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IS ANTITRUST THE MAGIC WAND FOR SLOWING THE INCREASE IN OIL PRICES?

With Brent crude oil now priced over $75 a barrel, politicians are under pressure to relieve the burden on citizens' pockets. In the past month, the United States Congress has proposed a number of actions intended to respond to the public's concerns over the rising price of gasoline. The Senate Judiciary Committee has approved the Oil and Gas Industry Antitrust Act of 2006. If passed into law, this act will, among other measures: (i) allow lawsuits against the Organization of the Petroleum Exporting Countries ("OPEC") for conspiring to control output and fix prices, while simultaneously outlawing legitimate joint ventures between private and state-owned oil companies, (ii) amend the Clayton Act to prohibit unilateral decisions to refuse to sell, or to withhold or divert, petroleum products "with the primary intention of increasing prices or creating a shortage," and (iii) require the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC"), the U.S. antitrust watchdogs, to conduct a study on whether current merger standards for oil and gas transactions should be amended.

In addition, the House of Representatives recently passed the Federal Energy Price Protection Act of 2006 to penalize gasoline price gouging (*i.e.*, artificial inflation of prices). Finally, two studies by the FTC on the oil market are currently pending.

All of these measures appear to be based on antitrust law considerations. However, as we explain below, these are not necessarily appropriate or consistent with the generally accepted objectives of antitrust laws.

The Oil and Gas Industry Antitrust Act of 2006 (S. 2557). It is an undeniable fact that OPEC is a cartel, *i.e.*, an agreement to increase prices. Its members (11 countries that together account for more than 40 percent of the world's oil production) seek, as recognized by OPEC itself, "coordination and unification of petroleum policies [...] ensuring the stabilization of prices in international oil markets with a view to eliminating harmful and unnecessary fluctuations." In order to do this, OPEC establishes

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the oil production quota of its members, to enable control of the barrel price. As is commonly known, agreements on price, together with bid rigging, are considered the most serious of antitrust violations. The sole objective of these types of agreements is to fix prices above the level that would prevail in the case of competition, which by definition harms consumers. That this is OPEC's sole objective has been admitted by Alvaro Silva, energy minister for Venezuela, one of OPEC's member countries ("Nobody wants a price war") and Ali Rodríguez, OPEC's secretary-general (" … if we compete, we will all lose something").

Price conspiracies are prohibited by antitrust regulations, and infringements can be subject to high fines in more than 100 countries. Among the most relevant regulations, such conspiracies are forbidden by the Sherman Act in the United States, which includes criminal sanctions, and the Treaty on European Union, which is applicable in 25 member states. In both cases the cartel, in theory, could be prosecuted by such rules, since OPEC agreements come into effect in the U.S. as well as Europe; the price of a gallon at a Washington or Brussels filling station is higher than the price would have been in the absence of an agreement by OPEC members on their production quota.

Then why are these rules not applied to OPEC? It is because several legislative and judicially created doctrines provide that the antitrust laws do not apply to the activities of countries acting within their respective governmental competence, as in the case of OPEC members. This includes decisions regarding the allocation of their natural resources. Certain members of Congress would like to change this. The proposed Oil and Gas Industry Antitrust Act of 2006 would strip OPEC member states of protection for these "act of state" and "sovereign immunity" doctrines, as they are known.

The proposed act is based on the assumption that natural law is the basis of antitrust law. The problem is not that this amendment seeks to make governments responsible for antitrust violations (for instance, the European Union Treaty contains competition rules addressed to the member states, rather than to companies, *i.e.*, exclusive rights and state aids). Rather, the challenge is to make enforcement practicable through an international agreement or, at least, the willingness of the United States to apply a law that might affect commercial relations with third-party countries. Up until now, similar measures approved by the Senate in the past have not obtained the support of the White House.

Unfortunately, the act does more than simply prevent OPEC members from invoking the "act of state" and "sovereign immunity" doctrines. As drafted, it also would outlaw most legitimate joint venture activities among state-owned oil companies and private firms. That is because the act would make it illegal for any state (including state-owned oil companies and instrumentalities) and "any other person" to act collectively to (1) limit the production or distribution of oil, natural gas, or any other petroleum product; (2) set or maintain the price of oil, natural gas, or any other petroleum product; or (3) otherwise take any action in restraint of trade for oil, natural gas, or any other petroleum product.

"Any other person" would include any private firm that engages in a joint production and/or sales venture with a state-owned oil company, although the vast majority of these are legitimate, efficiency-enhancing endeavors. From an antitrust perspective, this prohibition is simply wrong. The U.S. Supreme Court has recently decided that these are activities engaged in by legitimate joint ventures ***(Texaco v. Dagher)***, and the fact that one parent company is state-owned does not invalidate the legal and economic rationale of this analysis. In fact, this prohibition will outlaw those joint ventures that are necessary and the only means by which certain resource-rich states can gain access to the knowledge and technology necessary to engage in exploration and production activities.

The Oil and Gas Industry Antitrust Act of 2006 also has proposed to amend the Clayton Act (which allows for private rights of action), to make it unlawful to refuse to sell, or to withhold or export, petroleum and natural gas "with the primary intention of increasing prices or creating a shortage in a geographic market." This proposed amendment to the Clayton Act runs counter to the general direction and objectives of antitrust law in several respects. First, intent-based standards are inconsistent with an economic approach to antitrust. Second, in marketplaces, goods are sold to the buyer offering the best price, so the Clayton Act amendment would outlaw many legitimate pricing decisions. This amendment might be considered an illegal trade barrier or, even worse, a price-control mechanism. However, the temptation to set price controls is not restricted to the United States. For instance, in 2005, Spain, which has

increased its reliance on liquefied natural gas ("LNG") as feedstock to power generation, approved a much criticized price mechanism that indirectly discourages putting LNG loads initially destined for Spain into more price-attractive European or U.S. destinations.

Finally, the Oil and Gas Industry Antitrust Act of 2006 also seeks to have the DOJ and FTC conduct a study on whether specific thresholds to trigger mergers between U.S. oil and gas companies should be included in the Clayton Act. This measure is based on the general assumption that concentration in these markets has a negative effect on consumers. This might be true, if one were to overlook the fact that mergers (sometimes) help to reduce risks and costs (especially high in the exploration, production, and refining of oil). This is a benefit that can be passed on to consumers in the form of price reductions or quality improvements.

The Federal Energy Price Protection Act of 2006 (H.R. 5253). This proposed act, recently passed in the House of Representatives, requires the FTC to define, investigate, and penalize gasoline price gouging. Gas price gouging is already prohibited in over half the states, but usually only during natural disasters; for example, a number of states, including New York and New Jersey, took enforcement action against retailers that engaged in price gouging in the immediate aftermath of Hurricane Katrina. The proposed federal legislation would prohibit price gouging at any time and would require the FTC to determine what constitutes price gouging. The FTC would have primary responsibility for enforcing the law, which would permit fines of up to $150 million and imprisonment for up to two years.

The proposed act, however, raises several problems. First, this legislative activity occurred against the backdrop of the FTC's undertaking two congressionally mandated comprehensive studies of the oil and gas industry and pricing activities within the industry (see below). Second, if this bill is passed into law, it will be difficult for the FTC to define price gouging without actually setting oil prices, which is incompatible with market-driven economies. The testimony on gasoline prices by FTC chairman Deborah Platt Majoras before the Senate in November 2005 is very clear on this point: " … price gouging laws that have the effect of controlling prices likely will do consumers more harm than good."

Probes into the oil industry. There are also two congressionally mandated market studies currently being undertaken by the FTC. This is not the first time that the FTC has probed this industry in the United States, and up to now, the results have been similar; each time, the FTC concluded that higher prices were not the result of anti-competitive conduct, but rather of market-driven conditions. Similar studies have also been undertaken in Europe. For instance, in Spain, instead of horizontal price fixing, studies found vertical price control at the pumps by oil companies and exclusive agreements that, according to the European Commission, produced a foreclosure effect. In the United Kingdom, similar studies concluded that antitrust laws had not been broken.

Therefore, although it is the task of lawmakers to pass measures responding to citizens' concerns, it should be remembered that antitrust laws are intended not to change how markets work, but to serve as a tool to ensure that they work efficiently, something that seems to happen in the oil industry: market analysts agree that actual prices respond to, among other nonconspiracy factors, increases in demand from China and India and threats to supply stemming from unrest in Nigeria and problems with Iran.

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