

Antitrust in the transport sector: recent developments

W Todd Miller, William A Mullins, David C Reeves
Baker & Miller PLLC

The application of the US antitrust laws to the transportation sector is rich with history and complexities. Each key area of transportation (aviation, trucking, railroad and shipping) has its own special history and path to the application of the antitrust laws. Moreover, each area enjoys varying degrees of antitrust immunity stemming from the historically-based intersection between regulation and full application of the antitrust laws. Thus, both potential transactions and restraint of trade cases require close study of traditional antitrust principles, the nature of the regulatory scheme and any potentially applicable exemptions. This chapter will explore briefly the antitrust-regulatory interplay in each key transportation sector and discuss some recent developments.

The existence of a regulatory agency responsible for a specific transportation sector does not mean, however, that antitrust or antitrust principles are irrelevant. Indeed, in many instances, the question is not whether antitrust principles apply, but is more a question of how they are applied, who applies them and what weight they will be given in the process to be followed by the relevant regulatory agency. In such cases, there may be resulting antitrust 'immunity' from suits by the traditional antitrust enforcers (the Department of Justice (DOJ) and Federal Trade Commission (FTC)) or by private parties. The basic rationale of this structure is that the relevant regulatory body with substantial industry-specific expertise is to hear complaints that sound in antitrust. In some cases (eg, railroad mergers), the views of DOJ are an important part of the process. But such views are not dispositive and the regulatory agency is generally free to balance antitrust considerations with other public policy goals so long as it does so in a plausible and otherwise supportable way.

Aviation

The aviation sector has been substantially deregulated and opened to antitrust enforcement. While certain types of transactions remain subject to review and approval (and hence receive antitrust immunity) by the Department of Transportation (DOT), most areas of airlines operations are subject to scrutiny and potential challenge by the US Department of Justice. This is reflected by the number of airline matters during the past year.

For example, in early 2004, the combination of KLM with Air France was approved. While this transaction appeared to affect the European market much more than the US, DOJ undertook a somewhat unusual analysis. Usually, airline transactions have been examined on a city-pair basis to determine if the transaction would eliminate substantial competition on such a basis. In the KLM/Air France transaction, however, DOJ examined both city pairs on which KLM and Air France directly competed (there was only one affecting the US) and city pairs that were part of the broader airline alliances to which each belonged. Because KLM and Air France were in different alliances (Wings and SkyTeam, respectively), DOJ viewed the transaction as reducing the number of alliances from

four to three and therefore examined hundreds of city-pairs where those alliances implicated the US. In light of substantial remedies imposed by the European Commission on the transaction, DOJ closed its investigation.

Another transaction that received substantial attention was the relatively unusual manoeuvring among United Airlines and Atlantic Coast Airlines (ACA). In mid-2003, ACA announced that it would no longer operate as 'United Express' but would compete with United as a low-cost airline based in Washington, DC. In response, Mesa Air offered to acquire ACA (which later became an effort to take over the board of ACA), and Mesa and United declared that Mesa would have ACA continue as United Express. In late 2003, DOJ began an investigation. At the same time, and in response to an action filed by ACA, a court enjoined Mesa's attempts to take over ACA's board. United announced it was ending its arrangement with Mesa with regard to ACA, and the myriad of antitrust concerns and issues ended as well.

In an interesting consent decree matter, American Airlines agreed to pay a substantial civil penalty (US\$3 million) to settle DOJ allegations that it had violated an almost-expired 10-year-old consent decree regarding price signalling. The original consent decree had prohibited the major airlines and the Airline Tariff Publishing Company from engaging in conduct that had been deemed to be 'price signalling,' including the advance announcement of fares that never had to take effect for actual travel. American Airlines allegedly violated that decree by publishing fares "with increased advance purchase requirements that did not apply to current travel, but rather contained a first travel date in the future".

Putting DOJ actions aside, much that occurs in the airline sector has strong implications for competition and competition policy, but does not fit within a narrow 'antitrust' rubric. The most obvious of these are the Open Skies arrangements that the US has with numerous countries, including with 15 of the 25 member states of the European Union. The US and EU have been negotiating a new 'Open Skies' agreement for quite some time. (Whether such an effort will be successful is a serious question in light of the failure of the EU Transport Council's failure to endorse what appeared to be a comprehensive agreement.) Such an agreement would replace the bilateral agreements between the US and individual EU Member States, the legality of which agreements has been questioned by the European Commission. Such an EU-wide agreement would of course have broad-reaching competitive implications. This was the not very surprising finding in a recent report by the General Accounting Office for the US Congress. Regardless of what happens with the EU, the point is simply that, in a world where competition is very much restricted by various limits to market entry, the elimination of such restrictions is likely to have a much bigger impact than individual antitrust enforcement actions within the otherwise partially closed market.

Similarly, DOT conducted a rulemaking with regard to the pre-existing regulation of computer reservation systems (CRSs). In late 2003, DOT ultimately decided to liberalise the area and eliminate virtually all regulations affecting CRSs. It did maintain until 31 July 2004, two transition rules that prohibited favouring one airline over another in listing priority and requiring airlines to publish all fares through CRSs. In eliminating regulation for this area, DOT specifically noted that its original 'CRS rules were developed at a time when air carriers owned and operated the systems and were potentially in a position to favour their flights over those of competitors. Today no US carrier owns or operates a CRS, and consumers can purchase tickets from a range of sources, including independent travel websites, air carriers and CRS-powered web sites.' Thus, elimination of regulation of CRSs was appropriate.

Trucking

While there has been substantial deregulation in trucking over the past two decades, many critical areas remain subject to review by either DOT or the Surface Transportation Board (STB), a successor agency to the Interstate Commerce Commission. For example, there remain regulatory requirements relating to licensing and operations (governed by DOT). Although these are less intensive than prior to deregulation, some form of DOT approval is required for a firm to become a licensed carrier of freight. Issues relating to rates are the responsibility of the STB; antitrust immunity for joint ratemaking is still available but most aspects of rate regulation have been eliminated. This leaves substantial uncertainty over whether such rates are indeed 'regulated' for purposes of determining whether they can be challenged in separate litigation.

Mergers and acquisitions among trucking firms receive the same treatment as transactions in other industries, including application of the pre-merger reporting requirements of the Hart-Scott-Rodino Antitrust Improvements Act. Such transactions are not subject to review by any transportation regulatory agency and do not receive any special antitrust immunity. (Mergers and acquisitions of bus lines, however, is subject to STB review.) During the past year, the most significant development with antitrust implications in the trucking industry was the US\$1.1 billion acquisition of Roadway Corporation by Yellow Corporation. This transaction combined the two largest long-haul, less-than-truckload freight carriers and appeared to raise substantial antitrust concerns. After investigation, however, DOJ decided not to challenge the transaction because of the availability of other substantial shipping alternatives.

The FTC has also been active in the trucking sector. It has been pursuing several enforcement actions against household-moving company associates that have been improperly using the 'state action doctrine' to attempt to gain antitrust immunity for price-fixing by filing with state agencies rates for moving services that had been collectively set by a group of competitors. Because the states did very little to oversee such matters, the FTC took the position that the filing of such rates would not immunise them from challenge. Two of the cases were settled by consent decree. In one case (involving the Kentucky Household Goods Carriers Association), an administrative action was pursued. In mid-2004, the administrative law judge found that the collective setting of rates was not protected by the so-called 'state action doctrine' because Kentucky did not actively supervise the collective ratemaking by, for example, examining the reasonableness of rate changes.

Railroads

Like trucking, the railroad industry has faced tremendous deregulation over the past 25 years. Nonetheless, railroads remain substantially regulated under the jurisdiction of the STB and the STB retains the exclusive jurisdiction to review a wide range of activi-

ties. Moreover, the STB retains the ability to exempt activities for which STB approval has been sought; this leaves the application of antitrust laws to specific conduct very uncertain. Mergers and acquisitions among US railroads are subject to STB's exclusive jurisdiction, although competitive effects and the comments of the Department of Justice are considered in the process. The STB definitely has the last word and has declined to follow DOJ advice in a number of major transactions.

Like trucking, during the past year, the most significant antitrust-oriented developments are merger-related. In this regard, one transaction that attracted comments from DOJ to the STB was Canadian National's (CN's) acquisition of Great Lakes Transportation's railroad business. This transaction threatened to give CN a stranglehold on the transportation of iron ore from Minnesota to steel mills in the region. DOJ suggested that the STB require the granting of trackage rights to a third-party competitor. Consistent with DOJ's suggestion, the STB approved the acquisition application, subject to certain trackage rights agreed upon by CN with its competitor Burlington Northern Santa Fe and subject to promises by CN to take specified steps to maintain existing routes and rates on commercially reasonable terms.

Shipping

In contrast to the other areas of transport, ocean shipping remains subject to substantial regulation and review by the Federal Maritime Commission (FMC). Thus, there is antitrust immunity for activities that are part of an agreement that has been filed with the FMC. This immunity extends to the collective setting of rates and terms of carriage in a shipping conference, provided that the conference meets certain conditions.

Notwithstanding the availability of immunity for shipping conferences, during the past year, the Department of Justice has obtained guilty pleas from a Norwegian and a Dutch shipping company for fixing prices and allocating customers requiring parcel tanker affreightment. These activities were apparently undertaken outside the scope of a lawful shipping conference and are part of a continuing investigation that has resulted in guilty pleas from a few individual shipping executives as well.

Mergers and acquisitions in the shipping industry remain subject to the law applicable to other industries. Moreover, FMC jurisdiction does not extend to domestic shipping, which has been largely deregulated and is subject to STB jurisdiction.

Conclusion

Because of the existence of regulatory structures in each of the major transport areas, the application of antitrust to the transportation sector remains an interesting intellectual minefield. Before a private party or a traditional antitrust enforcement agency can commence any action, it must determine whether the conduct is subject to regulation (and hence either a potential referral to the relevant regulatory authority or outright immunity) and then how the existence of regulation may affect how companies would appropriately react in the marketplace. There are several recurring principles in this regard.

First, like other areas where there are special industry regulatory schemes, any available immunity from the antitrust laws will be read narrowly. This is one of the teachings of the criminal plea for price-fixing by the Norwegian and Dutch shipping companies—there is antitrust immunity available for international shipping conferences where rates are set jointly by competitors. Although there is no explanation regarding this point associated with DOJ's action, each necessary condition for such immunity must not have been satisfied (and it must have been obvious, hence leading to criminal prosecution).

Second, interesting questions regarding immunity for collective petitioning of governments (the *Noerr-Pennington* doctrine) and the

US: TRANSPORTATION

state action doctrine often arise because of (a) the nature of regulation and the oversight received from the government and (b) the obvious need for the regulated parties to petition the government. (Both of these doctrines are discussed in the 'Exemptions' chapter, supra.) In the past year, this was perhaps best demonstrated by the FTC's cases against the joint ratemaking activities of household-moving company associations.

Third, the nature of the regulatory structure may have a substantial effect on the marketplace and any antitrust analysis that may

be applied. Licensing and other requirements may create substantial barriers to entry. At the same time, as evidenced by the Open Skies negotiations, elimination of artificial barriers to competition created by regulatory schemes may be substantially more important to achieving competitive markets than any antitrust enforcement activity. The antitrust agencies sometimes (but not always) are actively involved in such efforts to open up markets as part of their 'competition advocacy' missions. This is true in the US-EU Open Skies negotiations, for example.

BAKER & MILLER PLLC

**2401 PENNSYLVANIA AVE., NW SUITE 300
WASHINGTON, DC 20037
TEL: +1 202 663 7820
FAX: +1 202 663 7840**

CONTACT:

W TODD MILLER
TMILLER@BAKERANDMILLER.COM

WILLIAM A MULLINS
WMULLINS@BAKERANDMILLER.COM

DAVID C REEVES
DREEVES@BAKERANDMILLER.COM

WWW.BAKERANDMILLER.COM

Baker & Miller PLLC was founded in 1995 to focus its practice on antitrust and international business regulation counselling and litigation. It recently expanded its boutique practice to include transportation regulation and related matters. The firm has consistently been among *Global Competition Review's* 100 Leading Competition Law Firms. The firm's senior partner, Donald I Baker, is a former Assistant Attorney General in charge of the Antitrust Division of the US Department of Justice (DOJ) and Professor of Law at Cornell University. Mr Baker is regularly honoured by numerous national and international publications and organisations as a leading antitrust lawyer. The firm's managing partner, W Todd Miller, is also an internationally recognised competition attorney who also teaches International and Comparative Antitrust Law at the Washington College of Law, American University. Baker & Miller is frequently engaged in matters which require substantial experience, knowledge and judgment with regard to the international application of competition laws. The firm routinely works with lawyers outside the US in representing targets and complainants in competition law proceedings in the US, Canada, Europe, Australia, Scandinavia and elsewhere. These international projects include mergers and joint ventures, civil and criminal investigations, as well as litigation and arbitration.

Baker & Miller regularly assists clients with all aspects of US competition law and policy, including distribution and pricing practices, collaboration with competitors, and marketing and other practices of the client's competitors. Baker & Miller represents clients on a recurring basis in intellectual property antitrust, electronic banking, transportation and other networks, as well as agreements involving agricultural cooperatives and labour unions. It has steady involvement in DOJ and Federal Trade Commission (FTC) proceedings, including civil and criminal investigations and mergers. The firm and Mr Baker have served as expert witness in foreign arbitrations, domestic court cases and a US Trade Representative proceeding.