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ANTITRUST

Expert Analysis

FTC Drops Bias Charges Against Google

By **Elai Katz**

The Federal Trade Commission (FTC) closed its eagerly followed investigation into allegations of anticompetitive "search bias" by Google because it found the challenged modifications to the search engine's results were legitimate product design improvements. The U.S. Court of Appeals for the Sixth Circuit affirmed dismissal of claims that rock salt suppliers allocated markets and rigged bids to sell road salt to the state of Ohio.

Other antitrust developments of note included the U.S. Court of Appeals for the Federal Circuit's determination that "wheel" slot machine games did not constitute a separate relevant market or submarket distinct from the general market for gaming machines and the FTC's move to block the proposed merger of computer switch suppliers.

Search Bias

Having received complaints from firms, including Microsoft, that operate various search engines and websites, the FTC opened an investigation into allegations that Google Inc. manipulated its search algorithms to disadvantage rivals in violation of antitrust laws. The commission explored whether Google unlawfully manipulated its search engine in response to competitive threats from "vertical" search websites—that is, sites that provide responses to Internet searches for specialty or topical information such as Expedia for travel inquiries, Nextag for comparison shopping, or Zillow for real estate. The investigation examined concerns that Google modified its algorithm to give preferential placement for its own "vertical" responses at the top of its search results page and pushed down links to rival "vertical" search sites to "below the fold" or another page.

The five FTC commissioners unanimously voted to close that investigation. The FTC determined that, "in the main," the evidence showed that Google changed its search results to "improve the quality of its search product and overall user experience" rather than primarily to exclude competitors and that any negative impact on competitors was incidental. The commission noted, for example, that Google did not promote its own content when testing showed that such a change would have adversely affected user experience. The commission's statement revealed a cautious approach to condemning product design improvements as exclusionary practices.

The FTC stated that Google committed to refrain from other conduct under investigation, including "scraping" or misappropriating competing websites' content and restricting advertisers' ability to "multihome" (simultaneously manage campaigns on Google and competing search engines' platforms).

Commissioner J. Thomas Rosch released a separate concurring and dissenting statement criticizing the scraping and multihoming aspects of the investigation because he (as well as Commissioner Maureen Ohlhausen who also wrote a separate statement) did not believe those practices violated the law and he disagreed with the acceptance of non-binding commitments by Google instead of asking the company to enter into a consent decree. Rosch observed that "after promising an elephant more than a year ago, the Commission instead has brought forth a couple of mice."

> The Sixth Circuit affirmed dismissal of claims that rock salt suppliers allocated markets and rigged bids to sell road salt to the state of Ohio.

On the same day, the FTC announced that as a result of a separate investigation concerning a portfolio of patents the company acquired from Motorola last year, Google

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entered into a formal consent order that prohibits it from seeking an injunction for patent infringement against someone willing to pay for a license to any standard-essential patents that Google previously committed to license on "fair, reasonable, and non-discriminatory" terms.

Statement of the Federal Trade Commission Regarding Google's Search Practices in the Matter of Google, FTC File No. 111-0163 (Jan. 3, 2013), *Statements of Commissioner Rosch and Commissioner Ohlhausen; Motorola Mobility and Google,* FTC File No. 121-0120 (Jan. 3, 2013)

Comment: Although the commission's analysis emphasized a reluctance to challenge product design changes where the evidence supports plausible procompetitive justifications, Google's "search bias" practices were unlike many other kinds of exclusionary practices that have been condemned as unlawful monopolization because the search bias did not eliminate links to rivals, which may have resulted in foreclosure, but rather demoted those links to "below the fold" where they could still be found by persistent users.

A proposed merger between the two largest producers of PCIe switches, devices that provide connections between complex computing systems, was abandoned by the parties after the FTC filed a complaint asserting that the planned combination violated §5 of the FTC Act and §7 of the Clayton Act.

Market Allocation

In a case involving allegations that producers of rock salt conspired to eliminate competition in northern Ohio, a panel of the Sixth Circuit affirmed the dismissal of the case by the lower court while disagreeing with the district court's analysis. After the price of rock salt purchased by the Ohio Department of Transportation rose by as much as 300 percent in 2008, the Ohio Office of the Inspector General issued a report finding that Morton Salt Inc. and Cargill Inc., the only two companies operating salt mines in Ohio, had engaged in anticompetitive conduct by dividing the market into two distinct zones and failing to compete in the other's zone.

The report also noted that Morton and Cargill were favored under the state's "Buy Ohio" law, which had been interpreted to require that when two firms selling rock salt mined in Ohio submitted bids, one of the two bids must be accepted, even if an out-of-state firm's bid was lower. Erie County subsequently brought a class action suit against Morton and Cargill alleging violations of the Valentine Act (Ohio's antitrust statute).

The complaint, based in large part upon the Inspector General's report, alleged that five indicators supported its allegations of collusion: (i) stable market shares, (ii) high incumbency rates, (iii) suspicious bidding patterns, (iv) sham bids and (v) high prices and profits. The district court dismissed the complaint, finding that the "defendants' actions are at least as likely to be those of independent beneficiaries lawfully exploiting [the Buy Ohio law's] erroneous anticompetitive interpretation as they are of unlawful conspirators in that same marketplace."

In evaluating the district court's ruling, the Sixth Circuit noted that bare allegations of parallel conduct are not sufficient to assert an antitrust violation and found that the district court had conflated the standards for a pleadings sufficiency motion with those for a motion for summary judgment. The Sixth Circuit noted that to state a claim under §1 of the Sherman Act, plaintiffs do not need to plead facts that tend to exclude the possibility of lawful, independent conduct, even though such facts must be shown at the summary judgment stage. The appellate panel added that plaintiffs do not have to allege facts showing that an unlawful agreement is more likely than lawful parallel conduct, as the pleading standard articulated by the Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), requires plausibility, not probability.

The Sixth Circuit noted that three of the five indicators—stable market shares, high incumbency rates, and high prices and profits—were "simply descriptions of the market." The court next examined allegations regarding suspicious bidding patterns, including the assertion that defendants failed to bid for profitable nearby contracts and contracted instead with counties that were farther from their mine or stockpile. Such allegations, the Sixth Circuit observed, were "exactly the sort of failure-to-compete claim that *Twombly* rejected," as they were "indicative of no more than a natural and independent desire to avoid a turf war and preserve the profits guaranteed by regional dominance."

As to the allegation that defendants "helped each other rule their respective turf by submitting intentionally losing bids," the appellate court noted that such sham bidding had no independent purpose and, in light of the Buy Ohio law, was not implausible. However, given that Erie County subsequently conceded that it was not bound by the Buy Ohio law, the court noted that the county would have been free to solicit bids from out-of-state companies and that any sham bidding on the part of defendants would have been "an exercise in futility." Accordingly, the Sixth Circuit stated, the conspiracy alleged was implausible in any county not bound by the Buy Ohio law.

Erie County v. Morton Salt, No. 11-4153, 2012-2 CCH Trade Cases ¶78,184 (6th Cir. Dec. 18, 2012)

Wheel Slot Machines

In a case involving patent infringement claims related to wheel features in casino gaming machines and antitrust counterclaims of attempted monopolization, the Federal Circuit affirmed the district court's grant of summary judgment based upon its determination that wheel games did not constitute a separate relevant antitrust market. Wheel games, based on the television show *Wheel of Fortune*, are slot machines containing a bonus game that incorporates a spinning wheel. Upon being sued for infringement of competitor IGT's patents relating to wheel games, Bally Gaming International Inc. counterclaimed that the lawsuit was an attempt to monopolize the wheel game market, arguing that Bally's entry into the wheel game market forced IGT to reduce its prices.

In upholding the district court's grant of summary judgment against Bally's antitrust claims, the Federal Circuit, in a 2-1 decision, stated that the evidence showed that "wheel games compete in the broader gaming machine market." On appeal, Bally argued that it had shown a lack of economic substitution, that is, that customers would still purchase wheel games even if they became more expensive than other gaming machines, under the "small but significant and non-transitory increase in price" (SSNIP) test, whereby a market is defined by identifying the smallest set of products whose prices could profitably be increased by a hypothetical monopolist because most consumers would not switch to other products due to a small but significant price hike. The Federal Circuit noted that Bally had not alleged facts that would satisfy the SSNIP test, as it had shown that the prices decreased, rather than increased.

Bally also contended that wheel games constituted an economically distinct "submarket," which, following the Supreme Court decision in *Brown Shoe v. United States*, 370 U.S. 294 (1962), has at times been a successful method of meeting the market definition requirement and showing market power and anticompetitive effects in a narrow relevant market. The *Brown Shoe* factors listed by Bally included recognition of the submarket as a discrete economic entity by the relevant industry or by the general public, the product's "peculiar characteristics and uses" and "unique production facilities."

The Federal Circuit stated that wheel games did not constitute an economically distinct submarket under *Brown Shoe*, noting that while the "peculiar characteristic distinguishing wheel games from other games is the wheel-shaped secondary bonus," the production facilities for wheel games are not unique from those for ordinary gaming machines. The Federal Circuit added that evidence of player preference for wheel games did not necessarily mean that there was either an industry or public perception that wheel games constitute a distinct market, as such player preference could just as easily show "that wheel games compete with all gaming machines to accommodate the spectrum of player preferences."

In a dissenting opinion, Judge William Bryson stated that Bally had presented sufficient evidence for a reasonable fact finder to find that wheel games were the relevant product market. He noted that IGT's price reduction after Bally entered the wheel game market indicated a separate demand for wheel games apart from casino gaming machines generally, as the fact that prices were decreased only after Bally's entrance implied that "customers were willing to incur monopolistic pricing without shifting demand to non-wheel games." Bryson further emphasized that IGT's patents barred competitors from producing wheel games, making the majority's focus upon supply elasticity "beside the point."

IGT v. Alliance Gaming, No. 2011-1166, 2012-2 CCH Trade Cases ¶78,183 (Fed. Cir. Dec. 17, 2012)

Comment: The developments reported immediately above and the one that follows reaffirm the pivotal role played by market definition in many antitrust cases and the need for a fact-specific inquiry in each case.

Computer Switch Merger

A proposed merger between the two largest producers of PCIe switches, devices that provide connections between complex computing systems, was abandoned by the parties after the FTC filed a complaint asserting that the planned combination violated §5 of the FTC Act and §7 of the Clayton Act. The FTC narrowly defined the relevant product market as "the development and sale of PCIe switches," noting that the internal documents of each company "treat PCIe switches as a discrete market." The complaint asserted that the two companies seeking to merge—PLX Technology (PLX), the largest supplier in the market, and Integrated Device Technology (IDT), the second largest supplier—dominated the worldwide PCIe switch market, with respective market shares of around 69 percent and 31 percent, and that the merger was thus presumptively unlawful.

The complaint stressed that PLX and IDT are each other's closest competitors and that the merger would likely result in higher prices, reduced innovation, and inferior customer service. The commission stated that its investigation revealed that many customers see IDT and PLX as their "only choices," and the combination would likely eliminate price competition and result in fewer incentives to innovate and provide high quality customer support. One day after the FTC filed its complaint, IDT and PLX announced their termination of the proposed merger.

Integrated Device Technology and PLX Technology, FTC File No. 121-0140 (Dec. 18, 2012).

Comment: The complaint's focus upon the closeness of the rivals and likely effects of the proposed merger, as well as its relatively limited analysis of the particularly narrow relevant product market, may be indicative of the approach taken by the antitrust agencies' 2010 Horizontal Merger Guidelines, which state that "analysis need not start with market definition" and that market definition "is not an end in itself: it is one of the tools the Agencies use to assess" the likely competitive effects of a transaction.

Exclusive Distribution

The FTC agreed to resolve charges that IDEXX Laboratories, the leading supplier of diagnostic tests for pet veterinarians, entered into exclusive distribution contracts prohibiting the five major distributors from carrying competitive products in violation of §2 of the Sherman Act. The commission stated that distributors had to carry IDEXX's products because of its broad line of products and dominant position and that the distributors had no choice but to forgo competitors' products.

The FTC noted that the relatively short nominal duration of the exclusive contracts did not mitigate their anticompetitive effects. The settlement requires IDEXX to enter into non-exclusive distribution arrangements with at least one of the three leading national distributors.

IDEXX Laboratories, FTC File No. 101-0023 (Dec. 21, 2012)

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