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ANTITRUST & TRADE REGULATION UPDATE

Squire, Sanders & Dempsey L.L.P.

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UNITED STATES

EUROPEAN UNION

AROUND THE WORLD

United States

Guilty Pleas in LCD Price-Fixing Conspiracies Yield Near Record Fine

LG Display Co., Ltd., Sharp Corporation and Chunghwa Picture Tubes, Ltd. agreed to plead guilty and pay US$585 million in criminal fines for conspiring to fix prices in the sale of thin-film transistor liquid crystal display (TFT-LCD) panels between 2001 and 2006. TFT-LCD panels, which are used in electronic devices such as computer monitors, laptops, televisions and mobile phones, were a roughly US$70 billion industry in 2006.

LG and Chunghwa are accused of participating in meetings in Taiwan, South Korea and the United States, where they agreed with other manufacturers to fix the price of TFT-LCD panels sold worldwide. Sharp is charged with participating in three other conspiracies to fix the price of TFT-LCD panels sold to Apple, Dell and Motorola.

Under the agreement, LG will pay US$400 million, the second highest criminal fine attained by the Department of Justice's (DOJ) Antitrust Division. Sharp and Chunghwa agreed to pay US$120 million and US$65 million, respectively. The DOJ applauded the efforts of each company's board of directors for cooperating in the investigation and noted that the fines would have otherwise been significantly higher.

Multidistrict litigation is currently pending in the Northern District of California against Sharp, Chunghwa and numerous other manufacturers of TFT-LCD panels for colluding to fix prices.

ABA Antitrust Section Offers Recommendations to Incoming Obama Administration

On November 25, 2008 the American Bar Association's (ABA) Section of Antitrust Law issued a transition report to the incoming Obama Administration, offering its views and recommendations on the current state of US antitrust enforcement and policy. The Section's overall assessment of antitrust and consumer protection enforcement was positive. Nonetheless, the report notes "room for improvement," specifically calling for reform of the merger guidelines and merger review process and increased international cooperation among national antitrust authorities.

With respect to merger reform, the report notes concerns that the merger guidelines no longer reflect current economic thinking and the approaches taken by the DOJ and Federal Trade Commission (FTC) in merger review. Therefore, the Section recommends the following reforms:

(1) Giving additional weight to certain fixed-cost efficiencies, such as research and development expenses;

(2) Improving application and understanding of unilateral effects theories, particularly with respect to auction markets, high tech mergers, evolving markets and the role of market definition relative to competitive effects;

(3) Providing official joint DOJ/FTC guidance for vertical mergers;

(4) Revising the guidelines to address potential competition and innovation issues;

(5) Assessing the effectiveness of remedies and improving the remedies process; and

(6) Providing greater transparency through speeches, commentary, closing statements and workshops.

The report also expressed concern regarding the lack of international cooperation among the world's 80-some merger control regimes. Because many of these jurisdictions prohibit mergers and acquisitions from closing until agency approval, inconsistent standards of review and procedures provide costly and unnecessary hurdles for companies involved in multinational mergers. The Section calls for streamlining the process for international mergers by allocating responsibility based on relative degree of interest. Moreover, the Section emphasizes the importance of providing comprehensive information in guidelines, notices, regulations and decisions to preserve the United States' leadership role in the development of antitrust jurisprudence and policy. Otherwise, the newly created and less experienced jurisdictions will begin to follow the precedents of the European Union, which publishes a greater volume of information in its administrative decisions than the United States.

Other issues addressed by the report include investigatory processes (including merger process reform, transparency, investigative timing and improving parties' contact with the agencies); improving resources; international cooperation (cartels, unilateral conduct and other types of civil non-merger enforcement); criminal enforcement, penalties and leniency; retrospective analysis; civil nonmerger enforcement; monopolies; interface of intellectual property and antitrust; health care; federal, state and private plaintiffs cooperation; and other substantive reforms, such as the repeal of the Robinson-Patman Act, opposition to exemptions and immunities from antitrust laws, and guidance for resale price maintenance analysis post-*Leegin*. For more information, please review the report on the ABA's website.

DOJ Revises Amnesty Guidelines

Roughly a year following a federal appeals court ruling against the DOJ in *Stolt-Nielsen Transportation Group Ltd.,* the DOJ revised its guidelines and model letters for its conditional leniency program. In *Stolt-Nielsen,* the DOJ revoked the applicant's conditional leniency after it had discovered that Stolt-Nielsen had continued to meet with competitors and engage in anticompetitive behavior for months after the company's general counsel had discovered the unlawful conduct. Stolt-Nielsen's immunity was predicated on a promise that it "took prompt and effective action to terminate its part in the anticompetitive activity being reported upon discovery of the activity." Nonetheless, the court dismissed the indictment, finding that the government had failed to produce credible evidence that Stolt-Nielsen had breached the agreement.

In response to this ruling, which ended the DOJ's first-ever attempt to revoke an offer of conditional leniency, the DOJ amended its model guidelines to include a proviso that reserves the DOJ "the right to grant conditional leniency only up to the date the applicant represents it terminated its participation in the activity" when "there [has been] a significant lapse in time between the date the applicant discovered the anticompetitive activity being reported and the date applicant reported the activity to the Antitrust Division."

InBev Required to Divest Labatt USA in Anheuser-Busch Acquisition

On November 18, 2008 InBev N.A./S.A. completed its acquisition of Anheuser-Busch Companies, Inc., which is subject to an agreement with the DOJ ensuring the preservation of competition in Upstate New York. The agreement requires InBev to divest its subsidiary Labatt USA and its "license to brew, market and sell" Labatt-brand products for consumption in the United States. The sale of Labatt beer brands must be to an independent third party and subject to approval by the DOJ. However, the agreement will not affect InBev's holdings or sales of Labatt products outside the United States and permits InBev to supply Labatt products to the new US licensee for a period of three years at prices and quantities subject to approval by the DOJ.

On November 14, 2008 the DOJ filed a civil lawsuit in the US District Court in Washington DC to block the transaction. Although the acquisition as originally proposed would increase the company's concentration by only 1 percent on a national level, it would have significantly increased concentration and decreased competition in Upstate New York. Without the divestiture of Labatt, the acquisition would have increased Anheuser-Busch's share in the beer market from 24 to 45 percent in Buffalo and Rochester and from 28 to 41 percent in Syracuse. Its largest competitor, MillerCoors has a 26 percent share in Buffalo and Rochester and a 28 percent share in Syracuse. The settlement agreement reached by InBev and Anheuser-Busch with the DOJ should, according to Deputy Assistant Attorney General Deborah A. Garza, "ensure that consumers will continue to benefit from the significant competition between the merging companies in Upstate New York."

For additional background on the acquisition please see "DOJ Extends Review of InBev's Planned Takeover of Anheuser-Busch" in our October 2008 *Antitrust & Trade Regulation Update*.

Investment Funds to Pay US$800,000 for HSR Act Violations

At the request of the FTC, the DOJ filed a complaint in the US District Court in Washington DC, against two investment funds, ESL Partners, L.P. and ZAM Holdings, L.P., for violating the premerger notification requirements of the Hart-Scott-Rodino (HSR) Act. The HSR Act requires parties to mergers or acquisitions that exceed certain jurisdictional thresholds to notify the FTC and the DOJ of the proposed transaction. The parties must then observe a waiting period, often 30 days, before closing the merger or acquisition.

ESL Partners and ZAM Holdings failed to notify the FTC and DOJ of their acquisitions of AutoZone, Inc. voting shares in the fall of 2004. Both companies individually increased their holdings in AutoZone to more than US$50 million. Prior to these purchases, ESL Partners held US$775 million of AutoZone voting securities, and ZAM Holdings, through its subsidiary ESL Investors, held US$225 million.

On four occasions between September 28, 2008 and October 14, 2008, ESL Partners purchased AutoZone stock, thereby increasing its total holdings to more than 10 percent of the auto-part retailer's outstanding voting stock. ESL Partners was required under the HSR Act to file a notification and observe the HSR waiting period prior to completing any acquisition of AutoZone shares. Nonetheless, ESL Partners did not make the required notification until after the FTC inquired into the absence of such a filing on January 27, 2005.

Similarly, ZAM Holdings failed to notify the FTC and DOJ when its subsidiary ESL Investors made two separate purchases of AutoZone voting stock in October 2004. ZAM did not file an HSR notification to cover these purchases until after the FTC notified the company on January 31, 2005.

Although both investment funds eventually filed notifications and did not have prior HSR violations, the FTC convinced the DOJ to file a civil lawsuit against ESL Partners and ZAM Holdings. To settle these charges, ESL Partners agreed to pay a US$525,000 penalty and ZAM Holdings a $275,000 penalty. The FTC noted that it takes the premerger notification process seriously and that it will continue to seek action against those failing to satisfy their responsibilities under the Act.

EUROPEAN UNION

Record Fines Totaling Nearly €1.4 Billion Against Car Glass Cartel

On November 12, 2008 the European Commission (EC) imposed the largest cartel fines in its history against four automobile glass producers for illegal market sharing and exchanging commercially sensitive information in the European Economic Area for an approximately five year period (early 1998 to early 2003). The cartel participants, Asahi Glass Co., Ltd. (Japan), Pilkington Group Limited (United Kingdom), Saint-Gobain (France) and Soliver (Belgium), controlled roughly 90 percent of the €2 billion market for glass used in new cars and for original branded replacement glass.

According to the EC, the four car glass manufacturers engaged in discussions regarding target prices, production levels, market sharing, customer allocation and renegotiations of on-going contracts. The companies intended to allocate their products in a manner so that they could each maintain the stability of their market shares in Europe. The EC initiated this investigation upon receiving “reliable information provided by an anonymous informant.” After a series of unannounced inspections, Asahi filed a leniency application.

Due to its full cooperation with the investigation, the EC reduced Asahi’s fine by 50 percent, resulting in a €113.5 million fine. Pilkington and Soliver were fined €370 million and €4.3 million, respectively, while Saint-Gobain received the largest fine ever imposed by the Commission – €896 million. This record-setting fine was the result of a 60-percent penalty increase imposed on Saint-Gobain for previous cartel offenses in Flat Glass Italy (1984) and Flat Glass Benelux (1988).

The Commission Issues Guidance on Rescue Aid to Banks in Financial Distress

On October 13, 2008 the EC published a guidance document on Member States action to support financial institutions in economic distress. (See “Commission Publishes Emergency Guidance on State Aid to Struggling Banks” in our October 2008 *Antitrust & Trade Regulation Update*.) Article 87(3)(b) of the EC Treaty allows state aid “to remedy a serious disturbance in the economy of a Member State.” The purpose of the guidance document is to ensure that Member States establish coordinated remedies without distorting competition. Aid schemes in line with the guidance document are approved by the EC within very short timeframes.

To date, the EC has approved a number of rescue packages proposed by Member States in support of financial institutions. The approved rescues were adopted in Greece, Finland, Italy, Spain, France, Netherland, Sweden, Ireland, the United Kingdom, Denmark and Germany.

In addition, the EC has approved the following *ad hoc* aid measures: a joint aid measure by France, Belgium and Luxembourg to Dexia; a guarantee mechanism in Belgium to facilitate the financing of Fortis Bank; a recapitalization plan in the Netherlands for the ING Group; aid in the Netherlands to liquidate Roskilde Bank; a package in the United Kingdom in support of Bradford & Bingley; a loan guarantee measure in Germany amounting to €35 billion to support Hypo Real Estate until April 2009, and a measure worth €9 billion in Germany to support the bank.

EC Fines Banana Importers €60.3 Million for Price-Fixing Cartel

On October 15, 2008 the EC determined that between 2000 and 2002 Chiquita, Dole, and Weichert participated in a cartel to fix the reference prices of bananas imported into eight EU Member States: Austria, Belgium, Denmark, Finland, Germany, Luxembourg, The Netherlands and Sweden. In 2002 consumers in these eight nations purchased 1.6 million metric tons of bananas, worth roughly €2.5 billion.

The EC initiated an investigation in April 2005 following Chiquita’s application for immunity under the EC’s leniency program. According to the EC, the three banana importers participated in telephone communications, during which they discussed or disclosed their pricing intentions. These conversations often occurred the day before these companies announced their weekly price quotations.

Chiquita’s compliance with the terms of the leniency program resulted in full immunity from what would have been €83.2 million in fines. Dole and Weichert each received a 60-percent reduction in fines due to certain market circumstances during the time period, such as the specific regulatory regime governing the banana market. Weichert received an additional reduction of 10 percent for not participating in part of the cartel. The fines actually imposed by the EC on Dole and Weichert amounted to €45.6 million and €14.7 million, respectively. Moreover, because Del Monte controlled Weichert during the period of the anticompetitive conduct, it was held jointly and severally liable for the payment of Weichert’s €14.7 million fine.

More Dawn Raids in the Pharmaceutical Sector

On November 24, 2008 officials from the EC and respective national competition authorities conducted unannounced inspections at several unnamed pharmaceutical companies located throughout the European Union. The raids constituted the beginning of an inquiry into suspected anticompetitive behavior within the pharmaceutical industry. The EC announced that it has reason to believe that members of the industry have engaged in restrictive business practices and/or abuse of dominant market position as prescribed by Articles 81 and 82 of the EC Treaty.

These inspections are not related to the inspections conducted in January 2008, which were in relation to a general inquiry into competition among originator companies (companies developing and selling new medicines) and between originator and generic companies in the pharmaceuticals sector. The sector inquiry resulted in a report issued by the EC on November 28, 2008, which found that originator companies engaged in the following practices to delay or block the market entry of competing medicines: multiple patent applications for the same medicine (so-called patent clusters), initiation of disputes and litigation, conclusion of patent settlements that constrain market entry of generic companies and interventions before national authorities when generic companies ask for regulatory approvals.

Commission Seeks Comments in Review of R&D and Specialization BERs

The EC requested input from businesses, industry associations, consumer groups and other stakeholders who have had direct experience in applying the block exemption regulations (BERs) for agreements on research and development (R&D) and for agreements on specialization in production that generate efficiencies in the production or distribution of goods. BERs permit the Commission to exempt from Article 81(1) of the EC Treaty certain agreements or practices that have the effect of promoting competition or innovation. The R&D and specialization BERs are set to expire in 2010.

Comments must be received by the Commission no later than **January 31, 2009**. A questionnaire issued by the EC is now available.

AROUND THE WORLD

GLOBAL – BHP Billiton Faults Economic Slowdown, Not Antitrust Hurdles for Merger Withdrawal

Australia-based mining giant BHP Billiton Ltd. withdrew its offer to acquire its Brazil-based rival Rio Tinto Ltd. in late November 2008. BHP and Rio Tinto rank second and third in market share of the global iron industry and combined would have been the world's largest iron ore company. Although the merger gained approval from competition authorities in Australia, South Africa and the United States, antitrust regulators in the European Union and Japan raised concerns about the proposed takeover, especially with respect to higher iron ore prices for these jurisdictions' steel companies.

On November 4 the EC issued a statement of objections indicating that it would require BHP to divest certain iron ore and metallurgical coal assets as a precondition to accepting the proposed transaction. The Japan Fair Trade Commission (JFTC) also reportedly intended to require a divestiture of assets or a full rejection of the acquisition. The JFTC struggled to obtain BHP's cooperation in November and threatened criminal prosecution unless the company complied with its requests for information. This marks the first time the JFTC has intervened in a merger or acquisition between two non-Japan-based companies.

BHP directors denied that the regulatory obstacles in the European Union and Japan affected its decision to abandon the transaction. Rather, they cited the recent economic downturn and falling commodity prices as the exclusive reason for not proceeding with the acquisition of Rio Tinto. However, BHP stated earlier this year that the deal would have been more profitable in a weak market, raising speculation by some observers that the hurdles erected by competition authorities, particularly in the European Union, were the main source for the withdrawal of BHP's bid.

AUSTRALIA – Labor Party Pushes to Criminalize Cartels

Presently, civil action is the only means of enforcing cartel behavior in Australia. The Australian Competition & Consumer Commission (ACCC) may initiate a civil proceeding against corporations or individuals engaging in cartel conduct. For corporations, the maximum civil penalty is the greater of AU$10 million, three times the value of the illegal benefit or 10 percent of the companies' annual turnover. Individuals may be assessed up to AU$500,000 in civil sanctions. Moreover, private parties may file suit against the cartel participants for damages.

After the order of record penalties of AU$36 million against Visy Board Pty Ltd by the Federal Court in November 2007, the ACCC emphasized the need for Australia to punish cartel behavior criminally. The United States, Canada and the United Kingdom all have criminal penalty regimes for cartel behavior, which include not only fines but also imprisonment.

The Trade Practices Amendment (Cartel Conduct and Other Measures) 2008, introduced on December 2, 2008 by Minister for Competition Policy and Consumer Affairs Chris Bowen, provides for criminal sanctions. The bill will impose a maximum sentence of 10 years in prison and/or a fine of AU$220,000 for individuals engaging in serious cartel conduct. Corporations will receive a maximum fine of AU$10 million or three times the value of the illegal benefit.

If passed, the Commonwealth Director of Public Prosecutions (DDP) will prosecute criminal cartel behavior, while the ACCC will be limited to investigating the cartel conduct and gathering evidence. Foreshadowing the approval of the Trade Practices Amendment, the ACCC and DDP have already entered into a Memorandum of Understanding (MOU) that defines each party's roles under the proposed legislation. The ACCC will continue to enforce cartel behavior civilly and will administer the immunity process for both civil and criminal conduct. However, the decision whether to grant criminal immunity will ultimately rest with the DDP upon recommendation by the ACCC. The MOU will go into effect after the Trade Practice Amendment receives royal assent. The Senate Economics Committee will issue a report by February 20, 2009.

CHILE – Three Major Pharmacy Chains Accused of Collusion

On December 9, 2008 Chile's antitrust authority, the Fiscalía Nacional Económica (FNE), filed a complaint with the Tribunal de Defensa de la Libre Competencia (TDLC) against three major pharmacy chains for fixing the prices of more than 200 drugs since December 2007. Some of the prices allegedly fixed by defendants Ahumada (FASA), Cruz Verde and Salcobrand included contraceptives and medicines to treat chronic diseases such as diabetes and epilepsy. In 2007 Ahumada, Cruz Verde and Salcobrand held market shares for the retail sale of drugs of 27.7 percent, 40.6 percent and 23.8 percent, respectively. The FNE is seeking the maximum fine, or US$13.4 million, for each company.

CHINA – First Publicly Known Complaint Filed Under China's New Antitrust Law

More than 50 companies have agreed to join Renren Information Service in its RMB174 million (US$25 million) complaint against Baidu.com Ltd. for abusing its dominant position in China's

Internet search engine market. The complaint is believed to be the first filed under China's new antimonopoly law, which first became effective in August 2008.

The aggrieved companies claim that they have suffered damages from Baidu's keyword auction system and its aggressive marketing of the system. For example, some complainants allege that Baidu blocked their websites despite promises by Baidu that it would not block the sites of those that did not bid for keywords.

If 100 companies join the lawsuit, they can file a mass complaint with the State Administration for Industry & Commerce (SAIC). The law firm organizing the complaint intends to allege the following legal actions under the mass complaint: brand infringement, fraud and unfair competition. Baidu's share of China's Internet search engine market is about 70 percent.

JAPAN – The JFTC Files Criminal Charges Against Galvanized Steel Sheet Cartel

On November 11, 2008 JFTC filed a criminal accusation with the Prosecutor-General against three major steel sheet companies, Nippon Steel & Sumikin Coated Sheet Corporation, Nisshin Steel Co., Ltd. and Yodogawa Steel Works, Ltd., on suspicions of violating Article 3 of the Antimonopoly Act ("Unreasonable Restraint of Trade"). This the first time in 17 years and the third time since World War II that the JFTC has filed a criminal accusation for a price-fixing cartel.

According to the JFTC, during the period between April 2006 and June 2006, employees of the accused companies agreed to raise the sale price of hot-dip 55-percent aluminum-zinc alloy-coated steel sheets and strips shipped after July 1, 2006 by ¥10 per kilogram.

A fourth steel manufacturer, JFE Galvanizing & Coating Co., also participated in the cartel. It was nevertheless excluded from the JFTC's criminal accusation filing because it applied for leniency (i.e., reduction or exemption of a surcharge) and notified the JFTC of the cartel voluntarily before the JFTC started its compulsory investigation.

In this case, the leniency system helped to reveal a cartel. The first to notify the JFTC of a cartel can avoid a criminal accusation by the prosecutors office (as a matter of fact) as well as any applicable surcharges by the JFTC (as a matter of law). The JFTC hopes that such treatment will keep the leniency system effective. Although Japan's law does not specifically provide for such exemption from criminal accusation by the prosecutors office, the prosecutors have also taken a position supporting the JFTC's policy regarding the leniency system.

MEXICO – Federal Competition Commission Investigates Ground Freight Industry

On December 18, 2008 Mexico's competition authority, the Comisión Federal de Competencia (CFC), announced its initiation of an investigation to determine whether ground freight companies have engaged in monopolistic practices in violation of the Federal Competition Law. More than 80 percent of commercial trade between Mexico and the United States and 75 percent of the merchandise circulating around Mexico is transported by ground (i.e., by trucks on highways). Article 31 of the Federal Competition Law provides the CFC with the power to conduct on-site verifications where necessary to assist in its analysis of the industry.

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