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ANTITRUST

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Doctors' Collective Bargaining Found "Inherently Suspect"

The Federal Trade Commission (FTC) characterized the collective negotiation of fees by a group of doctors in Texas as "inherently suspect" and therefore unlawful after only abbreviated antitrust analysis.

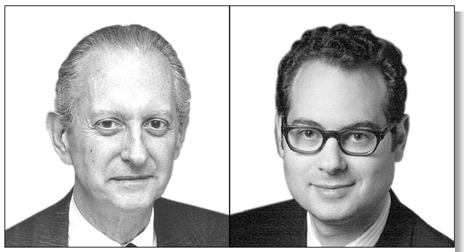
In other recent cases, the European Court of First Instance upheld the 2001 decision of the European Commission (EC) to block the combination of General Electric (GE) and Honeywell but did not agree with part of the EC's ruling, and a district court ruled that a purchaser of books on the Internet did not have standing to bring an antitrust claim challenging an agreement between two booksellers because the purchaser did not allege that it paid higher prices.

Other antitrust developments of interest included two enforcement actions by the French competition council involving the exchange of commercially sensitive information among mobile telephony providers in one case and between six prestigious Paris hotels in another case.

Restraint of Trade

Elaborating on earlier decisions, the FTC ruled that an organization of independent doctors in and around Fort Worth, Texas, facilitated horizontal price fixing in violation §5 of the FTC Act by collectively negotiating with health maintenance organizations and other third-party payors on behalf of its members. The commission stated that when the competing doctors are not financially or clinically integrated in an efficiency-producing manner, coordinated bargaining in order to increase reimbursement rates amounts to horizontal price fixing.

Among the practices that the FTC determined had facilitated a horizontal agreement on minimum prices was the organization's use of annual polls to determine minimum reimbursement rates. The commission stated that the organization obtained a right of first negotiation with payors from its members, refused to deal with particular payors and terminated contracts in order to



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enhance its bargaining power and obtain higher fees. In addition, the FTC noted that the organization refused to circulate proposed contracts that it determined most of its members would not agree to.

The FTC stated that although this conduct could be characterized as per se unlawful, it should be examined under the "inherently suspect" standard, as it was recognized that physicians can join together and negotiate fees in ways that do not harm competition. The commission also noted that the Supreme Court has urged caution in applying per se labels to conduct in professional settings where the economic impact is not immediately obvious.

The FTC commented that contemporary restraint of trade jurisprudence has evolved beyond the simple dichotomy between per se and rule of reason to a "sliding scale" and explained that on the continuum between per se and rule of reason analysis, the "inherently suspect" standard is a "close neighbor" of per se analysis. Under the "inherently suspect" analysis, an elaborate inquiry into the effects of the conduct in the market is not required. Unlike per se cases, however, an "inherently suspect" practice may be saved from summary condemnation by articulating a legitimate justification, which may consist of plausible reasons why the practice may not be expected to have adverse competitive consequences in its particular market context or may benefit consumers.

The FTC disagreed with the administrative law judge's conclusion that proof of market definition and market power was necessary in this case. The opinion explained that because the defendant did not meet its burden of establishing a legitimate justification for its inherently suspect practices, the focus is on the nature of the conduct, not the nature of the market.

As an example of possibly justifiable collaborations in the health care industry, the FTC stated that joint negotiation of fees could be lawful where it is reasonably related to an efficiency-enhancing integration of economic activity, such as a clinical resource management program, and reasonably necessary to achieve the procompetitive benefits of the integration.

***In re North Texas Specialty Physicians*, 2005-2 CCH Trade Cases ¶75,032**

Comment: In the opinion reported immediately above, the FTC continues its use and elaboration of the "inherently suspect" standard that it outlined in its 2003 *Polygram Holding* decision, more commonly referred to as the *"Three Tenors"* case, which was affirmed earlier this year by the U.S. Court of Appeals for the District of Columbia. In this case and the *Three Tenors* case, it appears that the commission eschewed the per se label because it believed that, with different facts, the conduct at issue could have been ancillary to a procompetitive collaboration. Future decisions of the commission and the courts may delineate more specifically the types of restraints likely to warrant "inherently suspect" treatment. The commission and the courts may have the opportunity in such cases to examine more carefully a defendant's assertion that an inherently suspect practice is not "expected to have adverse consequences in the context of the particular market in question" and provide guidance on how to determine whether such a justification is plausible and cognizable without engaging in full-blown rule of reason analysis. For the time being, practitioners who might prefer the predictability of a bright line between conduct subject to per se condemnation and conduct reviewed under the rule of reason must use caution in relying on such labels in counseling clients, particularly in the context of price restraints associated with collaborations among competitors.

Acquisitions

The EC's widely publicized 2001 decision to block GE's proposed acquisition of Honeywell was

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upheld by the European Court of First Instance based on one of the EC's grounds—that the merger would have created or strengthened dominant positions in several product markets, including jet engines for large regional aircraft and engines for corporate jet aircraft. The court disagreed, however, with the EC's conclusion that the merger was unlawful because it would result in anticompetitive "conglomerate effects," that is, a dominant position would be enhanced from the opportunity to bundle together complementary products or to foreclose competitors. The court stated that the likelihood of such conglomerate effects depends in part upon a prediction that the merged entity would engage in conduct that might constitute an abuse of dominant position in violation of Article 82. The court added that merely having a wider range of products than competitors does not support the conclusion that a merger would be anticompetitive.

***General Electric Co. v. Commission of the European Communities*, Case T-210/01 (Dec. 14, 2005), and *Honeywell International Inc. v. Commission of the European Communities*, Case T-209/01 (Dec. 14, 2005), available at www.curia.eu.int.**

Comment: The EC's 2001 decision attracted much attention not only because European regulators blocked a merger of two U.S.-based companies that had been approved in the U.S. but also because the EC's decision relied on a conglomerate effects theory—that the combination of a range of distinct relevant products can have anticompetitive effects through bundling or exclusionary conduct. In the decision reported immediately above, the Court of First Instance rejected the application of the conglomerate effects doctrine in this case and stated that conglomerate concentrations generally do not produce anticompetitive effects.

Antitrust Injury

A consumer challenged as an unreasonable restraint of trade an agreement between an online bookseller and a national chain of bookstores, whereby the online merchant operated the bookstore chain's web-site and controlled most of the terms of sale on the site. The district court granted the defendants' motion for judgment on the pleadings, ruling that the consumer lacked standing to bring his claims because he did not suffer any antitrust injury—a type of injury the antitrust laws were designed to prevent. The court stated that the complaint did not allege any specific instances of plaintiff paying higher prices than he would have paid absent the agreement.

***Gerlinger v. Amazon.com Inc.*, 2005-2 CCH Trade Cases ¶75,004 (N.D. Cal.)**

Attorney's Fees

A manufacturer of flash-frozen novelty ice cream brought a patent infringement suit against rival manufacturers of flash-frozen novelty ice cream. The rivals asserted antitrust counterclaims, alleging that the patent was obtained by fraud on the patent office which could, as the Supreme Court held in its 1965 *Walker Process* decision, violate §2 of the Sherman Act. The jury found that the rivals had proved all the elements of their antitrust counterclaim, but did not award any monetary relief. The court rejected the patent holder's contention that the rivals were not entitled to attorney's fees because the jury did not award any damages, stating that under §4 of the Clayton Act, once the antitrust plaintiff proves a violation of the antitrust laws which caused damage to its property or business, an award for attorney's fees and costs is mandatory.

***Dippin' Dots Inc. v. Mosey,* 2005-2 CCH Trade Cases ¶74,996 (N.D. Tex.)**

Limitation of Actions

Distributors of business training materials claimed that a supplier coerced them into signing distributorship agreements that imposed anticompetitive restrictions on their participation in the market in violation of federal and Missouri antitrust law. A district court ruled that the claims were time-barred because the cause of action began to accrue upon execution of the distributorship agreements, which occurred more than four years before the filing of the complaint. The court stated that later acts in performance of the agreements did not restart the limitations period.

***Wilson Learning Corp. v. Schlechte,* 2005-2 CCH Trade Cases ¶74,997 (D. Minn.)**

Information Exchange

The French competition authority, the Conseil de la Concurrence, announced that it imposed substantial fines on the three principal providers of mobile telephone services in France for participating in two anticompetitive agreements in violation of French competition law.

The Conseil found that every month between 1997 and 2003, the mobile telephony providers shared with one another the number of customers that each gained or lost in the previous month. The Conseil explained that the exchange of such competitively sensitive information, in a concentrated market, is likely to reduce competition even though the information did not bear on their future pricing strategies.

The Conseil also found that the three providers agreed to stabilize their respective market shares between 2000 and 2002, when growth in demand was slowing substantially. The Conseil stated that the market share agreement enabled the providers to introduce anticompetitive policies, such as billing in 30-second increments rather than one-minute increments, that would have been risky to implement unilaterally. The Conseil noted that the information exchanges were used to monitor the market share agreement.

***Anticompetitive Agreements in the Mobile Telephony Market* (Dec. 1, 2005) available at www.conseil-concurrence.fr.**

In another matter, the French competition council announced that six prestigious luxury hotels in Paris were fined for regularly exchanging commercially sensitive information. The Conseil found that the hotels held meetings and exchanged e-mails in which they provided one another with specific confidential data, including occupancy rates, average room prices and monthly revenue.

The Conseil found that the six hotels—the Bristol, Crillon, George V, Meurice, Plaza Athénée and the Ritz—constituted a distinct relevant market because no other hotels in Paris offered the same combination of superior restaurants, prestigious location, high staff-to-guest ratio and a high proportion of suites. In addition, the six hotels were able to charge higher rates for regular rooms and substantially higher rates for suites. The Conseil stated that in such an oligopolistic market, the exchange of strategic information facilitates collusive equilibrium and impedes competition because it enables monitoring of competitive policies and performance.

***Entente dans le secteur de l'hôtellerie de luxe* (Nov. 29, 2005), Décision No. 05-D-64 du 25 novembre 2005 relative à des pratiques mises en œvre sur le marché des palaces parisiens, available at www.conseil-concurrence.fr.**

Comment: The two French enforcement actions reported immediately above demonstrate that in certain markets, the authorities may view the exchange of specific, recent competitively sensitive information between most or all firms in a relevant market as facilitating collusion or leading to lessened competition. These types of exchanges can be distinguished from dissemination of data that may have procompetitive benefits, such as aggregate data collected by trade associations.

Enforcement Agencies

The EC announced that it will grant greater access to its files in merger and antitrust cases to parties involved in an investigation. The EC stated that the ability to review the file (excluding confidential and internal information) will allow parties subject to an enforcement action to see the evidence, whether it is incriminating or exonerating, which the EC described as a fundamental procedural safeguard.

***Competition: Commission Improves Rules for Access to the File in Merger and Antitrust Procedures*, IP/05/1581 (Dec. 13, 2005), available at europa.eu.int.**