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United States

Antitrust Agencies Provide Insight Into Proposed Revision of Horizontal Merger Guidelines

The Department of Justice (DOJ) and the Federal Trade Commission (FTC), collectively referred to as the Agencies, formally announced in September 2009 that they would explore the possibility of updating the Horizontal Merger Guidelines. To initiate the process, the Agencies requested public comments and held a series of public workshops seeking input about how the Agencies could harmonize the Guidelines with their current merger review practice, as well as ensure that the Guidelines reflect the legal and economic developments that have occurred since the Guidelines last significant revision in 1992.

In the fifth and final workshop on January 26, 2010, Assistant Attorney General Christine A. Varney acknowledged that there are areas where the Guidelines omit crucial considerations by the Agencies in the merger review process or inaccurately reflect enforcement. Closing the "gaps between the Guidelines and actual agency practice" is necessary to reduce uncertainty in business decisions and to ensure that courts are relying on accurate and comprehensive authority when adjudicating the validity of acquisitions under the antitrust laws.

Varney's discussion principally focused on three "gaps" commonly identified by commentators and recognized by the Agencies that require revision:

- The Agencies do not mechanically apply the Guidelines' five-step merger analysis (*i.e.,* analyze sequentially (1) market and market shares, (2) potential adverse effects, (3) entry, (4) efficiencies and (5) failing firms). Rather, they apply the five-part framework flexibly and find certain factors to be more important in some cases and less in others.
- The Guidelines overstate the importance of Herfindahl-Hirschman Index (HHI) thresholds. Although a useful tool, the HHI is not "the key driver of enforcement decisions."
- The Guidelines do not take into account significant developments in economic theory regarding unilateral effects that have occurred since 1992. In particular, the Guidelines provide insufficient discussion on the economic tools commonly used to analyze mergers of firms that sell differentiated products, such as diversion ratios, price-cost margins, win-loss reports, customer switching patterns, and views of competitors, customers and industry observers.

Varney concluded by noting other potential revisions that would improve the transparency of the Guidelines: (1) providing a more thorough discussion of targeted customers and price discrimination; (2) explaining that the Agencies normally assess market shares using recent or projected sales in the relevant market as well as identifying the conditions where other measures (*e.g.,* capacity) may be used; (3) providing a more unified approach to the concepts of expansion, entry and repositioning of non-merging firms; (4) clarifying that "coordinated effects can arise through accommodating behavior among a small number or rivals without the necessity of reaching terms of coordination"; and (5) formally recognizing the beneficial effects of innovation.

Smithfield Foods Fined US$900,000 for Premerger "Gun Jumping" Violation

In late January 2010 Smithfield Foods Inc. and its subsidiary, Premium Standard Farms LLC, agreed to pay a civil penalty of US$900,000 to settle alleged violations of the waiting period requirements under the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act). According to the DOJ's complaint, Premium Standard stopped exercising independent business judgment in its hog procurements soon after the execution of its September 2006 merger agreement with Smithfield Foods and prior to the expiration of the waiting period, which was extended until May 7, 2009 because of the DOJ's request for additional information. Premium Standard allegedly sought Smithfield's consent regarding three multiyear hog purchase contracts, providing Smithfield with key terms to the proposed contracts, including price, quantity and the length of the contract. Because the hog procurement contracts were necessary to Premium Standard's business operations in the ordinary course, Smithfield's exercise of consent over the contracts amounted to an exercise of operational control over the business in violation of the HSR Act.

DOJ Expresses Concerns With Proposed Amended Google Books Settlement

The DOJ submitted comments on the proposed amended class action settlement agreement between Google Inc. and author and publisher groups to resolve copyright infringement issues arising from Google's efforts to create an online digital library by scanning books from various sources.

While praising the amended settlement agreement for making "substantial progress," the DOJ contended that class certification, copyright and antitrust issues remain. Regarding class certification and copyright issues, the DOJ views the agreement as "an attempt to use the class action mechanism to implement forward-looking business arrangements that go far beyond the dispute before the Court in this litigation." With respect to its antitrust concerns, the DOJ noted that the agreement "confers significant and possibly anticompetitive advantages on Google as a single entity, thereby enabling the company to be the only competitor in the digital marketplace with the rights to distribute and otherwise exploit a vast array of works in multiple formats." Nonetheless, the DOJ expressed that it is optimistic that a beneficial solution for the parties and the public could be reached with continued collaboration.

The Open Book Alliance (OBA) – a coalition of technology companies, author groups, and library associations – continues to object to the settlement. The OBA calls for congressional discussion of the issue and proposes that a "digital book database should be entrusted to a neutral, civic, not-for-profit organization," like the Library of Congress.

On February 11, 2010 Google filed a brief responding to criticism of the amended settlement agreement focusing primarily on the public benefits of its digital library project. Notably, Google Books would provide the general public with access to rare book collections that are currently only available to a limited few and would lessen inequalities among educational institutions by providing students everywhere – not just at major research institutions – with access to the same wide-range of content. Google also noted that it does not have monopoly power as a new entrant and that there is no "dangerous probability" that it will acquire such power in any book market. Furthermore, Google contends that it will be creating an entirely new product, the institutional subscription, that would not otherwise exist without the amended settlement agreement. Pricing of institutional subscriptions would require review and approval by a not-for-profit entity (*i.e.,* Book Rights Registry) that represents those with copyright interests in the electronically published written works.

Taiwan-based TFT-LCD Producer Agrees to US$200 Million Fine for Cartel Participation

On December 9, 2009 the DOJ announced that Chi Mei Optoelectronics of Taiwan agreed to plead guilty and pay a criminal fine amounting to US$220 million for its participation in a conspiracy to fix prices in the sale of Thin Film Transistor-Liquid Crystal Display (TFT-LCD) panels. TFT-LCD panels are used in televisions, notebook computers, desktop monitors, mobile devices and other applications.

Between September 2001 and December 2006, Chi Mei allegedly agreed to sell TFT-LCD panels at certain prices during meetings and other communications in Taiwan, Korea and the United States. Chi Mei also issued price quotations in accordance with the agreements made in those communications and exchanged information on the sales of TFT-LCD panels to monitor and enforce the price fixing agreement.

The DOJ has obtained guilty pleas and agreements to pay criminal penalties from five other companies in association with its antitrust investigation into the TFT-LCD Industry: LG Display Co. Ltd. (US$400 million), Sharp Corporation (US$120 million), Chunghwa Picture Tubes Ltd. (US$65 million), Hitachi Displays Ltd. (US$31 million) and Epson Imaging Devices Corporation (US$26 million).

FTC and Key Congressional Members Urge Legislation to Curb “Pay-for-Delay” Settlements

The FTC and certain key members of Congress are calling for legislation to end so-called “pay-for-delay” agreements between brand-name and generic pharmaceutical companies that arise in the settlement of patent litigation. In a “pay-for-delay” agreement, the brand-name pharmaceutical company pays a generic competitor to keep its competing product off of the market for a certain period of time.

FTC investigations and enforcement actions against “pay-for-delay” agreements deterred their use from April 1999 through 2004. Notwithstanding a Sixth Circuit decision in 2003 holding “pay-for-delay” agreements to be *per se* antitrust violations, a few appellate courts have ruled to the contrary. Since the Eleventh Circuit’s 2005 ruling in *Schering-Plough Corp. v. Fed. Trade Comm’n,* upholding “pay-for-delay” agreements, “pay-for-delay” settlements have reemerged.

“Pay-for-delay” agreements allow a brandname company to keep its prices high while its generic competitor shares in the benefits of the brandname’s alleged monopoly profits. As a result, according to the FTC, consumers miss out on generic prices that are up to 90 percent lower than brandname prices. An FTC study found that “pay-for-delay” agreements cost consumers approximately US$3.5 billion per year. Another study by the FTC found that these settlements keep generics off the market for an average of 17 months longer than settlements that do not include a payment.

EUROPEAN UNION

Legislative Changes Following the Treaty of Lisbon

The Treaty of Lisbon or Treaty on the Functioning of the European Union (TFEU) entered into force on December 1, 2009, after ratification by all EU member states. The substantive provisions contained in the EC Treaty are mostly unchanged. What the Treaty of Lisbon does in terms of policy is merge the “three pillar” structure created by the Maastricht Treaty into one, streamlining the EU’s foreign policy and giving EU institutions a greater role in justice and home affairs cooperation. A number of new policy areas have also been added.

Although there are no substantive changes in the field of competition law, the relevant articles have been renumbered by TFEU. The basic competition rules are now Article 101 (replacing Article 81 on anti-competitive agreements) and Article 102 (replacing Article 82 on abuse of dominance). EU state aid law is now governed by Articles 107 and 108 of the TFEU (replacing Articles 87 and 88, respectively).

New Best Practices Guidelines

The European Commission has published three new Best Practices Guidelines:

(i) Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU

This document sets out changes in important aspects of such procedures, in particular earlier opening of proceedings (*i.e.,* as soon as the initial assessment phase has been concluded), state of play meetings at key points of the proceedings, disclosure of key submissions, public announcement of the opening and closing of procedures and the sending of statements of objections, and guidance about how the new instrument of commitment procedures is used in practice.

(ii) Best practices for the submission of economic evidence and data collection in cases concerning the application of articles 101 and 102 TFEU and in merger cases

This document describes officers’ various tasks and outlines how companies can make best use of a hearing. It also describes the reporting obligations and advisory role of hearing officers, the college of commissioners, and the addressees of European Commission (EC) decisions.

(iii) Guidance on procedures of the Hearing Officers in proceedings relating to Articles 101 and 102 TFEU

This document outlines the criteria companies must meet when responding to an EC request for economic evidence in the course of an investigation (used, for example, in econometric analyses). Parties often submit arguments based on complex economic theories on their own initiative. The paper explains the practices of competition services teams, and the role of the chief economist in contacts with parties who submit economic evidence.

Kraft's Proposed Acquisition of Cadbury Cleared by Commission

On January 6, 2010 the EC approved the proposed acquisition of Cadbury PLC by Kraft Foods Inc. by way of public offer, conditional upon the divestment of Cadbury's chocolate confectionary businesses in Poland and Romania. Both Cadbury and Kraft are significant competitors in the chocolate confectionary business in the European Economic Area (EEA). Kraft has a strong market presence in the EEA, except for the UK and Ireland where customers strongly prefer traditional British chocolate. Cadbury, on the other hand, is the market leader in the UK and Ireland. In continental Europe, Cadbury has significant business in France, Poland, Portugal and Romania.

The EC found the combined market share of Cadbury and Kraft's chocolate confectionary businesses to be particularly high in Poland and Romania, where each company's brands are in close competition, particularly in the area of chocolate tablets. To allay the EC's competition concerns, Kraft agreed to divest Cadbury's confectionary businesses in Poland and Romania. The EC concluded that with Kraft's divestiture commitment, the proposed acquisition would not adversely affect competition in the EEA.

Commission Imposes €173 Million in Fines for Participation in Plastic Additives Cartels

On November 11, 2009 the EC imposed a total of €173,860,400 in fines for violating Article 81 of the EC Treaty, which bans cartels and restrictive business practices (now Article 101 TFEU) on 24 entities from the following 10 parent companies: Akzo, Baerlocher, Ciba, Elementis, Elf Aquitaine (Arkema France), GEA, Chemson, Faci, Reagens and AC Treuhand. The Commission found that these entities fixed prices, shared customers, allocated markets and exchanged sensitive commercial information in the EEA for tin stabilizers between 1987 and 2000 and for ESBO/esters between 1991 and 2000. These products are used in packaging, credit cards, bottles and coatings as heat stabilizers.

The EC began investigating the cartels in February 2003 following an immunity application filed by Chemtura Corporation, which had participated in the cartels. Chemtura avoided fines for revealing the cartels and for cooperating in the investigation. The EC reduced the fines of three other companies – Arkema France, Baerlocher and Ciba – for their cooperation in the investigation. Arkema France, however, had its fine increased by 90 percent due to prior cartel violations (*i.e.,* for participating in the PVC, polypropylen and peroxygen products cartels). The EC expressed that "companies must learn the hard way that breaking the law does not pay and that repeat offenders will face stiffer penalties."

Commission Approves Oracle's Proposed Takeover of Sun Microsystems After Thorough Investigation

On January 21, 2009 the EC announced that it had cleared Oracle Corporation's proposed acquisition of Sun Microsystems. Oracle is a US database and application software company. Sun is a US company that supports the open source data base MySQL, as well as network infrastructure products and services. The EC's investigation, which was initiated in September

2009, focused on the proposed acquisition's effect on the database market, access to Java intellectual property rights, and the markets for middleware and the "IT stack."

Three proprietary database vendors – Oracle, IBM and Microsoft – possess 85 percent of the market in terms of revenue, with Oracle being the largest provider. The acquisition of Sun would provide Oracle with control over MySQL, which is the world's leading open source database. Oracle and MySQL compete in certain parts of the database market. However, the EC found that they are not close competitors in other portions of the market (*e.g.,* high-end). Furthermore, there is another open source database, PostgreSQL, that the EC believes will provide a sufficient alterative to MySQL and could reasonably replace MySQL's role as a competitor in the database market.

With respect to Java IP rights, the EC found that Oracle would have no incentive to restrict its competitors' access to such rights because it would jeopardize gains achieved from broad adoption of the Java platform. Furthermore, the EC determined that the merged entities resulting market shares in the middleware and IT stack markets did not raise competition concerns, especially given prevailing competition in these markets.

GERMANY – German Competition Authority: Inspections at Retailers and Branded Products Manufacturers

On January 14, 2010 the German Federal Cartel Office carried out surprise inspections at the premises of 15 companies on suspicion of coordinated retail price-fixing for confectionery, coffee and pet food. The companies raided include the following: chocolate manufacturer Mars; German retail giant Metro, which runs appliance stores, department stores, supermarkets, and cash-and-carry outlets; and confectionery manufacturer Haribo. Fellow retailers Edeka, Rewe, Shwarz Group's Lidl, and Kaufland, drugstore Rossmann, and pet food maker Fressnapf have also confirmed that they were visited.

RUSSIA – Federal Antimonopoly Service Warns Companies About Disseminating Information About Future Prices

The Russian Federal Antimonopoly Service (FAS) issued a press release warning Russia's coking coal producers that disseminating information about future prices can be interpreted as a competition-restricting concerted action, which is subject to administrative and criminal penalty. The FAS reports that "media, including Internet sites" have been publishing information that Russia-based companies will be increasing prices of coking coal by 30-40 percent. In 2008 the FAS fined three different company groups over a billion Rubles for abusing their dominant positions in the market for coking coal.

Violations for competition-restricting concerted actions are subject to an administrative fine ranging from one-hundredth to fifteen-hundredths of the violators income in the market where the anticompetitive behavior occurred. Violations are also punished by a criminal penalty of up to six years imprisonment and a fine of up to one million Rubles.

AROUND THE WORLD

JAPAN – Antimonopoly Act Amendment Passed

Amendments to the Antimonopoly Act passed by the Japanese Diet last summer became effective on January 1, 2010. The main amendments include a revision of the surcharge system and a revision of the regulation concerning mergers and acquisitions.

One of the revisions of the surcharge system is to expand the types of conduct subject to fines from cartels to exclusionary private monopolies, concerted refusals to trade, discriminatory pricing, sales at unfairly low prices, resale price restrictions and abuses of dominant position. The purpose in expanding the types of conduct subject to fines was to better protect the interests of medium and small enterprises.

To ensure the transparency of Japan Fair Trade Commission's (JFTC) enforcement of the revised Antimonopoly Act, the JFTC published guidelines (pursuant to public comments received) on October 28, 2009, that set forth its enforcement policies for investigation and the essential elements of exclusionary conduct. The Guidelines state that the JFTC's intent is to review matters on a priority basis – prioritizing cases involving companies with market shares of more than 50 percent. The 50-percent standard was disclosed for the first time in the Guidelines.

The revisions introduced a system of pre-notification (with a waiting period) instead of post-notification for mergers and acquisitions. As a general rule, shares may not be acquired until the expiration of a 30-day waiting period. In addition, the revisions reduce the number of percentage thresholds from three (10, 25 and 50-percent interests) to two (20 and 50-percent interests). The Amendments also introduce domestic turnover thresholds to replace the current asset-based thresholds.

MALAYSIA – Competition Regime in Place by 2011

Malaysia is attempting to establish a competition law and enforcement regime, which it expects to have in place by the end of 2011. The Malaysian Minister of Domestic Trade, Co-operatives and Consumerism has reported that the Fair Trade Practices Bill (FTPB) has been submitted to Malaysia's Attorney-General's Chambers and will be up for its first reading before the Malaysian Parliament in March. The FTPB would create a competition law that would prohibit abuse of dominant market position, hardcore cartel behavior, anticompetitive practices and unfair trade practices. The new law is intended to apply to all sectors of the economy except for communications, energy, banking and the sovereign functions of the Malaysia's government.

ARGENTINA – Telefónica Receives US$27.5 Million Fine for Failing to Notify Argentine Antitrust Authorities of Investment in Rival

In January 2010 the Argentine National Commission for the Defense of Competition (CNDC) levied a US$27.5 million fine against Telefónica de Argentina for failing to notify the CNDC of the investment made by its Spain-based parent company, Telefónica S.A., in Telecom Italia SpA. Telecom Italia holds a 50-percent share in Telecom Argentina, which is Telefónica de Argentina's main competitor in the provision of landline services. Telefónica de Argentina and Telecom Argentina are also the only providers of both landline and major mobile services in Argentina.

The CNDC ordered Telecom Italia to divest its holdings in Sofora Telecomunicaciones S.A., the holding company that controls Telecom Argentina, by February 25, 2010. Last month, however, a court in Argentina suspended the divestiture timeline and asked the Supreme Court of Argentina to order the government to create a national antitrust tribunal to determine whether the investment of Telefónica in Telecom Italia affects competition in Argentina.

BRAZIL – SDE Initiates Investigation into LCD-TFT Cartel

On December 7, 2009 the Brazilian Secretariat of Economic Law of the Ministry of Justice (SDE) formally initiated an investigation into a suspected international cartel between manufacturers of TFT-LCD panels. The SDE has surveyed six different companies in association with its investigation: Chungwa Picture Tubes, Hitachi Displays, LG Display, Samsung Electronics Corporation, Sharp Corporation and Epson Imaging Devices Corporation. The US DOJ obtained guilty pleas from five of these six companies through its price-fixing investigation into the TFT-LCD industry. The sixth company, Samsung, is presumed to be the amnesty applicant in the US investigation.

CHILE – Chile's Antitrust Authority Seeks to Curb Anticompetitive Practices in Tourism Industry

On December 17, 2009 the National Economic Prosecutor (NEP) filed an injunction with the Tribunal for the Defense of Free Competition against five tourism companies: Abercrombie & Kent S.A., ADS Mundo Turismo Ltda., Turismo Cocha S.A., Chilean Travel Services Ltda. and Turavion Ltda. The NEP contends that these five companies entered into an agreement to restrain competition in the provision of hotel marketing services. Specifically, the NEP alleges that these companies threatened to stop marketing Explore Chile S.A.'s services abroad unless it increased commission payments to the tourism companies. (Explore Chile is a luxury hotel chain). The NEP requested a fine of approximately US$1.5 million and the immediate cessation of the alleged anticompetitive practices.

MEXICO – Federal Competition Commission Fines Television Network US$3.7 Million

On November 20, 2009 Mexico's Federal Competition Commission (CFC) concluded that Grupo Televisa S.A. de C.V. – Mexico's largest television network – violated the federal competition law by denying retransmission of its television signals to its competitor, Tele Cable Occidente. Under the competition law, a refusal to deal by a company with substantial market power constitutes a "relative monopolistic practice." Grupo Televisa was fined US$3.7 million, the largest penalty ever imposed by the CFC on a media company.

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