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ANTITRUST

BY ELAI KATZ

DOJ: On Beef Packers, Anheuser-Busch, Delta-Northwest

In the waning months of the current administration, the U.S. Department of Justice has announced a wide variety of enforcement actions including: bringing a lawsuit to challenge the combination of two of the four largest domestic beef packers; requiring a divestiture in a foreign beer brewer's acquisition of the largest U.S. brewer; imposing one of the largest fines on this side of the Atlantic for a price-fixing cartel; and mounting an investigation that led to the abandonment of Yahoo! and Google's plans to collaborate in the sale of Internet search advertising.

Other recent antitrust developments of note included a ruling by the U.S. Court of Appeals for the Fifth Circuit that members of a standard-setting organization did not unlawfully conspire to exclude another member's technology from the industry standard.

Acquisitions

The Department of Justice and the attorneys general of more than 10 states filed a civil complaint seeking to enjoin the proposed combination of the third- and fourth-largest U.S. beef packers. Beef packers buy fed cattle from feedlots, slaughter and process the cattle and then package cuts of beef for sale to wholesalers and grocery store chains.

The department asserted that, if not blocked, the transaction would place more than 80 percent of domestic fed cattle capacity in the hands of three firms and eliminate a competitively significant market participant. The department alleged that the acquisition would lessen competition among beef packers in the sale of boxed beef. The department also stated that the combination would reduce competition among packers for the purchase of fed cattle from feedlots.

According to the complaint, when the meat-packing industry reduces production levels, cattle producers are paid less and customers pay more for beef because the supply of cattle and demand for beef are relatively insensitive to price changes, thereby increasing the packers' margins. The department also asserted that the transaction would increase the incentive and ability of major

packers to engage in coordinated output and pricing decisions.

***United States v. JBS SA*, No. 08-cv-5992 (N.D. Ill. Oct. 20, 2008), CCH Trade Reg. Rep. ¶45,108 (No. 4978) also available at www.usdoj.gov/atr**

Comment: The enforcement action reported immediately above examines the competitive impact of the proposed transaction on sellers to the merging firms as well as consumers of these firms' products.

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The Department of Justice announced the settlement of its challenge to the proposed acquisition of the leading U.S. brewer, Anheuser-Busch Cos., by the second-largest brewer in the world, Belgium-based InBev NV/SA. The department alleged that the transaction would have lessened competition substantially, in violation of §7 of the Clayton Act, in the market for beer in parts of upstate New York and required the divestiture of Labatt brand beer, which is brewed and sold by InBev's Buffalo-based subsidiary.

The department stated that although InBev (with its leading brands Labatt, Stella Artois, Bass and Beck's) had a small share of U.S. beer sales nationwide, the transaction would have combined two of the three major beer manufacturers and eliminated significant head-to-head competition in the Buffalo, Rochester and Syracuse metropolitan areas. The department alleged that in Buffalo, Rochester and Syracuse, Labatt had 13 to 21 percent of beer sales and that, with Anheuser-Busch's Budweiser, the combined firm would have accounted for 41 to 45 percent of those local beer markets. Other than the recently combined MillerCoors, with 26 to 28 percent, no other brewer had over 5 percent of those markets.

The department stated that beer is a separate relevant product market and that the price of wine or other alcoholic beverages does not significantly influence or constrain the price of beer. The Justice Department determined that the relevant geographic markets are relatively narrow because exclusive beer distribution territories, which are common throughout the United States, lead to localized pricing and competitive strategies. The department also noted that entry of a significant new entrant to the region was unlikely because of the importance of brand acceptance in the beer market.

***United States v. InBev NV/SA*, No. 1:08-cv-01965 (D.D.C. Nov. 14, 2008), available at www.usdoj.gov/atr**

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The Department of Justice announced the closing of its investigation into the proposed merger of Delta Air Lines and Northwest Airlines, the third- and fifth-largest airlines in the United States. The department stated that on most city-pair routes where the airlines compete with each other, they also compete with other airlines. The department added that consumers are likely to benefit from improved service due to the combination of the airlines' complementary networks and that the merger will likely produce substantial and credible efficiencies, including cost savings in airport operations and fleet optimization.

The European Commission (EC) had approved the proposed combination in August, noting that the airlines' transatlantic passenger routes are mostly complementary because each has major hubs in different U.S. cities. The EC observed that the airlines already cooperate with one another on transatlantic routes as members of the Sky Team alliance, which also includes Air France, KLM and Alitalia.

Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of the Merger of Delta Air Lines Inc. and Northwest Airlines Corp.*, CCH Trade Reg. Rep. ¶50,233 (Oct. 29, 2008), available at www.usdoj.gov/atr and *Mergers: Commission

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***approves acquisition of Northwest Airlines by Delta Airlines*, IP/08/1245 (Aug. 6, 2008), available at ec.europa.eu/comm/competition**

Joint Ventures

The Department of Justice announced that, after the department gave notice of its plans to bring an action to challenge Yahoo! Inc. and Google Inc.'s Internet advertisement agreement, the search engine companies abandoned their proposed collaboration.

Internet search engines generate revenue by selling advertisements that are relevant to the consumer's query and are usually displayed above and to the right of the list of results of a given query. These search engine and search advertising services are also offered to third-party syndication partners, such as newspapers' Web sites.

According to the Department of Justice, the agreement would have given Yahoo! the option to place Google-sold ads on Yahoo!'s search result pages instead of ads sold through its own competing search advertising platform. After determining that Internet search advertising and Internet search syndication constitute separate relevant product markets, the department found that Yahoo! was Google's most significant competitor in these two markets and that the firms' combined shares of these markets were 90 percent and 95 percent, respectively. The department asserted that the proposed collaboration would have reduced competition in these markets by diminishing the important competitive rivalry between the firms and reducing Yahoo!'s incentives to invest in certain areas of its search advertising business.

The department noted that the companies' cooperation and their agreement to delay implementation of the arrangement facilitated the department's investigation, which was conducted in cooperation with Canadian antitrust enforcers and attorneys general from 15 states.

***Yahoo! Inc. and Google Inc. Abandon Their Advertising Agreement* (Nov. 5, 2008), available at www.usdoj.gov/atr**

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A district court granted a motion to dismiss claims that music companies used two joint ventures to facilitate collusion by imposing uniform prices for downloadable digital music and unpopular restrictions on the use of such digital music files in order to buoy the prices of compact discs. The court discounted as conclusory and implausible allegations that the ventures were shams, as they were formed to address widespread music piracy, and stated that the plaintiffs did not challenge the legality of the joint ventures themselves. The court rejected plaintiffs' contention that an illegal agreement should be inferred from the defendants' adoption of parallel price and use restrictions after forming and participating in the ventures.

***In re Digital Music Antitrust Litigation*, 2008-2 CCH Trade Cases ¶76,338 (S.D.N.Y.)**

Cartels

The Department of Justice announced that three Asian-based electronics manufacturers agreed to plead guilty and pay substantial criminal fines for participating in conspiracies to fix prices of liquid crystal display (LCD) panels, used in computer monitors, televisions and other electronic devices. The department asserted that two of the firms participated in meetings with other coconspirators where they agreed to charge certain prices for standard-size LCD panels. The third firm was alleged to have entered into three bilateral agreements directed at fixing LCD prices sold to three leading U.S. consumer electronics and computer manufacturers. The assistant attorney general for antitrust stated that prosecuting international cartels is the antitrust division's highest priority because they cause the greatest harm to consumers.

***LG, Sharp, Chungwa Agree to Plead Guilty, Pay Total of $585 Million in Files for Participating in LCD Price-Fixing Conspiracies* (Nov. 12, 2008), available at www.usdoj.gov/atr**

The Department of Justice announced that, after the department gave notice of its plans to bring an action to challenge Yahoo! Inc. and Google Inc.'s Internet advertisement agreement, the search engine companies abandoned their proposed collaboration.

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The EC announced the imposition of the highest cartel fines ever on four car-glass manufacturers. The EC stated that the four firms, which controlled about 90 percent of the market, met regularly to allocate among themselves the supply of car glass to car makers and stabilize their market shares.

***Antitrust: Commission fines car-glass producers over €1.3 billion for market-sharing cartel*, IP/08/1685 (Nov. 12, 2008), available at ec.europa.eu/comm/competition**

Standard-Setting Agencies

A developer of wireless communications technology for cellular networks claimed that members of a cellular telecommunications standard-setting organization conspired to remove the complaining developer's technology from the organization's standard in violation of §1 of the Sherman Act.

A district court granted summary judgment for the defendants and the Fifth Circuit affirmed. Relying on the Supreme Court's 1986 *Matsushita* decision, the appellate court stated that the plaintiff failed to present evidence supporting the inference of a conspiracy and excluding the possibility of independent parallel conduct, and therefore did not establish the "contract, combination, or conspiracy" required by §1 to permit the claim to proceed to trial.

The court noted that e-mails showed that the defendants disliked the plaintiff's technology for different reasons and wanted to remove it from the standard at different times. The panel observed that informal communications between rivals is an important part of the process of developing procompetitive standards that promote compatibility and increase economic efficiency.

The court also added that "common dislike is not the same as an explicit understanding to conspire."

***Golden Bridge Technology Inc. v. Motorola Inc.*, No. 07-40954, 2008 U.S. App. LEXIS 22063 (Oct. 23, 2008)**

Relevant Market

Providers of a training program that teaches a safe technique for physically restraining people claimed that state agencies operating juvenile facilities and a university offering a competing training program conspired to restrain trade and monopolize the market for the provision of restraint training services to private child-care providers in New York State. The U.S. Court of Appeals for the Second Circuit affirmed the district court's dismissal of the antitrust claims for failure to define a plausible relevant market. The appellate court stated that the plaintiffs did not show how the market for restraint training for child care providers differed from the broader market for restraint training services for entities that need to safely restrain individuals of all ages.

***Chapman v. New York State Division for Youth*, 2008-2 CCH Trade Cases ¶76,337**