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ANTITRUST

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Completed Mergers Challenged in United States and Europe

The European Court of First Instance recently annulled the European Commission's unconditional approval of the combination of two record companies. Meanwhile, the U.S. Federal Trade Commission (FTC) challenged the completed, nonreportable merger of rival suppliers of certain medical diagnostic and imaging systems.

Other recent antitrust developments of interest included the Department of Justice's requirement that two newspaper chains divest a St. Paul, Minn., newspaper in order to proceed with their combination and a ruling by the U.S. Court of Appeals for the Second Circuit vacating as unreasonable a nonguidelines sentence for an individual who pleaded guilty to bid-rigging.

Acquisitions

In July 2004, after having previously stated its provisional opposition to the proposed combination of Sony and Bertelsmann's recorded music businesses, the European Commission (EC) approved the merger. The EC had stated that the heterogeneity of musical recording products, the difficulty of monitoring competitors' actual prices, and the absence of evidence of retaliatory measures demonstrated that it was unlikely that the merger would enhance or create a collective dominant position. A third party—an international association of independent music production companies—sought judicial review, arguing that the commission should not have approved the reduction of the number of major music companies from five to four in an industry it claimed was characterized by high, parallel prices and interdependence.

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The Court of First Instance ruled that the commission had not demonstrated to the requisite legal standard either the nonexistence of a collective dominant position before the merger or the absence of a risk that such a position would be created as a result of the merger. While the decision may be appealed to the European Court of Justice, the EC has asked the parties to update their notification to reflect current market conditions.

***Independent Music Publishers and Labels Association v. Commission of the European Communities*, T-464/04 (July 13, 2006), available at curia.europa.eu**

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The FTC announced the settlement of a challenge to a completed merger of two businesses that make certain diagnostic and digital imaging systems. The acquisition was not reviewed by antitrust authorities prior to its consummation because the $32 million transaction did not exceed the reporting thresholds of the Hart-Scott-Rodino premerger notification statute. The commission alleged that the acquisition eliminated the buyer's only significant rival in the U.S. market for "prone stereotactic breast biopsy systems." The consent decree requires the divestiture of the acquired business to a buyer approved by the FTC.

***Hologic Inc.* (FTC File No. 051-0263, July 7, 2006)**

Comment: The enforcement action reported immediately above serves as a reminder to practitioners that nonreportable transactions are not immune from challenge by the antitrust agencies even after they have been consummated. However, in contrast to European practice, decisions by American antitrust agencies not to challenge a transaction are not appealable.

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The Department of Justice announced the settlement of its challenge to the merger of two newspaper chains. The department stated that the proposed combination would have eliminated competition between the only two daily newspapers in the Minneapolis-St. Paul area, noting that this rivalry has resulted in lower prices and better coverage for readers and lower rates for advertisers seeking access to those readers. The department also stated that for both readers and advertisers, weekly papers, radio, television and Internet news are not adequate substitutes for local daily newspapers. The settlement requires the parties to divest the St. Paul Pioneer Press in order to complete their transaction.

***United States v. McClatchy Co. and Knight-Ridder, Inc.* CCH Trade Reg. Rep. ¶¶45,106 (No. 4837), 50,937 (D.D.C. June 27, 2006)**

Criminal Penalties

An owner of a printing brokerage firm pleaded guilty to participating in a bid-rigging conspiracy in violation of §1 of the Sherman

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Act. A district court sentenced the defendant to one year of home confinement, five years' probation, and required him to pay $155,000 in restitution. The Second Circuit vacated the sentence, ruling that it was an unreasonable deviation from the U.S. Sentencing Commission Guidelines, not supported by a "compelling statement" of the reasons for the reduced sentence. The appellate court observed that even though the sentencing guidelines are no longer mandatory after the Supreme Court's 2005 *Booker* decision, courts are still required to consider the guidelines and do not have unfettered discretion in sentencing.

***United States v. Rattoballi,* 2006-1 CCH Trade Cases 75,288**

Exemptions

Medical school graduates claimed that participants in a matching program used to assign prospective physicians to a single medical residency violated the antitrust laws by eliminating a competitive market for hiring residents and exchanging compensation information. In 2004, about two years after the suit was filed, President George W. Bush signed into law a statute exempting medical residency matching programs from antitrust claims, 15 USC §37b, and plaintiffs' claims were dismissed. The U.S. Court of Appeals for the District of Columbia Circuit affirmed and stated that the statute describes the very program that the complaint challenges. The appellate court noted that the statute not only exempts matching programs from the antitrust laws, but also precludes the consideration of match-related evidence in an antitrust action.

***Jung v. Association of American Medical Colleges,* 2006-1 CCH Trade Cases 75,275**

Patent Pooling

Chinese manufacturers of DVD-players claimed that patent owners agreed to fix the royalty rate for the license to their DVD-related patents in violation of the Sherman Act by entering into patent pooling arrangements. A district court dismissed the complaint and rejected the complaining manufacturers' claim that the patent pool constituted per se price fixing, relying on the Supreme Court's 1979 *Broadcast Music* ruling that blanket licenses to copyrighted musical compositions should not be subjected to per se condemnation. The court stated that the manufacturers' allegation that the patent pools were unlawful under the rule of reason because they included non-essential patents was insufficient because the complaint failed to identify which patents were non-essential or explain why they were not essential.

***WUXI Multimedia Ltd. v. Koninklijke Philips Electronics NV,* 2006-1 CCH Trade Cases 75,285 (S.D. Cal.)**

Comment: Intellectual property pooling arrangements that contribute to an efficiency-enhancing integration of economic activity have generally not been regarded as subject to per se treatment even though they could arguably be characterized as an agreement among horizontal competitors related to prices.

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Privilege

Canadian mining companies, alleged to have conspired to fix the price of sulfuric acid in violation of §1 of the Sherman Act, asserted that the attorney-client privilege shielded from discovery portions of an in-house report on metallurgical operations. A district court rejected the plaintiffs' contention that the privilege was waived because the company that prepared the report provided it to another defendant. The court stated that the privilege applied because the two companies shared a common legal interest in compliance with antitrust and other laws even though the document was not disclosed in the context of joint defense of actual or anticipated litigation.

In a separate opinion, the court ruled that the attorney-client privilege did not apply to material contained in antitrust compliance manuals because the manuals were instructional tools written by internal lawyers, not responses to requests for legal advice.

***In re Sulfuric Acid Antitrust Litigation,* 2006-1 CCH Trade Cases 75,315, 75,316 (N.D. Ill.)**

Class Actions

A maker of computer microprocessors alleged to have unlawfully monopolized the market removed purported class action complaints to federal court and the plaintiffs, purchasers of personal computers, moved to remand the cases to state court. The district court denied the motion, ruling that it had jurisdiction under the Class Action Fairness Act of 2005 because diversity of citizenship existed between at least one class member and one defendant, there were at least 100 class members and the amount in controversy exceeded $5 million. The court stated that the microprocessor maker's calculations, based on computer ownership data and the average cost of relevant computers, were sufficient to show that the amount in controversy exceed the statutory threshold.

***In re Intel Corp. Microprocessor Antitrust Litigation,* 2006-1 CCH Trade Cases 75,282 (D.Del.)**

Monopolization

In order to encourage the use of energy-saving devices, the Hawaii Public Utility Commission authorized an electric utility to provide incentives for the installation of solar water heaters in the form of rebates and allowed the utility to recover its costs and lost profits resulting from reduced energy demand by imposing a surcharge on consumers.

A solar water heater installation contractor on the island of Kauai alleged that the utility's rebate policy was intended to set a ceiling on the prices of solar water heaters and drive their sellers out of business. The court granted the utility's motion for summary judgment and stated that the contractor's claim was economically implausible because lower prices would lead to an increase in solar heater installations. The court also stated that there was no evidence that the utility intended to enter the solar heater installation market and therefore could not be said to have monopolized or attempted to monopolize that market.

***Lucas v. Citizens Communications Co.,* 2006-1 CCH Trade Cases 75,294 (D. Hawaii)**