

would negotiate with most service providers during the interim period.

3. Agreements to Fix Prices and Material Terms to Service Providers

Gemstar and TV Guide also agreed on the prices and terms that they would offer to most service providers during the interim period. To effectuate this agreement, they shared detailed and specific information about offers and counter-offers to service providers and kept each other apprised of individual contacts with customers. TV Guide provided Gemstar with its "rate card," which included both rates and non-price terms, and, on at least two occasions, TV Guide provided Gemstar with full drafts of proposed IPG contracts before they were sent to service providers. On at least two occasions, Gemstar sent to TV Guide red-lined comments on TV Guide's draft IPG contracts. In the course of maintaining regular contact with Gemstar, TV Guide blind-copied or forwarded to Gemstar electronic correspondence between TV Guide and service providers related to negotiations for IPG agreements.

As a result of this agreement, the prices and terms that TV Guide offered during the interim period substantially differed from offers it had made prior to June 1999, when it began coordinating with Gemstar. During this period eight service providers entered into IPG agreements with TV Guide under prices and terms that conformed to the illegal agreement.

C. Pre-Merger Acquisition of Assets

Though their agreements and other actions, Gemstar and TV Guide, in effect, merged their IPG decision-making processes, and each acquired substantial operational and decision-making control over important assets of the other, before the expiration of the statutory waiting period prescribed by Section 7A of the Clayton Act. Gemstar, for example, gained review and veto authority over TV Guide's IPG contract offers, converted TV Guide into its agent in various respects, and gained substantial influence over TV Guide's separate IPG advertising business. TV Guide, for its part, acquired substantial amounts of control over Gemstar's business of providing IPGs to service providers, including Gemstar's business opportunities and customer relationships. In addition, the parties shared confidential business information and made joint decisions regarding various business opportunities.

E. The Defendants' Conduct Violates Antitrust Laws

1. Sherman Act Violations

Section 1 of the Sherman Act prohibits any "contract, combination or conspiracy" in "restraint of trade." In the context of a merger, Section 1 requires competitors that have agreed to merge to maintain their status as independent economic entities throughout the pre-consummation period, i.e., until they can be legally combined. Here, the Complaint alleges three specific anticompetitive agreements that violated Section 1—to cease competing for customers, to allocate markets and customers, and to fix prices and terms. These agreements eliminated competition and foreclosed the possibility that customers could have obtained lower prices and secured better contract terms during the time before the merger could be legally consummated. Stand-alone agreements to fix prices, allocate markets or customers, or otherwise cease competition have long been condemned as per se violations of Section 1 of the Sherman Act. Given their harmful effect on competition and lack of any redeeming virtue, they are conclusively presumed to be unreasonable, without the need for an elaborate inquiry into the harm actually caused or to any potential business justifications for their use.

Here, the Antitrust Division concluded that no special circumstances justified the Defendants' conduct or removed it from the per se illegal category. The "slow roll" agreement, the market and customer allocations, and the fixing of prices and terms were not reasonably necessary to effectuate their merger agreement or the Back-Up Cross License Agreement, and thus were not ancillary to a legitimate business transaction. None of the restraints settled, or were reasonably ancillary to settling, the pending litigation. Similarly, the fact that many of the agreements were reached after the Defendants had agreed to merge did not change the character of the illegal restraints. The extensive coordination on prices and terms to be offered, whether in long-term contracts or otherwise, was not justified as necessary to protect any legitimate interest that Gemstar may have had in preserving TV Guide's business, or in preventing a material change in TV Guide's conduct that might adversely affect the value of the to-be-acquired business.

The Defendants' illegal agreements had the effect of lessening or eliminating competition between Gemstar and TV Guide in the provision

of IPG technology and services in violation of Section 1 of the Sherman Act and denied customers the benefits of that competition. During the period when those agreements were in effect, some service providers signed long-term IPG contracts based on the fixed prices and terms. Moreover, but for the illegal agreements, some service providers may have signed long- or short-term IPG agreements on better prices and terms than the Defendants had agreed to offer.

2. Clayton Act Section 7A Violation

Section 7 of the Clayton Act is the principal statute used by the antitrust agencies to challenge anticompetitive mergers and acquisitions. It provides in pertinent part:

No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.²

Prior to the enactment of section 7A of the Clayton Act, the DOJ and FTC often were forced to investigate anticompetitive acquisitions that had already been consummated without public notice. In those situations, the agencies' only recourse was to sue to unwind the parties' merger. The combined entity had the incentive to delay litigation so that years elapsed before adjudication and attempted relief. During this extended time consumers were harmed by the reduction in competition between the acquiring and acquired firms and, if the court ultimately found that the merger was illegal, effective relief was often impossible to achieve.

Congress enacted section 7A as a measure to strengthen and improve antitrust enforcement by giving the enforcement agencies an opportunity to investigate certain large acquisitions before they are consummated. In particular, section 7A prohibits certain acquiring parties from consummating the acquisition before a prescribed waiting period expires or is terminated.³

² 15 U.S.C. 18.

³ Section 7A requires that "no person shall acquire, directly or indirectly, any voting securities or assets of person" exceeding certain thresholds until both have made premerger notification filings and the post-filing waiting period has expired. 15 U.S.C. 18(a). At the time of the Defendants'