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ANTITRUST

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Utility Merger Ruled Immune From FTC Challenge

A district court has rejected the Federal Trade Commission's motion to halt the combination of natural gas distributors in Pennsylvania that had been approved by the state public utility commission. The European Commission has approved the acquisition of an aircraft engine component supplier by a "dominant" aircraft engine manufacturer.

Other recent antitrust decisions of note included a ruling by the U.S. Court of Appeals for the Sixth Circuit that a drug's price increase was not shown to have been materially caused by alleged anticompetitive conduct. Also of interest was a district court's rejection of an effort to define an airport as a relevant geographic market for taxicab services.

Acquisitions

The Federal Trade Commission (FTC) sought a preliminary injunction to prevent the merger of two public utilities in Pennsylvania, claiming that the combination would create a monopoly as the two firms are the only competitors in the distribution of natural gas to nonresidential customers in parts of Allegheny County.

A federal district court dismissed the FTC's complaint and stated that the state public utility commission's approval of the proposed transaction qualified for state action immunity. The court noted that the public utility commission determined that although about 500 customers pay lower prices due to competition between the two utilities, about 600,000 customers pay higher prices as a result of this rivalry and that the merger would produce overall efficiencies, eliminate duplication, and would be in the public interest.

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The court stated that Pennsylvania clearly articulated a state policy to displace competition with pervasive regulation, including, expressly, the review of mergers and acquisitions and that the state has mandated active supervision of this policy whereby the public utility commission will continue to monitor and regulate the merged utility.

FTC v. Equitable Resources, Inc., 07cv0490, 2007 U.S. Dist. LEXIS 35061 (W.D. Pa. May 14, 2007)

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The European Commission (EC) announced its approval of the acquisition of a supplier of components for aircraft engines and other aircraft equipment by an aircraft engine manufacturer. The EC stated that, even though the buyer holds a dominant position in the market for the supply of jet engines for large commercial aircraft and the seller is a leading supplier of certain aircraft engine components, the merged firm would not likely be able to discriminate against rival engine manufacturers (by refusing to sell components to them) or other component suppliers (by not buying from them) because there are sufficient alternative suppliers and buyers of aircraft engine components.

The commission added that there would not be any anticompetitive "conglomerate effects" from the combination of the supply of engines and other equipment to aircraft manufacturers.

Mergers: Commission approves proposed acquisition of aerospace division of Smiths Group by General Electric, IP/07/541 (April 23, 2007), available at ec.europa.eu/comm/competition

Comment: In a 2005 decision affirming the EC's challenge to an acquisition by the same buyer, the European Court of First Instance criticized the EC's conglomerate effects analysis, which examined the potential impact of bundling different aerospace products.

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The Department of Justice announced the proposed settlement of its challenge to a completed merger of suppliers of railroad end-of-car cushioning devices that protect sensitive cargos during transit and coupling.

The department stated that it opened an investigation only after the transaction was consummated because it was not large enough to require pre-merger notification and observation of a waiting period under the Hart-Scott-Rodino Act. The department asserted that the merged firms were the only two manufacturers of new cushioning devices and two of only three suppliers of reconditioned cushioning devices.

The department stated that the merged firm presently operates only one manufacturing facility and that it would be disruptive to the industry to require the divestiture of that facility to restore competition. However, the proposed settlement requires divestiture of intangible assets that were acquired as well as a perpetual, royalty-free license to use the intellectual property of the retained business.

United States v. Amsted Industries Inc., CCH Trade Reg. Rep. ¶¶45,107 (No. 4868), 50,942 (April 18, 2006), also available at www.usdoj.gov/atr

Comment: Parties to transactions that do not require pre-merger notification must nevertheless consider the risks of an antitrust challenge both before and after closing, as the antitrust agencies continue to investigate and, from time to time, unwind non-reportable transactions.

Exclusive Dealing

Drug wholesalers and retailers that distribute oral estrogen replacement therapy drugs sued a manufacturer of such drugs asserting that its marketing practices excluded a rival drug-maker's product from the market in violation of §2 of the Sherman Act.

The plaintiffs alleged that the defendant's agreements required exclusive or preferred listing of defendant's product, which had accounted for over 70 percent of the market, on third-party payers' "formularies," or lists of covered drugs, in order to receive rebates. The agreements also provided that third-party payers would lose substantial rebates if defendant's products accounted for less than a specified share of the payer's sales in the oral estrogen replacement therapy market.

The plaintiffs claimed that as a result of defendant's conduct, a new entrant failed to acquire formulary status with important third-party payers, and that the price of defendant's product increased substantially.

A district court granted defendant's summary judgment motion and the Sixth Circuit affirmed on the ground that the plaintiffs' injury—higher prices—was not proximately caused by the alleged antitrust violation.

J.B.D.L. Corp. v. Wyeth-Ayerst Laboratories, Inc., 2007 U.S. App. LEXIS 11003 (May 10, 2007)

Relevant Market Definition

A Harrisburg, Pa., taxicab company claimed that a rival's exclusive operating agreement with the Harrisburg International Airport unreasonably restrained trade in violation of §1 of the Sherman Act.

The plaintiff alleged that the arrangement granted the defendant exclusive access to the airport's queue and garage facilities and limited other taxicabs' ability to pick up outgoing passengers.

A district court dismissed the antitrust claims on the pleadings because the complaint's proposed relevant market—which was limited to Harrisburg International Airport—was unduly narrow. The court noted that the complaint did not embody the concepts of reasonable interchangeability and cross-elasticity of demand.

Capital City Cab Service, Inc. v. Susquehanna Area Regional Airport Authority, 2007-1 CCH Trade Case ¶ 75,677 (M.D. Pa.)

Group Boycott

A Long Island retailer of kitchen and bath furnishings sought to become a member of appliance buying cooperatives that make volume discounts and warehouse space available to small and medium-sized retailers of household appliances. The plaintiff's application for membership was denied and it brought suit claiming that the denial constituted a group boycott and a per se violation of §1 of the Sherman Act.

The buying cooperatives moved to dismiss the complaint for failure to properly allege a per se violation. The court denied the motion and stated that the complaint alleged that the buying cooperatives possessed market power and "exclusive access to an element essential to effective competition" which, according to the court, was sufficient to state a per se claim under the U.S. Supreme Court's 1985 *Northwest Wholesale Stationers* decision.

Consumers Warehouse Center, Inc. v. Intercounty Appliance Corp., 2007-1 CCH Trade Cases ¶ 75,669 (E.D.N.Y.)

Labor Exemption

Registered nurses in the Chicago area claimed that several hospitals conspired to depress their wages and agreed to exchange related information in violation of §1 of the Sherman Act.

A district court denied a motion for summary judgment, rejecting defendants' argument that the alleged agreement was immune from antitrust liability based on the non-statutory labor exemption, which protects some restraints between employers from antitrust scrutiny in order to permit meaningful collective bargaining. The court stated that even though the hospital had been involved in collective bargaining activity, the challenged conduct occurred outside of the collective bargaining process.

Reed v. Advocate Health Care, 2007-1 CCH Trade Cases ¶ 75,667 (N.D. Ill.)

Price Fixing

The Department of Justice announced that a Korean executive from the world's largest memory chip manufacturer agreed to plead guilty to conspiring to fix the prices of dynamic random access memory (DRAM) chips, which provide high-speed storage and retrieval of data from computer and consumer electronic products.

The department stated that the executive will pay a $250,000 criminal fine and serve 14 months in prison, the longest imprisonment by a foreign price-fixing defendant.

"Sixth Samsung Executive Agrees to Plead Guilty to Participating in DRAM Price-fixing Cartel," April 19, 2007, available at www.usdoj.gov/atr, *United States v. Il Ung Kim*, CCH Trade Reg. Rep. ¶ 45,106 (No. 4851)

Foreign Injuries

A district court dismissed a complaint by technology companies seeking to recover overcharges paid to participants in an alleged global conspiracy to fix DRAM prices.

The complaint failed to distinguish between domestic injury claims that were within the court's jurisdiction under the Foreign Trade Antitrust Improvements Act and foreign injury claims that fell outside the court's jurisdiction because they did not have the requisite effect on U.S. commerce. The court stated that in order to proceed, the plaintiffs must amend their complaint to specify where prices were negotiated, where purchases were made, and where the memory chips were delivered.

Sun Microsystems Inc. v. Hynix Semiconductor, Inc., 2007-1 CCH Trade Cases ¶ 75,665 (N.D. Cal.)

Refusal to Deal

One of the largest department store retail chains in Canada claimed that suppliers of prestige perfumes refused to continue dealing with the retailer in violation of §61 of Canada's Competition Act, which prohibits refusal to supply a person because of low pricing.

The Competition Tribunal denied the retailer's request for leave to seek an order requiring the suppliers to resume selling to the retailer and stated that the refusal to deal did not have a substantial effect on the retailer's overall business, as opposed to merely a segment of its business.

Sears Canada Inc. v. Perfums Christian Dior Canada Inc., 2007 Comp. Trib. 6 (CT-2007-001, Mar. 23, 2007), available at www.ct-tc.gc.ca