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ANTITRUST

BY ELAI KATZ

FTC Will Not Block Online Advertising Merger

After over 33 years of crisp and insightful commentary on antitrust law in this newspaper, William T. Lifland decided to put down his pencil late last year. The first time this column was published under his sole byline in July 1973 (having taken over from his partner Jerrold G. Van Cise), the developments covered included a ruling by the U.S. Court of Appeals for the Seventh Circuit that antitrust actions brought by short-sellers against a commodity exchange market need not be stayed to reconcile possible conflicts between the antitrust laws and the Commodity Exchange Act.

Demonstrating just how much the application and interpretation of the antitrust laws have changed even as the topics and issues addressed remain about the same, this month's column reports on a district court decision dismissing antitrust claims by short-sellers because they are incompatible with securities regulations. Immediately preceding that report is a discussion of a decision by the Federal Trade Commission (FTC) not to challenge a proposed merger in the nascent online advertising industry.

Other recent antitrust developments of note included a district court's rejection of an assertion by an economic expert that National Association for Stock Car Auto Racing (NASCAR) races constitute a separate relevant market to the exclusion of other sports or entertainment events and an FTC enforcement action brought against an investment fund for failing to comply with premerger notification regulations.

Acquisitions

The FTC announced that it will not challenge the proposed combination of Google Inc., the leading Internet search engine and DoubleClick Inc., the leading provider of management and reporting technology for online advertising.

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According to the commission's statement announcing the closing of its investigation, the two firms are not direct horizontal competitors in any relevant market and the transaction was not likely to substantially lessen competition. Google is the dominant seller of sponsored advertising on its search engine and also sells advertising as a provider of ad intermediation services, which enable advertisers to buy targeted online advertising space indirectly, that is, not for a specific Web site. DoubleClick is the leading supplier of ad serving products, which manage the selection of advertisements for publishers and advertisers and provide data used to track and analyze online campaigns. The FTC emphasized that DoubleClick does not sell advertising space.

The FTC rejected the suggestion that Google and DoubleClick compete with one another in an "all online advertising" market. The commission stated that the evidence showed it was unlikely that an increase in the price of DoubleClick's ad serving products would result in sufficient numbers of publishers and advertisers switching to Google's ad intermediation product, particularly because other significant ad serving products are the closest alternatives to DoubleClick's product. The statement added that evidence of the elimination of potential competition between the two firms, both of which had been developing competing products, was not sufficient to block the merger because the possible addition of new entrants to the ad intermediation and ad-serving markets is not likely to have significant procompetitive effects in markets that are already competitive.

The FTC also assessed the possibility of nonhorizontal competitive effects and determined that any leveraging or bundling strategy Google might employ would not likely be effective because DoubleClick does not have market power (despite its high market share) and any attempt by Google to "strong- arm" customers will likely result in them switching to another ad-serving firm. The commission noted that customers that do not want to work with Google have already moved to one of DoubleClick's rivals.

The commission also rejected the argument that the ad-intermediation market could "tip" to Google due to network effects, finding that the various market participants compete by offering differentiated technology and kinds of ad space inventory.

The FTC noted the importance of privacy concerns in the industry, but stated that it lacked the power to block the merger on grounds other than injury to competition. Still, it considered the concern that the combination will reduce competition over consumer-friendly privacy policies and determined that it was not significant.

The transaction remains subject to approval by the European Commission, which opened an in-depth, Phase II investigation to examine the elimination of potential competition in ad intermediation as well as possible exclusionary impact on competitors from the combination of leading firms in related markets in the online advertising industry.

Statement of Federal Trade Commission Concerning Google/DoubleClick, **CCH Trade Reg. Rep. ¶16,092, FTC File No. 071-0170 (Dec. 20, 2007), available at www.ftc.gov; *Mergers: Commission Opens in-depth***

***investigation into Google's proposed take over of DoubleClick*, IP/07/1688 (Nov. 13, 2007), available at ec.europa.eu/comm/competition/index _ en.html.**

Comment: Merger analysis under §7 of the Clayton Act is inherently prospective and necessarily involves predictions about the evolution of the markets at issue—an especially difficult task when assessing future competition in the rapidly changing online search and advertising business. Indeed, it appears that one dissenting FTC commissioner would have challenged the transaction because of her different predictions about the future of the online advertising business and the proposed merger's impact on the evolution of the industry.

Implied Immunity

An antitrust action brought by short-sellers, investors hoping to profit from their expectation that the value of a security will decline by borrowing securities from brokers, alleged that securities brokerage firms conspired to fix minimum borrowing rates and collusively classify particular securities as "hard-to-borrow" in violation of §1 of the Sherman Act.

In what may be the first direct application of the U.S. Supreme Court's *Billing* decision, handed down last year, a district court dismissed the complaint, stating that the antitrust laws are clearly incompatible with the securities laws in the short sale context.

The court considered whether an antitrust suit would threaten the efficient functioning of the securities market and stated that because there is a clear overlap between evidence tending to show an antitrust violation and evidence tending to show lawful securities conduct, such as daily communications between brokerage firms regarding short sales transactions, this kind of lawsuit "would likely chill a broad range of activities that the securities laws permit and encourage."

The court observed that the securities laws and antitrust laws are in serious conflict here, even assuming that the Securities and Exchange Commission (SEC) disapproves of the conduct at issue, because a "fine and complex line" separates permissible and impermissible conduct under the commission's regulations.

***In re Short Sale Antitrust Litigation*, 2007-2 CCH Trade Cases ¶75,988 (S.D.N.Y.)**

Relevant Market Definition

The owner of a Kentucky auto-racing track claimed that a leading stock car promoter refused to permit the racetrack owner to host a popular and lucrative race in violation of antitrust laws. A district court granted summary judgment to the defending promoter because the complaining racetrack owner failed to prove a relevant market. The court stated that the plaintiff's economic expert did not use a reliable method in determining that the proper relevant market is limited to the promoter's popular race series and excluded his testimony in accordance with the Supreme Court's 1993 *Daubert* decision. The court noted that the expert did not consider other sports or entertainment events as possible substitutes for those attending the popular stock car races.

***Kentucky Speedway LLC v. National Association of Stock Car Auto Racing, Inc. a/k/a* NASCAR, 2008 U.S. Dist. LEXIS 1076 (E.D. Ky. Jan. 7, 2008)**

Premerger Notification

The FTC and the Department of Justice announced the settlement of charges that an investment fund failed to comply with the premerger reporting requirements of the Hart-Scott-Rodino Antitrust Improvement Act (HSR Act). The HSR Act requires parties to acquisitions of voting securities or assets exceeding certain thresholds to notify the antitrust agencies of the proposed transaction and observe a waiting period before completing the transaction.

The investment fund failed to make an HSR filing to report an acquisition that resulted in crossing a second HSR threshold, $100 million (adjusted for inflation), even though it had complied with its obligation to report plans to cross the first, $50 million, threshold. The fund's filing obligation resulted from its aggregation of separate entities' holdings into a single master fund that held over $100 million of three companies' voting securities and then made additional acquisitions.

The statutory language requires a filing when an acquisition results in the holding of voting securities or assets valued at above one of the HSR thresholds even if the buyer's holdings already exceeded that threshold prior to the acquisition due to a nonreportable transaction or an increase in the market value of the shares.

The commission noted that the investment fund had previously made corrective HSR filings to report completed transactions that should have been notified and that the FTC did not seek penalties for those first inadvertent violations.

***United States v. Value Act Capital Partners LP*, Civ. Action No. 1:07-CV-02267 (Dec. 19, 2007), CCH Trade Reg. Rep. ¶16,901, ¶45,107 (No. 4919), available at www.ftc.gov**

Comment: The matter reported immediately above serves as a reminder that acquisitions by investment firms and financial institutions may require reporting under the sometimes arcane rules of the HSR Act, even though a number of exemptions may be applicable, and that the agencies have not restricted their enforcement of HSR Act violations to situations that raise substantive antitrust concerns.

Interchange Fees

The European Commission decided that a credit card network's multilateral interchange fees for cross-border transactions constituted a restrictive trade practice in violation of Article 81 of the European Treaty. The commission stated that the network's "fallback" interchange fee charged by a cardholder's bank to a merchant's bank sets a price floor and reduces competition between member banks without procompetitive innovation or efficiency effects.

***Antitrust: Commission prohibits MasterCard's intra-EEA Multilateral Intercange Fees*. IP/07/1959 (Dec. 19, 2007), available at ec.europa.eu/comm/competition/index_en.html**

Monopoly Leveraging

The French competition authority, the Conseil de la Concurrence, ruled that a cinema chain violated French competition law by requiring film distributors wishing to exhibit their films in areas where the chain had a monopoly to grant it exclusive rights to exhibit popular films in areas where it faced competition. The Conseil noted that the cinema chain boycotted distributors that refused to agree to its conditions.

***Decision No. 07-D-44 of Dec. 11, 2007 regarding practices implemented by GIE Ciné Alpes*, available at www.conseil-concurrence.fr**

Comment: Although the U.S. Supreme Court's 1948 *Griffith* decision condemned a cinema leveraging strategy akin to the conduct described in the decision reported immediately above, the Supreme Court's 2004 *Trinko* opinion stated that using a monopoly in one market to obtain competitive advantage in another market does not violate §2 of the Sherman Act unless there was a "dangerous probability of success" in monopolizing the second market.