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ANTITRUST

Expert Analysis

Computer Chip Loyalty Discounts Condemned in Europe

The European Commission ruled that U.S.-based computer chip maker Intel violated European competition law by providing discounts to computer manufacturers on the condition that they buy all or almost all their needs from Intel. The Department of Justice withdrew a controversial report on monopolization issued toward the end of the previous administration, signaling a shift in policy and enforcement priorities.

Other recent antitrust developments of note included a decision by a district court applying the Supreme Court's ruling that resale price maintenance arrangements must be judged under the rule of reason and new legislation in Maryland providing that resale price maintenance is unlawful per se under the state's antitrust law.

Abuse of Dominance

The European Commission (EC) imposed a fine of €1.06 billion (around $1.45 billion) on Intel Corporation, the world's leading producer of microprocessor chips used in personal computers, for using its dominant market position to exclude its main competitor from the market in violation of Article 82 of the European Treaty.

The EC stated that Intel, which held about 70 percent of the relevant market, abused its dominant position by offering rebates to major computer manufacturers on the condition that they purchase all or close to all of their chips from Intel. For example, the commission reported that Intel gave rebates to a particular computer manufacturer conditioned on the purchase of no less than 95 percent of that manufacturer's needs for business desktop computer chips from Intel.

The commission added that Intel's dominant position in the market, whereby only a small portion of a given manufacturer's needs is open to competition, made the use of such loyalty rebates unlawful.

By **Elai Katz**

The EC also noted that Intel made direct payments to computer manufacturers to postpone or cancel the launch of computers incorporating its principal rival's chips and concluded that Intel deliberately acted to exclude competitors from the market for computer chips for more than five years.

> The European Commission asserted that Intel's loyalty discounts harmed competition by stifling innovation and limiting consumer choice.

The commission asserted that it does not seek to protect competitors instead of consumers and that Intel's loyalty discounts harmed competition by stifling innovation and limiting consumer choice.

Commission imposes fine of €1.06 bn on Intel for abuse of dominant position; orders Intel to cease illegal practices, IP/09/745 (May 13, 2009), available at ec.europa.eu/competition/

Comment: Of the handful of U.S. courts that have examined the issue, most concluded that single-product loyalty discounts did not violate §2 of the Sherman Act as long as the discounts did not bring the total price on all units sold below the dominant firm's costs. In contrast, the EC's analysis in the decision reported immediately above focused on whether an equally efficient rival would have to sell below its own costs to meet the dominant firm's discounts.

Monopolization

The Department of Justice announced the withdrawal of a report on monopoly law issued by the prior administration in September 2008 under the title "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act." The Federal Trade Commission did not sign on to that report despite its participation in the hearings that led to its publication and several commissioners criticized the report at the time. The department stated that the withdrawal indicates a shift in philosophy and that the department will aggressively now pursue monopolization cases.

Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009) available at www.usdoj.gov/atr

Comment: The withdrawal of the monopoly law report may indicate the end of an era. But the report itself need not be discarded even if it is no longer representative of official policy, as it contains a thorough and expansive review of judicial and scholarly analysis of many topics, such as the single-product loyalty discounts at issue in the EC's Intel decision, including discussion of the possibility that, in some cases, above-cost loyalty discounts may lead to anticompetitive effects.

Resale Price Maintenance

On remand from the Supreme Court's 2007 decision *PSKS, Inc. v. Leegin Creative Leather Products, Inc*, which abandoned per se condemnation of minimum resale price maintenance in favor of rule of reason analysis of such vertical price-fixing agreements, a district court granted the defendant's motion to dismiss the amended complaint for failing to allege a tenable definition of the relevant product market. The court rejected the plaintiff's first proposed product market—the retail market for the defendant's brand of women's accessories—because, absent exceptional circumstances, one brand in a market of competing brands could not constitute a relevant product market.

The plaintiff's alternate market definition—the wholesale sale of brand-name women's

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accessories to independent retailers—was also rejected for failing to allege facts addressing the interchangeability of "brand name" accessories with other accessories or the relevance to consumer substitution of whether the sale of such accessories occurs through independent or national retailers. The court also stated that the term "women's accessories" improperly groups together products that are not interchangeable with each other, such as handbags, shoes and jewelry.

PSKS, Inc. v. Leegin Creative Leather Products, Inc., 2009-1 CCH Trade Cases ¶76,592 (E.D. Tex.)

The state of Maryland recently passed a law in reaction to the Supreme Court's decision in *Leegin*. Effective Oct. 1, 2009, Maryland's amended Antitrust Act provides that an agreement establishing a minimum resale price for retailers, wholesalers or distributors is an unreasonable restraint of trade. By so defining such agreements, the law is intended to preclude arguments that certain resale price maintenance arrangements are reasonable or not per se unlawful.

2009 Maryland Laws Ch. 43 (S.B. 239), Ch. 44 (H.B. 657), amending Md. Code Ann., Commercial Law §11-204, CCH Trade Reg. Rep. ¶32,302

Conspiracy Pleadings

Manufacturers of chocolate candy bars and other chocolate confectionary sought to dismiss a complaint alleging that they conspired to fix prices in violation of federal and state antitrust laws. A district court denied the motion and rejected the defendants' argument that the pleadings merely alleged parallel conduct that was insufficient to state a claim under the Supreme Court's 2007 decision *Bell Atlantic Corp. v. Twombly* (550 U.S. 544 (2007)). The court stated that allegations of three coordinated price increases between 2002 and 2007 in a market where input costs were stable while demand declined, along with alleged anticompetitive conduct in Canada, rendered the pleadings of concerted action plausible.

The court certified an interlocutory appeal of the order denying the motion to dismiss because the U.S. Court of Appeals for the Third Circuit had not yet applied *Twombly* in an antitrust context and issues involving the interpretation of *Twombly's* pleading standard could effectively pass beyond the reach of appellate review.

In re Chocolate Confectionary Antitrust Litigation, 2009-1 CCH Trade Cases ¶¶76,593, 76,594 (M.D. Pa.).

Restraint of Trade

The Department of Justice announced the settlement of charges that a Columbia, S.C., real estate multiple listing service (MLS) unreasonably restrained trade by requiring applicants for membership to forgo innovative low-price business models. According to the department's complaint, the MLS reserved the power to deny membership to real estate brokers who seem to be planning to compete too aggressively. The proposed consent decree provides that any licensed broker may become a member of the MLS and that members may provide less than a full set of brokerage services at a lower price.

United States v. Consolidated Multiple Listing Service Inc., No. 3:08-CV-01786-SB, CCH Trade Reg. Rep. ¶¶45,108 (No. 4939), 50,967 (D.S.C. May 4, 2009)

Retailer Termination

The owner of antique and faux antique furniture stores in Water Mill and Bridgehampton, N.Y., claimed that a furniture manufacturer stopped supplying the stores at the behest of a larger retailer in violation of §1 of the Sherman Act. A district court dismissed the complaint for failing to plead an adverse effect on competition in the relevant market. The court stated that the fact that consumers will no longer be able to buy the manufacturer's faux antique furniture from the plaintiff or even other small retailers does not amount to an injury to competition as a whole.

Habitat, Ltd. v. The Art of the Muse, Inc., 2009-1 CCH Trade Cases ¶76,573 (E.D.N.Y.)

Joint Venture

The Attorney General of Arizona sought a restraining order to prevent the closing of one of Tucson's two daily newspapers on antitrust grounds because the newspaper's owner also held a financial interest in the other local paper through its participation in a joint operating agreement (JOA). Under the JOA, news and editorial departments were operated separately but all other aspects, including advertising, circulation and printing were run by a jointly owned firm.

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The district court rejected the state's motion because it did not demonstrate a likelihood of success. The court noted that under the Newspaper Preservation Act, a newspaper that is party to a joint operating agreement can be closed lawfully if one of the newspapers, run independently, would be a failing company and there are no buyers for that newspaper. The court stated that the closed newspaper would satisfy the failing company test.

The court added that the newspaper did not cease publication until after the Department of Justice closed a lengthy investigation of the newspaper's anticipated closure.

Arizona v. Gannett Co., No. 4:09-CV-0281-TVC-RCC (D. Ariz. May 18, 2009)

Information Exchanges

The Israeli Antitrust Authority ruled that the country's five largest banks violated the Restrictive Trade Practices Law by exchanging information regarding present and future bank fees charged to customers. The authority stated that the exchanges facilitated the coordination of prices and hindered the competitive process.

The authority also noted that its decision can be used as evidence of the existence of a restrictive arrangement in civil suits for the recovery of damages.

IAA Director General, Ronit Kan, Issued a Decision Stating Israel's 5 Largest Banks Were Engaged in Restrictive Arrangements Concerning Exchange of Information Regarding Fees (April 26, 2009), available at www.antitrust.gov.il/eng

Antitrust Injury

The U.S. Court of Appeals for the Ninth Circuit decided that a plaintiff alleging anticompetitive conduct in the animal testing services industry lacked standing to bring antitrust claims. The Court affirmed the district court's grant of summary judgment and stated that the plaintiff did not present sufficient evidence demonstrating that it was either an actual competitor in the market or had the requisite "intent and preparedness" to enter the market. The Court noted that the plaintiff did not conduct appropriate tests of its products, obtain financing or enter into contracts, as would be expected from a business that is ready to enter the marketplace.

Cyntegra, Inc. v. INDEXX Laboratories, Inc., 2009-1 CCH Trade Cases ¶76,574 (not designated for publication)