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ANTITRUST

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European Regulators "Market Test" Microsoft's Antitrust Remedies

The European Commission (EC) said it would seek input from market participants in its assessment of a software company's proposal for compliance with a finding of abuse of a dominant position. The U.S. Court of Appeals for the Eighth Circuit ruled that a federal statute promoting the use of professional peer reviews shielded a hospital from a terminated physician's antitrust claims for money damages. Other recent antitrust decisions of interest included a determination by the Supreme Court of Connecticut that municipalities and utilities alleged to have unlawfully excluded a potential water supplier could not find immunity from antitrust liability under Connecticut's narrow state action statute.

Remedies

The EC announced that it will "market test" a plan to implement its decision requiring a software company to enable rivals to develop software that is fully compatible with the software company's dominant operating system. The EC determined in March 2004 that the software company had abused its dominant position in personal computer operating systems in its efforts to acquire a dominant position in the market for operating systems for work group servers, computers used by companies and other organizations to run their computer network. The servers' operating systems must be able to interoperate with (or "talk" properly to) the operating systems of the personal computers connected to the network in order to function quickly, reliably and securely. The EC found that the software company deliberately restricted interoperability between its personal computer operating system and the operating systems of rival work group servers by refusing to provide sufficient interface information to other software companies. The EC's investigation, prompted by a rival's complaint, concluded that these nondisclosures were part of a broader strategy to foreclose competition in violation of Article 82 of the European Union Treaty.

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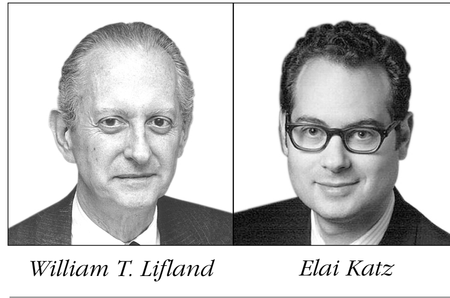
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In order to enable rivals to compete in the work group server operating system market, the EC required the software company to disclose interface documentation that would allow the rivals to develop software that has full interoperability with the software company's operating systems. In response to the EC's concerns about the terms and conditions in the software company's earlier proposals, the company submitted a revised proposal, which allows global development and sale of interoperable products and makes certain proprietary information available on a royalty-free basis.

The EC stated that in order to assess the viability of the proposed plan, it will "market test" the proposal by asking industry participants to evaluate the reasonableness of its terms. Early press accounts of industry reactions indicate that some participants in the market test criticized the restrictions on development of "open source" software and the breadth of the data made available on a royalty-free basis. The EC is likely to determine whether the proposal satisfies the terms of its decision in the fall.

***Microsoft Corp.*, European Commission (IP/05/673, June 6, 2005, announcement available at europa.eu.int).**

Comment: Fashioning appropriate and effective remedies for monopolization violations is a complex and uncertain task, in part because it is so difficult to predict how the competitive landscape will be affected by a proposed remedy, particularly one involving compulsory licensing of intellectual property. The U.S. antitrust agencies have consulted with industry participants to assist in evaluating a proposed remedy and have from time to time used trustees who are experts in the industry to develop effective license remedies for antitrust

violations. The EC's more formal practice of publicly enlisting market participants to evaluate the likely effects of a proposed remedy understandably seeks out the views of firms that should be in a good position to articulate what is necessary to promote competition, yet the rivals and customers of a dominant firm may be inclined to give vent to their special interest which, in some cases, may prove to chill rather than promote competition.

Immunities

The Eighth Circuit affirmed summary judgment in favor of a hospital alleged to have revoked a physician's staff privileges in violation of federal antitrust law. The appellate court held that the hospital was immune from damages claims under the Health Care Quality Improvement Act of 1986, which provides that a professional peer review action that meets certain procedural and substantive standards, including a reasonable belief that the action was in furtherance of quality health care, is immune from damage suits. The act also provides that professional peer review actions are presumed to meet these standards and the court concluded that in this case the physician did not meet her burden to rebut the presumption.

Lee v. Trinity Lutheran Hospital, **2005-1 CCH Trade Cases ¶74,825**

Owners of a pond brought suit alleging that municipal entities and water utilities excluded them from the wholesale water market in the New London area in violation of the Connecticut Antitrust Act by refusing to deal with the pond owners and threatening to use the power of eminent domain to take the pond if they did not abandon their plans to supply water to the New London region. A trial court ruled that the state action immunity doctrine sheltered the defendants from antitrust liability and the Supreme Court of Connecticut reversed. The state Supreme Court stated that while the conduct may have been immune under the U.S. Supreme Court's 1943 *Parker* decision and its progeny, Connecticut's state action immunity statute proposed a different test based on its distinctive text, which provides that conduct is immune only when it is "specifically directed or required by a [state or federal] statute."

The court rejected the defendants' contention that Connecticut law requires the incorporation of federal case law when construing Connecticut's antitrust laws, including the state action statute, explaining that Connecticut follows federal precedent in interpreting state antitrust laws unless the text of the antitrust statute requires a different interpretation, as it does in this case.

Courts have applied a rule-of-reason analysis to say that the exchange of prices among competitors with the effect of reducing competition may violate §1 of the Sherman Act.

The Supreme Court found that although Connecticut statutes envision local monopolies in the retail supply of water, state law did not authorize deterring the development of independent water suppliers or the manipulation of water supply figures, which are both alleged by plaintiffs.

Miller's Pond Co. v. City of New London, **2005-1 CCH Trade Cases ¶74,823**

Comment: Even in states where it is well-settled and expressly provided that federal interpretation of antitrust law should be followed in construing state statutes, differences in statutory language may mandate different outcomes.

Acquisitions

The Federal Trade Commission (FTC) announced that it is closing its investigation into an acquisition of a rival by a producer of Southern Powder River Basin (SPRB) coal and that it will discontinue administrative litigation challenging the deal. A district court denied the FTC's motion for a preliminary injunction to prevent consummation of the deal in August 2004 and the U.S. Court of Appeals for the D.C. Circuit affirmed the order shortly thereafter. The commission stated that the costs of pursuing administrative litigation would not serve the public interest—there would be substantial duplication of effort because the preliminary injunction hearing amounted to nearly a full trial on the merits. The commission added that it was not necessary to correct any legal error because the district court's ruling that a theory based on the likelihood of coordination in output decisions is novel, with which the commission strongly disagrees, was rejected by the D.C. Circuit. The commission based its decision on its application of the criteria set forth in its 1995 Statement of Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction.

Commissioner Pamela Jones Harbour

dissented from the commission's decision, stating that the FTC should take the opportunity to write an opinion clarifying the law relating to coordinated interaction. She also said that substantial new evidence about the capacity, expansion plans and production levels of SPRB coal producers supports the likelihood of coordinated interaction postmerger.

Commissioner Thomas B. Leary issued a separate statement explaining his vote in support of closing the investigation. He noted that he believed an administrative trial would have been preferable to a preliminary injunction action in federal court because the factual issues in the case were complex—for example, the transaction did not reduce the number of producers of SPRB coal but ownership of a mine which was the primary source of output expansion changed hands in a way that the FTC believed would facilitate coordination of output—and prospects may exist for effective post-merger relief.

***Arch Coal, Inc.*, CCH Trade Reg. Rep. ¶15,756 (June 13, 2005)**

Competitive Info Exchange

The Department of Justice announced a proposed settlement of charges that consulting firms exchanged competitive information regarding contractual terms in violation of §1 of the Sherman Act. The complaint alleges that actuarial consulting firms that provide actuarial risk analysis and management services to financial service organizations, including pension funds, agreed to share competitively sensitive information regarding the implementation of limitations of liability clauses in their contracts with clients. The complaint does not allege that the firms agreed to implement limitations of liability clauses or that they agreed on specific terms to be included in such clauses.

According to the department's complaint, until 1999, actuarial consulting firms generally did not seek contractual limitations of their liabilities due to actuarial mistakes, which can result in substantial losses to their clients.

However, the complaint avers, following an increase in the severity and frequency of liability claims, some actuarial consulting firms began considering the inclusion of limitations of liability clauses in their bids.

The department alleges that these consulting firms recognized that they would be at a competitive disadvantage unless use of limitations of liability clauses was widespread and began to exchange information regarding the implementation and content of these clauses with other consulting firms.

The complaint alleges that these communications facilitated the firms' decisions to begin submitting bids with limitations of liability clauses by eliminating or reducing uncertainties about the potential for losing clients to firms not using these clauses. The complaint also alleges that certain firms urged their competitors to adopt limitations of liability clauses and that expressions of displeasure were communicated to one firm that submitted a bid without a limitations of liability clause. The department asserted that the information-sharing agreement restrained competition with respect to significant terms of contracts with actuarial consultants' clients, deprived these clients of the benefits of unrestrained competition and resulted in more prevalent use of limitations liability clauses.

***United States v. Professional Consultants Insurance Co.*, CCH Trade Reg. Rep. ¶¶45,105, 50,924 (D.D.C. June 24, 2005)**

Comment: Courts have held, applying a rule-of-reason analysis, that the exchange of price information among competitors with the intent and effect of reducing competition may in certain circumstances violate §1 of the Sherman Act. On the other hand, the exchange of information unrelated to prices or costs among competitors, not in connection with any alleged per se agreement in restraint of trade, has generally not been the subject of antitrust actions. Indeed, in a 2002 Business Review Letter, the Department of Justice concluded that circulation of a model contact including a limitations of liability clause (with the terms left blank) is not likely to reduce competition. The enforcement action reported immediately above, however, indicates that the apparent intent and possible effects of information exchanges between competitors should be carefully scrutinized by antitrust counselors even when the exchanged information does not include costs or prices.

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