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ANTITRUST

Expert Analysis

MLS Restrictions, Geographic Markets and Google

By
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The U.S. Court of Appeals for the Sixth Circuit ruled that a real estate multiple listing service violated the Federal Trade Commission (FTC) Act by restricting the distribution of discount brokers' listings. The U.S. Court of Appeals for the Fourth Circuit decided that, as a pleading matter, the relevant geographic market for a globally manufactured product may be limited to the United States, to the exclusion of foreign countries where the product is made.

Other recent antitrust developments of note included several cases involving Google — the rejection of the Google Books settlement and the approval, with conditions, of Google's acquisition of a travel software firm — as well as a district court's grant of the FTC's request to preliminarily enjoin a hospital merger in Ohio.

Realty Listing Service

An association of rival real estate agents and brokers in southeastern Michigan, Realcomp II, Ltd., operates the state's largest multiple listing service (MLS), a database of real estate listings that can be viewed and searched by member realtors. Facing a growing threat to traditional broker arrangements from the Internet and discount brokers, Realcomp restricted the dissemination of discounted listings. Under Realcomp's policies, non-traditional listings subject to discounted brokerage arrangements were excluded from the default search setting in the Realcomp MLS, necessitating an affirmative extra step to find the discounted listings (the search-function policy), and were also excluded from the data feed distributed to public real estate advertising websites (the website policy).

The FTC challenged the policies as unreasonable restraints of trade that injured consumers by restricting the publication and marketing of non-traditional listings and constituted unfair methods of competition in violation of §5 of the FTC Act. Following an administrative trial, an FTC administrative law judge ruled late in 2007 that the complaint counsel failed to show that the policies had significant anticompetitive effects. The Commission reversed in a unanimous opinion and determined that the policies were unlawful whether subject to a "quick look" standard of review or a full rule-of-reason analysis.

The Sixth Circuit affirmed, stating that substantial evidence supported the FTC's conclusion. The appellate panel noted that its affirmance was based on a full rule-of-reason analysis without deciding whether it would have been appropriate to apply an abbreviated quick look review.

> A district court rejected a proposed settlement of copyright claims arising from Google's efforts to create a universal digital library.

The Sixth Circuit stated that the website policy was likely to adversely impact competition by limiting consumer access to discount listings and imposing additional costs on discount brokers. The court observed that the Internet and limited-service discount listings exerted pricing pressure on traditional brokers and that consumers were not informed that the websites display only traditional, full-service listings. The appellate opinion emphasized that the restrictive policies were especially pernicious because they targeted nascent or emerging threats to traditional business models.

The Sixth Circuit then reviewed the FTC's evidence of actual effects on competition. The court found that a decrease in the share of discount listings from about 1.5 percent to about 0.75 percent, among other evidence, supported the commission's finding of actual anticompetitive effect. But the appellate court added that even if the actual effects evidence was inconclusive, the commission met its initial burden under the rule of reason by establishing Realcomp's market power and the "anticompetitive tendencies" of the policy.

The court rejected Realcomp's procompetitive justifications, stating that the policy did not plausibly prevent "free riding" by discount brokers as they were also paying members of Realcomp. The court then stated that the contention that the website policy was designed to eliminate a "bidding disadvantage" was not a meritorious procompetitive justification as it merely described efforts to protect brokers from pricing pressures.

Realcomp II Ltd. v. FTC, No. 09-4596, 2011-1 CCH Trade Cases ¶77,409 (April 6, 2011).

Comment: The policy challenged in the *Realcomp II* case did not exclude discounted listings altogether from the MLS but rather encumbered their dissemination, preventing consumers from learning about offerings from lower-cost sellers. Collective efforts by industry groups to suppress the flow of competitive information have long been the subject of enforcement actions and have often been upheld by the courts. Query whether restricting rivals' access to a crucial marketing tool or network would have been deemed unlawful under current Supreme Court jurisprudence if implemented by a single dominant firm rather than an association of rivals.

Relevant Geographic Market

A Korean manufacturer of para-aramid fibers—strong, synthetic fibers used to make tires, body armor and fiber optic cables—claimed that DuPont, the only American producer of para-aramid, entered into exclusionary supply arrangements with major customers, insulating substantial portions of the market from competition in violation of §2 of the Sherman Act.

A district court dismissed the antitrust claims brought by the Korean firm, Kolon Industries Inc., for failure to properly plead a relevant geographic market and exclusionary conduct. The Fourth Circuit reversed.

The appellate court noted that dismissals of antitrust claims for failure to adequately allege a relevant market are relatively rare and generally limited to "glaring deficiencies," such as failing to define a market altogether or alleging an unreasonably and implausibly narrow market.

Kolon's complaint asserted that the relevant

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geographic market was the "worldwide supply of para-aramid fiber to commercial purchasers in the United States" and that DuPont had over 70 percent of that market. But the district court stated that the market must be expanded to include Korea and the Netherlands, where the foreign sellers to U.S. customers are headquartered.

The Fourth Circuit disagreed and criticized the lower court for ignoring commercial realities, including the extent to which any para-aramid fiber supplied to customers in Korea and the Netherlands could practicably be diverted to U.S. buyers. The appellate panel pointed out that Kolon was not a major participant in the U.S., as the Korean manufacturer alleged it had been in the U.S. market for only a few years and accounted for less than one percent of U.S. sales of para-aramid.

The court rejected the suggestion that supplier headquarter sites must be included in the relevant geographic market definition as a matter of law, without considering whether consumers can actually turn to those regions for supplies.

Turning to the sufficiency of allegations of exclusionary conduct, the appellate court stated that even though DuPont's contracts did not require that customers buy all of their supply of para-aramid from DuPont, requiring major customers to obtain around 85 percent of their needs from DuPont could effectively foreclose competition in this context.

E.I. DuPont de Nemours and Co. v. Kolon Industries Inc., 2011-1 CCH Trade Cases ¶77,380 (March 11, 2011).

Comment: The Department of Justice and the FTC came to an agreement on this case and submitted an amicus brief criticizing the suggestion that a relevant geographic market must, as a matter of law, include the locations of production for all supplies of the relevant product. While the agencies acknowledged that in many cases the geographic dimension of the market is properly defined around the locations where the product is made, they argued that the geographic market may be restricted to the location of customers due to commercial realities, including the feasibility of cross-border arbitrage.

Google Books Settlement

A district court rejected a proposed settlement of copyright claims arising from Google's efforts to create a universal digital library. The court observed that the settlement, if not modified, would reward Google for engaging in unauthorized wholesale copying and identified concerns about class action and copyright law as well as antitrust law.

Among other features of the settlement, Google would have obtained a license to display out-of-print books without prior authorization from the copyright holder unless the rights holder objected. The court stated that the proposed settlement would grant Google a "de facto monopoly" over unclaimed or "orphan" works and would disadvantage a potential rival provider of digital library services that did not have rights to millions of orphan works. In addition, the court expressed concern that Google's market power in the online search market would be enhanced by the ability to prevent competitors from searching orphan books scanned by Google.

The Authors Guild v. Google Inc., 2011-1 CCH Trade Cases ¶77,387 (S.D.N.Y. March 22, 2011).

Hospital Acquisition

A district court granted the FTC's request for a preliminary injunction to prevent the completion of a hospital merger in the Toledo, Ohio, area, and allow the FTC to conduct an administrative trial while preserving the status quo. The court stated that the transaction was presumed unlawful because the merger would significantly exceed the market concentration thresholds set forth in the antitrust agencies' merger guidelines: The combined hospitals' post-acquisition share of the general acute care market would approach 60 percent in an already concentrated market and the merger would lead to a duopoly in the inpatient obstetrical services market with over 80 percent of that market.

> The policy challenged in 'Realcomp II Ltd. v. FTC' did not exclude discounted listings altogether from the Multiple Listing Service but rather encumbered their dissemination, preventing consumers from learning about offerings from lower-cost sellers.

FTC v. ProMedica Health System Inc., 2011-1 CCH Trade Cases ¶77,395 (N.D. Ohio March 29, 2011).

Comment: Despite agency efforts to de-emphasize relevant market analysis and market concentration thresholds in the new merger guidelines, the FTC's victory in the *ProMedica Health System* decision was due in large part to the court's adoption of those traditional metrics.

Travel Software Acquisition

The Justice Department agreed, subject to behavioral conditions, to allow Google to proceed with its proposed acquisition of ITA Software, a developer of software used by online travel agents and search sites to perform customized flight searches. The department alleged that Google's plans to offer an online search product combined with its prospective ownership of the underlying search software would lessen competition among providers of comparative flight search websites. To ensure that websites would continue to have access to ITA's pricing and shipping software, the department required Google to develop and license this software on commercially reasonable terms, establish internal firewalls to prevent unauthorized use of competitively sensitive information from ITA and continue funding research and development for flight search software.

United States v. Google Inc. & ITA Software Inc., No. 1:11-cv-00688 (April 8, 2011) available at http://www.justice.gov/atr/cases/google.html.

Comment: In the enforcement action reported immediately above, the department extracted a traditionally disfavored form of relief, imposing affirmative obligations that require ongoing monitoring instead of requiring a one-time structural change, such as a divestiture.

Price Comparison Sites

In another review of a transaction involving Google, the United Kingdom Office of Fair Trade opened an inquiry into Google's completed acquisition of British financial products price comparison site, BeatThatQuote.com.

"Google/BeatThatQuote," available at http://www.oft.gov.uk/OFTwork/mergers/Mergers_Cases/2011/Google.

Detergent Price Fixing

The European Commission (EC) fined producers of washing powder €315 million for engaging in price coordination in the market for household laundry powder detergent in eight European Union member states. The commission alleged that the collusion began through a trade association initiative to improve the environmental performance of detergent. Two producers, Procter & Gamble and Unilever, received the standard 10 percent reduction in the fine for participating in the settlement process. Under the EC's leniency program, a third producer, Henkel, received immunity for revealing the cartel to the EC and did not pay a fine, while Proctor & Gamble and Unilever received a 50 percent and 25 percent reduction, respectively, for coming forward with information during the investigation.

"Antitrust: Commission fines producers of washing powder € 315.2 million in cartel settlement case," IP/11/473 (April 13, 2011), available at http://ec.europa.eu/competition/.

Network Membership

The General Court of the European Union upheld the EC's €10.2 million fine imposed on Visa for its refusal to accept Morgan Stanley to Visa network membership because the bank owned the rival Discover Card network. The EC asserted that the exclusion prevented a potential competitor from entering a highly concentrated market with a trend toward consolidation and noted that the refusal to admit Morgan Stanley prevented it from providing services for accepting Visa cards and MasterCard cards. The court rejected Visa's argument that Morgan Stanley could have entered into a "fronting arrangement" with a Visa member financial institution.

Visa International Service v. Commission, T-461/07 (April 14, 2011), available at http://curia.europa.eu/.

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