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ANTITRUST

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FTC Challenge to Natural Supermarket Merger Justified

The U.S. Court of Appeals for the District of Columbia Circuit ruled that a district court erred when it denied a request by the Federal Trade Commission (FTC) to block the combination of two natural and organic supermarket chains. The FTC also challenged the merger of sellers of two leading brands of superpremium vodka and required the implementation of procedures to prevent improper postclosing information exchanges with a joint venture partner.

Other recent antitrust developments of note included the European Court of First Instance's (CFI) ruling that a consulting firm was liable for its supporting role in a cartel among chemical producers.

Acquisitions

The FTC had asked a district court to preliminarily enjoin the merger of two natural and organic supermarkets to permit the commission to conduct an administrative hearing to determine if the acquisition violated §7 of the Clayton Act. The FTC alleged that the combination would create monopolies in 18 cities where the two firms were the only premium, natural, and organic supermarkets (PNOS).

The district court had accepted the supermarkets' contention that they faced competition from traditional supermarkets and concluded that the FTC's preliminary injunction motion must be denied because it was not likely to succeed on the merits in showing that the transaction would have an anticompetitive effect in a market that the court broadly defined to include all supermarkets. The firms then consummated the transaction.

On appeal, the D.C. Circuit reversed the district court's order in a split decision, holding

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that the lower court erred in adopting a market definition based on marginal customers and in ruling that the FTC could not prove a distinct PNOS submarket where the merged firms were the only two significant national players.

The D.C. Circuit observed that Congress designated a special standard to enable the FTC as an independent administrative agency charged with protecting the public interest to litigate antitrust matters in an administrative setting, and, thus, the district court "must not require the FTC to prove the merits." The appellate court stated that the commission could meet this standard by simply "rais[ing] questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation."

The D.C. Circuit rejected as inexplicable the FTC's argument that market definition is not necessary to a §7 case, but went on to accept the FTC's narrow relevant product market, which amounted to a market comprised principally of the two firms that merged.

The appellate court stated that the FTC presented sufficient evidence of the possibility of a submarket where the merged firms competed principally with each other for "core" consumers at the same time as they competed with many other supermarkets for "marginal" consumers. The appellate court also stated that the FTC presented evidence suggesting that the merged firms competed directly with each other, but not with other stores, in the sale of high-quality perishables and competed with other supermarkets principally on dry grocery items.

***FTC v. Whole Foods Market Inc.*, 533 F.3d 869 (D.C.Cir. 2008), 2008-2 CCH Trade Cases ¶76,233**

Comment: Economists have shown that "core" customers are generally protected from price increases as long as enough marginal customers switch to a different seller when prices go up, unless there is a way for the seller to identify and discriminate between core and marginal customers. In the matter reported immediately above, the administrative court will likely have to examine whether the ability to discriminate is supported by any evidence, such as data showing that marginal customers come into premium natural supermarkets to buy dry grocery items while core customers buy high-quality perishables.

The FTC announced the settlement of its challenge of the proposed acquisition of a Swedish spirits company by a rival, alleging that the proposed transaction would eliminate substantial competition between the two most popular brands of superpremium vodka in the United States, Stolichnaya and Absolut. The consent order required the buyer to cease distributing Stolichnaya vodka within six months of the closing of the transaction.

The FTC asserted that the buyer's anticipated role in managing a pre-existing joint venture between the acquired firm and a third firm that is also a rival supplier of spirits would enable an information exchange that could facilitate future coordinated interaction within four additional distilled spirits markets: cognac, domestic cordials, coffee liqueur, and popular gin. The commission alleged that, by enabling the buyer to have access to competitively sensitive information regarding the third firm's products through its new role as a partner in the joint venture, the proposed transaction would have anticompetitive effects in each of these four markets. The consent decree requires "firewall" procedures to prevent the exchange of information about the third firm's products.

The European Commission (EC) approved the proposed transaction on the condition that the buyer would divest six brands of various distilled spirits and cease distributing a Canadian whisky.

***Pernod Richard SA*, CCH Trade Reg. Rep. ¶16,168 (July 17, 2008), also available at www.ftc.gov and *Mergers: Commission approved proposed acquisition of V&S Vin & Sprit by Pernod Picard*, IP/08/1181 (July 17, 2008), also available at ec.europa.eu**

Cartels

The CFI affirmed an EC decision finding that a consultancy firm was complicit in the implementation of a cartel among three producers of organic peroxides (chemicals used in the plastics and rubber industries) and imposing a fine of € 1,000.

Stating that the competition laws of the European Union do not create a distinction between entities that "perpetuate an infringement and those whose role is one of complicity," the CFI concluded that the consultancy firm actively contributed to the implementation of the cartel by storing and concealing the originals of two 1970 agreements that formed the basis of the conspiracy, collecting, analyzing and communicating data regarding the commercial activities of the cartel, organizing and attending some of the meetings where anticompetitive discussions took place, and reimbursing travel expenses for these meetings with the intent to hide any traces of the implementation of the cartel.

While recognizing that the violation was committed primarily by three producers of organic peroxides, the court stated that even a firm with a "subsidiary, accessory or passive role" that did not sell the price-fixed product could share liability for a cartel because of its contribution to the implementation of a conspiracy. The court observed that this limited role may be taken into account when determining the level of the fine.

***AC-Treuhand AG v. Commission of the European Communities*, Case No. T-99/04 (July 8, 2008), available at curia.europa.eu**

Cartel Amnesty Program

The D.C. Circuit ruled that the Department of Justice must disclose approximately 100 cartel amnesty agreements in a variety of industries in response to a Freedom of Information Act request made by a firm alleged to have participated in an international parcel shipping cartel. The court noted that the government could redact or withhold portions of these agreements that would reveal details of industries under investigation and stated the government had "not established that there was no reasonably segregable portion of the documents required to be released."

***Stolt-Nielsen Transportation Group, Ltd. v. United States*, 2008-2 CCH Trade Cases ¶76,232**

The appellate court said the FTC presented sufficient evidence of a submarket where the merged firms competed principally with each other for "core" consumers at the same time as they competed with other supermarkets for "marginal" consumers.

Relevant Market

A windshield repair shop alleged that an insurance company's policy to replace rather than repair windshields with long cracks depressed demand for such long-crack repairs—the plaintiff's specialty—in violation of federal antitrust law. The U.S. Court of Appeals for the Tenth Circuit affirmed the district court's grant of summary judgment and stated that the plaintiff's asserted relevant market was improperly restricted to windshield repairs by customers insured by a single insurance company. The court noted that the plaintiff did not allege that other customers were not available and added that the appropriate relevant market included all purchasers of windshield repair and replacement services, including other insurance companies and customers without insurance coverage.

***Campfield v. State Farm Mutual Insurance Co.*, 2008-2 CCH Trade Cases ¶76,227**

Jurisdiction

A British computer maker that purchased memory chips in the United Kingdom sought to recover damages under U.S. antitrust law for injuries arising from an alleged price fixing conspiracy among manufacturers of dynamic random access memory chips. The district court dismissed the complaint for failure to meet the jurisdictional requirements of the Foreign Trade Antitrust Improvement Act of 1982 (FTAIA).

Relying on the Supreme Court's 2004 *Empagran* decision, the Ninth Circuit stated that complaint did not sufficiently allege that the domestic effect of the alleged conspiracy gave rise to the British computer maker's foreign injury. The court rejected the computer maker's argument that but for artificially inflated memory chip prices in the U.S. prices would not have been higher abroad and explained that it was the overall price-fixing conspiracy, rather than the U.S. effect of the conspiracy, that proximately caused the British computer maker's injury. The court also noted that the computer maker had recourse under British competition laws.

The concurrence criticized the distinction between "but for" and "proximate" causation and stated that the result should be explained as a policy judgment that the U.S. law is not intended to protect the economic interests of foreign consumers.

***In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, No. 06-15636, 2008 WL 3522419 (Aug. 14, 2008)**

Competitive Effects

Chicken farmers brought suit alleging that a chicken processor and dealer refused to offer them the opportunity to operate on the same terms that were available to a rival chicken farmer in violation of the Packers and Stockyards Act (PSA). The defendant chicken dealer moved for summary judgment, arguing that the farmers did not allege or prove an adverse effect on competition, and the district court denied the motion, stating that the plain language of the PSA did not require such a showing. The Fifth Circuit affirmed in a split decision and stated that it disagreed with other circuit courts that have gleaned an adverse effect on competition requirement from the legislative history or administrative interpretation of the PSA.

***Wheeler v. Pilgrim's Pride Corp.*, 2008-2 CCH Trade Cases ¶76,228**

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