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# ANTITRUST & TRADE REGULATION UPDATE

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## United States

### FTC Finds Rambus Monopolized DRAM Market

The Federal Trade Commission (FTC) has ruled that computer chip designer Rambus, Inc. monopolized the markets for certain types of Dynamic Random Access Memory chips (DRAM), known as SDRAM and DDR SDRAM, which are widely incorporated in personal computers, digital cameras, servers and printers. The 5-0 decision of the commissioners overrules the 2004 decision by an FTC administrative law judge that dismissed the charges against Rambus.

In the opinion by Commissioner Pamela Jones Harbour, the Commission held that Rambus monopolized the markets for DRAM by manipulating its membership in the Joint Electron Device Engineering Council (JEDEC), an industry trade group. The JEDEC was formed to adopt industry standards for electronic components and to avoid, where possible, the use of patented technologies in those standards. If patented technology is unavoidable, JEDEC works to ensure access to the technology on a royalty-free basis or under reasonable and nondiscriminatory terms.

According to the Commission, Rambus misled other JEDEC members to believe that it did not possess and was not developing technology patents, information that would have been critical to JEDEC's decisions on SDRAM and DDR SDRAM standards. The Commission found that through its deception, "Rambus was able to conceal its patents and patent applications until after the standards were adopted and the market was locked in," at which time Rambus revealed its patents through "patent infringement lawsuits against JEDEC members who practiced the standard." Such conduct, the Commission found, resulted in Rambus acquiring monopoly power in markets for four separate technologies, violating Section 2 of the Sherman Act and Section 5 of the FTC Act.

The FTC will now consider the appropriate remedy for Rambus and has ordered additional briefing on the matter. Among possible remedies is an order barring Rambus from enforcing certain licensing agreements and patents, which would jeopardize tens of millions of dollars in royalties owed to Rambus by DRAM chip makers.

### Seventh Circuit Rejects Monopoly Leveraging Theory

Judge Frank H. Easterbrook of the US Court of Appeals for the Seventh Circuit has upheld a lower court's dismissal of claims brought against Abbott Laboratories that alleged the drug maker leveraged its monopoly in its patented AIDS drug Norvir to increase profits in its combination AIDS drug Kaletra. Norvir is one of many brands of protease inhibitors (PI), which are used to treat AIDS by hampering the ability of HIV to replicate in the bloodstream. Taken alone, Norvir has severe side effects, but as a component in a combination drug treatment, Norvir acts as a "booster" that prolongs the effectiveness of other PIs.

In the case before the court, *Schor v. Abbott Laboratories*, the plaintiff alleged that the drug maker used its monopoly power over Norvir, ensured by its patent, to monopolize the market for PIs in violation of Section 2 of the Sherman Act. The plaintiff argued that Abbott charged unduly high prices for Norvir when sold as a stand-alone drug and unduly low prices for the drug when incorporated in Kaletra, and thereby caused HIV patients to choose Kaletra over other combination drugs. The plaintiff theorized that Abbott's pricing scheme constituted monopoly leveraging because Abbott intended to force competing combination drugs out of the market, leaving Abbott free to raise prices of both Kaletra and Norvir.

Judge Easterbrook rejected the plaintiff's monopoly leveraging theory and upheld the lower court's dismissal for failure to state a claim. According to Easterbrook, assuming that Abbott has monopoly power in the PI market and that Abbott could force other PI makers out of the market through its pricing strategy, Abbott would not maximize profits by doing so. Instead, Abbott would be better off promoting rigorous competition in the combination treatment market thus reducing prices of the other components and allowing Abbott to increase its price for Norvir.

By rejecting the stand-alone monopoly leveraging theory, the Seventh Circuit joins the Federal Circuit in opposing the stance taken by the Ninth Circuit in Image *Technical Services v. Eastman Kodak* recognizing such claims.

## FTC Urges Legislative Solution to Generic Drug Entry Barriers

FTC Commissioner Jon Leibowitz testified in July before the US Senate's Special Committee on Aging in support of proposed legislation (S. 3582) to address increasingly common tactics employed by US brand-name and generic drug makers to delay competition by generics. The proposed legislation would prohibit certain types of agreements between brand name and generic drug makers used to settle patent infringement suits. These agreements effectively serve as payoffs to the generic drug makers in return for delaying entry, allowing brand-name drug makers more time to reap the monopoly profits as the sole supplier in the market. During this delay, harm from these agreements passes directly to the consumer in the form of higher prices. According to Commissioner Leibowitz, in the current fiscal year, seven of 10 settlement agreements between generic and brand-name drug companies involved some form of payment to the generic companies and a delay provision. Commissioner Leibowitz further testified that it is now FTC practice to review all settlement agreements between generic and brand-name drug companies, and to aggressively protect competition in the industry by challenging agreements it deems anticompetitive and filing amicus briefs in other cases involving effects on competition.

Commissioner Leibowitz also testified about two other tactics employed by brand-name drug companies to delay entry of generic drugs. First, under the Hatch-Waxman Act, a brand-name drug patent holder is granted an automatic 30-month stay of Food and Drug Administration (FDA) approval of new generic drugs when it sues (for patent infringement) a generic drug company that contests the validity its patents. If, on the other hand, the patent holder settles its infringement suit by agreeing to delay entry of the generic drug, the delay is compounded by the 180-day period of marketing exclusivity granted under Hatch-Waxman to the generic drug company, further preventing new generic drugs from entering the market. Second, brand-name drug companies are filing citizen petitions with FDA to delay generic drug approvals, which have been particularly effective in light of FDA's current backlog of generic drug applications.

Commissioner Leibowitz indicated that the FTC would endorse legislation to address these additional delay tactics. Such legislation may not be far off. Senator John D. Rockefeller IV (D-W.Va.) has announced that he plans to sponsor a bill eliminating the 180-day marketing exclusivity provision of Hatch-Waxman. Sens. Debbie Stabenow (D-Mich.) and Trent Lott (R-Miss.) have already drafted legislation that would restrict citizen petitions filed at the FDA against generic approvals.

### Review of Barr Labs' Acquisition Extended, Apparent Agreement Reached

The FTC has extended its review of US-based Barr Pharmaceuticals, Inc.'s US$2.3 billion tender offer for the Zagreb, Croatia-based generic drug company Pliva d.d. Barr originally notified the FTC of the acquisition on July 7, 2006, but before the 30-day review period had expired the FTC requested additional time to examine possible harm to competition. Barr's chairman and chief executive officer, Bruce L. Downey, had indicated that the acquisition would produce few anticompetitive concerns given the minimal overlap between the companies' product lines, markets and operations. Downey more recently announced that Barr has reached an agreement with the FTC that alleviates the agency's concerns.

Croatian regulators have already approved the acquisition and Barr expects to close the transaction before the end of October. If consummated, the transaction would establish Barr as the world's third largest producer of generic drugs.

## European Union

### CFI Annuls Commission Decision on Sony-BMG Merger

The European Court of First Instance (CFI) has overturned the European Commission's July 18, 2004 decision that authorized the merger of Sony and Bertelsmann, creating Sony BMG. The merger reduced the number of so-called music majors from five to four without, however, giving Sony BMG the leading position in Europe, which continues to be held by Universal. The Commission had unconditionally cleared the merger, concluding that it would not create or strengthen a collectively held dominant position whereby the four remaining music producers (Sony BMG, Universal, EMI and Warner Music) could easily coordinate market behavior and exercise monopoly power.

The appeal of the Commission's decision to grant the merger was brought by the Independent Music Publishers and Labels Association (IMPALA), an international association of 2,500 independent music production companies. Siding with IMPALA, the CFI was highly critical of the Commission's analysis. Complaining that the Commission conducted only a cursory examination of the economic implications of the merger, the CFI rejected the Commission's conclusion that the absence of a collective dominant position may be inferred from the heterogeneity of the product. The CFI also criticized the Commission's conclusion that promotional discounts common in the industry created a lack of transparency that would stifle efforts to police coordinated anticompetitive conduct.

An appeal, limited to points of law, may be brought before the Court of Justice of the European Communities against a decision of the Court of First Instance within two months of notification. Absent an appeal to the Court of Justice, the Commission would be required to re-examine its approval of the merger.

### Microsoft Fined for Noncompliance

The European Commission has levied a penalty of euro 280.5 million (US$357 million) on Microsoft for failing to comply with its obligations under the Commission's March 2004 order requiring that the software giant grant its rivals' programs complete interoperability with its Windows operating system.

Under the terms of the November 2004 order, Microsoft was to disclose all information necessary to ensure that rival software designers' programs run smoothly in Windows, and to make such information available on

reasonable terms. On November 10, 2005 the Commission ruled that Microsoft had not complied with its obligations under the 2004 order and warned Microsoft that it would be penalized up to euro 2 million per day if its noncompliance continued beyond December 15, 2005. Later, in June of this year, the Commission concluded that Microsoft failed to comply with the December 15, 2005 deadline, Imposing the euro 280.5 million fine (euro 1.5 million per day for the period from December 16, 2005 to June 20, 2006). According to the Commission, the penalty was significantly reduced from the euro 2 million per day maximum to reflect recent steps taken by Microsoft toward full compliance with the 2004 order. The Commission also warned Microsoft that should it fail to comply with its obligations by July 31, 2006, it would face additional penalties of up euro 3 million per day.

## European Retail Banking Sector Inquiry Intensifies

On July 17, 2006 the European Commission held a public hearing in Brussels to discuss the preliminary findings of its retail banking sector inquiry. The sector inquiry is examining the markets for payment cards and core retail banking services in the EU. In its interim report on payment cards, published in April 2006, the Commission highlighted significant entry barriers, which ultimately raised prices to firms and consumers. The Commission also published in July 2006 its interim report on core retail banking services. This report shows that retail banking markets remain fragmented along national lines and that there are significant entry barriers, including restrictions on access to payment systems and credit databases. The interim report also found that the clearing systems for inter-bank payments are highly fragmented across the EU and that low customer mobility in the EU has allowed banks to reap substantial profits.

Only two days later, on July 19, 2006, the Commission sent a Statement of Objections to the *Groupement des Cartes Bancaires* (the GCB), a French banking association that manages the French payment card system. The Commission maintains that the association violated EU competition rules by adopting tariffs that discourage new entrants from issuing cards at lower rates than incumbent banks.

## Commission Names New Chief Economist

The European Commission has appointed Professor Damien Neven as the new chief economist in the Commission’s Competition Directorate General. Professor Neven succeeds Professor Lars-Hendrik Röller, who was the first to hold this office. The position of chief economist was introduced by the Commission in 2003 in its move toward a more economic approach to the enforcement and policy making of EC antitrust rules.

The chief economist is appointed for a nonrenewable three-year term. As leader of the Commission’s team of industrial economists, the Office of the Chief Economist is tasked with evaluating the economic impact of the Commission’s actions and providing independent guidance on methodological issues of economics and econometrics in the application of EU antitrust rules.

### Mergers Investigated in Pulp Mill Machines and Snow Chains

On August 14, 2006 the Commission opened an in-depth investigation into the proposed acquisition by the Finnish company Metso of the pulp mill machinery and power businesses of the Norwegian group Aker Kvaerner. The Commission's preliminary investigation indicated that the acquisition would give rise to significant antitrust concerns in the market for pulp mill machinery, which is characterized by high barriers to entry and is already highly concentrated with only three competing firms.

On August 16, 2006 the Commission opened a second-phase investigation into the proposed merger by the Swedish company Thule of the Austrian company Schneeketten/Pewag. Both companies are key players in the European market for the manufacture and sale of snow chains for passenger cars and heavy vehicles. The merger would bring together two of the largest competing snow chain producers in Europe, creating significant overlaps across Europe and especially in the Alpine countries.

## Around the World

### CHINA – Business Associations Voice Concerns Over Draft Anti-Monopoly Law

China's draft Anti-Monopoly Law is receiving a mixed response from Chinese and foreign businesses. The Anti-Monopoly Law was approved by China's State Council in June 2006 and delivered to the Standing Committee of China's National People's Congress. Although the Committee has not yet called for public comment on the latest draft of the law, government-sponsored industry associations have already begun soliciting opinions of Chinese and non-Chinese businesses. At recent roundtable discussions hosted by the US-China Business Council (USCBC), members of the USCBC voiced numerous concerns about the current draft of the law. Among those concerns were the following:

- The draft law inadequately describes the analysis for determining the relevant market;
- The draft law inadequately defines key terms, such as "unfair prices," "market shares" and "dominance";
- The provisions describing penalties for violations of the law (between 1 and 10 percent of annual turnover) are unclear as to whether they refer to worldwide or Chinese turnover;
- The draft law prohibits anticompetitive behavior by Chinese administrative bodies, but does not indicate which agency is charged with investigating and punishing such behavior;
- The monetary thresholds requiring notification of mergers and acquisitions are higher than previous thresholds, but they require a disproportionately small nexus to the Chinese market. Notification under the draft law is required when one party's turnover in China exceeds only RMB 800 million (US$100 million) and the combined turnovers of all parties exceeds RMB 12 billion (US$1.5 billion);
- It is unclear whether local divisions of the new enforcement authority will have the power to conduct and prosecute independent investigations.

The Committee recently completed its first reading of the law and is expected to conduct second and third readings later this year, indicating that the law could be passed before the year's end.

## JAPAN – Daio Objects to Oji's Takeover of Hokuetsu

On August 18, 2006 the third largest participant in the Japanese paper industry, Daio Paper Corporation, submitted a written opinion to the Japan Fair Trade Commission opposing the takeover bid launched by Oji Paper Co., Ltd. for Hokuetsu Paper Mills, Ltd. Daio asserts that a successful takeover bid by Oji would result in a violation of the Anti-Monopoly Law of Japan.

Daio states that a combination between Oji and Hokuetsu would significantly impede competition and result in a market structure that would adversely affect other paper manufacturers through domination by the combined entity over distributors and wholesale merchants. Daio further asserts that the combination would create an oligopoly in the paper industry, resulting in an entity with an estimated 40.02 percent market share for printing paper, 27.4 percent market share for communication paper and 60.9 percent market share for white paperboard (used to box tissues, snack foods, etc.).

## JAPAN – Plan for Postal Privatization Announced

Japan Postal Corporation (JPC) has released an outline of its plan for the privatization of the postal businesses of the public corporation Japan Post. Under the plan, beginning in October 2007, JPC will become a holding company for four postal units: (i) Postal Service Corporation (*Yubin Jigyo Kabushiki-Kaisha*), (ii) Post Office Corporation (*Yubin Kyoku Kabushiki-Kaisha*), (iii) Postal Savings Bank (*Yubin Chokin Ginko*) and (iv) Postal Insurance Corporation (*Yubin Hoken Kabushiki-Kaisha*), to be known collectively as "the Succession Companies." The outline provides a general description of the business operations of each of the Succession Companies that will inherit the current businesses of Japan Post and explains the basis on which the execution plan was prepared.

The outline summarizes JPC's intention to expand the businesses of the postal savings bank and postal insurance corporation into financial enterprises. As of the time of privatization in October 2007, the Postal Savings Bank and Postal Insurance Corporation will have JPY 227 trillion and JPY 114 trillion in total assets respectively, making them the largest bank and insurance company in Japan by assets. (The value of the total assets of the Bank of Tokyo-Mitsubishi UFJ, Ltd. is JPY 187 trillion, and that of Nippon Life Insurance Co. is JPY 50 trillion). The outline also sets forth a plan for the Postal Savings Bank and Postal Insurance Corporation to become listed on the Tokyo Stock Exchange by 2011, within no more than four years of privatization.

The newspaper *Nikkei* recently reported that in order to bring about conditions conducive to fair competition after privatization, the Postal Savings Bank will be subject to stamp taxation not previously applicable to Japan Post and that the Postal Service Corporation will not receive property tax reductions that Japan Post had previously received.

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