

Antitrust Alert

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Federal Trade Commission Extends *In re Polygram's* "Inherently Suspect" Anticompetitive Analysis to Endorsements

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The Federal Trade Commission's ("FTC") recent settlement with ski manufacturers Marker Volkl (International) GmbH ("Marker Volkl") and Tecnica S.p.A. ("Tecnica") continues to expand the scope of "inherently suspect" business practices under *In re Polygram's* quick-look analysis. That doctrine, initially articulated by the FTC in *In the Matter of Polygram Holding, Inc.*, evaluates conduct that is not quite considered *per se* unlawful, but may be condemned if the parties cannot come forward with cognizable efficiency goals (even without inquiry into whether the conduct caused actual competitive harm or even whether the parties have sufficient market power to cause such harm). 136 FTC 310 (FTC 2003), *aff'd*, 416 F.3d 29 (D.C. Cir. 2005).

The FTC last week settled charges that Swiss company Marker Volkl, the leading seller of skis in the United States, and Tecnica, the fourth largest seller, agreed not to compete for one another's ski endorsers or employees. *In the Matter of Tecnica Group, SpA.*, FTC File No. 121-0004 (May 19, 2014), and *In the Matter of Marker Volkl (International) GmbH*, FTC File No. 121-0004 (May 19, 2014).

Specifically, the FTC alleged that beginning around 2004, Marker Volkl and Tecnica agreed not to solicit, recruit or contact any skier who had previously endorsed their rival's skis. The companies then expanded the scope of their agreement in 2007 to cover all employees, all in violation of Section 1 of the Sherman Act and Section 5 of the Federal Trade Commission Act. Noting that the most effective and costly tool for marketing ski equipment is securing endorsement agreements from well-known ski athletes, the FTC alleged that the purpose of the agreements was to avoid bidding up the cost of securing endorsements from skiers, as well as the salaries of the companies' employees. Typically, ski equipment companies compete to secure the endorsement of prominent skiers, and when an agreement (which is generally of short duration) expires, the companies try to induce the skier to switch from one company to another.

In its analysis of its action, the FTC likened the agreements between Marker Volkl and Tecnica with those at issue in *In the Matter of Polygram Holding, Inc.*, where distributors of musical recordings entered into a joint venture to distribute a concert album and agreed to suspend discounts and advertising related to that album. Consequently, the FTC concluded, agreements between competitors not to compete for professional services, whether employees or endorsers, are "presumptively anticompetitive or inherently suspect." The FTC moreover found that the agreements served no pro-competitive purpose in that they were not required for the marketing collaboration between the parties and that the parties failed to provide efficiency justifications for the agreements.

As evidenced by this case, as well as private cases and those handled by the Department of Justice ("DOJ") involving "do not poach" arrangements among Silicon Valley companies, antitrust scrutiny is not limited to price and customer agreements with competitors. Moreover, the FTC's action here demonstrates that while such agreements are not assumed to be *per se* unlawful, the FTC will quickly condemn them without a succinct and understandable efficiency rationale.

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