Kluwer Competition Law Blog

It matters how you look

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Perception is a problem in competition law. Many consumers and small businesses only understand what the subject might be about when a dispute is local, small-scale, potentially bad tempered and served with a generous helping of bad faith. For practitioners and corporate advisers, though, competition law is usually more to do with big-picture policy issues, regulatory clearances or official investigations. Often this difference of viewpoint will not matter. Professionals and the public frequently have a different take on things. On the other hand, perception does matter if you want people to believe in what regulators are doing.

Take, for instance, the row between the London Bridge Experience (LBE) and the London Dungeon, two tourist attractions on the south bank of the Thames that specialise in blood-spattered depictions of the more gruesome bits of London history. Competition between the two attractions is intense. Two years ago, following accusations of dirty tricks by LBE's sales staff, the companies reached an out-of court settlement, with LBE promising not to discourage people from visiting the London Dungeon.

However, the dirty tricks continued, said the London Dungeon. So Merlin Entertainments (which owns the Dungeon, as well as other tourist moneyspinners such as Madame Tussauds and Thorpe Park) wrote to booking agents. It said in essence that it didn't want to share any sales platform with the LBE, so ticket agents had to choose between the two organisations. Several agencies apparently dropped the LBE as a result. LBE has now complained to the UK's Office of Fair Trading about Merlin's actions.

It isn't at all clear, though, how consumers have suffered in all this. It is essentially a story of one company scared of losing business to another. The London Dungeon is doubtless very annoyed that its rival is allegedly breaking its out-of-court settlement promises. But unless the paying punters are going to lose out in some way, most competition lawyers will see this as a nothing event, especially as it's a spat between local rivals rather than a grand battle involving multinationals. On the other hand, lots of members of the public (especially those who run local businesses) will immediately understand what's going on, why it might matter and have views on whether a regulator ought to sort it out.

Contrast that with Intel's acquisition of McAfee and the European Commission's approval of the deal in late January. The Commission was worried that Intel/McAfee would embed McAfee's security systems into Intel's chips and chipsets. This would make it impossible to run the products of other security technology companies on computers with Intel computer components, or to run

McAfee software on computers using non-Intel parts. To get the Commission to ok the deal, Intel promised to ensure that, in future, all Intel/McAfee products would be able to operate in conjunction with those produced by its competitors.

By any standards, this is a proper competition case as understood by competition lawyers and other insiders. The difficulty comes in how it has been presented to the outside world. In a press notice that was oleaginous even by its normal standards, the Commission announced that it would now clear Intel's acquisition at the end of the preliminary first-phase investigation "thanks to the good co-operation of Intel". The Commission added it had collaborated with the US Federal Trade Commission on the case and "the co-operation with this competition authority has been close and helpful". And in a fulsome statement that doubtless had Intel/McAfee's marketing people purring with pleasure, the EU competition commissioner Joaquin Almunia announced that Intel's promise "will ensure that vigorous competition is maintained and that consumers get the best result in terms of price, choice and quality of IT security products".

What is wrong with this puffery is that the Commission looks as if it's sucking up to two huge household-name US corporations. That is a pity, particularly if (as one assumes) it was genuinely trying to prevent consumers paying over the odds for a restricted choice of products and didn't want to go to the unnecessary expense of a more detailed examination. But by imitating a butler bowing and scraping to his social superiors, the Commission does itself and the image of regulation no favours at all. Does it matter? Yes, because consumer belief in all regulation and its efficacy has taken such an enormous battering following the banking crisis that regulators have to look more like policemen and less like flunkeys if they want to be taken seriously.

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