services until the consolidated facility could be created. The new agreements required customers to pay two to three times more than they had been previously paying, despite receiving a more limited range of services.

The FTC challenged the joint venture agreement on antitrust grounds. First, the agency asserted that the parties' collaborative efforts to impose higher "interim" prices constituted unlawful price-fixing in violation of Section 5. In addition, the title companies' efforts to consolidate their plants and operations constituted an effort to eliminate competition and create a monopoly in the local land title services market, violating Section 7 and Section 5. Although Commonwealth and First American had not been required to file an HSR notification of their letter of intent, their conduct was viewed as analogous to gun-jumping because the firms effectively combined their efforts prior to consummating their joint venture.

Faced with the FTC's challenge, the parties abandoned their planned joint venture. Commonwealth entered into a consent agreement under which it agreed to move its title plant to a separate location from and operate it in competition with First American's facility.

Commonwealth agreed further to restore customers to their most recent previous prices, to refund any excess payments that had been made, and not to claim legal rights under the interim customer agreements.

United States v. Input/Output, Inc.

- No. 99-0912 (D.D.C. filed Apr. 12, 1999).
- Complaint, No. 99-0912 (D.D.C. filed Apr. 12, 1999), *available at* http://www.ftc.gov/os/1999/04/inputoutput.pdf.
- Press Release, Federal Trade Commission, Companies to Pay $450,000 Civil Penalty for Violation of Hart-Scott-Rodino Waiting Period (Apr. 12, 1999), *available at* http://www.ftc.gov/opa/1999/04/input.htm.

Input/Output agreed to purchase Laitram's wholly-owned subsidiary DigiCOURSE. This subsidiary was the sole manufacturer of cable positioning systems, which are critical in positioning and operating the seismic data acquisitions systems made by Input/Output. Ten days after signing the acquisition agreement – four days before even filing the requisite pre-merger notifications – Input/Output began to integrate its operations and personnel with those of DigiCOURSE. They persisted in this effort for more than three weeks before trying to reverse it after DOJ objected.

Included among its premature actions, Input/Output announced that it was reorganizing itself into product-based divisions, including a newly structured division for the DigiCOURSE operations and Input/Output's entire marine operations. Three former DigiCOURSE officers were appointed to leading positions in this division – including appointment of the former head of DigiCOURSE as the division president. These three officers, along with three other DigiCOURSE employees, moved to the Input/Output offices, where they were given offices and access to internal Input/Output reports. They also received new e-mail addresses, as well as business cards with Input/Output titles that were given to DigiCOURSE customers. The newly-appointed division president went to England to negotiate a dispute between Input/Output and one of its customers and then signed the resulting settlement on behalf of Input/Output. He also consulted with Input/Output officers regarding that company's contemplated purchase of another marine equipment company.

If Input/Output's acquisition of DigiCOURSE had raised antitrust concerns, the companies' degree of premature integration would have frustrated the ability of the enforcement agencies to fashion an effective remedy. Even though, on review, the transaction did not raise competitive concerns, both Input/Output and Laitram each agreed to pay civil penalties of $225,000 under Section 7A for their failure to observe the waiting period before integrating their operations.

United States v. Computer Associates International, Inc.

- No. 01-02062, 2002 WL 31961456 (D.D.C. Nov. 20, 2002).
- No. 01-02062, 2002 WL 32387915 (D.D.C. Apr. 22, 2002).

In the purchase agreement between Computer Associates and Platinum, which were direct rivals, Computer Associates imposed an extraordinary series of pre-consummation restrictions on Platinum's operations, pricing, information management, and employees. Consumer Associates installed at Platinum's office one of its own employees, who was given the authority to review and approve customer contracts. Platinum's sales representatives were expressly required to get prior approval of contracts granting discounts greater than 20% off list price, even though such discounts previously had been routine and sometimes even approached 80%. Whereas Platinum previously had been willing to incorporate non-standard terms in its contracts, Computer Associates prohibited such deviations without prior approval. Computer Associates also required Platinum to cease offering software consulting contracts for a fixed fee that lasted more than thirty days. In the course of monitoring and supervising Platinum's management and sales activities, Computer Associates' employees received competitively sensitive information, including the prices and amount of discounts that specific customers were offered and the justifications for those proposals. Computer Associates also denied Platinum permission to participate in a trade show where Platinum could have displayed its products and sought future sales. In sum, Computer Associates prematurely took control of Platinum's operations, and it used that control to elevate Platinum's prices, limit services, and restrict the independent competitive activity of a company that still was a direct rival.

To resolve the matter, which alleged violations of Section 1 and Section 7A, Computer Associates entered into a settlement requiring the company to pay civil penalties of $638,000. The Final Judgment also enjoined Computer Associates from entering into any merger agreement under which it could, during the pre-consummation period, establish the prices for products or services offered by a merger partner, receive bid information submitted to that partner, or insist on the right to approve customer contracts. Computer Associates had earlier settled a separate complaint alleging violation of Section 7 by agreeing to divest certain Platinum assets.

United States v. Gemstar-TV Guide International, Inc.

- No. 03-0198, 2003 WL 21799949 (D.D.C. July 11, 2003).
- Competitive Impact Statement, No. 03-0198 (D.D.C. filed March 19, 2003), *available at* http://www.usdoj.gov/atr/cases/f200800/200848.htm.
- No. 03-0198, 2003 WL 22019515 (D.D.C. Feb. 6, 2003).
- Complaint, No. 03-0198 (D.D.C. filed Feb. 6, 2003), *available at* http://www.usdoj.gov/atr/cases/f200700/200737.htm.

The merger parties were both producers of interactive program guides, which are on-screen guides that enable television viewers to display and select among program listings. As an outgrowth of patent/antitrust litigation, the parties in the spring of 1999 began discussing the possibility of creating a joint venture, negotiations that in October resulted in an agreement to merge. In June, however, Gemstar and TV Guide mutually agreed to each "slow roll" their ongoing discussions with various cable service providers to establish long-term contracts, until the parties could resolve their negotiations. At approximately the same time, the parties agreed that TV Guide would concentrate on marketing to cable service providers while Gemstar would focus its efforts on sales and licensing to consumer electronics firms. Gemstar and TV Guide also agreed which of them would deal exclusively with specific customers during the pre-consummation period. In addition, the parties determined the prices and terms to be offered to most cable service providers, an agreement that required the companies to share competitively-sensitive, customer-specific information. These agreements required TV Guide to significantly alter the offers it had been making prior to coordinating its price-setting and marketing efforts with Gemstar.

These agreements were viewed as constituting both price-fixing and customer allocation in violation of Section 1. In addition, the parties were viewed as having violated the waiting period requirement of Section 7A by sharing confidential, customer-specific, marketing and pricing information and by prematurely integrating their marketing operations, assets, and decision-making efforts. Even though the DOJ decided not to challenge the merger itself on substantive antitrust grounds, the final judgment required Gemstar and TV Guide each to pay the maximum civil penalty under Section 7A of $11,000 per day, for a combined total of $5,676,000. In addition, the parties were enjoined from engaging in future conduct that would constitute similar violations of the Sherman and Clayton Acts.