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FTC Decision May Reassure Info-Exchange Participants

Law360, New York (June 10, 2013, 11:59 AM ET) -- A recent decision by an Federal Trade Commission administrative law judge may provide reassurance to companies engaging in information exchanges with competitors, so long as certain accepted safeguards are employed after a consent decree in the same matter shed doubt on the efficacy of those safeguards.

In the winter and spring of 2012, the FTC issued consent decrees with Star Products Ltd. and Sigma Corporation to enjoin the companies from further participation in an information-exchange program with McWane, their competitor in the market for ductile iron pipe fittings ("DIPF"). DIPF describes a broad range of fittings that are used in pipeline systems that transmit sewage and drinking water for municipal and regional water authorities. The FTC alleged that twice in 2008, McWane orchestrated a conspiracy of the three DIPF producers to raise and maintain prices. According to the FTC, part of this conspiracy consisted of forming the Ductile Iron Fitting Research Association — DIFRA — in order to monitor each other's compliance with the agreement by collecting data on historical tons shipped.

The FTC alleged that the information exchange facilitated a price-fixing agreement among Star, Sigma and McWane and was also a stand-alone violation of the antitrust laws. The consent decree was noteworthy because the FTC challenged an information exchange, even though the participants took many of the precautions that antitrust counselors typically advise companies to employ. For example, the participants provided only historical information to a third-party accounting firm, which aggregated the information before disseminating it to the participants, and made the information public after it was collected. None of the DIPF manufacturers included price with the information provided to the accounting firm.

And even though DIPF was sold throughout the United States at varying prices, the data provided to the accounting firm did not include the location of sales. Under the consent decree, Star agreed not to participate in information exchanges unless fairly stringent safeguards were taken — the data had to be at least six months old, could be disseminated no more than twice annually, and price or cost data could not be exchanged if market shares reached certain thresholds.[1] Thus, one could have fairly concluded based on the FTC's consent decree with Star that information exchanges were at risk, even when traditional procedural safeguards were employed.

McWane, on the other hand, chose to fight the FTC's allegations and — at least with respect to the information-sharing allegations — prevailed.[2] After a full evidentiary hearing, Chief Administrative Law Judge Michael Chappell concluded that McWane did not engage in a conspiracy to fix prices on DIPF and that the information exchange was not illegal either as a facilitating device or as a stand-alone violation of the antitrust laws. Judge Chappell applied the factors for analyzing information exchanges set forth in Todd v. Exxon[3] — the time frame of data, the specificity of data, whether data were publicly available, and whether the data were discussed in joint meetings.[4]

Judge Chappell concluded that, unlike the company-specific data exchanged in Todd, DIFRA's data were sufficiently aggregated to minimize the utility of the data to monitor compliance with a conspiracy.[5] All tons-shipped data were grouped into six categories — two different types of pipe and three different sizes for each type — despite the fact that they represented thousands of SKUs. Judge Chappell concluded that the DIFRA members could use the data to calculate their own market shares but not those of their competitors and that a company's own market share would not help one monitor adherence to an anti-competitive agreement.

The age of the data also supported Judge Chappell's conclusion that the information exchange was not anti-competitive.[6] The DIFRA members exchanged only past data, which varied from three weeks to many months old and did not specify the date of particular sales. The DIFRA data were especially prone to delay and unpredictability because a large portion of sales were for public-works projects, which incur delays more frequently than private-sector projects.

Other precautions that DIFRA members took may also have helped McWane avoid liability for the information exchange.[7] Unlike in Todd, where the information was allegedly discussed at meetings of the competitors, the DIFRA members did not discuss the data among themselves and disseminated the sales data publicly. When this type of data is provided to customers but not shared among industry participants, Judge Chappell reasoned, it is unlikely to be used for nefarious purposes.

At first blush, Judge Chappell's decision will help antitrust counselors and participants in information exchanges rest easier. After all, some common tactics to allow information exchanges to pass muster were upheld in a 464-page decision by the FTC's chief administrative law judge, on a full factual record. As Judge Chappell noted in his decision, amalgamation of data, third-party administration, the data's historical nature, the absence of pricing information, and public dissemination clearly tipped the scales of likely competitive effect in DIFRA's favor.

This story is not over, however, as the FTC's complaint counsel has indicated its intent to appeal the decision to the full FTC. But while complaint counsel traditionally has the upper hand before the commission that approved the complaint, in this case only two commissioners — Chairwoman Edith Ramirez and Julie Brill — sat on the commission that approved the complaint. Since that time, Republicans Joshua Wright and Maureen Ohlhausen have joined the commission and may be more inclined to revisit their predecessors' decisions. Thus, whether or not a new commissioner is appointed before the appeal is heard could impact the success of complaint counsel's appeal and the viability of competitor information exchanges going forward.

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[1] Agreement Containing Consent Order, In the Matter of McWane, Inc., No. 9351 (F.T.C. Mar. 20, 2012), available at http://www.ftc.gov/os/adjpro/d9351/index.shtm.

[2] The FTC prevailed, however, on its claim that McWane unlawfully excluded competition from the DIPF market. Initial Decision, In the Matter of McWane, Inc., No. 9351 (F.T.C. May 8, 2013), available at http://www.ftc.gov/os/adjpro/d9351/index.shtm ("Initial Decision").

[3] Todd v. Exxon Corp., 275 F.3d 191 (2d Cir. 2001).

[4] Initial Decision at 357-62.

[5] Id. at 357-58.

[6] Id. at 357.

[7] Id. at 361-62.