

LEGAL DEVELOPMENTS

April 3, 2006

DEPARTMENT OF JUSTICE APPROVES WHIRLPOOL-MAYTAG MERGER

In one of the most highly publicized and controversial conclusions to a merger investigation in recent times, last week the United States Department of Justice cleared the merger of appliance giants Whirlpool and Maytag. The DOJ approved the merger -- without any divestitures -- despite the fact that the combined companies reportedly will control nearly 50% of the consumer appliances market and, in particular, more than 70% of the market for top-loading washers and dryers in the United States.

The approval is demonstrative of the current administration's policy on merger review, which has eschewed an approach that relies significantly upon an analysis of market shares and concentration levels in favor of one which places a great deal of value on the potential efficiencies and other benefits of mergers and also favors a rigorous competitive effects analysis, which often results in positive outcomes for merging parties.

As set forth in its closing statement accompanying the approval, the DOJ "determined that the proposed transaction is not likely to reduce competition substantially" due to the "large cost savings and other efficiencies that Whirlpool appears likely to achieve." Furthermore, the DOJ found that the combination will not "give the merged entity market power in the sale of any of its products in the United States" because "any attempt to raise prices likely would be unsuccessful."

In the course of its investigation, the government made a number of interesting determinations, including focusing on "household automatic clothes washers and dryers" instead of "top loading washers and dryers," as many had anticipated. The DOJ nevertheless indicated in its closing statement that there was excess capacity in top-loading appliances and that such appliances might be interchangeable with front-loaders if one looked beyond

the purchase prices and included the costs of operation. The DOJ also focused on competition between "brands" rather than between manufacturers, which had the effect of adding Sears' Kenmore brand as a competitor, although Sears' principal suppliers are Whirlpool and Maytag.

Concerning competitive brands, despite the fact that the companies sell many leading brands (including not only Whirlpool and Maytag, but also KitchenAid, Amana, and Jenn-Air), other companies' brands, such as Kenmore, General Electric, Frigidaire, LG, and Samsung, present sufficient competition, according to the DOJ. In particular, the DOJ found that "LG, Samsung, and other foreign manufacturers could increase their imports into the U.S." and that "[e]xisting U.S. manufacturers have excess capacity and could increase their production," in response to any price increases or output reductions of the combined Whirlpool and Maytag. The DOJ also considered the presence of power buyers -- such as Sears, Lowe's, The Home Depot and Best Buy -- which it found will serve to restrict the ability of the combined companies to exercise market power.

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