February 1, 2010

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Antitrust News *in Five Minutes*

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HSR

Thresholds Adjusted downward to $63.4 million

The FTC adjusts the HSR filing thresholds every year. This year, for the first time, the thresholds went down.

The most commonly-used threshold — transaction value — went from $65.2 million down to $63.4 million.

The new thresholds become effective on February 22, 2010.

Mergers

$900,000 "Gun Jumping" fine imposed for 2006-2007 activities

Last week, the DoJ imposed a $900,000 "gun jumping" fine on Smithfield Foods and Premium Standard Farms.

The violations occurred in 2006-2007, after the two companies had made HSR filings for their merger but *before* HSR approval. During the waiting period, Premium Standard Farms, the merger target, supplied Smithfield Foods with specific details of its ordinary-course-of-business hog procurement contracts (including terms, price, quantity, and duration). Premium Standard then asked Smithfield to approve the contracts.

The DoJ found this was a violation of the HSR rules, because "requiring a buyer's approval of the seller's ordinary course contracts can prematurely transfer operational control."

What made this case unusual was that the merger closed in 2007. There was no antitrust problem with clearance of the merger itself. The fine was imposed purely on account of the violation of the HSR rules.

Note: *This matter involved "gun jumping" during the HSR waiting period. But even after the waiting period, "gun jumping" can still occur if the merger parties do anything to lessen competition before the closing takes place. Even after the HSR waiting period, a buyer cannot influence the merger target's competitive business practices before the closing.*

Vertical price fixing

House committee approves bill to re-outlaw resale price maintenance

The House Judiciary Committee approved a bill that would restore the per se illegality of vertical resale price maintenance under the federal antitrust laws.

Vertical resale price maintenance was considered *per se* illegal until the Supreme Court's 2007 decision in *Leegin v. PSKS*. That case held that vertical resale price maintenance needed to be analyzed on a case-by-case basis under the Rule of Reason.

The issue is highly political. Proponents of the bill paint themselves as consumer saviors. Opponents argue, as did the Supreme Court, that vertical resale price maintenance could have pro-competitive effects in some cases.

Conspiracy/Immunities

Auction-rate-securities class action dismissed on immunity grounds

A district court dismissed a class action against broker-dealers on grounds of antitrust immunity.

The case involved the auction process for municipal bonds, corporate bonds, and preferred stocks whose interest rates are set by auction. Traditionally, when there were not enough bids from investors, broker-dealers bought for their own account to prevent failed auctions and maintain liquidity in the ARS market.

By February 2008, the market for these securities had sharply declined, and UBS announced it would no longer support the auction market. Immediately, all the major broker-dealers followed. The auctions failed, and the issuers of the securities had to pay higher interest rates. Some of the issuers and investors then brought this antitrust class action against the broker-dealers, claiming they conspired not to bid.

The court dismissed the case based on the Supreme Court's 2007 *Credit Suisse* decision. *Credit Suisse* held that the securities laws were designed as a complete regulatory solution under the supervision of the SEC. Because of this, the Court held that the federal securities laws impliedly repealed the antitrust laws for many market-making activities.

Applying that principle, the district court specifically found that "it is unreasonable to expect broker-dealers in the ARS market to determine the fine line between permissible communications under securities law and impermissible communications under antitrust law." It dismissed the case.

UK

Company may be able to recover antitrust penalties from employees

In what could be a major change of law in the practical enforcement of UK competition law, a UK trial court ruled that a company can go to trial and try to recover the cost of antitrust fines and damages from the employees who were responsible for the violations. (This includes officers and directors.)

Safeway, a British supermarket chain, was involved in a price-fixing investigation of dairy products. It settled the issues for £16.5 million, then sued to recover the penalty from its directors and other employees.

The defendants tried to get Safeway's claims dismissed, arguing that Safeway not be allowed to benefit from the wrongdoing it had itself committed. They also argued that the UK competition act forbids contribution.

The trial court judge rejected the motion to dismiss and sent the case to trial. The judge said that Safeway has a "realistic prospect" of defeating the employees' arguments, because the employees committed the illegal actions in the course of their duties.

Note: *Peter Crowther, head of our EC competition practice, said: "This case is significant because it means that at least in some cases financial liability for involvement in competition law infringements can be shifted from company to individual. Companies should be considering the scope of their D&O policies, and those involved in potential acquisitions will consider very carefully the exact warranties they are seeking."*

EC

Enforcement statement from proposed new commissioner: no change

Joaquim Almunia, nominee for EC commissioner, said at confirmation hearings that he would not change the level of existing cartel enforcement or the fines imposed for violations. "The best recommendation I can give to companies is not to [engage] in anti-competitive practices so that they will not have to care about the fines," he said.

Before the hearings, some antitrust experts had speculated that Almunia might be more sensitive to recession issues in treating violations and imposing fines.

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Our Antitrust practice has more than 60 lawyers, many with special areas of concentration. Our 25 offices in 15 countries allow us to handle our clients' antitrust problems around the world.

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06-30-2009

8533 REV1 02-01-2010