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ANTITRUST

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Collusion Proposed on Analyst Conference Call

The Federal Trade Commission (FTC) charged a firm with acting unlawfully by using a quarterly conference call with investment analysts as an occasion to invite a rival to temper competition.

The U.S. Court of Appeals for the Third Circuit ruled that federal courts may not enjoin the government from indicting an alleged conspirator who was granted conditional amnesty. Other recent antitrust developments of interest included the Department of Justice's decision to close its investigation of the combination of two leading appliance manufacturers notwithstanding relatively high post-merger concentration levels as well as the department's decision to bring an enforcement action charging communications technology firms with unlawful premerger coordination.

Invitation to Collude

The FTC announced its acceptance of a proposed settlement of charges that a producer of free-standing newspaper coupon inserts unlawfully invited a rival to cease competing for each other's customers and end an ongoing price war, in violation of §5 of the FTC Act. The invitation to collude was extended, according to the complaint, by the producer's chief executive during the company's quarterly conference call with securities analysts, which is available to the public and often monitored by competitors. The invitation communicated specific measures, including abandoning efforts to gain market share, detailing prices for particular classes of customers and establishing a plan to monitor adherence to the proposal. The executive stated that if the rival "continues to pursue our customers and market share, then we will go back to our previous strategy." The FTC indicated that the statements in this case went far beyond legitimate or typical disclosures of business strategy and allegedthat the statements were intended to facilitate collusion.

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***Valassis Communications Inc.*, CCH Trade Reg. Rep. ¶15,860 (March 14, 2006)**

Comment: Section 1 of the Sherman Act, the principal federal statute governing agreements in restraint of trade, does not prohibit unilateral conduct not amounting to an anticompetitive agreement. Nevertheless, the FTC has on occasion brought actions against attempts at collusion as unfair competition in violation of §5 of the FTC Act, as in the enforcement action reported immediately above. In one case, the Department of Justice proceeded against such conduct as an "attempted joint monopolization" in violation of §2 of the Sherman Act (see the U.S. Court of Appeals for the Fifth Circuit's 1984 *American Airlines* decision).

Amnesty

A shipping services company provided information to the Department of Justice about its participation in a customer allocation conspiracy with two competitors pursuant to an agreement, under the department's corporate leniency program, that the government would not charge it criminally. Asserting lack of effective action to terminate its part in the anticompetitive activity, the government subsequently withdrew its conditional grant of leniency and announced its intention to indict the company and an executive. A district court permanently enjoined the department from bringing indictments, finding that the government could not rescind the leniency agreement without a judicial determination of breach.

The Third Circuit reversed, stating that while federal courts have jurisdiction to hold the government to the terms of agreements it makes with defendants, the constitutional separation of powers grants the executive branch exclusive authority to decide whether to indict. The appellate court added that traditionally immunity agreements have been construed to protect the defendant against conviction rather than indictment because being indicted and forced to stand trial is not considered an injury for constitutional purposes.

***Stolt-Nielsen, S.A. v. United States*, 2006-1 CCH Trade Cases ¶75,172**

Comment: In the case reported immediately above the Third Circuit notes that, after indictment, it is not in the interest of defendants or the government to go through a trial before determining whether an immunity agreement bars conviction, and that the issue will likely be decided before trial.

Acquisitions

The Department of Justice announced that

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it closed its investigation of the proposed acquisition by Whirlpool Corp. of Maytag Corp. The department stated that, despite relatively high shares in the household automatic washer and dryer markets, any attempt by the merged firm to raise prices will be checked by other U.S. suppliers, who were found to possess excess capacity, as well as foreign producers. The department added that front-load machines, which are generally more expensive to buy but less expensive to operate, could also discipline the pricing of top-load machines sold by the combined entity. The department also observed that large retailers have alternatives to the leading domestic products, citing specific recent examples of retailers that reduced their dependence on domestic models by successfully introducing a foreign made brand.

***Department of Justice Antitrust Division Statement on the Closing of Its Investigation of Whirlpool's Acquisition of Maytag,* CCH Trade Reg. Rep. ¶50,209 (March 29, 2006)**

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The Israeli Restrictive Trade Practices Tribunal, a specialized court dedicated to reviewing noncriminal antitrust matters, reversed an order of the Israel Antitrust Authority blocking the merger of two firms engaged in the wholesale and retail distribution of gasoline. The tribunal approved the combination with divestitures of a substantial number of gasoline stations, stating that any potential anticompetitive impact of the acquisition—potentially eliminating a maverick firm and significantly increasing concentration—will be overshadowed by the impending privatization by the Israeli government of two major petroleum refineries, which will likely result in vertical integration in the market. According to the tribunal's order, the merged entity is precluded from acquiring a privatized refinery and will be required to divest fewer gas stations if one of its two principal rivals acquires the refinery. The Supreme Court of Israel temporarily enjoined closing of the transaction pending its expedited review.

***Dor-Alon Energy in Israel (1988) Ltd. and Sonol Israel Ltd. v. General Director of the Antitrust Authority,* R.T.P. 613/05 (April 9, 2006).**

Comment: The two enforcement matters reported immediately above show that merger analysis in different parts of the world may attach more importance to whether it is likely, in light of industry trends and anticipated developments in the market, that the combined entity will be able to raise prices rather than merely whether the transaction will increase concentration in a relevant market.

Premerger Coordination

The Department of Justice announced a settlement of charges that a communications technology company violated the premerger waiting period requirements of the Hart-Scott-Rodino Act by exercising control over a firm it had agreed to acquire prior to the conclusion of regulatory review by the antitrust agencies, often referred to as "gun jumping."

The department's complaint alleges that the merger agreement required the buyer's consent before the acquired firm engaged in certain business activities, including presentation of business proposals to customers and intellectual property licensing. The complaint alleges that the acquired firm sought the buyer's approval of business decisions even when it was not obligated to do so under the agreement. The merging parties agreed to pay a $1.8 million civil penalty, which the department stated was reduced from the maximum penalty because the companies reported the gun jumping violations voluntarily and took measures to modify the agreement and their conduct.

***United States v. QUALCOMM Incorporated* (D.D.C. April 13, 2006), available at www.usdoj.gov/atr**

Comment: Even in transactions that do not raise substantive antitrust issues, practitioners who counsel parties to mergers and acquisitions should be aware that covenants restricting the operation of the business being acquired prior to closing may attract governmental attention.

Resale Price Maintenance

A retailer brought suit alleging that a manufacturer of women's accessories violated §1 of the Sherman Act by conditioning retailer participation in a marketing program on a pledge to adhere to the manufacturer's suggested pricing policy and terminating the retailer after it violated the policy. A jury found for the retailer and awarded damages of $1.2 million, which the district court trebled, and the manufacturer appealed. The U.S. Court of Appeals for the Fifth Circuit rejected the manufacturer's argument that its conduct should not be subjected to per se treatment, stating that although other types of vertical agreements are evaluated under the rule of reason, the Supreme Court has reaffirmed that vertical minimum price fixing agreements are per se unlawful. The appellate court upheld the district court's exclusion of expert testimony regarding economic conditions and the pricing policy's alleged procompetitive effects, as such analysis is not relevant in a per se case. The Fifth Circuit also rejected the manufacturer's contention that the retailer did not prove it suffered antitrust injury, observing that antitrust injury is distinct from injury to competition.

***PSKS Inc. v. Leegin Creative Leather Products Inc.,* 2006-1 CCH Trade Cases ¶75,166**

Immunity

The U.S. Court of Appeals for the Sixth Circuit ruled that an interscholastic athletic association in Tennessee was not entitled to antitrust immunity under the state action doctrine. The association was alleged to have violated federal antitrust laws by enforcing a rule prohibiting undue influence in recruitment of student athletes. The appellate court noted that the statute authorizing the Board of Education to develop school policy did not clearly articulate the anticompetitive state policy in the area of interscholastic athletics and that the state is not actively involved in supervising the association.

***Brentwood Academy v. Tennessee Secondary School Athletic Association,* 2006-1 CCH Trade Cases ¶75,161**