An Excerpt From:

K&L Gates Global Government Solutions® 2012: Annual Outlook

January 2012

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Recent U.S. Enforcement Activity Underscores the Danger of Firms with Monopoly Power Refusing to Deal with Non-Exclusive Customers

Moving into 2012, U.S. antitrust enforcement agencies can be expected to continue their increasing focus on efforts by companies with large market shares to force customers or suppliers into exclusive dealing arrangements that foreclose rivals, or potential rivals, from the market. Several recent and pending agency cases have centered on allegations that a dominant firm has violated Section 2 of the Sherman Act by imposing onerous restrictions on the ability of its vertical partners to deal with rivals.

These cases are not unprecedented, but the renewed efforts to challenge this type of conduct highlight the fact that, although there is no such thing as conduct that is "per se" unlawful under Section 2, which prohibits illegal efforts to preserve or acquire a monopoly, these situations come as close as anything to the heart of the U.S. antitrust enforcement agenda in terms of unilateral-conduct cases.

Over the years, the enforcement agencies have pursued all kinds of conduct under Section 2, from below-cost pricing in the American Airlines case, to the old AT&T's refusals to interconnect with rival long-distance companies like MCI, to the myriad of behaviors challenged in the IBM and Microsoft cases. But in recent years, it has become clear that the behavior most likely to draw fire from the agencies is the refusal to deal with a customer (or supplier) unless that customer (or supplier) agrees to stop dealing with rivals of the monopolist.

Challenges to restrictions on dealing date back at least to the government's successful challenge under Section 2 of the Sherman Act to a monopoly newspaper's refusal to accept advertising from companies that also advertised on the local radio station [see *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951)]. The government's recent initiatives can be traced to the Justice Department's challenge to a "loyalty" policy enforced by Dentsply, the dominant firm in the artificial tooth market [*see United States v. Dentsply Int'l, Inc.*, 399 F.3d 131, 189-90 (3d Cir. 2005)]. Dentsply had a policy of refusing to sell to distributors that also dealt with Dentsply's competitors. Because Dentsply had such a large share of the market, the policy had real bite: distributors needed to stock at least some of Dentsply's teeth, because they were demanded by dental labs.

In the last two years, the government has brought several cases fitting into this mold. In *In re Intel Corporation* (FTC December 16, 2009), the U.S. Federal Trade Commission (FTC) challenged Intel's arrangements that required computer manufacturers not to adopt or purchase non-Intel CPUs. The FTC alleged that this conduct raised barriers in a market already characterized by a number of legitimate barriers to entry. Similarly, in *In re Transitions Optical, Inc.* (FTC April 22, 2010), the FTC challenged the leading U.S. photochromic lens treatment developer's practice of requiring its manufacturer customers to exclusively use its lenses. The FTC also took issue with the company's agreements with retail chains and wholesale labs to restrict their ability to sell competing lenses. The FTC alleged that such tactics foreclosed rivals from the relevant markets, harming competition and consumers.

The FTC's most recent effort in this regard, *In re Pool Corporation* (FTC November 21, 2011), involved a challenge to the allegedly exclusionary tactics of PoolCorp, the largest U.S. pool product distributor. The FTC's complaint alleged that PoolCorp refused to purchase supplies from manufacturers that also sold to new distributors competing with PoolCorp. In a statement addressing the PoolCorp Complaint, the FTC Commissioners stated that "[c]onduct by a monopolist that raises rivals' costs can harm competition by creating an artificial price floor or deterring investments in quality, service, and innovation." The Commissioners also warned that new rivals are often the targets of anti-competitive exclusion because they are most likely to create competition in the market by competing aggressively on price and introducing innovative business strategies, indicating that the FTC will be keeping a close eye on market leaders that target new entrants with exclusionary conduct.

The Department of Justice's Antitrust Division has also come down hard on this same type of conduct. In *United States v. United Regional Health Care System* (N.D. Tex. February 25, 2011), the Antitrust Division alleged that United Regional unlawfully maintained its monopoly for hospital services in the Wichita Falls area by offering contracts with steep discounts to health insurers in exchange for exclusivity. Since United Regional—a dominant hospital in the area—was a "must have" service provider for insurers selling health insurance in that market, and since the penalty for contracting with United Regional's rivals was so significant, the Antitrust Division alleged that this practice was exclusionary and effectively prevented insurers from contracting with United Regional's competitors.

Given the resurgence of government enforcement in single-firm, exclusionary conduct scenarios, companies that have market power should seek the advice of antitrust counsel if considering entering into exclusive, or *de facto* exclusive, agreements that could foreclose rivals from customers or sources of supply.

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