Antitrust and Trade Regulation Bulletin

2001-12-01

VISA and MasterCard Found Guilty of Sherman Act Violation

In 1998, amid much fanfare and attention, the United States Department of Justice (DOJ) sued both MasterCard and VISA alleging that their policies preventing credit card issuers from issuing competing credit cards such as American Express or Discover cards were an unreasonable restraint of trade in violation of the Sherman Act. Years later, the United States District Court for the Southern District of New York issued its ruling, which passed nearly unnoticed. *United States v. VISA U.S.A. Inc., et al.*, 163 F. Supp. 2d 322 (S.D.N.Y. 2001).

The government alleged, and the court accepted, that MasterCard's and VISA's arrangements permitting issuers to issue either MasterCard or VISA cards, but terminating the relationship in the event an issuer issued either American Express or Discover cards, injured competition in the credit card industry. In fact, the court found that since 1996, when American Express decided to allow bank issuance, not a single U.S. bank gave up its VISA and MasterCard portfolios in order to begin issuing American Express cards.

The court found that while there are other ways to issue credit cards – both Discover and American Express issued cards without bank issuers – banks provided essential attributes to credit card network competitors. Bank customers offered a credit card from their primary bank are more likely to accept the offer, more likely to use the card regularly and less likely to cancel the account. As a result, the exclusionary practices caused significant competitive harm with no countervailing procompetitive benefit. The court-ordered remedy prevents VISA and MasterCard from terminating issuers who issue rival cards, but does not demand that

VISA and MasterCard treat those issuers on par with those who do not issue rival cards.

The government also alleged, and the court rejected, an argument that the dual membership of issuers in the MasterCard and VISA associations harmed consumers by reducing competition between the two cards. Both MasterCard and VISA have moved, since the initiation of the litigation, from a dual system to one which encourages issuers to issue only a single card, but does not require it. Although the government argued that this "fix" resulted directly from the litigation, the court found the firms were considering these new loyalty programs prior to the filing of the litigation. Either way, the government's complaint became stale, making allegations about the way things had been instead of the way things were at the time of trial. Accordingly, any prospective relief on this issue seemed unnecessary to the court.

Public Hearings Scheduled to Address Interplay of Intellectual Property and Antitrust

In November, Tim Muris, chairman of the Federal Trade Commission (FTC), announced a series of public hearings entitled "Competition and Intellectual Property Law and Policy in the Knowledge-Based Economy" to be co-hosted with the DOJ. The first hearing should be held sometime in January with additional sessions into the spring.

In announcing the hearings, Muris observed that in the 1970's, antitrust law and policy lacked a sufficient appreciation of the innovation incentives which intellectual property (IP) rights create. More recently, some commentators have come to believe that "it is the intellectual property doctrine that is not showing proper appreciation for the innovation that competition may spur."

Muris listed a variety of recent events which impact the interplay between antitrust and intellectual property, including: the vast increase in the number of patents issued; the expanded scope of issued patents; the increased incidence of antitrust claims brought in patent cases, many of which are decided at the appellate level by the Federal Circuit Court of Appeals; and the tensions between antitrust and IP doctrines caused by unilateral refusals to license intellectual property. The hearings intend to address a multitude of questions created by these events, all designed to assist the FTC and DOJ in developing antitrust policy which promotes competition without quashing incentives to innovate.

DOJ Vigorously Enforcing "Gun Jumping"

Antitrust practitioners consistently advise merging parties that until a merger is final, the two parties must continue to behave as competitors. Nevertheless, it is also true that during the time it takes for the transaction to be formally consummated, the buyer has a legitimate interest in protecting the business and the assets it has contracted to purchase. There has been little legal precedent relevant to the resolution of these conflicting interests.

This may soon change because the DOJ recently sued Computer Associates International, Inc. (Computer Associates) alleging that while its 1999 cash tender offer for Platinum Technology International, Inc. (Platinum) was pending, it acquired too much control over its soon-to-be subsidiary. *United States v. Computer Assoc. Int'l, Inc.*, Civ. Action No. 1:01CV02062 (S.D.N.Y, filed Sept. 28, 2001). The DOJ alleges that Computer Associates violated both the HSR waiting period rules as well as the Sherman Act. The resolution of this case should provide useful insight with respect to the appropriate scope of pre-merger activities between competitors who are intending to merge.

In 1999, Computer Associates made a cash tender offer for Platinum. In connection with that transaction it filed a pre-merger notification under the Hart-Scott-Rodino Act of 1976. The DOJ investigated the transaction and after about two months allowed the transaction to close subject to divestitures it believed were necessary to prevent competitive harm. Two years later, the DOJ filed this action based upon the contractual terms that governed Platinum while the transaction was pending. According to the government, the transaction documents limited Platinum's ability to discount its products beyond 20% and also limited its ability to amend its standard contract terms. In addition, the DOJ alleges that Computer Associates assigned a person to work at Platinum to review and approve Platinum's customer contracts. The government contends that Platinum regularly discounted its products far more than 20%, making the restriction a change in its normal business practice, rather than a mere continuation of what had been its practice. The government seeks civil penalties from each party to the merger at the statutory maximum of $11,000 per day for the fifty-eight days the violations allegedly continued and an order preventing Computer Associates from engaging in similar conduct in the future.

After the DOJ filed its suit, Computer Associates issued a press release and observed that the disputed contractual language had been standard language used for fourteen years and was necessary to protect the assets to be acquired. In addition, it contended that the government made no complaint about the contractual language until two months after the completion of the Platinum acquisition.

The Ties Have It

Since Tim Muris became the new chairman of the FTC, there have been two prominent and controversial transactions in which the FTC has not acted because Muris' recusal left the FTC in a 2-2 tie. The FTC cannot act without a majority vote in favor, so the tie votes became decisions to take no action.

The FTC staff recommended a challenge to the Pepsi acquisition of Quaker Oats, but the FTC inaction allowed the merger to close. The staff recommended a consent decree to resolve competitive issues connected with the sale of Pillsbury to General Mills, but with two commissioners voting to reject the decree in favor of litigation and two voting to accept the decree, the FTC inaction allowed the transaction to close without a formal enforceable decree imposing the conditions the staff negotiated.

In *Pepsi*, the staff became convinced that the sale of Quaker's Gatorade brand of sports drink to Pepsi, one of the two dominant soft drink companies in the market, would harm competition. It reached this conclusion even though Pepsi contracted to sell its competing drink, All Sport, to a third party. This approach, often called "fix it first," failed to persuade the staff who were convinced that selling All Sport to a company less powerful than Pepsi would decrease its competitive significance in the sports drink segment of the marketplace.

In the General Mills matter, the FTC staff was concerned about reduced competition between the Pillsbury Doughboy baked goods mixes and those offered by General Mills' popular Betty Crocker line. The staff's negotiated solution would have given General Mills ownership of the Doughboy trademark, but would have required General Mills to license that trademark to a new competitor who would have purchased the baked goods assets and marketed those products using the Doughboy mark. Two commissioners thought that the proposed solution to split the Doughboy mark, allowing General Mills to use it on some products and a third-party purchaser to use it on the baked goods mixes, was an acceptable solution because they believed the product lines were sufficiently distinct so that consumers would not be confused. However, the two other commissioners thought the remedy would, in fact, confuse consumers. In addition, they worried that the third-party purchaser might not be sufficiently large and influential to market the Pillsbury branded products as widely and prominently as Pillsbury previously had, given its broad line of grocery products.

One would expect that the longer Muris is at the FTC, the fewer recusals he will be required to make. His future participation will, obviously, be very significant given the demonstrated tendency for the other four commissioners to align in a 2-2 tie.

Chubb plc Completes Divestiture of Door Hardware Companies to Assa Abloy AB

As described in our October, 2000 bulletin (see Antitrust and Trade Regulation Group.

James C. Burling

Co-Chair, Boston office

617.526.6416

james.burling@haledorr.com

John C. Christie

Co-Chair, Washington office

202.942.8403

john.christie@haledorr.com

Michelle D. Miller

Vice-Chair, Boston office

617.526.6116

michelle.miller@haledorr.com

This publication is not intended as legal advice. Readers should not act upon information contained in this publication without professional legal counseling.

Authors

James C. Burling

RETIRED PARTNER

+1 617 526 6000

Michelle D. Miller

RETIRED PARTNER

+1 617 526 6000

John C. Christie Jr.

RETIRED PARTNER

+1 202 663 6000