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ANTITRUST

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Minimum Resale Price Pacts Not Automatically Illegal

The U.S. Supreme Court ruled that vertical minimum price restraints are not per se illegal, but rather are subject to review under the rule of reason. Another recent antitrust development of note included the European Court of First Instance deciding that the European Commission must compensate an electrical equipment maker for costs incurred as a result of an improper decision to block a merger.

In other cases: a major software company undertook to list and include independent software providers' desktop search programs on the new version of its operating system in order to comply with prior settlement agreements; and a district court decided that purchasers of computers and other products containing memory chips did not have standing to seek recovery from participants in an alleged memory-chip price-fixing conspiracy.

Resale Price Maintenance

A discount retailer of leather goods challenged a manufacturer's minimum resale price policy as a per se violation of §1 of the Sherman Act. The district court refused to allow the defendant to present expert evidence as to the procompetitive benefits of the pricing policy, holding that such evidence was irrelevant in a per se case. A jury returned a verdict for plaintiff and the U.S. Court of Appeals for the Fifth Circuit, citing the Supreme Court's 1911 *Dr. Miles* decision, affirmed.

In a 5-4 decision, the Supreme Court reversed. The Court observed that the *Dr. Miles* decision had been premised in large part on the common-law rule against restraints on

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alienation rather than on concerns related to competition and that the decision improperly equated horizontal and vertical restraints.

The Court observed that resale price maintenance agreements can encourage interbrand competition and serve to promote the provision of various services by retailers, thus undermining the argument that the effect of such restraints is always or almost always anticompetitive.

The Court emphasized that it was not adopting a rule of per se legality for vertical price restraints, but only abandoning the rule of per se illegality and noted that in applying the rule of reason, the courts should look to a number of factors including the presence or absence of market power and whether the restraint was initiated by the manufacturer or the retailer, which may have fewer procompetitive reasons for resale price maintenance. The Court also anticipated that over time courts would devise rules of analysis, perhaps even "presumptions" that would provide more guidance to businesses and simplify rule of reason litigation.

***Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 2007-1 CCH Trade Cases ¶75,753**

Acquisitions

In a case of first impression, the Court of First Instance ordered the European Commission (EC) to pay for damages caused by the commission's denial of a merging party's procedural rights under the European Merger Regulation.

In 2001, the EC blocked the proposed combination of two French electrical equipment manufacturers and required the divestiture of shares already acquired by the buyer. The buyer appealed and the Court of First Instance reversed the commission's decision, stating that the commission acted unlawfully by advancing a previously unarticulated objection—that the buyer's dominant position in electrical panel-board components would be "buttressed" by the seller's leading position in downstream electrical equipment—for the first time when it was too late for the parties to respond.

The buyer subsequently brought an action seeking compensation from the commission and the Court of First Instance ruled that the EC's infringement of the buyer's right to be heard without justification entitled it to compensation for some legal expenses and a portion of the losses it sustained when it had to sell the shares it acquired at a lower price.

***Schneider Electric SA v. Commission of the European Communities*, T-351/03, Press Release No. 48/07 (July 11, 2007), available at curia.europa.eu**

Monopolization

The Department of Justice announced an agreement resolving claims that a major software company excluded independent software vendors from competing to provide the desktop search function in its latest operating system in violation of final judgments in antitrust litigation brought against the software company in the late 1990s by the department and several state attorneys general. A search engine company had asserted that the software company's new operating system did not give users and computer manufacturers a choice among providers of desktop search functionality, which allows users to search quickly for files located on their computer. The agreement requires the software company to enable consumers and computer manufacturers to select a default program to handle desktop search from a list that will include the operating system's program as well as those of independent software vendors.

***United States v. Microsoft Corp.*, No. 98-1232 (D.D.C. June 19, 2007), available at www.usdoj.gov/atr**

Indirect Purchasers

Indirect purchasers of dynamic random access memory (DRAM) computer chips sued to recover damages resulting from an alleged conspiracy to fix DRAM prices in violation of the antitrust laws of various states. A district court dismissed for lack of standing those claims arising from purchases of products, such as computers, in which DRAM is a component.

The court noted that even though many state antitrust laws, unlike federal law, permit claims by indirect purchasers, the plaintiffs must nevertheless satisfy general antitrust standing requirements set forth in the Supreme Court's 1985 *Associated General Contractors* decision. The court ruled that the plaintiffs did not allege that they suffered antitrust injury because they were not participants in the DRAM market but rather in markets for separate products incorporating DRAM as a component and that the artificially high price of DRAM had only an indirect impact on the prices plaintiffs paid for these products.

***In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 2007-1 CCH Trade Cases ¶75,736 (N.D. Cal.)**

Market Definition

A company engaged in the business of stretching vehicles into limousines and buses alleged that automakers and members of a limousine builders association that adhered to self-imposed safety standards conspired to exclude the plaintiff from participating in trade shows and advertising in trade publications in violation of §1 of the Sherman Act.

The U.S. Court of Appeals for the Eighth Circuit, which had previously ruled that the alleged restraint must be judged under the rule of reason, affirmed the district court's grant of summary judgment to defendants and stated that no reasonable jury could find that plaintiff properly defined the relevant product market. The court noted that the proposed market—limousines stretched longer than the safety standards (120 or 130 inches, depending on the make of the base car)—was arbitrary and, if accepted, would mean that cars stretched by 85 and 120 inches were interchangeable with each other but not with a car stretched by 121 inches.

The court added that the plaintiff did not show any adverse effect on competition, such as an increase in prices, reduction in output or a decrease in the number of competitors in the limousine industry.

***Craftsmen Limousine, Inc. v. Ford Motor Co.*, 2007-1 CCH Trade Cases ¶75,748**

Comment: Markets characterized by a broad continuum of product size, quality or prices may lead to arbitrary and not necessarily appropriate definitional boundaries.

Patents

Customers of an online DVD-rental service brought suit alleging that patents describing methods of ordering DVDs through the Internet were obtained by committing fraud on the patent office. Although the court ruled that the conduct could support a claim of unlawful monopolization under the Supreme Court's 1965 *Walker Process* ruling, the court nevertheless dismissed the complaint, stating that allegations that the existence of the patents deterred potential competitors from entering the market did not sufficiently plead the minimum level of enforcement necessary to state a *Walker Process* claim.

***In re Netflix Antitrust Litigation*, 2007-1 CCH Trade Cases ¶75,749 (N.D. Cal.)**

Tying

A cable television services provider claimed that an operator of television stations in small- and medium-size markets refused to sell the rights to retransmit its network affiliate programming unless the cable company also bought the retransmission rights for other less desirable stations, constituting unlawful tying in violation of §1 of the Sherman Act.

A district court denied the cable company's motion for a preliminary injunction preventing the television station operator from terminating the existing retransmission agreements because the cable company did not suffer antitrust injury and stated that its injuries—lost customers and damaged reputation—were the result of the termination of the existing agreement, not the alleged tying arrangement.

***Mediacom Communications Corp. v. Sinclair Broadcast Group, Inc.*, 2007-1 CCH Trade Cases ¶75,734 (S.D. Iowa)**

Margin Squeeze

The EC fined an incumbent Spanish telecommunications company over €151 million for engaging in an unlawful "margin squeeze" to exclude small rivals from the high speed Internet services market, constituting an abuse of dominant position in violation of Article 82 of the European Treaty. The commission stated that the relatively small difference between the prices the incumbent firm charged its retail customers for high speed Internet access and the wholesale prices it charged its competitors—which were entitled under Spanish regulation to access the incumbent firm's telecommunications infrastructure —left equally efficient rivals with the option of either incurring losses or leaving the market.

The EC observed that as a result of the margin squeeze Spanish consumers paid higher prices on average than other Europeans for high speed Internet service and a lower percentage of Spaniards subscribe for these services, which harms the economy more broadly. The commission added that providers of Internet services over cable television networks had limited coverage and had not been able to discipline the incumbent company's high prices.

***Antitrust Commission fines Telefónica over €151 million for over five years of unfair prices in the Spanish broadband market*, IP/07/1011 and MEMO/07/274 (July 4, 2007), available at ec.europa.eu**