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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

HP and Staples Sued Over Anticompetitive Ink Cartridge Agreement

Computer manufacturer Hewlett-Packard Co. and office supply retailer Staples Inc. face a consumer class action lawsuit for allegedly agreeing to restrict competition in the market for laser printer ink cartridges. In December, a California resident and owner of an HP inkjet printer, Ranjit Bedi, filed a lawsuit against the companies in the US District Court for the District of Massachusetts. Bedi claims that HP and Staples conspired to reduce competition and raise prices in the HP-compatible ink cartridge market. HP is the US market leader for both printers and replacement ink cartridges, but earns higher profits on sales of ink cartridges.

The complaint states that HP and Staples violated the antitrust laws when they entered an agreement in 2006 according to which Staples ceased sales of its own brand of HP-compatible printer cartridges in exchange for monetary benefits from HP. Such benefits allegedly included more than US$100 million in “market development funds.” According to the complaint, the HP-Staples agreement is a horizontal agreement between direct competitors: “It reduces the output of HP-compatible cartridges, increases the price of HP-compatible cartridges, eliminates interbrand competition between Staples and HP and limits nonprice competition in the market for HP-compatible cartridges.”

Bedi claims that the HP-Staples agreement is illegal under the Sherman Act because it restrains trade and fixes prices. He has asked the court to certify a class of similarly situated purchasers of HP-compatible ink cartridges. He has also asked for injunctive relief, treble damages, attorneys’ fees and court costs.

ALJ Dismisses FTC Action Against Michigan Realtors Association

Chief Administrative Law Judge Stephen J. McGuire has dismissed the complaint brought by the Federal Trade Commission (FTC) against Realcomp, a corporation servicing more than 2,100 Michigan real estate brokerage offices. Realcomp, which is owned by a group of realtor boards and associations, operates the multiple listing service (MLS) for Southeastern Michigan. The FTC alleged that by restricting certain brokers’ access to the MLS and related public websites, Realcomp unreasonably restrained competition.

According to the FTC’s complaint, Realcomp restrained trade by blocking information about Exclusive Agency (EA) listings and listings by other nontraditional brokerage services and by preventing the dissemination of this information to public websites that are fed by the MLS. EA listings are produced by agreements whereby the broker receives a commission only if the broker locates the buyer; if the seller locates the buyer, the agent receives no commission. The complaint further alleged that brokers who adopted Realcomp’s MLS rules effectively agreed to restrict the manner in which they compete. Moreover, such brokers collectively withheld a valuable resource from their nontraditional broker competitors.

In dismissing the FTC’s complaint, Chief Judge McGuire ruled that the agency failed to establish an “anticompetitive effect or actionable consumer harm.” Specifically, McGuire found that the evidence presented failed to demonstrate that the Realcomp website Policy: “(1) has eliminated or limited consumer choice of a desired product; (2) has excluded discount EA listings from substantial exposure on the Realcomp MLS or other public websites; (3) has unreasonably impeded the ability to discount brokers to compete in Southeastern Michigan; or (4) has forced discount brokers to exit the market or deterred entry." "Despite the website Policy," McGuire held, "discount brokers offering EA listings have been able to market their products and compete successfully in the Realcomp Service Area, without having to labor under an unreasonable competitive disadvantage."

FTC Clears Google-DoubleClick Merger

Closing its eight-month investigation of the transaction, the FTC has announced that it will not intervene to block Internet search engine Google from acquiring the Internet advertising firm DoubleClick. Despite widespread skepticism about the deal, and urgings by members of Congress (see our December 2007 issue) to proceed with caution, the Commission determined by a 4-1 vote (Commissioner Pamela Jones Harbour dissenting) that the proposed acquisition was unlikely to harm competition.

In a statement written by FTC Chair Deborah Platt Majoras, the majority of the commissioners expressed their finding that there is no basis for preventing the transaction from going forward. Specifically, the majority found that Google and DoubleClick are not direct competitors in any relevant market. Google sells advertising on its website and through its ad intermediation product, AdSense. DoubleClick sells third party ad serving products, but does not buy or sell advertising. The transaction, the majority held, is therefore "not likely to cause competitive harm by eliminating significant current competition between Google and DoubleClick." The Commission found that there was no evidence suggesting that the merger would eliminate any potential competition or allow Google to leverage market power in one market to harm competition in another.

Addressing concerns about online privacy raised by the merger, the majority commented that the FTC lacks authority to block the transaction on such grounds. "The sole purpose of federal antitrust review of merger and acquisitions," the majority noted "is to identify and remedy transactions that harm competition."

Travelers Settles Multistate Bid-Rigging Allegations

Insurance firm Travelers Companies, Inc. has entered a consent decree with nine states and the District of Columbia, agreeing to pay US$6 million to settle claims relating to the company's involvement in a nationwide bid-rigging and price-fixing scheme in the market for commercial insurance. Attorneys general from the settling states are part of a multistate task force that is investigating the industry. The states represented on the task force include Hawaii, Florida, Maryland, Massachusetts, Michigan, Oregon, Pennsylvania, Texas, West Virginia and the District of Columbia.

Travelers and other insurers were charged with conspiring with insurance broker Marsh & McLennan Cos. to submit artificially inflated bids where the broker had preselected the winning bidder. The scheme created the illusion that customers were selecting policies with premiums derived through competitive bidding. Travelers was also charged with paying "contingent commissions," or profit sharing commissions, in exchange for favorable treatment from brokers. Collectively, such practices resulted in higher insurance premiums paid by insurance customers including companies, nonprofit organizations and public entities. The settlement with Travelers follows similar deals reached with insurers ACE Group Holdings, Inc. in October 2007 and Zurich American Insurance Co. in December 2006.

EUROPEAN UNION

Commission Sends Statement of Objection to Air Cargo Cartel Members

On December 21 the European Commission (Commission) sent a Statement of Objection to several airlines that are alleged to have participated in a cartel in the market for international air freight services. Specifically, the airlines are alleged to have agreed on levels of fuel surcharges and other fees applicable to international freight shipments. Although the Commission has not announced which carriers received the Statement of Objection, officials at British Airways, Germany's Lufthansa, Air France-KLM and Scandinavia's SAS have all confirmed their involvement.

A Statement of Objection is the procedural document whereby the Commission informs the parties under an antitrust investigation of the objections raised against them. Recipients are entitled to respond to the Commission's objections in writing. In addition, parties may request an oral hearing to present their defense to the charges. The Commission will then issue a decision on whether or not the parties have violated the EC antitrust rules.

Commission Fines Chloroprene Rubber Cartel

The European Commission imposed fines totaling €243.2 million on six rubber manufacturers that engaged in a cartel to allocate customers and fix prices for chloroprene rubber. The companies – namely Bayer, Denka, DuPont, Dow, ENI and Tosoh – were charged with violating Article 81 of the EC Treaty, which bans cartels and restrictive business practices. The Commission found that, between 1993 and 2002, the companies agreed on market shares and set prices for chloroprene rubber. Chloroprene rubber is a synthetic flexible rubber used in a range of industrial products including hoses, v-belts, diving equipment and adhesive in shoes.

In assessing fines for violations of Article 81, the Commission considers, among other things, the seriousness of the offense, the amount of affected sales and, in the case of cartels, the "combined market share, the geographic scope, and the actual implementation of the cartel agreements." The Commission also factors in reductions of fines for firms that cooperate with the Commission's investigation through its Leniency Program. In this case, the fines assigned to ENI and Bayer were increased by 60 percent and 50 percent respectively because each company had previously been found by the Commission to have been involved in cartel activities. Bayer was nevertheless granted full immunity from fines because it was the first applicant under the Commission's Leniency Program; ENI was fined €132 million without reduction. Tosoh and DuPont/Dow were granted fine reductions of 50 percent in the case of Tosoh and 25 percent in the case of

DuPont/Dow. As a result, the companies were fined €4.8 million and €108 million, respectively. The Japan-based firm Denka was fined €47 million with no reduction.

Commission Raids PVC Manufacturers

On December 12 and 13 officials from the European Commission carried out surprise inspections at the premises of two PVC producers in the UK pursuant to Article 13 of the EC Merger Regulation. The Commission suspects that the companies concerned took steps to implement a merger before the Commission's clearance decision. The companies are alleged to have exchanged business information in violation of the EC rules concerning cartel behavior and other restrictive business practices.

MasterCard Interchange Fees Found to Violate Antitrust Rules

The European Commission has ruled that MasterCard's intra-EEA Multilateral Interchange Fees (MIFs) for cross-border transactions with MasterCard and Maestro branded debit and credit cards constitute a restrictive business practice in breach of Article 81 of the EC treaty. MIFs are transaction fees paid by retailers to banks that issue the payment cards. The Commission determined that the charges inflate the cost of card acceptance by retailers without benefiting consumers or leading to technical and economic efficiencies.

The Commission ordered MasterCard to withdraw the MIF system within six months. Should MasterCard fail to comply with such order, the Commission can impose a daily fine of up to 3.5 percent of MasterCard's daily global turnover during the preceding year. MasterCard has indicated that it plans to appeal the Commission's decision.

Commission Improves State Aid Rules

The European Commission has amended the so-called "Implementing Regulation" establishing procedural rules for the application of the EC Treaty State Aid provisions. Among the changes to the Regulation are the introduction of additional notification forms, as well as an electronic notification system and a secure email system to be used by Member States to submit state aid notifications and subsequent correspondence with the Commission. Use of the electronic notification and email system will become mandatory as of July 1, 2008. The Commission estimates that the new notification procedures will significantly streamline its decision-making process. In addition, the amended Regulation provides that the Commission will publish the full text of approved state aid decisions on its website.

AROUND THE WORLD

JAPAN – JFTC to Issue First-Ever Cease-and-Desist Order Against Foreign Companies

The Japan Fair Trade Commission (JFTC) has confirmed that it issued prior notices of a cease-and-desist order against five companies alleged to have formed an international cartel to fix prices of marine hose. The companies that received notices include Japan's Bridgestone Corporation and Yokohama Rubber Co., the UK's Dunlop Oil and Marine, France's Trelleborg Industries, a Swedish unit of Trelleborg, and Italy's Parker ITR and Manuli Rubber Industries S.p.A. The JFTC's notices were based on findings from a joint investigation into the marine hose industry conducted with regulators from the US and European Union.

Companies that receive notice of a cease-and-desist order may respond through written statements and by submitting evidence in opposition of the action threatened by the JFTC. After examining such responses the JFTC can decline further action or issue an administrative penalty. Although the JFTC has issued cease-and-desist orders against Japan-based companies, the JFTC has until now never taken such action against a foreign company. It is expected that the JFTC will subject only Bridgestone to a surcharge payment order at this time and issue only cease-and-desist orders against Bridgestone's foreign co-conspirators. The JFTC has decided to forego penalizing Yokohama Rubber Co. because of the company's admission of guilt.

JAPAN – JFTC Consults Foreign Antitrust Agencies Over Proposed Merger

On December 22, 2007 the JFTC revealed that it entered into discussions with the European Commission and the Australian Competition and Consumer Commission to evaluate an acquisition by international mining firm BHB Billiton of rival Rio Tinto. The JFTC was concerned that the acquisition would restrain competition in Japan's market for ironstone. According to press reports, it is the first time that the JFTC has requested a consultation about a foreign merger from foreign antitrust agencies.

Under the 1998 amendment to the Antimonopoly Act of Japan, the JFTC may review corporate transactions between foreign companies and issue cease-and-desist orders to prevent transactions that would harm competition in Japan's market. In this case, the JFTC sought consultations with a foreign competition agency because there was no guarantee that the parties would comply with an order by Japan's competition authority blocking the transaction. It has been reported that the JFTC is considering similar consultations with competition agencies in Korea and Taiwan where there are significant imports of ironstone from BHP Billiton and Rio Tinto.

INDONESIA – State-Owned Investment Firm to Appeal Antitrust Ruling

Indonesia's state-owned investment firm Temasek Holdings has filed an appeal challenging the decision by Indonesia's Commission for the Supervision of Business Competition (KPPU), which found that the firm violated the country's antitrust laws by acquiring majority ownership in rival mobile telecommunications firms. The acquisition involved Indonesia's two largest mobile operators: PT Indosat (Indosat) and PT Telekomunikasi Selular (Telkomsel).

In November 2007 a five-member panel of the KPPU found that Temasek violated the antitrust laws by indirectly holding a majority interest in both Indosat and Telkomsel through its affiliates Singapore Telecom (SingTel) and Singapore Technologies Telemedia (Telemedia). The panel ordered Temasek to divest its interest in either Telkomsel or Indosat within two years, and further ordered each of Temasek, SingTel and Telemedia to pay US$4 million in fines.

Under Indonesia's antitrust laws, it is unlawful for an entity to hold a majority stake in more than one company within the same industry. According to Syamsul Ma'arif, head of the KPPU panel that ruled against Temasek, the company's "cross-ownership of the Telkomsel and Indosat has led to Telkomsel committing a monopolistic act and abuse of dominant position through charging excessive tariffs." The companies deny allegations of anticompetitive behavior and argue that the KPPU has misapplied the law. Telemedia and SingTel have each filed separate appeals of the KPPU's ruling.

SOUTH KOREA – KFTC Investigates Foreign Luxury Car Makers

The Korea Fair Trade Commission (KFTC) has launched an investigation into the pricing practices of several foreign car makers. In mid-December the competition agency raided the Korean import offices of Mercedes Benz AG, BMW AG, Toyota Motor Corp.'s Lexus division and Volkswagen AG's Audi division, as well as the Korea Automobile Imports & Distributors Association. According to a KFTC spokesperson, the car makers are being investigated for possible anticompetitive conduct that resulted in inflated prices in Korea as compared with other countries. Specifically, the agency is investigating possible coordination among the car makers to interfere with so-called "gray market" imports. The "gray market" refers to legal imports into a territory that are not conducted or sanctioned by the manufacturer (a form of transshipping). Where there are significant price disparities between territories, distributors or dealers often engage in arbitrage between the territories.

Contacts

If you have any questions regarding the issues discussed in this Update, please contact any of the people listed below:

Washington DC Office
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20044-0407
Tel: +1.202.626.6600

James V. Dick
jdick@ssd.com

Edward A. Geltman
egeltman@ssd.com

Barry A. Pupkin
bpupkin@ssd.com

Shanker A. Singham
ssingham@ssd.com

Christopher H. Gordon
cgordon@ssd.com

Iain R. McPhie
imcphie@ssd.com

Christopher H. Skinner
cskinner@ssd.com

Brussels Office
165, Avenue Louise – Box 13-14
1050 Brussels
Belgium
Tel: +322.627.11.11

Brian N. Hartnett
bhartnett@ssd.com

Rebecca O'Donnell
rodonnell@ssd.com

Oliver H. Geiss
ogeiss@ssd.com

Please feel free to contact other members of our worldwide antitrust practice:

Beijing Office
25th Floor, North Tower, Suite 2501
Beijing Kerry Centre
1 Guanghua Road
Chaoyang District
Beijing 100020
People's Republic of China
Tel: +86.10.8529.6998

Daniel F. Roules
droules@ssd.com

James M. Zimmerman
jzimmerman@ssd.com

Budapest Office
Roosevelt Irodaház
Roosevelt tér 7-8.
Budapest H-1051
Hungary
Tel: +36.1.428.7111

Akos Mester
amester@ssd.com

Caracas Office
Centro Seguros Sudamerica,
Piso 10, Oficina 10-A
Av. Francisco de Miranda
El Rosal
Caracas 1060
Venezuela
Tel: +58.212.953.4006

Hernando Diaz-Candia
hdiaz@ssd.com

Arghemar Perez
aperezsanguinetti@ssd.com

Hong Kong Office
40th Fl., Gloucester Tower
The Landmark
15 Queen's Road Central
Central, Hong Kong
Hong Kong SAR, China
Tel: +852.2509.9977

Nicholas Chan
nchan@ssd.com

Phoenix Office
Two Renaissance Square
40 North Central Avenue,
Suite 2700
Phoenix, Arizona 85004-4498
Tel: +1.602.528.4000

George Brandon
gbrandon@ssd.com

Rio de Janeiro Office
Praia de Botafogo, 440, 14º andar
22250-040 Rio de Janeiro, RJ
Brazil
Tel: +55.21.2271.3300

Carlos A. Derraik
cderraik@ssd.com

San Francisco Office
One Maritime Plaza, Suite 300
San Francisco, California 94111-3492
Tel: +1.415.954.0200

Nathan Lane III
nlane@ssd.com

Tallahassee Office
215 South Monroe Street, Suite 601
Tallahassee, Florida 32301-1804
Tel: +1.850.222.2300

Gary P. Timin
gtimin@ssd.com

Tokyo Office
Ebisu Prime Square Tower, 16F
1-1-39 Hiroo
Shibuya-ku, Tokyo 150-0012
Japan
Tel: +81.3.5774.1800

Munehiro Matsumoto
mmatsumoto@ssd.com

NORTH AMERICA
Cincinnati
Cleveland
Columbus
Houston
Los Angeles
Miami
New York
Palo Alto
Phoenix
San Francisco
Tallahassee
Tampa
Tysons Corner
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