

Editors' Note

Dear Readers,

Welcome to "Antitrust News in Five Minutes." We designed it to fill a gap in antitrust newsletters. We do not try to be comprehensive, and will not run long articles. Instead, we offer *quick-read* alerts on the most important antitrust developments that could affect your business. Please tell us how we can make this more useful to you.

Blackberry access: If you prefer to receive this newsletter on your Blackberry, please send an email to Steven.Levitsky@dl.com with "Blackberry" in the subject field.

If you have any questions, please call or email your Dewey & LeBoeuf lawyer or one of us.

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Antitrust News in Five Minutes



David Turetsky is co-chair of the Antitrust Practice Group. He was Deputy Assistant Attorney General for Antitrust during the Clinton Administration; a senior legal officer of a telecom company; twice a federal

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Steven Levitsky concentrates on complex international mergers and joint ventures, and competition issues in the insurance and energy industries. He has supervised US and international competition clearances for such transactions as MetLife's \$11.8 billion acquisition of Travelers from Citigroup; The St. Paul's \$16 billion merger with Travelers Property Casualty; AEGON's \$5.4 billion sale of Transamerica Financial Services to General Electric; and National Grid's \$8.9 billion acquisition of Niagara Mohawk.

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FTC commends resignation of interlocked director

Earlier this week, the FTC investigation of the Apple/Google interlocking boards ended when an Apple director resigned from Google's board.

In May the FTC had started an investigation of the relationship

between the two companies, which then had two common directors. Section 8 of the Sherman Act prohibits a person from serving as an officer or director of competing companies (except when very minor amounts of competitive overlap exist).

The FTC chairman warned, "Beyond this matter, we will continue to monitor companies that share board members

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and take enforcement actions where appropriate.”

Resale price maintenance continues to have doubtful future

Two years ago, the Supreme Court held in the *Leegin* case that resale price maintenance was governed by the rule of reason and was no longer a per se offense.

In an earlier issue, we warned that several federal and state officials either threatened new legislation to overrule *Leegin*, or claimed that existing laws made resale price maintenance illegal.

Last week, the head of the DoJ Antitrust Division, speaking at Columbia, apparently joined this group. Assistant Attorney General Christine Varney said, “I am not ruling out the possibility that *Leegin*’s dissenters were right in thinking the effort to develop a new analytical framework will not succeed *or that evidence will show that the actual uses of RPM are almost always harmful.*”

TRO entered against AT&T for alleged predatory pricing

In an earlier issue, we reported that smaller telephone carriers (known as “Competitive Local Exchange Carriers” or “CLECs”) filed an antitrust case against AT&T. They claimed that AT&T planned to offer discounts to retail customers and

eliminate wholesale rates to the CLECs.

The CLECs sued, claiming violations of the antitrust laws as well as the Telecommunications Act.

This week, a federal judge in Texas entered a TRO against AT&T, barring it from implementing these pricing changes.

EC accepting comments on revised insurance industry block exemption

The EC will accept public comments on its proposed insurance “block exemption” revisions. These provide exemptions from EU antitrust laws for collaborative activity. The current exemption expires on March 31, 2010.

The revised exemption would continue to exempt two of the four categories of insurance industry cooperation:

- 1 Agreements on joint calculations, tables and studies and co(re)insurance pools *with these changes*:
 - an amendment of the term to “joint compilations, tables and studies;”
 - exchange of information only where it is necessary; and
 - access to shared data for third parties.
- 2 Exemption for pools, *with these changes*:
 - a change in market share calculation to bring it into line with other competition rules;

- a 3 percent rise in the flexibility percentage for market share thresholds; and
- an amendment to the definition of “new risks.”

The EU concludes that the other two categories, (3) agreements on standard policy conditions and (4) agreements on security devices, are not peculiar to the insurance industry and are covered by other EU guidelines.

Another title insurance price-fixing case dismissed

In 2007, the first of a national wave of antitrust class actions was filed against title insurers. The cases claimed, among other things, that the title insurers used state-required rating-bureau activity in New York and other states to fix prices. Some of the complaints claimed that the price fixing occurred when industry members submitted data to the state insurance departments and the departments set the rates.

We reported earlier on the ongoing dismissals of these cases. Now a court in New Jersey is the latest court to dismiss, in this instance based on the filed rate doctrine. (The filed rate doctrine recognizes the pre-emptive jurisdiction of an administrative agency that fixes or approves the rate.)

The plaintiffs are allowed to re-plead. However, in similar cases in other states where the complaints were

dismissed, the plaintiffs have not re-pleaded even after six months.

EU officials raid European drug manufacturers

EU competition commissioner Neelie Kroes recently told a EU committee of her proposed investigations of pharmaceutical manufacturers after several recent large-scale mergers (including Merck/Schering-Plough, Pfizer/Wyeth, and Roche/Genentech).

Now EU police have raided the offices of several drug manufacturers. The EU's stated concerns are that the drug manufacturers have abused their "dominant" market positions and engaged in "restrictive trade practices."

EU fines six transformer manufacturers; informer gets off fine-free

The EU fined six transformer manufacturers, ABB, AREVA T&D, ALSTOM, Fuji Electric, Hitachi and Toshiba €67.6 million for purported price fixing.

According to an EU release, "they met one to two times per year, both in Asia and Europe, usually in high class hotels in such places as Malaga, Singapore, Barcelona, Lisbon, Tokyo, Vienna and Zurich, to reaffirm their agreement. The cartelists went to great lengths to try to hide their illegal behavior. They concluded the market sharing agreement orally and used code names for their companies to avoid detection."

According to the EU enforcers, the companies referred to their arrangement as a "Gentlemen's Agreement." ABB's fines were increased by 50 percent because it had already been fined for price fixing in the pre-insulated pipes market.

Siemens received full immunity from fines because it was the first company to come forward with information about the cartel under the Commission's 2002 Leniency Notice.

China update: new procedures announced.

The State Administration of Industry and Commerce ("SAIC") issued two decrees. They are undated but became effective July 1, 2009.

1. SAIC Decree 41

This defines SAIC's role in checking the abuse of administrative power by other governmental agencies. SAIC alone can suggest solutions or penalties to be imposed on agencies, and must make those recommendations to the superior organ of the agency.

2. SAIC Decree No. 42

This defines procedural rules by which SAIC handles an investigation and its decision-making process. They include:

- (i) *Division of power between the headquarters and local SAIC arms:* The SAIC headquarters is the only authority to decide on the conduct of any investigation. It may delegate the investigation to the provincial-level arms.
- (ii) *Third-party report:* Any entity or person may report an anti-

monopoly agreement or abuse of market dominance.

- (iii) *Scope of power in investigation:* SAIC may conduct an investigation by conducting an on-site investigation; interrogation of any relevant entity and/or person; review of any agreements, books and letters, seizure of relevant evidence and review of the bank account information of the relevant business. It may also ask the relevant parties and/or the investigated business to provide certain written materials including, e.g., the production and business data of the previous three years, annual sales data and offshore investment data, etc. SAIC will keep the information and data confidential.
- (iv) *Suspension of investigation:* The investigation may be suspended upon the application and commitment by the investigated business to eliminate the anti-monopoly effect.
- (v) *Disclosure to public:* SAIC may announce the anti-monopoly cases it has concluded.
- (vi) *Limit to SAIC's power:* SAIC shall report its intended decision to the State Council Anti-monopoly Commission before the decision is finalized, if the case is of "significant implication."
- (vii) *Appeal:* the business investigated and punished by the SAIC may apply for administrative review or initial administrative complaint.

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