Antitrust Alert

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DC Circuit Reaffirms Judicial Deference to an Administrative Agency's Subpoena

By Jay L. Levine and Michael S. Denniston

In a recent opinion, the DC Circuit re-affirmed the high hurdle a target of an agency subpoena must jump in order to limit or quash the subpoena. In 2009, the Federal Trade Commission (FTC) launched an investigation into Church & Dwight Co. (C&D), the makers of Trojan brand condoms (and Arm & Hammer brand products), seeking to determine whether its sales and distribution policies aided the company's market position (70%) for the sale of condoms in the US. In marketing its condoms, C&D offers retailers a discount based upon the amount of shelf space they devote to its condoms and other products, including such products as cat litter and toothpaste.

Pursuant to its rules, the FTC issued a "Resolution Authorizing Use of Compulsory Process in Nonpublic Investigation" in which it defined the scope of its investigation as "whether Church & Dwight, Co., Inc. has attempted to acquire, acquired, or maintained a monopoly… [by] conditioning discounts or rebates to retailers on the percentage of shelf or display space dedicated to Trojan brand condoms and other products distributed or sold by C&D." The subpoena defined the "relevant area" as including both the United States and Canada, requiring production of documents from C&D's Canadian subsidiary. The subpoena also included the standard FTC instruction that all "documents responsive to this request...shall be produced in complete form, unredacted unless privileged."

C&D objected to producing documents from its Canadian subsidiary because the investigation only concerned sales practices in the US. Additionally, C&D redacted information concerning products other than its condoms, arguing that that the resolution governing issuance of the subpoena related only to condom products. The FTC sued C&D to enforce the subpoena and the district court sided with the FTC, stressing the fact that the standard for limiting an agency subpoena was one of "reasonable relevance" and that agency speculation as to the potential relevance of information and documents were sufficient as long as they were not "obviously wrong."

With respect to the Canadian subsidiaries, the court held that the investigation need not be limited to US economic activities. "It cannot be true that in a globalized economy a federal agency may never investigate the activities of [a] foreign subsidiary of an American company merely because the agency's original grant of authority is the investigation of economic activity that has had an impact on interstate commerce within the United States." Because it is plausible that C&D's activities in Canada may be useful to an investigation and analysis of its practices in the US, the court ordered enforcement of the subpoena with respect to Canadian documents.

Justifying its redactions, C&D claimed that when the resolution stated "Trojan brand condoms and *other products* distributed or sold by C&D," it referred only to condom products and thus information concerning toothpaste, for example, was irrelevant to the investigation. The

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district court disagreed. Deferring to the FTC's interpretation of its resolution, the court noted that Supreme Court precedent mandated a broad standard in determining the scope of an agency subpoena; as the court said, "While it may be the place for the court to determine relevancy in a circumstance such as this, *Texaco* sets the bar for that relevancy very low, and limits its power to question the judgment of the investigating administrative agency." Given that, the court held that "it is entirely plausible that information appearing in the same document with relevant information concerning C&D's male condoms would itself be relevant to the investigation. The requested materials, including those portions that do not obviously concern male condoms, need only be reasonably relevant to the investigation, not to any potential outcome."

The DC Circuit upheld the district court's enforcement of the FTC subpoena. The court reiterated that "we defer to the Commission's interpretation of its own Resolution." So long as the material sought is relevant to the investigation and the matter being investigated is within the reach of the law that the agency enforces, the subpoena will be enforced. Because bundling of rebates and its effect on competition is within the antitrust laws the FTC enforces, the subpoena was valid and must be enforced.

Interestingly, in the final footnote of the opinion, the DC Circuit limited its holding to situations where the information being sought was relevant to the investigation itself. In other words, it refused to fully condone the FTC's non-redaction policy. The FTC had argued that its instruction prohibited redaction even if the material redacted was not relevant to the investigation. The court refused the opportunity to condone that approach, stating "We need not, however, reach the question whether the Commission's anti-redaction policy is permissible because we conclude the subpoena and CID at issue here are directed entirely toward information reasonably relevant to the Commission's investigation."

Conclusion

The opinion is noteworthy for three reasons. First, it is the latest case that expresses the judiciary's extreme deference to an administrative agency when determining whether the information sought by the agency is relevant to the investigation. As long as the information is reasonably relevant to an investigation that the agency has the power to conduct, the subpoena will be upheld. Moreover, the agency's interpretation of what it is investigating and what qualifies as relevant information will control the agency's ability to access that information, unless the agency's interpretation is "obviously wrong."

Second, the case reveals that the FTC is actively investigating the competitive effects of bundling. Many commentators and courts have criticized those opinions that have made it illegal to offer bundled discounts even where the price is not below cost. Nevertheless, the FTC apparently is continuing to investigate such issues. This should have resonance not only in traditional consumer product industries, but others as well, such as healthcare. For example, hospital systems that bundle a variety of services and offer them at a discount to payers must be aware that such conduct, together with a leading market position, could subject them to antitrust scrutiny.

Finally, it is interesting to note that the court left open the question whether an agency can legitimately require non-redaction where the material to be redacted is irrelevant to the investigation. The DC Circuit left the door open and it remains to be seen whether any target of an administrative agency will attempt to drive the proverbial truck through it.

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