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Antitrust and Competition Law Update

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Busy Times for U.S. Antitrust Enforcement

The last several weeks have seen a flurry of important developments in antitrust enforcement, with major decisions in one merger and one joint venture case, an important Federal Trade Commission policy statement about disgorgement and restitution remedies, and an announced FTC challenge to a consummated merger. Each of these developments is significant standing alone; collectively, they reflect extremely active Justice Department and FTC antitrust enforcement programs, with the agencies at times adopting more aggressive positions than some might have expected from a Republican administration.

The Label Stock Case: A Coordinated Effects Renaissance?

On July 26, 2003, Judge Zagel of the United States District Court for the Northern District of Illinois granted the Justice Department's motion preliminarily to enjoin the proposed acquisition of the number three U.S. label stock supplier, MACtac, by the second largest supplier, UPM-Kymmene.¹ The parties abandoned the transaction soon thereafter.

This is the first time in many years that the government has won a litigated merger challenge based on a "coordinated effects" theory. Although the agencies had in recent years focused on "unilateral effects" in merger enforcement,

senior DoJ officials have announced a renewed emphasis on assessing whether a transaction threatens supplier coordination.² The agencies' primary reliance on unilateral effects may have reflected, in part, the relatively well-developed and accepted tools for assessing whether a merger is likely to permit the combined firm to raise prices by itself. By contrast, coordinated effects analysis has long labored under substantial doctrinal confusion and imprecision. In particular, although it is generally accepted that certain market characteristics tend to make coordination more or less likely, until recently there has been little learning about how to evaluate whether a particular merger is likely to affect suppliers' ability and incentives to reach terms of coordination and detect and punish deviations therefrom. Recent analytical advances and experience gained from pros-

¹ *U.S. v. UPM-Kymmene Oyj*, No. 03 C 2528 (July 26, 2003), available at <http://www.usdoj.gov/atr/cases/f201100/201196.htm>, at ¶ 52. Unlike with most merger cases that DoJ brings, the District Court did not consolidate preliminary injunction proceedings with trial on the merits.

² See, e.g., Jaret Seiberg, "Antitrust Goes Back to the Future," *The Deal* (August 13, 2003) (reporting on speech by Assistant Attorney General R. Hewitt Pate in which Pate stressed recent DoJ focus on coordinated effects); Charles James, "Rediscovering Coordinated Effects" (Aug. 13, 2002) at <http://www.usdoj.gov/atr/public/speeches/200124.htm>.

WILMER, CUTLER & PICKERING

ecuting many international cartels,³ however, seem to be giving the agencies greater confidence that they can accurately identify particular mergers likely to lead to coordination — and then sell courts on coordinated effects theories in close cases.

The label stock case well illustrates the agencies' increasing comfort in relying on coordinated effects. This was not a three-two merger, or otherwise an immediately obvious candidate for a challenge. Although, by combining the second and third players, the transaction would have resulted in two suppliers controlling about 70 percent of the label stock market, there would have remained a substantial third player (about 10 percent share) and a significant competitive fringe comprised of several small suppliers.

DoJ nonetheless convinced the court that the acquisition threatened to stop or slow a trend of decreasing industry prices, largely because it consolidated most of the industry's excess capacity with two leading players. The court found that the smaller suppliers would lack the excess capacity and incentives necessary to preserve the intense competition present before the acquisition.

We anticipate that DoJ's success in this case will encourage the agencies further to step up their attention to coordinated effects. Parties contemplating mergers in concentrated industries should expect, in particular, closer agency scrutiny of how combining the merging parties may affect incentives and ability to coordinate. As coordinated effects analysis becomes more sophisticated, we may see quick rules of thumb for evaluating the likelihood of agency concern — such as HHI indices — become less reliable.

Three Tenors: Truncated Rule of Reason and Parent Non-Competes

In a unanimous opinion authored by Chairman Timothy Muris, the FTC applied a truncated rule of reason analysis and condemned limited restrictions on parents competing with a joint venture.⁴ Polygram and Warner Communications had respectively marketed recordings and videotapes based on the Three Tenors concerts at the 1990 and 1994 World Cups. For the 1998 World Cup concert, however, they formed a joint venture to produce and sell recordings and videotapes. After initial sales of the 1998 concert products proved disappointing, Polygram and Warner mutually agreed to a ten-week moratorium on advertising and discounting their competing 1990 and 1994 concert products.

The FTC devoted a good deal of its opinion to considering the appropriate analytical framework for evaluating agreements between competitors. It concluded that the case law, including the Supreme Court's decision in *California Dental Association*, 526 U.S. 756 (1999), supports a return to the truncated rule analysis that the FTC first used in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), and later abandoned.

The Commission then held that both the advertising and discounting restrictions were "inherently suspect" and therefore properly evaluated under a "quick look," rather than a full rule of reason analysis which balances any pro and anti-competitive effects from the restrictions. Polygram claimed that the restrictions were necessary to keep the parents from free riding off the joint venture's promotional activities through increased sales of their respective competing Three Tenors products, and thereby ensure efficient promotion of the joint venture products. The Commission declared, however, that this rationale went "far beyond the range of justifications that are cognizable under the antitrust laws," and served only to shield the joint venture "from legitimate interbrand competition." Despite holding the restrictions illegal under a quick look, the Commission nonetheless went on also to apply a fuller rule of reason analysis. It found that the restrictions had, in fact, lessened competition and were not reasonably necessary to promote the joint venture efficiently.

The Commission's opinion could potentially have far-reaching consequences. Courts have generally viewed restrictions on parents competing with their joint venture as ancillary to the venture and reviewed them under a rule of reason standard that focuses principally on whether the restrictions are overbroad in terms of scope and duration. Here, however, the Commission used a quick-look analysis to condemn a very narrow, short-term covenant not to compete that was arguably *less* restrictive than many commonly upheld non-competes involving joint venture parents.

Three Tenors is subject to appeal. It remains to be seen whether, if affirmed, the opinion portends a fundamental shift in standards for evaluating ancillary restraints that goes beyond the particular facts of the case. In the meantime, parties to joint ventures and other collaborations between competitors and their counsel are well advised to study the FTC's opinion carefully and consider whether and how it might bear on the analysis of any ancillary restraints.

3 See, e.g., William J. Kolasky, "Coordinated Effects in Merger Review: From Dead Frenchmen to Beautiful Minds and Mavericks," (April 24, 2002) at <http://www.usdoj.gov/atr/public/speeches/11050.htm>; Jonathan B. Baker, "Mavericks, Mergers and Exclusivity: Proving Coordinated Effects Under the Antitrust Laws," 77 N.Y.U. L.Rev. 133 (2002).

4 In the Matter of Polygram Holding, Inc., et al., FTC Docket No. 9298 (July 24, 2003), at <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>.

FTC Policy Statement on Disgorgement and Restitution: From the Wrongdoer Come the Spoils?

On July 25, the FTC issued a unanimous statement clarifying its policy on the use of disgorgement and restitution remedies in antitrust cases.⁵ The statement underscores that, in appropriate antitrust cases, the Commission will seek disgorgement of profits or restitution to victims. The Commission made clear, however, that it does not view disgorgement and restitution as routine remedies in antitrust cases and will continue to rely mostly on more traditional sanctions like civil fines, criminal penalties, and injunctions against future illegal conduct. (We note that the Justice Department lacks the statutory authority to seek disgorgement and restitution on which the FTC relies.)

The statement comes after two recent cases where the FTC obtained disgorgement of profits from antitrust violations. One case involved an alleged conspiracy to obtain monopoly power through exclusive supply agreements in the pharmaceutical industry, *FTC v. Mylan Labs, Inc.*, No. 1:98CV03114 (TFH) (D.D.C. Feb. 9, 2001); the other grew out of a merger to monopoly accompanied by withholding of documents from the FTC, *FTC v. The Hearst Trust*, No. 1:01CV00734 (TJP) (D.D.C. Nov. 9, 2001).

As the FTC's statement explains, disgorgement is "designed to deprive the wrongdoer of his unjust enrichment and to deter others from future violations." Restitution serves "different but often complementary purposes." It "is intended to restore the victims of a violation to the position they would have been in without the violation."

In deciding whether to seek disgorgement or restitution in particular cases, the Commission will consider three main factors. *First*, the underlying conduct must be a clear violation of the antitrust laws; that is, "a reasonable party should expect that the conduct at issue would likely be found to be illegal." The statement makes clear, however, that the violation need not necessarily constitute a *per se* offense. Indeed, neither the conduct in *Mylan* nor in *Hearst* was illegal *per se*.

Second, there must be a reasonable basis for calculating the amount of disgorgement or restitution, although undue precision will not be required.

Third, the Commission will consider whether it makes sense to seek disgorgement or restitution in light of other available remedies, including private civil actions, civil fines, and criminal proceedings. For instance, if it seems unlikely that victims will be able to recover their losses through private suits, the FTC will be more likely to seek restitution for them. Similarly, disgorgement may be appropriate if private actions or civil or criminal penalties will be inadequate to strip the defendant of all its illegal gains. When private actions or other enforcement mechanisms are likely sufficiently to punish the wrongdoer and fully compensate victims, the Commission will be less likely to seek disgorgement or restitution.

Aspen Technologies: FTC Challenge to Another Consummated Transaction

The FTC announced on August 7 that it has authorized the filing of an administrative complaint seeking to unwind Aspen Technologies, Inc.'s March 2002 acquisition of Hyprotech, Ltd.⁶ The Commission alleges that the transaction combined two of the three largest developers and suppliers of certain process engineering simulation software, gave the combined firm between 67 and 80-percent market shares in relevant markets, and left only one other meaningful competitor (which has been declining in importance). The acquisition, the Commission claims, threatens to enable Aspen Technologies unilaterally to increase prices and decrease innovation. (Aspen Technologies has announced that it will contest the Commission's allegations in FTC administrative proceedings.)

Aspen Technologies comes less than two months after an FTC administrative law judge ordered Chicago Bridge & Iron Co. to unwind its already consummated acquisition of assets from Pitt-Des Moines, Inc.⁷ (For a discussion of *Chicago Bridge & Iron Co.* and FTC challenges to consummated mergers generally, see WCP Antitrust Update of June 27, 2003, at http://www.wilmer.com/docs/news_items/Antitrust%20Update%2006-27-03.pdf.) Unlike *Chicago Bridge & Iron*, however, the Aspen Technologies transaction was not notifiable under the Hart-Scott-Rodino Act. The FTC investigation of the transaction had been ongoing for 15 months, but it is unclear whether, as in *Chicago Bridge & Iron*, the parties were on notice of an investigation when they closed.

⁵ Federal Trade Commission, "Policy Statement on Monetary Equitable Remedies in Competition Cases," (July 25, 2003), available at <http://www.ftc.gov/os/2003/07/disgorgementfrn.htm>.

⁶ FTC News Release, "FTC Charges Aspen Technology's Acquisition Of Hyprotech, LTD. Was Anticompetitive," (Aug. 7, 2003), at <http://www.ftc.gov/opa/2003/08/aspen.htm>; Administrative Complaint, *In the Matter of Aspen Technology, Inc.*, FTC Docket No. 9310 (Aug. 6, 2003) at <http://www.ftc.gov/os/2003/08/aspencomp.pdf>.

⁷ The FTC has also recently challenged two other consummated mergers. See *In the Matter of MSC Software Corp.*, FTC Docket No. 9299 (Aug. 14, 2002) (consent to divestiture before commencement of administrative proceedings after FTC alleged that non-reportable merger created monopoly in certain markets), at <http://www.ftc.gov/os/2002/08/mscsoftwareagee.pdf>, and *FTC v. The Hearst Trust, The Hearst Corp. and First Data Bank, Inc.*, Civ. No. 01-00734 (D.D.C. Nov. 9, 2001) (ordering divestiture of acquired company when failure to produce required documents allegedly concealed anticompetitive effects from FTC), at <http://www.ftc.gov/os/2001/12/hearstfinalorder.pdf>.

In the press release announcing the complaint, the new Director of the FTC's Bureau of Competition, Susan Creighton, commented that "[a]lthough the fact that a merger has been consummated increases the complexity of the Commission's decision to seek relief, that hurdle is not sufficient for the agency to forgo a challenge to a transaction that is likely to lead to anticompetitive effects." This echoes statements by her predecessor, Joseph Simons, in connection with the administrative law judge's order in *Chicago Bridge & Iron*. Although it may be two or three years before the FTC's challenge is finally resolved, *Aspen Tech-*

nologies is another reminder that the possibility of an agency investigation and challenge does not end at closing, especially when the transaction is not subject to HSR notification.

Please contact us if you would like further information about these developments or would like information about any other issue of U.S. or foreign antitrust or competition law.

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