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ANTITRUST

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FTC Orders Compulsory Memory Chip License

The Federal Trade Commission (FTC) ordered a firm found to have deceived a computer memory chip standard-setting organization to license its technology at FTC-determined rates. The U.S. Court of Appeals for the Eighth Circuit ruled that single-use and multi-use dialysis devices should be included in the same relevant product market despite substantial price differences.

Other recent antitrust developments of interest included the FTC's requirement that private equity funds give up active involvement in an energy distribution firm in order to proceed with their acquisition of minority interests in a rival firm.

Remedies

The FTC ordered a developer of semiconductor technology to license its memory chip technology and to charge no more than specified rates enumerated by the FTC in order to restore the competition that would have prevailed absent the developer's anti-competitive conduct in a standard-setting process. Previously, the commission found that the developer had violated the FTC Act by concealing from a standard-setting organization that it had applied for patents covering the computer memory chip standards under consideration by the organization.

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In specifying curative maximum rates, the FTC acknowledged that such rates are best set by the market, but stated that the developer's conduct prevented the competitive process from determining the technology and associated license terms for the memory-chip standard selected by the organization.

Two commissioners dissented in part, stating that a royalty-free license should have been ordered because there was strong evidence that, with proper disclosure by the developer, the standard-setting organization would have adopted standards not covered by the developer's patent portfolio.

***Rambus Inc.,* FTC Docket No. 9302 (Feb. 2, 2007)**

Relevant Market

Dialyzers function as artificial kidneys, which filter waste in blood, and come in single- and multiple-use design. Multiple-use dialyzers must be cleaned in dialyzer reprocessing machines and solutions. A manufacturer of such machines and solutions brought suit alleging that a rival violated §2 of the Sherman Act by modifying the design of its reprocessing machine and the terms of its warranty to render plaintiff's solution incompatible and less marketable. The district court granted summary judgment for defendant and the Eighth Circuit affirmed.

The appellate court ruled that the defendant did not have monopoly power in the relevant market because multiple-use dialyzers compete with single-use dialyzers in one market. The Eighth Circuit rejected plaintiff's argument that the two types of dialyzers constitute separate relevant markets because of the substantial price differential between them, noting that a price differential alone is insufficient to infer the existence of two separate markets.

***HDC Medical, Inc. v. Minntech Corp.,* 2007-1 CCH Trade Cases ¶75,567**

Comment: Depending on the specific circumstances, a price differential between two similar products that vary in longevity, quality or other attributes may reflect either the lack or presence of customer substitution.

Acquisitions

The FTC announced a proposed settlement of charges that an acquisition of minority interests in an energy distribution firm by private equity funds that held significant stakes in a competing energy distribution firm would lessen competition in violation of §7 of the Clayton Act. The commission alleged that the transaction would enable the funds to exercise unilateral market power because they would have board representation and access to competitively sensitive information at both firms, which were each other's closest rivals in some parts of the Southeast. The proposed consent order requires the funds to remove their board representatives as well as to adopt procedures to prevent the exchange of sensitive information between the competing firms.

***TC Group L.L.C., et al.*, CCH Trade Reg. Rep. ¶ 15,971 (Jan. 25, 2007), also available at www.ftc.gov**

Comment: The enforcement action reported immediately above raises questions about the market impact of an investment firm holding significant but noncontrolling stakes in two competing companies. The market dynamics of such a position will vary considerably with the circumstances.

The European Commission (EC) announced that it approved the acquisition of a U.S.-based manufacturer of uninterruptible power supply (UPS) devices by a French-based rival but required the divestiture of the French firm's small UPS device business. The commission stated that the acquisition would combine the number one and number two European sellers of small (under 10kVA) UPS devices, used mostly to protect individual computers and equipment for small businesses from power cuts and surges.

***Mergers: Commission clears planned acquisition of APC by Schneider Electric, subject to conditions*, IP/07/164 (Feb. 8, 2007), available at ec.europa.eu/comm/competition**

Monopolization

A manufacturer of threaded connections for joining lengths of pipe used in drilling oil and gas wells alleged that a rival obtained a patent by committing fraud on the patent office constituting a claim of unlawful monopolization rooted in the Supreme Court's 1965 *Walker Process* ruling. The complaint alleged that the defendant did not disclose prior art, including its own prior sales, in applying for a patent covering a combination of pipe and fittings. A district court dismissed the complaint pursuant to rule 12(b)(6) for failure to assert that the patent had been enforced. The U.S. Court of Appeals for the Federal Circuit reversed, stating that allegations of threats against plaintiff's customers, rather than plaintiff itself, were sufficient to satisfy the enforcement requirement.

***Hydril Co. LP v. Grant Prideco LP*, 2007-1 CCH Trade Cases ¶75,566**

Tying

A bar admission candidate alleged that a provider of bar review courses unlawfully tied its New York state law course to its multistate course in violation of federal antitrust laws. The district court denied the course provider's motion for summary judgment and rejected the argument that state-specific and multistate courses did not constitute distinct products because other providers offered stand-alone state-specific and multistate courses.

The court also stated that the plaintiff did not demonstrate that the course provider had sufficient market power to establish a per se unlawful tying arrangement, despite its possession of 80 percent to 90 percent of the state-specific course market, and that the plaintiff would therefore have to show anticompetitive effects to establish an antitrust violation. The court indicated that summary judgment for defendant was precluded by the lack of evidence regarding the legitimacy of the provider's justification for the alleged tie.

***Park v. Thomson Corp.*, 2007-1 CCH Trade Cases ¶75,552 (SDNY)**

Predatory Pricing

The European Court of First Instance affirmed the EC's ruling that Wanadoo, a French high-speed Internet access provider, abused its dominant position in violation of Article 82 of the European Union Treaty by charging predatory prices and restricting market entry. The court observed that the rapid growth of the high-speed Internet market did not render competition laws inapplicable and stated that the commission presented evidence of appropriately calculated below-cost pricing and the existence of a plan to exclude competitors. The court added that the commission did not have to prove a reasonable likelihood of recoupment of losses due to below-cost prices.

***France Télécom SA v. Commission of the European Communities*, T-340/03 (Jan. 30, 2007), available at www.curia.europa.eu**

Comment: The view of the European Court of First Instance as to recoupment seems to be different from that expressed by the U.S. Supreme Court in its 1993 *Brooke Group* decision.