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ANTITRUST & TRADE REGULATION UPDATE

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United States

Rambus Ordered to License SDRAM and DDR SDRAM Under Fixed Royalties

The Federal Trade Commission (FTC) issued a final opinion and order in its case against computer technology firm Rambus, Inc. for unlawful monopolization of the markets for four types of dynamic random access memory chips (DRAMs) widely used in consumer electronics. In June 2002, the FTC charged Rambus with various anticompetitive practices relating to its participation in the Joint Electron Device Engineering Council (JEDEC), an industry standard-setting group. Organized to promote fair competition in the industry, one of JEDEC's goals was "to avoid, where possible, the incorporation of patented technologies into its published standards, or at a minimum to ensure that such technologies, if incorporated, will be available to be licensed on royalty-free or otherwise reasonable and non-discriminatory terms." According to the FTC's complaint, Rambus participated in JEDEC's DRAM standard-setting activities while concealing from fellow JEDEC members that it was developing, and possessed, pending and active patents on DRAM technologies that were incorporated into the standards. The FTC charged RAMBUS with monopolizing the markets of four separate DRAM technologies, harming competition and consumers. In July 2006, the Commissioners unanimously held that Rambus had monopolized these markets, and ordered additional briefing and oral argument on the issue of remedies. *(See August/September Issue).*

On February 5, 2007, the Commissioners ruled on the remedies issue, ordering, among other things, maximum royalty rates for the technologies affected by Rambus' monopolization. In their opinion, the majority of the Commissioners noted that although they were authorized to impose royalty-free licensing, complaint counsel had failed to demonstrate that such a remedy would restore the competition that would have existed but for Rambus' conduct. "Royalty rates," according to the majority, "unquestionably are better set in the marketplace, but Rambus' deceptive conduct has made that impossible." The majority, therefore, imposed a compulsory maximum royalty rate for Rambus' DDR SDRAM technology of 0.5 percent for the first three years, and no royalties after that. It further imposed a maximum royalty rate of 0.25 percent for Rambus' SDRAM, noting that the lesser royalty was appropriate given that SDRAM uses only two of the relevant technologies, whereas DDR SDRAM uses all four. The majority also prohibited Rambus from enforcing agreements with existing licensees that involve higher royalties than the rates imposed in the order.

Under the order, Rambus was also prohibited from misrepresenting its patents or patent applications to any standard-setting organization. In addition, Rambus must employ a Commission-approved compliance officer to ensure it makes all required disclosures to standard-setting organizations, and to ensure the accuracy of periodic reports it must now make to the Commission.

Commissioners Pamela Jones Harbour (who wrote the July 2006 opinion on liability) and J. Thomas Rosch concurred and dissented in part. Both Harbour and Rosch favored imposing a zero-royalty remedy, commenting that the majority's remedy enables Rambus to continue to reap the fruits of its monopolization.

Supreme Court Overturns Predatory Bidding Verdict Against Weyerhaeuser

The Supreme Court has unanimously ruled to reverse the US$78.7 million verdict against Weyerhaeuser Company (Weyerhaeuser) that was handed down by the US District Court for the District of Oregon, and affirmed by the Ninth Circuit Court of Appeals. The plaintiff, Ross-Simmons Hardwood Lumber Company, Inc. (Ross-Simmons), filed suit under Section 2 of the Sherman Act, alleging that its larger rival Weyerhaeuser

had monopolized the market for red alder sawlogs. In particular, Ross-Simmons alleged that Weyerhaeuser had bid up the prices of sawlogs to a level that prevented it from competing (so-called “predatory bidding”), which ultimately caused it to go out of business, thereby harming competition in the relevant market.

Defending claims before the District Court, Weyerhaeuser proposed jury instructions which incorporated into the predatory bidding offense, elements of the test applied in predatory pricing cases. Predatory pricing is the logical inverse of predatory bidding, and occurs where a company temporarily lowers prices below costs hoping to force a competitor out of business, after which the company can recoup its losses and reap additional profits through supra-competitive prices. As set out in the seminal case *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209 (1993), to make out a claim for predatory pricing two essential elements must be proved: (i) a rival’s below-cost pricing; and (ii) a dangerous probability that the rival will succeed in recouping its investment in below-cost prices. The District Court declined to apply the *Brooke Group* elements to Ross-Simmons’ predatory bidding claim, and upheld the jury verdict against Weyerhaeuser. That decision was affirmed by the Ninth Circuit on appeal.

Reversing, the Supreme Court rejected the conclusion reached by the District Court, and echoed by the Ninth Circuit, that buy-side predatory bidding does not warrant the high standard of liability imposed by *Brooke Group* on predatory pricing claims. The Court reasoned that predatory bidding and predatory pricing are economic parallels, stating “Both claims involve the deliberate use of unilateral pricing measures for anticompetitive purposes. And both claims logically require firms to incur short-term losses on the chance that they might reap supra-competitive profits in the future.” The Court further reasoned that predatory bidding, like predatory pricing, should involve high liability standards given the many procompetitive reasons that a company might bid up input prices. Such reasons might include: (i) responding to increased consumer demands for its outputs; (ii) gaining market share in the output market; or (iii) hedging against risk of future input shortages. Consequently, the Court held that a plaintiff claiming predatory bidding must satisfy the two-pronged *Brooke Group* test by proving first, that predatory bidding led to below-cost pricing of the competitor’s outputs, and second, that the defendant had a dangerous probability of recouping the losses incurred through bidding up input prices through the eventual exercise of monopsony power. The Court vacated the judgment of the Court of Appeals and remanded the case for further proceedings.

FTC Commissioner Harbour Breaks Ranks Over Minimum Resale Price Maintenance

In a rare open letter to the Supreme Court, FTC Commissioner Pamela Jones Harbour has opposed the *amicus* brief – approved by a 3-2 vote of the commissioners – filed in the pending *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* case. At issue in *Leegin* is whether to overturn the milestone Supreme Court case *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373 (1911), which established the now 95–year-old principle that minimum vertical price fixing agreements (such as those between a manufacturer and a retailer) are *per se* unlawful under the antitrust laws.

Arguing jointly as *amici,* the FTC and the Antitrust Division of the Department of Justice (DOJ) have urged the Supreme Court to abandon *Dr. Miles* as inconsistent with modern antitrust analysis. As stated in their *amicus* brief to the court, *per se* treatment of economic restraints under Section 1 of the Sherman Act is “reserved for restraints that always, or almost always, reduce consumer welfare by limiting competition and output.” The agencies argue that minimum vertical resale price maintenance no longer warrants *per se* treatment because its effects are not obviously or predictably damaging to consumer welfare and can impart significant procompetitive benefits. Such benefits include increasing *interbrand* competition by reducing

intrabrand competition, encouraging retailers to provide point-of-sale services, eliminating “free riding” by price-cutting retailers and, for certain products, preserving brand reputation and customer loyalty.

In her letter to the high court, Harbour insists that the legal and economic justification for analyzing minimum vertical price agreements under the *per se* rule, as opposed to the rule of reason, are as vital today as they were when *Dr. Miles* was decided. Acknowledging the theoretical potential for greater point-of-sale services from reduced *intrabrand* competition, Harbour argues that minimum vertical price agreements rarely produce such consumer benefits. Rather, they eliminate incentives for distributors and retailers to become more efficient and typically lead to higher consumer prices. Additionally, minimum vertical price agreements ensure comfortable levels of profits to even the most inefficient retailers; distort retailers’ incentives objectively to assist customers in comparing competing brands; reduce the likelihood of effective entry by new products; and, where such agreements promote point-of-sale improvements to retail stores and facilities, promote free-riding by *interbrand* competitors. As a practical matter, according to Harbour, analyzing minimum vertical price fixing cases under the rule of reason would render it virtually impossible for a plaintiff or the government to prove the fact of a contract, combination or conspiracy absent an express agreement.

Oral arguments in the *Leegin* case are scheduled for March 26, 2007.

DOJ Orders Divestiture of Sparrows Point Steel Mill

The DOJ has announced that it will require Mittal Steel Company N.V. (Mittal) to divest its Sparrows Point Steel Mill near Baltimore, Maryland, pursuant to the consent decree entered in August 2006, relating to Mittal’s US$33 billion takeover of rival Arcelor S.A. Under the terms of the consent decree, Mittal must divest a steel mill that supplies tin mill products to the Eastern United States. The first choice for divestiture, as indicated in the consent decree, was Dofasco, Inc., a Canadian company owned by Arcelor. Shortly before it was acquired, however, Arcelor transferred legal title of Dofasco to a Dutch foundation, which prevented Mittal from completing the divestiture. Under the consent decree, the DOJ could choose as an alternate divestiture either Mittal’s Sparrows Point mill or its Weirton, West Virginia mill. Opting for the former, the DOJ defended the choice by noting that Sparrows Point is a profitable and diversified facility capable of producing more than 500,000 tons of tin mill products annually and that its divestiture would suffice to preserve competition in the relevant market.

European Union

Commission Fines Escalator and Lift Cartel Members

On February 21, 2007, the European Commission (Commission) fined the Otis, KONE, Schindler, Mitsubishi Elevator Europe B.V. and ThyssenKrupp groups over €990 million for having participated in cartels for the installation and maintenance of lifts and escalators in Germany and in the Benelux countries between 1995 and 2004. These are the largest fines ever imposed by the Commission for cartel violations. According to the Commission, the effects of the cartels may continue for 20 to 50 years, as lift and escalator maintenance is often performed by the companies that install the equipment.

KONE subsidiaries in Belgium and Luxembourg, as well as Otis Netherlands, each received full immunity from fines under the Commission’s leniency program for being the first to have informed the Commission

about the cartels. The ThyssenKrupp companies received the highest total fines (over €479 million), which included a 50 percent increase for being a repeat offender.

Commission Unveils Draft Guidelines on Nonhorizontal Mergers

On February 13, 2007, the Commission published draft Guidelines for the assessment of nonhorizontal mergers, such as mergers between companies at different levels of a supply chain (vertical mergers) or mergers between companies active in complementary or otherwise related markets (conglomerate mergers). The draft Guidelines provide examples, based on established economic principles, of vertical and conglomerate mergers that significantly restrict competition. The draft Guidelines also indicate “safe harbor” thresholds, in terms of market share and concentration levels, below which the Commission is unlikely to identify competition concerns.

The Commission has launched a public consultation on the Guidelines which will be open until May 12, 2007. The draft Guidelines can be found on the Commission’s website at: http://ec.europa.eu/comm/competition/consultations/open.html.

Power Transformer Firms Raided

The Commission, joined by several of its national counterparts, carried out surprise inspections at the offices of power transformer producers in France, Germany and Austria. Power transformers are responsible for adjusting the voltage in electrical circuits and are essential in electricity transmission and distribution networks. The companies under investigation are suspected of having violated Article 81 of the EC Treaty, the key provision of which prohibits restrictive business practices such as price fixing.

ECJ Confirms Fine Against Belgian Beer Producer Danone

The European Court of Justice (ECJ) has dismissed Danone’s appeal of the fine it received for participating in price fixing cartels in the Belgian beer market between 1993 and 1998. In December 2001, the Commission fined Interbrew, Danone and Alken-Maes, acting as a subsidiary of Danone, for having operated two secret cartels in the Belgian beer market. Danone was fined €44 million for its own participation and that of its subsidiary. Danone appealed the fine to the Court of First instance (CFI), which, in October 2005, confirmed the Commission’s decision but reduced the fine to €42.4 million. Danone subsequently appealed to the ECJ seeking a further reduction, but ultimately failed to convince the ECJ that the fine was unjustified.

France Télécom Fine Upheld

The CFI has upheld the Commission’s decision finding that France Télécom, formerly Wanadoo Interactive SA (Wanadoo), had abused its dominant position by engaging in predatory pricing in the French market for high-speed Internet access. In July 2003, the Commission fined Wanadoo €10.35 million for charging predatory prices for its Pack eXtense and Wanadoo ADSL services.

The CFI dismissed France Télécom’s appeal in its entirety and confirmed that the Commission was right to consider that Wanadoo held a dominant position in the French high-speed Internet market during the period covered by the investigation. Moreover, the CFI confirmed the Commission’s methodology, which led it to

conclude that there was predatory pricing. Under EC antitrust laws, prices are considered predatory and hence abusive when they are below average cost or below average total cost but above average variable cost, and are implemented as part of a plan to eliminate a competitor.

Around the World

CHINA – MOFCOM Revises Guidelines to Premerger Notification Rules for Foreign Investors

The Antitrust Investigation Office of the Ministry of Commerce (MOFCOM) has published draft revisions of its guidelines on pre-merger notification under the *Regulation on Merger and Acquisition of Domestic Enterprises by Foreign Investors.* The revised guidelines, which relate only to mergers and acquisitions of Chinese enterprises by non-Chinese investors, would require a filing party to provide an extensive description of the transaction to MOFCOM before completing the transaction or, in the case of a stock tender offer, after the release of the offer. Among the items that MOFCOM would require are a market analysis that defines the relevant product and geographic markets affected by the transaction and explains the basis for the proposed market; a detailed analysis of market access conditions including a description of entry barriers such as economies of scale, regulatory barriers and barriers created by intellectual property rights; and a description of all major market entry or exit events that have transpired during the preceding three years.

The revised guidelines encourage parties to consult with the Antitrust Investigation Office before filing notification on whether a transaction requires a filing or determining the relevant market. Parties are advised to make a request for pre-filing consultation at least one month before filing, and to produce all documentation that would accompany the filing as well as any additional information or documentation that relates to the relevant market or conditions of competition. The revised guidelines also indicate that once notification is filed, MOFCOM will have 30 days to complete its review. If after 30 days the filing party has received no notification extending review, the application is deemed approved.

JAPAN – JFTC Announces Draft Revised Merger Guidelines

On January 31, 2007, the Japan Fair Trade Commission (JFTC) unveiled draft amendments to its Anti-Monopoly Act Guidelines on Corporate Merger Examination (JFTC Merger Guidelines), which were originally adopted in 2004. Prominent among the proposed revisions to the JFTC Merger Guidelines are the consideration of global market shares in determining the competitive effects of a proposed merger or acquisition, and clearer “safe harbor” thresholds according to which certain transactions would be presumptively immune from challenge.

The current JFTC Merger Guidelines indicate that the JFTC will analyze domestic market shares in determining the effects of a proposed merger or acquisition, but are silent as to global market analysis. To address this discrepancy the revised merger guidelines provide that the JFTC may define the relevant geographic market beyond Japan’s borders, and may approve transactions between firms participating in a worldwide market despite evidence of high market shares in Japan.

The revised merger guidelines also clarify the circumstances under which a consolidation would not infringe the Anti-Monopoly Act or would pose only a minimal threat of infringement. Under the revised guidelines, the JFTC would not conduct an examination where, based on the Herfindahl-Hirschman Index (HHI), (i) the market concentration index is less than 1500, (ii) the market concentration index is less than 2500 and the increase in HHI from the transaction is less than 250, or (iii) the market concentration index is more than 2500 and the increase in HHI is less than 150. The revised merger guidelines further provide that where the HHI is less than 2500 and the market share of the combined entity would total less than 35 percent, the combination would not pose a significant threat to competition.

JAPAN – JFTC to Propose Amendments to the Anti-Monopoly Act

The JFTC is reportedly considering amendments to the Anti-Monopoly Act of Japan that would further the advances in antitrust enforcement widely credited to the Act's 2005 amendments. Notably, the 2005 amendments increased the administrative fines available to the JFTC from 6 percent of sales to 10 percent, introduced a leniency program, and provided for compulsory investigation of criminal cases by the JFTC. Since the adoption of the 2005 amendments, the Council for Anti-Monopoly Act, a private council of the Chief Cabinet Secretary, has discussed with the JFTC, the Japan Federation of Economic Organizations and others ways of further enhancing antitrust enforcement in Japan. Through proposed legislation it plans to submit to the next regular Diet, the JFTC will seek to both broaden the scope of actions that are subject to fines and to again raise the maximum available fine.

KOREA – KFTC Fines Members of Oil Price Fixing Cartel

The Korean Fair Trade Commission (KFTC) has imposed fines against four oil companies alleged to have conspired to fix prices of gasoline, diesel and kerosene between April 1 and June 10, 2004. The companies, SK Corporation, Hyundai Oilbank, GS Caltex and S-Oil Corporation, were fined US$20.5 million, US$17.3 million, US$9.9 million and US$8.3 million, respectively. Collectively, the four companies account for approximately 90 percent of Korea's light oil products markets.

Although the conspiracy spanned just over two months, KFTC officials estimated that it incurred a total cost to consumers amounting to approximately US$225 million. KFTC vice-chairman Kim Byung-Bae expressed the commission's hope that its investigation had produced sufficient evidence to prosecute other conspiracies among the oil companies. Byung-Bae added that, in handing over its findings to the Prosecutor's Office, he hoped that they would further investigate this and other suspected conspiracies.

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