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Editor's Note

This issue of Mayer, Brown, Rowe & Maw LLP's Antitrust Quarterly reflects our global practice. In the first half, we bring several important cross-boundary antirust issues to light. For example, we discuss the complexity of the question of whether, and to what extent, legal privilege attaches to communications in Europe. The complexity of the question is not only due to the differences among EU Member State rules, but also to the overlaying and different approach taken by the European Commission's Competition department. This issue of Antitrust Quarterly also includes an article about a German appeals court decision that clarifies this privilege issue in relation to Germany. The article provides a thoughtful discussion of the German position and compares it with the EU position. In another article, which addresses antitrust issues arising from international transactions, we discuss jurisdictional aspects of transactions under the EC Merger Regulation. The article posits that identifying the purchaser is critical to determining jurisdiction, as a purchaser's identity is necessary to calculate the turnover of the purchaser and the group to which it belongs. On a related front, we have included an interesting article that addresses jurisdiction in the context of the European Commission's consultation process on its Draft Consolidated Jurisdiction Notice under the EC Merger Regulation. Specifically, the article includes a discussion about transactions that are subject to the EC Merger Regulation in the context of the ongoing jurisdictional dispute over the Endessa/E.ON transaction. As you may know, transactions subject to the EC Merger Regulation are normally regulated by the European Commission. However, Member States have the right to regulate such transactions to protect a national "legitimate interest." As we discuss, member States are increasingly using, and it would seem abusing, the "legitimate interest" exception to protect and/or create national champions.

In the U.S., the question of whether brand name pharmaceutical companies' introduction of authorized generic drugs discourages competition from independent generics has become a major issue and is the subject of proposed federal legislation that would ban the introduction of authorized generics. An article in this issue discusses whether the introduction of authorized generics is likely to violate the antitrust laws and looks at the current state of this controversy. The rules regarding resale price maintenance are also a hot topic in the U.S., as the Supreme Court soon will consider whether to do away with the per se rule against minimum resale price maintenance in the *Leegan* case. We have included an article that discusses a recent case decided by the Texas Supreme Court and the practical implications of that case for counsel advising clients on pricing issues. In the aftermath of the U.S. Supreme Court's 2004 decision in the *Trinko* case, questions remain about the extent to which Section 2 of the Sherman Act prohibits a monopolist from refusing to deal with a competitor. This Antitrust Quarterly addresses this issue by examining post-*Trinko* jurisprudence. Finally, the Antitrust Modernization Commission plans to issue its recommendations this April. One of the issues the Commission intends to address is treatment of immunities and exemptions from the antitrust laws. An article in this issue addresses the likely content of these recommendations and how they may affect the continued viability of such immunities and exemptions in the future.

We hope that this issue provides valuable insights.

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Authorized Generics:

The Government Considers Banning Lower-Priced Products to Encourage Patent Challenges[1]

The competitive landscape in the areas of pharmaceuticals is growing more complicated, as Congress and the Federal Trade Commission consider whether lower-priced competition is actually good long-term in the pharmaceutical area.

The Federal Trade Commission has announced plans to study, and some members of Congress have proposed legislation to ban, "authorized generics." An authorized generic is a generic drug produced under the auspices of a pioneer drug company's New Drug Application.[2] Under the federal food and drug laws, a generic drug manufacturer that successfully challenges the patents associated with a branded drug gets a 180-day period where no other generic drug company may enter. Recently, pioneer drug companies have responded by authorizing a generic version of its product to provide competition during the 180-day exclusivity period.

Generic companies have complained that allowing pioneer companies to introduce authorized generics will discourage generic drug companies from challenging patents and therefore there will be less competition in the long run. Pioneer drug companies respond that, by offering competition during the 180-day period of exclusivity, consumers will pay lower prices.

More than a year ago, it was disclosed that the FTC would study the competitive effects of authorized generics. This study has been moving extremely slowly. Meanwhile, two bills, one in each chamber of Congress, would ban the practice of offering authorized generics.

This article will examine the authorized generics controversy.

The Development of Authorized Generics

Authorized generics have become competitively significant because of the structure created by the Drug Price Competition and Patent Term Restoration Act of 1984, also known as the "Hatch-Waxman Amendments" to the Food, Drug and Cosmetic Act.[3] In order to market a new drug, a pioneer drug company must obtain approval from the Food and Drug Administration. This requires that the pioneer drug complete clinical drug trials that demonstrate that the drug is both safe and effective.[4] This type of application is called a "New Drug Application," or "NDA." Prior to filing an NDA, a pioneer drug company must have completed all phases of clinical testing in humans. The process to take a new compound from

the laboratory to the marketplace can take many years, and the clinical testing portion itself can take several years to complete.

The Hatch-Waxman Amendments provide generic drug companies with an opportunity to bring a generic drug to the market more quickly. These amendments allow a drug manufacturer seeking to market a generic version of a branded drug to file a shorter, quicker application, called an "Abbreviated New Drug Application" or "ANDA." The FDA will approve an ANDA so long as the generic version of the drug is the bioequivalent of the branded version.[5] The generic drug company filing an ANDA must certify that any patents would not apply because: (1) no patent information is applicable to the branded drug; (2) any patent applicable to the branded drug has expired; (3) the generic drug will be marketed only after any patents applicable to the branded drug will expire, or (4) any patent applicable to the branded drug "is invalid or will not be infringed by the manufacture, use, or sale of the new drug for which the application is submitted."[6] This last certification is known as a "Paragraph IV certification," and is often a precursor to patent litigation.

Needless to say, to demonstrate that a patent is either invalid or not infringed, it may be necessary for a generic drug company to spend millions of dollars in litigation and other costs. The reward to the first generic company to file an ANDA application (a "first filer") that demonstrates that the branded drug's patents are either invalid or not infringed by the first filer's bioequivalent drug is a 180-day exclusivity period, wherein, no other ANDA filer may market its drug.[7] This 180-day exclusivity period is extremely valuable to generic drug companies.[8]

The FDA has held that it is without authority to regulate authorized generics….

A company marketing an authorized generic version receives its authorization to market the drug not from an ANDA, but from the original NDA. Thus, the 180-day exclusivity period will not apply to authorized generics.

The FDA has held that it is without authority to regulate authorized generics, and this decision has been upheld by two courts, including the United States Court of Appeals for the District of Columbia.[9]

Specifically, the FDA held that it was without authority to regulate authorized generics because: (1) removing the brand name or changing the channel of distribution is unlikely to pose any threats; (2) the FDA does not regulate drug prices and cannot prevent a branded drug company from lowering its prices to compete with generics; and (3) the Federal Food, Drug and Cosmetic Act provides no authority to regulate authorized generics during the 180-day period.[10] The FDA stated that "the Agency does not believe that [authorized generics'] marketing should be delayed [during the 180-day exclusivity period], as this marketing appears to promote competition in the pharmaceuticals marketplace, in furtherance of a fundamental objective of the Hatch-Waxman Amendments."[11]

Hatch-Waxman Incentives and Authorized Generics

The debate over authorized generics has not focused on antitrust law, or even antitrust policy, but rather on congressional intent in passing the Hatch-Waxman Amendments and on the incentives created by the 180-day exclusivity period.

Generic drug companies argue strenuously that the 180-day exclusivity period is critical to encouraging generic companies to challenge branded drug patents. The generic companies claim that if the incentives of this exclusivity are eroded, there will be fewer patent challenges and fewer efforts to enter. The generic drug companies and consumer groups argue that authorized generics' "benefits to consumers and the market are illusory and short-term,"[12] and "[w]ithout this full exclusivity incentive, we are very concerned that generic companies may elect not to pursue all relevant future challenges or create non-infringing versions of the drug, resulting in a substantial delay in access to cost-effective generics."[13]

Pioneer drug companies argue that authorized generics provide competition and therefore benefit consumers. They claim that generic drug companies will continue to challenge patents if those challenges are warranted, and that the generic drug companies are merely complaining that their profits are being competed away. Any anticompetitive impact of authorized generics is at best speculative.[14] Indeed, pioneer drug companies argue that the 180-day exclusivity period itself carried some anti-competitive baggage, including encouraging speculative patent challenges that are brought with the hope of coercing a settlement rather than a realistic belief to prove a patent invalid or not infringed.[15]

The central question is the purpose and effect of the 180-day exclusivity. If the purpose of the exclusivity is to discourage free riding by generic companies, then allowing authorized generics is entirely consistent with this policy. If the purpose is to provide a bounty to generic drug companies for the scalp of an invalid or non-infringed patent, then authorized generics are inconsistent with Hatch-Waxman.

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The other aspect of this analysis is consideration of the strength of the incentive. Generic drug companies argue that they will not challenge patents in the absence of the 180-day exclusivity period. "The threat of authorized generics, which guts the value of the 180-day exclusivity, adds considerable complexity to generic company decision-making because it delays, and even prevents, generic companies from recouping their investments over a shorter period of time, if at all."[16]

However, in rejecting the idea that authorized generics harmed competition, the FDA seemed to suggest that the incentive for generic drug companies would not be impacted significantly by authorized generics. "If 180-day exclusivity were the sole incentive for ANDA submission, FDA would presumably not see, as we do, second, third and fourth ANDAs filed by generic companies that are aware that they are not first to file an ANDA application including a paragraph IV certification and therefore, cannot gain 180-day exclusivity."[17]

Recent legislation may make authorized generics much less financially attractive to branded drug companies as well. The Deficit Reduction Act of 2005 ("DRA")[18] will have a major impact on the ability of research-based pharmaceutical manufacturers to compete for generic sales of their own "pioneer" products. The DRA does this indirectly by changing how the manufacturer must calculate Average Manufacturer Price (AMP) and "best price" for purposes of the required Medicaid rebate. Thus, a manufacturer will have to include in its AMP and best price of ***all*** drugs marketed under a single NDA, presumably including any author-

ized generic. This provision may have significant financial implications for a manufacturer's rebate obligation if it markets an authorized generic under its NDA.

Antitrust Issues Associated with Authorized Generics

While the discussion of Hatch-Waxman and potential competition has been significant, there have been no antitrust challenges relating to the unilateral decision to market an authorized generic. Although one article has suggested that the practice of marketing authorized generics standing alone can be a violation of the antitrust laws,[19] there seems to be little if any support for this proposition.

If there were a claim to be brought, it would have to be brought as a monopolization or attempted monopolization claim pursuant to Section 2 of the Sherman Act. Such a claim would likely allege that the pioneer company engaged in predatory pricing in order to discourage generic drug companies.

Because "cutting prices in order to increase business often is the very essence of competition,"[20] the Supreme Court has formulated two prerequisites to recovery on a predatory pricing claim: (1) proof that the prices complained of are "below an appropriate measure of its rival's costs";[21] and (2) a dangerous probability that the defendant will recoup its upfront investment in below-cost prices.[22] The most commonly accepted cost measure is average variable cost.[23]

[T]here have been no antitrust challenges relating to the unilateral decision to market an authorized generic.

A predatory pricing claim regarding authorized generics seems very unlikely to succeed. Generally, the average variable cost of an authorized generic would be very low, perhaps approaching the cost of ingredients and distribution. In addition, the authorized generic's prices are likely designed to meet the competition, rather than undercut it.[24]

Second, even assuming below-cost pricing, it is not likely that an authorized generic will achieve recoupment. The theory would have to be that pioneer companies will profit by discouraging generic drug companies from challenging patents on ***other*** drugs in the future.[25] In other words, a pioneer company offering an authorized generic is seeking to develop a "fighting" reputation that will scare away generic drug companies.

No court has found liability based on a predation by reputation theory. Perhaps the best known recoupment by reputation case was brought by the Department of Justice's Antitrust Division, and the theory was squarely rejected.[26] In *U.S. v. AMR Corp*., the government alleged that American Airlines aggressively reduced fares and increased the number of flights to and from Dallas Fort Worth Airport ("DFW") whenever a low-cost carrier entered, and then increased fares and decreased the number of flights when the low-cost carrier exited. The government argued that American was recouping on routes other than the ones where American was engaging in allegedly predatory conduct by discouraging low-cost airlines from entering in the first place. The court rejected this argument, holding that there was "no principled basis for the court to distinguish between a general reputation for aggressive but lawful conduct on the one hand, and illegal predatory conduct. Such theories would inherently degenerate...into self-serving complaints about reputation by a defendant's competitors."[27]

A second conceivable antitrust theory would be that the licensing of an authorized generic to a separate license during the 180-day exclusivity period inherently violates the antitrust laws. Section 1 of the Sherman Act prohibits "[e]very...combination in restraint of trade."[28] In order to prevail on a Section 1 claim relating to an authorized generic, the plaintiff would have to prove that the agreement is unreasonable pursuant to the "rule of reason," which requires a plaintiff to prove a relevant antitrust market, show market power in that market and demonstrate actual anticompetitive effects of any agreement.

Any antitrust plaintiff challenging an authorized generic under Section 1 would have to prove that the speculative harm from discouraging rivals outweighed the immediate and very real benefits from added competition. There is nothing to distinguish that effect from the one that any procompetitive conduct may have on actual and potential rivals. Consequently, an antitrust claim based on the license requires making much the same argument as the predation claim discussed above, and has about the same chance of success.

If there is an area of antitrust concern, it is not a monopolization theory involving a pioneer or a Section 1 theory based on licensing an authorized generic, but rather a Section 1 theory involving a promise by a pioneer ***not*** to issue an authorized generic.[29] FTC Commissioner Jon Leibowitz has suggested that addressing an agreement between a pioneer and a generic to settle patent litigation "may raise interesting questions regarding whether accepting delay in exchange for an assurance from the brand that the generic can enjoy its exclusivity period—without fear of competing with an authorized generic—constitutes a violation of the FTC Act."[30] Similarly, another commentator has suggested that while agreements between pioneer manufacturers and first ANDA filers that settle patent litigation may on balance be pro-competitive, "if such agreements limit competition that would likely arise in the absence of the agreement, including competition from an authorized generic, they may be anti-competitive and illegal."[31]

If there is an area of antitrust concern, it is not a monopolization theory involving a pioneer or a Section 1 theory based on licensing an authorized generic, but rather a Section 1 theory involving a promise by a pioneer not to issue an authorized generic.

No one has suggested that any of these agreements are automatically, or even likely to be, unlawful; only that they could be. On the other hand, there may be very compelling reasons to make such an agreement. For example, for a settlement between a pioneer and a generic to be viable, the generic must have some confidence that the pioneer will not undercut the value of the deal—for instance, by introducing an authorized generic for sale at the same time as the settling generic launches its product. Regardless, there is a need for some care to be taken when counseling clients regarding agreements between generics and pioneers that involve promises about an authorized generic.

The FTC Study

In November 2005, at the urging of several Senators,[32] the Federal Trade Commission decided to initiate a study of authorized generics for the following reasons: to "understand the circumstances under which innovator companies launch authorized generics; to provide data and analysis of how competition between Paragraph IV generics and authorized generics during the 180-day exclusivity period has affected short-run price competition and long-run prospects for entry by Paragraph IV generics; and to build the economic literature about the effect of authorized generic entry on prescription drug prices."[33]

A study of this sort begins with a Federal Register notice, seeking comments on the burdens associated with the study. These comments are received and sent to the Office of Management and Budget. After OMB processes the comments, OMB will usually authorize the study. While this process goes on, economists from the FTC's Bureau of Economics develop the methodology for the processing and analysis of the data. The Commission will then issue its data request, called a "6(b) Order," to the recipients. After the data is received, the economists will analyze the data, and along with FTC attorneys, begin to reach preliminary conclusions. The Commission staff will then conduct interviews with industry participants, while drafting the report. The report may or may not contain recommendations for enforcement actions or legislation. The full Commission will then approve and release the report.

On March 29, 2006, the FTC issued its Federal Register Notice of Study, announcing that it will conduct "a study to analyze the use and likely short- and long-run competitive effects of authorized generic drugs in the prescription drug marketplace."[34] This notice provided a detailed description of what the FTC will collect and analyze.

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In order to conduct a statistically reliable study, the FTC announced that it will seek data from 80 brand-name drug manufacturers, 10 authorized generic drug companies and 100 independent generic companies. Although the FTC's announcement did not specify exactly what drug products the study will examine, the FTC currently intends to seek information on every NDA product for which a Paragraph IV ANDA has been filed since 1999. As to these products, the FTC will subpoena the following information:

- Detailed price and cost information for NDA products and corresponding ANDA products;
- All studies since 1998 received by any senior officers concerning patent expiration, generic entry, and authorized generics;
- All license agreements and FDA applications related to authorized generics; and
- IMS Health Data

In response to the FTC's Federal Register notice, a total of 12 commentators submitted statements. These commentators represented a variety of interests, including representatives of branded drug companies, representatives of generic drug companies, and consumer groups.

Studies of this nature often take approximately 12-18 months from issuance of the notice of the study to completion.[35] This study has taken substantially longer, and there has been no public movement in the study since last March when the Federal Register notice issued.

What's Next for Authorized Generics

There is already some possibility that legislation will be enacted to regulate, or ban, authorized generics. Senators Patrick Leahy (D-VT), John D. Rockefeller (D-WV), Herbert Kohl (D-WI) and Charles Schumer (D-NY) have introduced a bill that would ban authorized generics. The proposed legislation would prohibit a pioneer from issuing an authorized generic at any time after it learns that a generic has filed an ANDA.

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Other People's Prices

Is an agreement between a manufacturer and a retailer limiting the minimum price at which the retailer may resell a competing manufacturer's product unlawful? Not necessarily.

In a hotly-disputed 5-4 decision that was not issued until nearly two years after the oral argument, the Supreme Court of Texas reversed an intermediate appellate court and threw out a jury verdict against The Coca-Cola Company and some of its bottlers in a case alleging that the bottlers had fixed the retail prices of competing brands in violation of Texas antitrust law (which follows federal law). *Coca-Cola Co. v. Harmar Bottling Co.*, 2006-2 Trade Cas. (CCH) ¶ 75,464 (Tex., Oct. 20, 2006).

The Coca-Cola bottlers had entered into promotional agreements with retailers which, among other things, required the retailers to price the bottlers' products by a specified amount below competing products during the promotions (which lasted from 42 weeks up to a full 52 weeks a year). As a result, when the wholesale price that the retailer paid for competing products was less than the price it paid for the Coca-Cola bottler's product, the retailer sometimes "had to charge" consumers more for the competing products than it "otherwise would have" charged, in order to maintain the specified differential.

The result, at times, was a higher price for the competing products at the retailer's store. However, the majority held that the plaintiffs, who were bottlers of the competing products, had failed to prove an effect on overall competition in any relevant market since consumers could avoid the higher prices at one store by "going down the street" to another store. Although "consumers may have paid more on occasion in a particular store, there is no evidence that [the agreements] caused consumers to pay higher prices generally."

The dissent asserted that a manufacturer "paying retailers to raise its competitors' prices is price-fixing, pure and simple." The dissent took the position that agreements setting a floor on resale prices are per se unlawful even if they result in some price variation, and because "the sole purpose of these agreements was to keep the price of all competing soft drinks higher than they otherwise would have been, they were illegal *per se*."

Note, however, that the per se rule against minimum resale price maintenance will be revisited this year by the United States Supreme Court in the *Leegin* case, in which the Court took the unusual step of issuing a stay prior to granting the certiorari petition. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, No. 04-41243, *cert. granted*, Dec. 7, 2006.

Note too that the Coca-Cola bottlers did not require retailers to price competing brands at any specified price, but only to price the Coca-Cola products, which of course were the products being promoted, ***lower*** than competing brands. *Cf. Sun-Drop Bottling Co. v. Coca-Cola Bottling Co.*, 604 F. Supp. 1197, 1199 (W.D.N.C. 1985) (addressing requirement that "[o]ur brands must be the exclusive soft drinks with a reduced retail"). Such a practice does not necessarily elevate the price of any brand, although it could have the effect of elevating the retail price of any competing brands having much lower wholesale prices, as acknowledged by the Court.

It also should be pointed out that in reaching its decision, the Court refused to apply Texas competition law to competitive injury alleged to have occurred in other states, a holding that may have important implications of its own in future cases brought under Texas law but claiming out-of-state harm. Compare *Southwestern Bell Telephone Co. v. Superior Payphones*, LTD., 2006-1 Trade Cas. (CCH) ¶ 75,165 (Tex. Ct. App., 13th Dist., Feb. 23, 2006).

So, why is this case noteworthy and how much reliance should one place on a 5-4 decision of the Texas Supreme Court? There have been relatively few new cases in this area, yet advice on promotional activity is being requested and provided every day, raising the level of interest in this case. As for reliance, the Court's majority held that evidence of harm to competition was "missing in this case," but presumably if such evidence had been presented, the Court would have affirmed the court below under the rule of reason. Moreover, four Justices were prepared to condemn the agreements as *per se* unlawful. Bottom line: While Coca-Cola and its bottlers won this appeal, the decision should be approached with caution, regardless of how the Supreme Court decides the *Leegin* case.

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District Court Rules on Scope of Legal Privilege in Germany

Legal privilege under German law is not a general principle. However, attorney-client communication is protected by several seizure prohibitions, their scope and applicability depending on the statutory basis of the legal proceedings leading to the seizure of such communication. The Federal Cartel Office ("FCO") can conduct investigations—and seize documents—on the basis of administrative or criminal procedure law. Regarding the latter, the Bonn district court recently defined the scope of privileged client-attorney communication, especially as far as in-house lawyers are involved.[1] Moreover, the court held that inspections carried out by officials of the FCO due to alleged infringements of both national and European competition law will be measured by national principles alone, as long as the decision of the FCO as to which law will finally apply (or whether the case is to be referred to the European Commission ("Commission")), is still pending.

Attorney-Client Privilege and German Criminal Procedure

The investigative powers of the FCO for cases where the FCO intends to impose fines, are governed by the Administrative Offences Act (Ordnungswidrigkeitengesetz—OWiG) and the Code of Criminal Procedure (Strafprozessordnung—StPO).[2] German criminal procedure law gives privilege to attorney-client communication in two ways:

- either as a consequence of a lawyer's right to refuse testimony ("attorney privilege"); or
- as a suspected person's entitlement to effective defense ("defense privilege").

Legal privilege under German law is not a general principle.

While the first privilege requires that the lawyer is in sole possession of the documents in question, the second privilege protects only communication exchanged in close connection to the subject matter of ongoing investigations.[3]

The Decision of the Bonn District Court

The dispute before the Bonn district court centered around documents seized by officials of the FCO—under Criminal Procedure law—in the office of the concerned undertaking's in-house counsel. The seizure followed investigations due to alleged discriminatory behavior under section 20 of the Act against Restraints of Competition and an investigation decision of the Commission due to alleged agreements/concerted practices prohibited under Article 81 EC Treaty. Regarding the latter, the Commission authorized the FCO to conduct inspections pursuant to Art. 20 (2) Regulation No. 1/2003.

The seized file in question contained a legal opinion of and other correspondence with outside lawyers as well as the in-house counsel's notes regarding this correspondence and oral discussions. A part of these documents dealt with a competition law assessment of the undertaking's dealings with customers. After the local court confirmed the seizure order, the undertaking's counsels appealed to the district court. The Bonn district court upheld the seizure order, finding that neither seizure prohibitions under German law nor legal privilege principles under European Community law applied to the case.

Seizure Prohibitions under German Law

First, the court analyzed whether a defendant's constitutional ***entitlement to effective defense***, also protected under Article 6 (3) European Convention on Human Rights and Section 148 StPO, was impaired. Under this doctrine, attorney-client correspondence is protected, irrespective whether it is stored at the client's or the attorney's premises. However, the court noted that the scope of this concept encompasses only so-called "defense correspondence." Such correspondence must be prepared in awareness of, and directly relate to, the defense in criminal proceedings. Therefore, the court ruled that the correspondence in question did not relate to the investigations, as it was not the underlying purpose of the legal opinion and the other documents to assess and provide defense against possible legal sanctions for dealings in the past but to provide general legal advice in an ongoing business situation with a view to avoid legal sanctions.

Second, the court went on to examine whether the ***attorney privilege***, established under criminal procedure law, applied to the case. This seizure prohibition stems from the right to refuse testimony, granted to certain professions in order to avoid self-incrimination. Accordingly it only encompasses documents which are in the sole possession of a member of such a privileged group. ***In-house lawyers*** enjoy the professional privilege only as far as they are members of the bar and they actually act as lawyers, the court held. Privilege will only extend to documents prepared by the in-house lawyer for third parties in order to present them as a lawyer. Thereby the in-house counsel must be allowed to act independently, exempted from instructions from his company. Furthermore, the documents must be in the sole possession of the in-house lawyer. Documents stored in the counsel's office, situated on the premises of the undertaking, will be considered as also in the possession of the undertaking. Interestingly, the court noted that documents, locked in a cabinet in the in-house lawyer's office, with no one else but him possessing the key, could be regarded as in the sole possession of the in-house lawyer. The court found that the in-house counsel in question could not be regarded as an independent lawyer nor were the documents in question in his sole possession. Accordingly, the court refused to apply the seizure prohibition.

Privilege will only extend to documents prepared by the in-house lawyer for third parties in order to present them as a lawyer. Thereby the in-house counsel must be allowed to act independently, exempted from instructions from his company.

Seizure Prohibitions under EC Law

The court went on to analyse the general framework for cooperation between the competition authorities under ***Council Regulation 1/2003***. According to Article 22 (1) and (2) para. 2 Regulation 1/2003, investigations by competition authorities of the Member States, on behalf of the Commission, shall be conducted in accordance with their national law. The court went on to state that according to Article 12 (3) Regulation 1/2003, information exchanged between the Commission and a competition authority of a Member State may only be used as evidence

if the information has been collected in a way which respects the same level of protection of the rights of defence of natural persons as provided for under the national rules of the receiving authority. Since no seizure prohibition under German rules was applicable, the court found the seizure in question was conducted in accordance with national rules and therefore also in accordance with Regulation 1/2003.

Finally, the court considered the doctrine of ***legal privilege***, as established under EC law. Referring to the *AM & S* decision of the European Court of Justice ("ECJ"), the court noted that the confidentiality of written communications between a lawyer and client is subject to two conditions: first, such communications must be made for the purpose and in the interest of the client's rights of defense; and, second, they must emanate from independent lawyers, who are not bound to the client by a relationship of employment.[4] Further, the court noted that this protection not only covers communications exchanged after the initiation of the administrative procedure but extends also to earlier written communications which have a relationship to the subject matter of that procedure. Therefore, the court concluded that ***correspondence with in-house lawyers*** at present cannot be regarded privileged under EC law. The court recalled that the ECJ—due to lack of urgency—annulled an interim order of the Court of First Instance ("CFI"), which supported a different view.[5] The ECJ stated that if the Commission wrongly denied legal privilege for documents, it would be prevented from using these as evidence. Otherwise, the Commission's decision on the infringement, in so far as it was based on such evidence, would be annulled.

[T]he court concluded that correspondence with in-house lawyers at present cannot be regarded privileged under EC law.

Nevertheless, the court noted a degree of ***divergence between German and European law***, as far as ***correspondence between outside lawyers and their clients*** is concerned. This gap is due to the fact that German law neither generally extends protection to documents exchanged before the initiation of formal proceedings nor to documents not in the sole possession of a lawyer. Consequently, the district court acknowledged that at least the legal opinion prepared by outside legal counsel was protected under EC standards.[6] But since the seizure in question aimed at the enforcement of both national and EC competition law and it was still unclear which law would finally apply, the court felt inhibited to invalidate the seizure decision by the FCO. Instead it found that in the meantime the decision would not cause any serious harm to the complainant. If, as a result of the investigations, it were decided that EC law applied, the Commission would be prevented from using this document as evidence. If it were decided that German law applied, the seizure order was valid.

Arguably, the court took the view that legal privilege does not affect the interpretation of national procedural law, despite the ECJ's recognition of this concept as a general principle common to the laws of the Member States. Even though the court held that legal privilege under EC law does not hold the status of a European fundamental right, it should have considered whether general principles demand effective judicial protection under the effet utile.

Guidelines, as to the scope of protection of client-attorney communication under German Criminal Procedure law, derived from the court's decision:

- Documents held by mandated outside lawyers are generally privileged.
- Documents held by an undertaking are only privileged if:

- the documents are prepared after the initiation of investigations; and
- with a view to defend the undertaking against possible sanctions as a result of these investigations,
  → Such documents should be marked accordingly.
  → Sensitive issues should be addressed verbally or through outside lawyers.

■ Additionally, documents held by in-house lawyers are only privileged if:
- the in-house lawyer is a member of the bar;
- the in-house lawyer is actually mandated to defend a member of his own undertaking in course of the investigations;
- the in-house lawyer is allowed to act independently, exempted from instructions from his company; and
- the documents are in the sole possession of the in-house lawyer (*e.g.,* in a locked cabinet, with no one else possessing a key).
  → Such documents should be marked accordingly.

Seizure Prohibitions and their Scope of Protection under German and EC Law

Seizure Prohibition	Protected Correspondence:	Documents prepared by whom:	Where need the documents to be placed?	Time Frame
Defense Privilege[7]	Correspondence Directly Related to the Client's Defense	Client/Lawyer	Client/Lawyer	Correspondence, Eminated after Initiation of Investigations
Attorney Privilege	Correspondence Exchanged in Attorney-Client Relationship	Client/Lawyer	In Sole Possession of the Lawyer	
EC Legal Privilege	Communications Made for the Purpose and in the Interest of the Client's Right to Defense	Client, Summarizing Communications from External Lawyers/ Independent Lawyer, not Bound to the Client by a Relationship of Employment	Client/Lawyer	

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The Notion of Acquisition of Control over Investment Funds

The Draft Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings

On 28 September 2006, the Commission launched a public consultation on a Draft Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings ("Draft Notice").

The Draft Notice aims at consolidating the previous Commission Notices on (1) the concept of concentration, (2) the concept of full/function joint ventures, (3) the concept of undertakings concerned and (4) the calculation of turnover. In addition, the Draft Notice is meant to also reflect the Commission's past experience in applying jurisdictional elements of the Merger Regulation.

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Within the concept of concentration, the exact determination of natural or legal persons acquiring control, and the means by which control is acquired are essential. Control may be acquired by the acquisition of shares or assets, on a contractual basis or by other means (that is *de facto* control). For the first time, the Commission in the Draft Notice included a description of the acquisition of control by investment funds (para. 19 Draft Notice).

This article deals with some of the issues and open questions deriving from the Draft Notice's attempted guidance on acquisition of control over investment funds.

Control over Investment Funds

The Draft Notice confirms that structures involving investment funds will be analyzed on a case-by-case basis. However, based on cases previously dealt with, the Commission points out some general features of investment funds:

- If there is a multitude of investors in the fund, the investors do not exercise control, neither individually nor collectively, but control is typically exercised by the fund itself or the investment company which has set up the fund;
- The investment company usually exercises control by controlling the general partner of the funds or by contractual arrangements;
- In case of investment funds which set up several investment funds, the different funds are linked together by their relationship with the investment company;
- The operation of different funds under a common brand, combined with a common organization structure or contractual arrangements are indicators of a common control structure.

Given the ever increasing number of M&A transactions which involve the acquisition of control by investment funds, often having complex organizational structures, the Commission's effort to provide more specific guidelines is laudable. It undoubtedly addresses actual issues

faced by competition law practitioners. However, on closer analysis, the stated principles give way to open questions which raise legal uncertainty.

As the Draft Notice points out, individual investors do not normally exercise control over investment funds, either solely or jointly. Usually, in the absence of special facts, investment funds are independent entities and therefore the fund itself constitutes the ultimate entity for control purposes.

The Draft Notice adds that a fund "typically" may be controlled (a) by the investment company which has set up the fund on the basis of contractual arrangements, or (b) by a company which "operates" multiple funds under a common brand, combined with a common organizational structure.

In our experience, control over investment funds is not typically exercised by another party through contractual agreements. In addition, further clarification of the concept of control deriving from a common organizational structure may be necessary under the considerations made below.

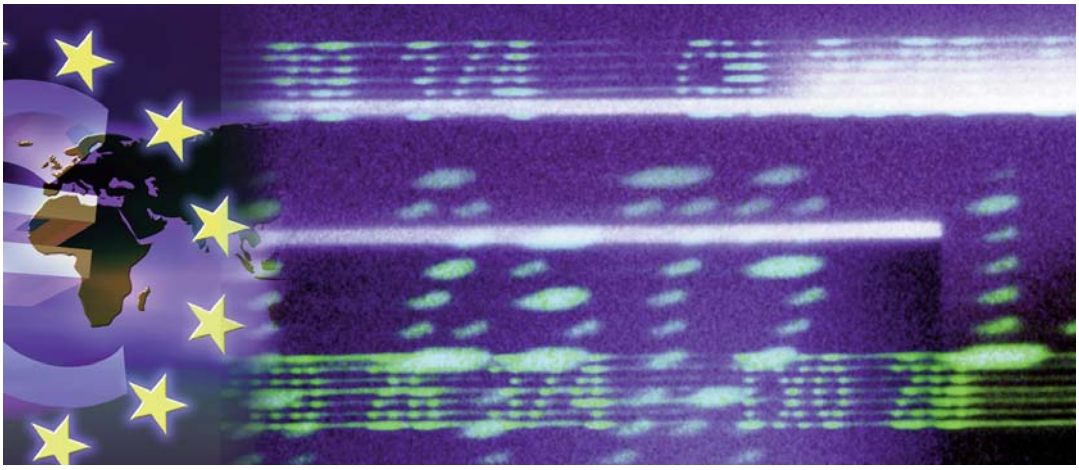
Contractual Arrangements

Where a fund concludes a management agreement (or an investment advisory agreement) with another party (such party usually being called the Manager), the principles for the assessment of control should be those that are developed in general for the issue of acquisition of control through contractual arrangements.

Paragraph 15 of the Draft Notice explains the criteria for the acquisition of control on a contractual basis. According to the Draft Notice, control on the basis of contractual arrangements will be acquired if the arrangements cause a structural change; to that extent, the agreements must be of a "very long" duration, and without a possibility of early termination for the party granting the contractual rights. The Draft Notice provides examples of certain possible types of "controlling" contracts to be entered into under national laws, such as the "Domination Agreement" (*Beherrschungsvertrag*) under Section 291 German Stock Corporation Act or the Portuguese "Subordination Contract" (*Contrato de Subordinaçao*).

In our experience, investment management agreements do not typically confer on the Manager control over investment funds, either in terms of substance or in terms of duration. In substance, management agreements do not confer the degree of control that, for instance, Domination Agreements do. Domination Agreements confer on the "dominating" (*i.e.*, controlling) entity unrestricted power to issue instructions to the Board of the company under control in relation to all the strategic and commercial behavior. This is not generally true for investment companies managing or advising funds. The management power is usually restricted by certain rights held by investors in order to oversee the Manager's activities. It may also be restricted by further rights such as those which can be conferred on limited partners by partnership agreements, including, *inter alia*, the right to approve investments above a certain monetary threshold (usually indicated as a percentage of the total commitment), transactions between funds commonly managed by the same Manager and other matters.

These rights or powers customarily held by limited partners (that is the investors) serve to align the incentives of investors and Managers. Further, those powers are used by the individual investors, who bear the investment risks, to restrict the freedom of the Managers. Domination Agreements may serve again to illustrate the differences. While in a Domination Agreement the controlling entity bears the entire financial and economic risk of the controlled companies, Managers of investment funds do not share such a burden to the same extent as the fund's investors *(see also* Case COMP/M.3136—*GE/Agfa NDT* of 5 December 2003 concerning a specific contract to confer control over entrepreneurial resources, management and risks). Therefore, unlike in the case of Domination Agreements, the economic interest remains with the fund's investors.



Regarding duration, in general management agreements extend only for the lifetime of a fund, which is often less than the period which the Commission in the past has considered long enough to constitute long-term contracts (see for instance Case COMP/M.3858—*Lehman Brothers/SCG/Starwood/Le Meridien* of 20 July 2005—the management contracts had a duration of 10 to 15 years; Case COMP/M.2632—*Deutsche Bahn/ECT International/United Depots/JV* of 11 February 2002—the contract had a duration of 8 years). In our experience, a fund's life time is—on average—only 5 to 7 years. If the Commission believes that management contracts may confer control irrespective of the duration of the management agreement or the lifetime of the fund, it would be helpful if this was clarified, given that available precedents suggest that management contracts may not be long enough to confer control.

Greater detail about the scope of the powers conferred on Managers needed to bestow control would certainly be appreciated.

Furthermore, control, that is lasting and stable control, may always be at risk in investment funds. It is customary that investors have the right to dismiss the Manager by exercising any of the provisions included in the early termination clause of the management agreement. It is indeed our experience that management contracts are terminated by investors. Among other reasons, early termination provisions usually allow dismissal of the Manager if, for instance, the Manager fails to achieve a targeted rate of return on the investments made.

Greater detail about the scope of the powers conferred on Managers needed to bestow control would certainly be appreciated. Such explanation is all the more important as it would also clarify the Draft Notice's initial statement that investment funds are independent entities. Where Managers are not able to exercise control on the basis of contractual agreements, and where investors do not exercise joint control over investment funds—as for legal reasons they are barred to do so—each individual fund would normally constitute a separate legal entity for merger control purposes. In this respect, it would also helpful if the Com-

mission would clarify the extent to which the criteria developed for the assessment of joint control would be applicable to investment funds.

Organizational Structure

Further clarification would also be needed in relation to the statements regarding the case of an investment company setting up different funds; and in particular regarding the following: (i) different funds are normally linked together by their relationship with the investment company, and (ii) the operation of the different funds under a common brand, combined with a common organization structure or contractual arrangements are indicators of a common control structure.

In this sense, the meaning of the term "linked by their relationship" seems unclear. Moreover, the mere fact that one investment company has entered into management agreements with different funds, and may use an "umbrella" brand, should not, in general, serve as an indicator of common control. There are a variety of scenarios that may make it necessary to come to varying conclusions. Considering that it is questionable that Managers typically exercise control over an investment fund, and that investors do not have joint control over the funds in which they invest, it follows that the notion of "linkage" between funds gives way to different interpretations and so it should be afforded greater clarity.

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Thus, often, different funds of a single management company have entirely different investors, and these funds pursue different investment objectives in terms of capital commitments, industry, territory and duration. Moreover, investors normally approve in advance the combination of portfolio companies owned by different funds commonly managed by the same Manager.

Moreover, if "linked by their relationship" refers to a sort of economic relationship or economic dependence, comparable to the concept of *de facto* control (paragraph 17 Draft Notice), the Draft Notice may usefully clarify what other links—as they are required for the conclusion of *de facto* control (usually structural)—are needed in order to establish control. As such, greater guidance would be helpful as to when different funds, and their controlled portfolio companies, should be taken into account for merger control purposes.

Final Remarks

The initiative of the Commission to provide specific guidance on the question of how control is exercised, and who exercises control over investment funds is welcomed. However, the use of new notions such as "linkage" between funds, and the absence of specific criteria concerning when a Manager can be exercising control over the funds, raise legal uncertainties. Legal uncertainty should be avoided, in particular, as it may impose an undue burden on private equity funds in relation to transactions that are entered into which are incapable of creating substantive competition concerns.

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The Give And Take of National Legitimate Interests:

Article 21 of the EC Merger Regulation

On 20 December 2006, the European Commission (the "Commission") decided that Spain is violating Article 21 of the EC Merger Regulation ("ECMR")[1] because of the new conditions the Spanish Government imposed on the German energy company E.ON in relation to the proposed takeover of Spanish electricity operator ENDESA.[2] The Commission gave Spain until 19 January 2007 to withdraw the conditions which are considered incompatible with EU law, and in particular, susceptible of infringing the EC Treaty principles of free movement of capital and freedom of establishment (Articles 56 and 43 respectively). The decision is the last step before the opening of an infringement procedure before the European Court of Justice. The decision is legally binding, and consequently E.ON could invoke it before the Spanish Courts.

This is not the first time the Commission has disagreed with the Spanish Government as far as this transaction is concerned, and that a deadline for modifying the conditions imposed on E.ON is imposed. The Commission approved the merger without conditions on 25 April 2006.[3] However, during the summer, the Spanish energy regulator Comisión Nacional de la Energía ("CNE") imposed 19 conditions on E.ON's bid for ENDESA.[4] The conditions were not previously communicated to the Commission. In September 2006, the Commission concluded that those conditions were incompatible with EU law and it formally requested the conditions to be withdrawn.

All the warnings of the Commission seem to have been ignored. Various statements made by the Spanish Ministry for Industry, Mr. Clos, suggest that the matter will be ruled upon by the European Courts in Luxembourg. The Commission's threat to take Spain before the European Courts is now closer than ever to coming true, but eight months have already gone by since the transaction was cleared; and, after all, judicial intervention will not provide the much needed timely response.

This article gives a view of the legal and political considerations involved in the struggle between the Commission and the Member States or in other words, between the defense of Europe's core freedoms and purportedly national protectionist measures, in the context of cross border merger control in Europe.

Article 21 ECMR Procedure

Article 21 ECMR reserves to the Commission exclusive jurisdiction over concentrations with a Community dimension. However, under Article 21(4), the Member States are allowed to adopt national measures to protect "legitimate interests" provided that the measures are compatible with EU Law. Public security, plurality of media and prudential rules[5] are expressly considered legitimate interests (the "Recognized Legitimate Interests"). The provision does not exclude that other public interests could also be legitimate.

When Member States adopt national measures which are Recognized Legitimate Interests, the measures need not be communicated to the Commission. However, according to Article 21(4), any other "public interest" measures must be communicated to the Commission for a compatibility assessment prior to the measures being taken. The Commission has 25 working days to assess the compatibility of the measures with EU principles. The burden of proof lays on the Commission.

As such, the procedure is not a novelty in Europe and the exact same wording was used in the prior Merger Regulation which was in force until 2004.[6] The 25 working days deadline was introduced, however, in 2004 as part of the attempt to speed up the merger control process in the EU. The current relevance of Article 21 of the ECMR derives from the actual wave of cross-border mergers in Europe linked to sectors, such as energy or transport, in which the Member States seem to be reluctant to relinquish their authority.

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A number of questions, substantive and procedural, have arisen when applying Article 21(4). The core issue is the margin of discretion enjoyed by the Member States to use protectionist measures to raise barriers to the successful execution of cross-border transactions.

The first issue is substantive. EU institutions only have those powers conferred on them by the EC Treaty. The ECMR is based on Articles 83 and 308 EC Treaty, so the Member States have conferred no powers on the European Commission other than as properly interpreted by those Articles. Those Articles do not trump other EC Treaty Articles, and this is expressly recognized in the ECMR by preamble 19, which identifies that "*any Member State may take such measures as it considers necessary for the protection of the essential interests of its security which are connected with the production of or trade in arms, munitions and war material*" and also that Member States are not prevented from taking appropriate measures to protect legitimate interests other than those pursued by the ECMR. Therefore, Member States enjoy the right to adopt national measures on the basis of legitimate interests other than public security, plurality of media and prudential rules and the Commission has no power to prevent such measures taking effect.

However, this argument is clouded by the Commission's role as guardian of the EC Treaty, a role that requires the Commission to enforce the EC Treaty against Member States, and that the ECMR is a Council Regulation. This means the Member States agreed in Council to the Regulation and to be subject to the procedure set out in Article 21(4) ECMR. The reason for the Member States to come to such an agreement is the concern about potential abuse of the legitimate interest exception. Recent cases[7] where Member States have adopt-

ed national measures without prior communication to the Commission provide telling examples of such abuse. In those cases, the Commission questioned the legitimate nature of the measures and urged the Member States to communicate them.

For example, in a case involving the Republic of Portugal and its special rights as shareholder of the Target company, a former public undertaking,[8] the European Court of Justice concluded that (i) it is an obligation for the Member States to communicate the intended measures and their justification to the Commission; that (ii) the Commission can and should assess the compatibility of the measures, whether or not they have been communicated to it; and that (iii) in doing so, the Commission does not encroach on the Court's jurisdictional powers. The Court's findings appear to support the application for Article 21(4) in full, namely communication prior to taking into effect of the measures and, more importantly, that those measures are not legitimate interests until approved by the Commission.

As a result, following the court's findings, when the national measures are not previously communicated, the Commission's request to the Member States would seem to attach an initial preliminary assessment on incompatibility of the measures with EU law. Based on the lack of prior communication, the Commission would adopt a preliminary assessment stating that the legitimate/public interests that are claimed would be harmed have not been validated by the Commission and thus the measures intended to protect them are not lawful until reviewed and approved by the Commission.

Pragmatically, the Commission seems to have opted for a negotiation-approach, as opposed to a judicial one; the Commission appears to be balancing to what extent controversial concentrations can be saved....

For fullness, the above substantive point raises the issue of who bears the burden of proof. When the Member States communicate national measures under Article 21(4) of the ECMR, it is for the Commission to prove that the national measures are incompatible with EU law. However, when the measures are not communicated, the burden of proof shifts to the Member States. It will be for the Member States to prove that Article 21 of the ECMR is not violated. The shift of the burden of proof *de facto* perhaps restricts the ability of the Member States to successfully claim the interest is legitimate.

Rigorous and Timely Response?

Article 21 procedures entail a lengthy administrative process, where both parties seem to engage in unlimited letter exchange. The 25 working days assessment is taking an uncertain number of months, without the Commission being able to act as quickly as it should.

If, procedurally, the system may seem unbalanced in favor of the Commission, in reality, National Governments are clearly doing whatever they can to put forward any national interest justifications, legitimate or not. The Commission is aware that Article 21 issues involve delicate national politics and sometimes strategic economic sectors and that jurisdictional control is neither the most suitable option not the most threatening and timely solution.

The law is abused, no doubt, but the ways to cut down the abuse are less obvious. It could always be argued that Article 21 of the ECMR could be amended. The legitimate interests defense could be limited to a number of "interests" and all measures made subject to prior communication. Given that the ECMR is a regulation approved by the Council, many, if not

all, Member States would surely block any such amendment. The recourse to the legitimate interests justification could always be useful. Legislative change is probably not an option.

Pragmatically, the Commission seems to have opted for a negotiation-approach, as opposed to a judicial one; the Commission appears to be balancing to what extent controversial concentrations can be saved, even under the uncertainty as to whether, and significantly when, the national measures would be removed, without opening a *sine die* infringement procedure before the European Courts. Is this way of dealing with what it is seen as brute political interventionism effective? A recent case signals that the answer is no.

On 14 December 2006, the Spanish company Abertis and the Italian Autostrade made public their intention to put off their merger plans in what would have created the world's largest motorway group. The declaration was made at the end of an almost four-month-long process starting with the Commission approving the merger proposal on 22 September 2006.[9] During these four months the Commission requested the Italian Government to remove several national measures which impeded the implementation of the transaction. In particular, it was claimed that the contracts for the management of the Italian motorways held by Autostrade had been modified unilaterally and that certain proposals for regulatory changes which were to be introduced by the end of the year in the Budget Law would have also had a negative impact on the transaction. To the very end, the parties trusted that the Commission would prevail and declared throughout their faith in completing the transaction. But the legal uncertainty finally proved too much of a burden for the companies and the transaction seems to have been abandoned. The Commission is failing to efficiently act against this kind of political interventionism.[10]

Allegations of Discrimination and National Policies

Political interventionism can clearly damage core European freedoms which Member States have pledged to comply with. But it is also true that sometimes the presumed national interest justifications are not adopted without reason. On the one hand, Member States may concede to internal demands for protectionism as a reaction to actual or perceived discriminatory treatment. In the E.ON/ENDESA case, the Spanish Government pointed out that the Commission was treating Member States differently. In particular, the discussion has revolved around the so-called "Ruhrgas Clause." Under this condition, E.ON would have been obliged to sell ENDESA if a third party acquired more than 50% of its share capital.

Spain, through its energy regulatory body CNE, argued that a similar condition was precisely imposed on E.ON in 2002 by the German authorities following the takeover of Ruhrgas and that if Germany has not withdrawn the clause (or it is really not forced to do so), Spain should not be asked to do so.[11]

In relation to the energy sector, some argue that Member States can not simply be accused of being protectionists or anti-European, but that, on the contrary, Member States are using national remedies as a means to respond to the lack of consideration of national energy policies under the ECMR. In this context, it is suggested that merger control analysis should also

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Section 2 Refusal to Deal Jurisprudence Since *Trinko*:

Viable Claims Are Generally Limited to the Facts of *Aspen Skiing*

In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398 (2004), the Supreme Court revisited refusals to deal under Section 2 of the Sherman Act, and in so doing, characterized its prior decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.* as a "limited exception" to the general rule that a company may exercise independent discretion regarding the parties with whom it will deal.[1] This article examines the *Trinko* Court's reassessment of *Aspen Skiing*, and the degree to which the jurisprudence of the federal courts has followed suit. Based on the case law thus far, a defendant that successfully distinguishes its conduct from those facts of *Aspen Skiing* deemed pertinent by the *Trinko* Court will likely avoid refusal to deal liability under Section 2.

Trinko's Approach to Refusals to Deal

In *Trinko*, Verizon Communications Inc. ("Verizon") was the incumbent local exchange carrier serving New York State and, until the Telecommunications Act of 1996 ("1996 Act"), enjoyed a monopoly within its service area.[2] The 1996 Act required Verizon to share its network with competitors, including access to individual elements of its network on an unbundled basis.[3] As part of its obligations, Verizon was required to provide access to operations support systems (OSS), which provide support services to customers and through which Verizon's competitors would place customer orders; without access to OSS, a rival could not fill its customers' orders.[4] In late 1999, Verizon's competitors complained to regulators that many orders were going unfilled, in violation of Verizon's obligations under the 1996 Act. These complaints led to a Federal Communications Commission (FCC) consent decree and a series of orders from New York's Public Service Commission (PSC) that, *inter alia*, imposed $13 million in financial penalties on Verizon.[5] The day after Verizon entered into its consent decree with the FCC, the Law Offices of Curtis V. Trinko ("Trinko"), a local telephone service customer of AT&T, filed a complaint on behalf of itself and a class of similarly situated customers alleging—based on Verizon's conduct with regard to the OSS that was the subject of regulatory action by the FCC and PSC—that Verizon filled its rivals' orders on a discriminatory basis as part of a scheme to discourage customers from becoming or remaining customers of Verizon's competitors.[6]

After concluding that the existence of the 1996 Act, which contains an antitrust law savings clause, did not bar an antitrust claim under a theory of implied immunity, the Court turned

to Trinko's Section 2 claim based on Verizon's alleged refusal to deal. The Court first looked to *United States v. Colgate & Co*., 250 U.S. 300, 307 (1919) in stating that "as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'"[7] The Court then explained that in certain limited exceptions to the general rule—limited "because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm"—a refusal to cooperate with rivals can constitute a violation of Section 2. The Court reasoned that Trinko stated a claim for Section 2 liability only if the conduct alleged fell within an existing exception or provided a basis for recognizing a new one.[8]

The Court then compared the conduct alleged to that at issue in the previous leading case regarding refusals to deal, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp*., 472 U.S. 585, 593-94 (1985), which it characterized as "at or near the outer boundary of § 2 liability."[9] The *Trinko* Court recounted that in *Aspen Skiing*, the defendant, which had owned three out of four mountain ski areas in Aspen, for years had jointly issued a multiple-day, all area ski ticket with the plaintiff, which owned the fourth ski area. The defendant eventually canceled the joint ticket after continually demanding an increased share of the proceeds, and even refused to accept the plaintiff's offer to purchase the defendant's tickets at full retail price. The *Aspen Skiing* Court upheld a jury verdict for the plaintiff, on the basis that the jury could have concluded that the defendant's unilateral termination of its voluntary course of dealing with the plaintiff indicated a willingness to forego short run profits to reduce competition in the long run.[10] The *Trinko* Court added that "the defendant's unwillingness to renew the ticket *even if compensated at retail price* revealed a distinctly anticompetitive bent."[11]

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Turning to the refusal to deal alleged by Trinko's complaint, the *Trinko* Court explained that it did not fall within the limited exception recognized in *Aspen Skiing* because, in contrast to the defendant in *Aspen Skiing*, Verizon's prior conduct did not shed light on whether its conduct was prompted by anticompetitive intent. First, "[t]he complaint does not allege that Verizon voluntarily engaged in a course of dealing with its rivals, or would ever have done so absent statutory compulsion." Second, whereas the defendant in *Aspen Skiing* turned down an offer to sell to its rival at its own retail price, "suggesting a calculation that its future monopoly retail price would be higher," Verizon's failure to provide interconnection services at the cost-based compensation available under the 1996 Act, in the view of the *Trinko* Court, "tells us nothing about dreams of monopoly."[12] Third, whereas in *Aspen Skiing* the defendant refused to provide a product it already sold at retail, in *Trinko* the defendant had been accused of failing to provide services "not otherwise marketed or available to the public" that were never previously provided and had been brought out only under compulsion of the 1996 Act.[13] Based on this analysis, the *Trinko* Court concluded that Verizon's alleged conduct did not fall within any existing refusal-to-deal precedents.[14]

The Court then concluded that Trinko's complaint did not warrant the creation of a new exception to the general rule that there is no duty to aid competitors. The Court asserted that where a regulatory scheme designed to deter and remedy anticompetitive harm exists, "the additional benefit to competition provided by antitrust enforcement will tend to be small,

and it will be less plausible that the antitrust laws contemplate such additional scrutiny."[15] Then, the Court assessed "the slight benefits of antitrust intervention here" against its costs, and found no reason to expand Section 2 liability based on the case before it. First, it stated that applying the requirements of Section 2 is difficult due to the possibility of "mistaken inferences and false condemnations," which "chill the very conduct the antitrust laws are designed to protect."[16] Second, the Court stated that the cost of false positives—in this case, that Verizon's failure to provide a service "might have nothing to do with exclusion"—counseled against expanding Section 2 liability.[17] Finally, the Court cautioned that the conduct alleged by Trinko might be "beyond the practical ability of a judicial tribunal to control."[18]

Since *Trinko*, Courts Have Required Plaintiffs To Fit Within the Facts of *Aspen Skiing*

The federal district and appellate courts have largely followed *Trinko* by limiting viable refusals to deal to the "limited exception" of *Aspen Skiing*. For example, in *Covad Communications Co. v. Bellsouth Corp.*, on remand from the Supreme Court in light of *Trinko*, the Eleventh Circuit reversed its prior course and held that under *Trinko*, a telephone company's denial to the plaintiff of access to its network did not state an antitrust claim. In so doing, the court reasoned, *inter alia*, that "Trinko now effectively makes the unilateral termination of a voluntary course of dealing a requirement for a valid refusal-to-deal claim under *Aspen*."[19] In *Covad v. Bellsouth*, by contrast, the 1996 Act, as in *Trinko*, had required Bellsouth to enter into a relationship with Covad.[20] The D.C. Circuit, in *Covad Communications Co. v. Bell Atlantic Corp.*, similarly concluded that because "Covad alleges neither that Bell Atlantic had at one time voluntarily dealt with Covad nor that it would ever have been in Bell Atlantic's interest to have done so," allegations that Bell Atlantic failed to cooperate with Covad, just as in *Trinko*, did not state a claim under Section 2.[21] And the Ninth Circuit, in *Metronet Services Corp. v. Qwest Corp.*, also based its analysis of a refusal to deal claim on whether the plaintiff could fit its case "comfortably in the *Aspen Skiing* mold."[22] The *Metronet* court held that the plaintiff did not fall within the *Aspen Skiing* exception because Qwest's conduct did not involve sacrificing short-term profits for long-term anticompetitive gain, and because Qwest, unlike the defendant in *Aspen Skiing*, had not "refused to deal with MetroNet on the same terms that it deals with direct consumers."[23]

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District courts have followed suit. For example, in *America Channel, LLC v. Time Warner Cable, Inc.*, The America Channel (TAC), a new cable channel, alleged, inter alia, that Time Warner and Comcast refused to carry its programming on their cable systems in violation of Section 2.[24] In opposition to the defendants' motion to dismiss, TAC argued that its Section 2 claim was viable under "traditional principles" articulated in cases such as *Aspen Skiing*.[25] The court pointed to *Trinko*'s assessment of *Aspen Skiing* as "at or near the outer boundary of § 2 liability," and rejected TAC's contention because, in contrast to *Aspen Skiing*, "[h]ere there is no history of cooperation between TAC and Defendants to shed light on Defendants' motivations in refusing to deal with TAC."[26]

In *Kinderstart.com LLC v. Google, Inc.*, the court rejected a claim that Google's failure to remedy the alleged blockage of Internet users' access to the Kinderstart.com website through Google's search technology amounted to a viable refusal to deal under Section 2.[27]

In so doing, the court, *inter alia*, relied on *Trinko*'s interpretation of *Aspen Skiing*, pointing out that that there, "the larger of two ski resorts with a long-standing, bilateral, cooperative and profitable arrangement to market joint ski passes later refused to deal with the smaller resort—not even at market prices."[28] By contrast, the allegations did not identify either a prior voluntary course of dealing or a refusal to provide a product at retail prices, since Google had not previously sold search results to Kinderstart or anyone else.[29]

Similarly, the court in *In re Educational Testing Service Praxis Principles of Learning and Teaching: Grade 7-12 Litigation* found that the plaintiffs had failed to state a Section 2 claim based on allegations that Educational Testing Service (ETS) failed to make its test booklets and answer sheets available to competitors.[30] In so doing, it relied on *Aspen Skiing* as the sole exception to the rule that a monopolist has no duty to deal with its competitors, reasoning that "plaintiffs clearly cannot shoehorn their allegations into the paradigm of [*Aspen Skiing*], since "[t]here is no allegation that ETS changed a profitable course of dealing with a competitor to the detriment of that competitor."[31]

A review of the case law since *Trinko* indicates that a defendant facing refusal to deal liability under Section 2 of the Sherman Act may prevail on such a claim—even as early as the 12(b)(6) stage—if it succeeds in distinguishing its actions from the conduct at issue in *Aspen Skiing*.

And in *Dealer Computer Services, Inc. v. Ford Motor Co.*, the court relied solely on its ability to distinguish the case before it from *Aspen Skiing* in holding that a preliminary injunction for an alleged refusal to deal was unwarranted.[32] Dealer Computer Services (DCS), a provider of an electronic parts catalog, had received a monthly parts update pursuant to a license agreement for the prior ten years. The parties sought to renegotiate a new license agreement, but DCS would not agree to Ford's terms, which it found unreasonable. The court found *Aspen Skiing* distinguishable on three separate grounds. First, in the court's view, the existence of an expired license agreement between the parties, which the parties were unsuccessful in renegotiating, did not amount to a "course of dealing" as required by *Aspen Skiing*, even if the term of the license agreement had lasted ten years. Second, the court concluded that, unlike the defendant in *Aspen Skiing*, Ford was not sacrificing short term profits for long term anticompetitive gains when it offered to renew the license agreement on terms that were unacceptable to the plaintiff. Finally, the court concluded that unlike Aspen Skiing Co., Ford had a legitimate business reason for its conduct, because "Ford's decision to provide its own electronic parts catalog is nothing more than an attempt to provide actual parts at a lower cost to its dealers...."[33]

Conclusion

A review of the case law since *Trinko* indicates that a defendant facing refusal to deal liability under Section 2 of the Sherman Act may prevail on such a claim—even as early as the 12(b)(6) stage—if it succeeds in distinguishing its actions from the conduct at issue in *Aspen Skiing*. Based on the Supreme Court's recent interpretation in *Trinko*, *Aspen Skiing* provides at least three separate bases on which to do so: (i) the absence of a prior voluntary course of dealing between a defendant and its rivals; (ii) the absence of facts or allegations that would suggest that the defendant's conduct is based on a calculation that its future monopoly price would be higher as a result of refusing to deal; and (iii) the absence of facts or allegations that the defendant has refused to provide a product already sold at retail. It is

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Antitrust Modernization Commission Overview of Immunities and Exemptions

In June 2001, F. James Sensenbrenner, Jr. (R-WI), then Chairman of the House Judiciary Committee, introduced a bill[1] intended to address "issues and problems relating to the modernization of the antitrust laws."[2] While Chairman Sensenbrenner acknowledged that the federal antirust laws "have served us well over the past one hundred years" he recognized the need to form a bipartisan commission to study whether "any changes might help ensure a competitive and innovative marketplace for the next one hundred years."[3]

The federal antitrust laws were designed to promote consumer welfare. By prohibiting anticompetitive behavior, they serve the U.S. economy by facilitating innovation, lowering prices, and improving the quality of products and services offered to American consumers. However, in many ways, today's marketplace is vastly different from the one Congress sought to advance when enacting much of the current federal antitrust legislation.

In November 2002, Congress responded to Chairman Sensenbrenner by establishing a commission empowered to make recommendations about the antitrust laws.[4] The Antitrust Modernization Commission ("Commission") consists of 12 members, four appointed by the President, four appointed by the leadership of the Senate, and four appointed by the leadership of the House of Representatives.[5] The Commission is comprised of prominent antitrust practitioners, private law firm attorneys and in-house counsel, as well as current and former members of the Federal Trade Commission ("FTC") and Department of Justice ("DOJ").[6]

[I]n many ways, today's marketplace is vastly different from the one Congress sought to advance when enacting much of the current federal antitrust legislation.

While ensuring that the antitrust laws are compatible with encouraging efficiency and innovation in today's economy is an important goal, any adaptation must be done cautiously so as not to alter the free market that these laws have preserved. Congress therefore directed the Commission as follows:

- Examine whether the need exists to modernize the antitrust laws and to identify and study related issues;
- Solicit views of all parties concerned with the operation of the antitrust laws;
- Evaluate the advisability of proposals and current arrangements with respect to any issues so identified; and
- Prepare and submit to Congress and the President a report based on its findings.[7]

The Commission's report is to contain "a detailed statement of the findings and conclusions of the Commission, together with recommendations for legislative or administrative action the Commission considers to be appropriate."[8]

Immunities and Exemptions Working Group

In January 2005, the Commission selected an initial list of issues to study as part of its mandate to examine whether the U.S. antitrust laws require modernization.[9] The Commission created ten working groups to study the issues and recommend potential revisions to the

antitrust laws.[10] One of the initial issues identified for examination is statutory immunities and exemptions to the federal antitrust laws, which is the topic of this article.

The Immunities and Exemptions working group identified thirty-one exemptions and immunities to the federal antitrust laws. Recognizing that Congress is not likely to permit a thorough examination of every individual immunity and exemption, the working group decided to focus on a few of the more common exemptions for illustrative purposes, *e.g.*, the McCarran-Ferguson Act exemption for insurers,[11] and to formulate a general methodology for Congress and the courts to employ when evaluating immunity and exemption issues. The Commission anticipates that its proposed framework will be applied to future analyses of antitrust immunities and exemptions.

[A] number of exemptions and immunities, many of which were enacted decades ago, may no longer be necessary or beneficial to U.S. economic interests.

Proposed and Tentative Recommendations

The primary issue being addressed by the Immunities and Exemptions working group is the question, "Should antitrust immunities and exemptions be eliminated if not justified by the benefits they provide, or should they otherwise be time-limited?"[12]

A central premise of U.S. economic policy is that "vigorous competition in a free market, protected by the sound application of the antitrust laws, is the best approach to promote consumer welfare and efficiency."[13] Exception from federal antitrust law is typically inconsistent with this policy. Thus, exemptions and immunities are generally considered justified, and enacted into law, only when necessary to correct market failures. However, product and geographic markets are not static—a number of exemptions and immunities, many of which were enacted decades ago, may no longer be necessary or beneficial to U.S. economic interests.[14] For example, the Anti-Hog-Cholera Serum and Hog-Cholera Virus Act,[15] enacted in 1935, has been irrelevant for many years, as the U.S. was declared free of hog cholera in the late 1970's.

There is a consensus in the Commission that free market competition benefits consumer welfare by forcing lower prices, improved quality, and greater innovation, while exceptions limiting free market competition can result in inefficiencies that deny consumers these benefits. A number of formerly regulated industries, *e.g.*, airlines, trucking, and telecommunications, originally deemed ill-suited for market-based competition, have been substantially deregulated in recent decades as U.S. policymakers recognize that competition in most markets is more effective than any form of price control.

Accordingly, the Commission is expected to propose a framework for analysis that strongly disfavors statutory immunities. The positions of the commissioners during deliberations and hearings suggest that the Commission will recommend that immunity from federal antitrust law rarely be granted, and when it is, that it should be in effect only as long as necessary to satisfy a societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general.[16] Likewise, the commissioners agree that courts should construe all exceptions to competition as narrowly as possible.[17]

The Commission's potential and tentative recommendations suggest that the Commission will propose the following tripartite test for Congress to consider when evaluating the need for existing or new immunities:

- Whether, absent the immunity, the conduct to which the immunity applies could, or would, subject the actors to antitrust liability;
- The likely adverse impact of the immunity on consumer welfare; and
- Whether a particular societal goal trumps the goal of consumer welfare achieved through competition.[18]

The commissioners tentatively agree that procedural safeguards be employed to assist Congress in its consideration of the above factors, including:

- Creating a full public record on any existing or proposed immunity under consideration by Congress;
- Consulting with the FTC and DOJ about whether the conduct at issue could subject the actors to antitrust liability and the likely competitive effects of the immunity; and
- Requiring proponents of an immunity to submit evidence showing that consumer welfare achieved through competition has less value than the goal promoted by the immunity, and that the immunity is the least restrictive means of achieving the goal.[19]

[T]he Commission is expected to propose a framework for analysis that strongly disfavors statutory immunities.

Finally, if Congress determines that immunity to the federal antitrust laws is necessary, the Commission will likely recommend that Congress:

- Consider a limited form of immunity, such as a limit to the type of conduct to which the immunity applies and the extent of the immunity;
- Adopt a sunset provision under which the immunity would terminate at a specified time unless renewed; and
- Prior to any vote on renewal, require the FTC, in consultation with the DOJ, to report to Congress as to whether the conduct could subject the actors to antitrust liability as well as the competitive effects of the immunity.[20]

McCarran-Ferguson Act

In addition to the general immunities and exemptions studied by the Commission, the working group held a separate hearing on the McCarran-Ferguson Act, one of the initial exemptions the Commission proposed to study for illustrative purposes.

Congress passed the McCarran-Ferguson Act[21] ("McCarran") in 1945 after the Supreme Court determined that insurance is a form of interstate commerce that can be regulated by Congress and subjected to the federal antitrust laws.[22] McCarran affords insurers an exemption from the federal antitrust laws when: (1) the challenged practice is part of the "business of insurance,"[23] (2) the practice is "regulated by State law," and (3) the practice does not constitute an agreement or act to "boycott, coerce, or intimidate."[24]

The McCarran exemption was deemed necessary to promote a societal goal that may be inhibited by the antitrust laws in the absence of protective legislation. In order to price insurance policies, insurers must project loss costs—the costs of covering and adjusting claims. The projection of loss costs generally requires large amounts of historical data and actuarial expertise, neither of which are ordinarily possessed by single insurers with respect to all of the lines of insurance that they sell. Many insurers, particularly property and casualty insurers, cooperate on rate-related matters through participation in "rating" or "advisory" organizations that collect "historic loss costs" according to risk classifications, determine "prospective loss costs" through loss development (*i.e.*, projection of future claims under past policies) and trending (*i.e.*, examination of trends affecting future losses), and develop "end rates" by considering loss costs in addition to administrative and other expenses. Insurers often underwrite risk jointly in order to spread a policyholder's risk amongst themselves, allowing coverage in situations where a single insurer may not be willing to accept the full risk.

[T]he Commission's examination of McCarran illustrates that repeal or modification of an exemption could have significant implications for those protected by the immunity as well as consumers and the U.S. economy in general.

Proponents of McCarran contend that cooperation on matters related to the business of insurance is procompetive and serves U.S. economic interests because, among other things, it reduces the costs associated with pricing and regulating insurance, allows consumers to better compare products, and provides insurance for risks otherwise unable to obtain coverage. Absent the McCarran exemption, many services provided by rating and advisory organizations, such as joint trending and standardized risk classifications, might be found to violate federal antitrust laws. Opponents of McCarran, including Eliot Spitzer, current Governor and former Attorney General of the State of New York, argue that a uniform federal standard would benefit both plaintiffs and defendants, in contrast to "disparate actions, under different [state] laws, that may yield inconsistent results."[25] Spitzer, writing as Attorney General, also points to settlements obtained in state court for alleged customer allocation and bid-rigging among insurance providers that may not have been obtained in federal court due to the McCarran exemption.[26] As is apparent, the Commission's examination of McCarran illustrates that repeal or modification of an exemption could have significant implications for those protected by the immunity as well as consumers and the U.S. economy in general.

Next Steps

The Commission plans to submit its final report to Congress and the President on April 2, 2007.[27] Both the House Judiciary Committee, chaired by John Conyers, Jr. (D-MI) and the Senate Judiciary Committee, chaired by Patrick J. Leahy (D-VT), will review the report and may hold hearings concerning the Commission's recommendations regarding current and proposed statutory immunities and exemptions. While it is difficult to predict whether the Judiciary Committees will propose legislation implementing the Commission's recommendations, several Congressmen have publicly revealed inclinations regarding certain immunities.

Charles E. Grassley (R-IA), member of the Senate Judiciary Committee as well as the Subcommittee on Antitrust, Competition Policy and Consumer Rights, has advocated in favor of the limited antitrust exemptions afforded by the Export Trading Company Act[28] ("ETCA") to U.S. exporters of agricultural products.[29] Other Senators, including Trent Lott (R-MS), Thad Cochran (R-MS),[30] and Craig Thomas (R-WY)[31] have also publicly recognized the advantages to U.S. exporters afforded by the ETCA as well as the Webb-Pomerene Export Act.[32]

Chairman of the Senate Judiciary Committee, Patrick Leahy, as well as ranking member Arlen Specter (R-PA), are likely to take a keen interest in any impact of the Commission's recommendations regarding the exemption afforded to insurance providers by the McCarran-Ferguson Act. Senator Specter has confronted the issue of whether federal oversight of the insurance industry is necessitated by the perceived lax enforcement of some state antitrust laws. During a hearing convened by Senator Specter before the Senate Judiciary Committee in June 2006 regarding possible repeal or modification of McCarran, the Senator questioned Illinois Insurance Director Michael McRaith as to why his state did not file criminal complaints against executives accused of bid-rigging activities by New York Attorney General Eliot Spitzer, despite Mr. McRaith's admission that the activities uncovered by Mr. Spitzer's office harmed Illinois consumers.[33]

Senator Leahy has introduced potential legislation aimed at tackling issues confronting consumers as a result of increasing medical malpractice insurance premiums.[34] The Chairman of the Senate Judiciary Committee proposes exempting medical malpractice insurers from the protections of the McCarran-Ferguson Act—"If insurers around the country are operating in an honest and appropriate way, they should not object to being answerable under the same federal antitrust laws as virtually all other businesses."[35]

The Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights may also hold independent hearings and propose action regarding the Commission's immunity and exemption recommendations. During the 108th Congress, both Subcommittee Chairman Mike DeWine (R-OH) and ranking member Herbert Kohl (D-WI) acknowledged that exemptions may be warranted in special circumstances, but cautioned that "each exemption effectively repeals antitrust law in a piece-by-piece manner."[36] The Senators' concern stemmed from the recognition that immunities "create inconsistency in the law and often are not founded on sound economic policy rationales."[37] The Senators therefore recommended that the FTC and DOJ play a more active role in commenting on proposed exemptions, many of which are enacted with little input from these agencies.[38]

In addition to hearings that may be held by the Judiciary Committees, the House Oversight and Government Reform Committee, chaired by Representative Henry Waxman (D-CA), plans to soon conduct a series of oversight hearings and investigations to determine, among other things, whether legislation in certain business areas should be continued, curtailed, or eliminated.[39] Also, the committee's recently formed Domestic Policy Subcommittee, chaired by Representative Dennis Kucinich (D-OH), has far-reaching investigatory authority that includes federal antitrust oversight. If the Commission's recommendations to Congress raise sufficient interest on Capitol Hill, the House and Government Reform Committee or the Domestic Policy

Subcommittee could also decide to hold hearings concerning statutory immunities and exemptions to the federal antitrust laws.

Conclusion

The Antitrust Modernization Commission is scheduled to submit its report to Congress and the President in April of this year. Recognizing the benefits of free market competition, the Commission is expected to recommend a framework for analysis that strongly disfavors statutory immunities and exemptions from federal antitrust law, and will advise Congress to grant immunity only where necessary to satisfy a societal goal that trumps the benefit of a free market. Where immunity is deemed necessary, the Commission will likely advise Congress to adopt a sunset provision pursuant to which the immunity would terminate at a specified time unless renewed. Also, the Commission will likely suggest that Congress seek advice regarding the competitive effects of specific exemptions from the Federal Trade Commission and the Department of Justice, the agencies having the most experience with application of the federal antitrust laws.

While the Commission will likely recommend a methodology for analysis rather than address each specific individual existing or proposed immunity, the report will apply current antitrust and economic thinking to long-standing immunities enacted over time in diverse political and social environments. As a result, the Commission's recommendations, and Congress' reaction thereto, may have significant implications for those industries and businesses that are currently affected by exemptions from the federal antitrust laws, as well as consumers and the U.S. economy in general.

Michael P. Bodosky, Washington, D.C.

Endnotes

1 H.R. 2325, 107th Cong. (2001).

2 Press Release, United States House of Representatives, Committee on the Judiciary, Sensenbrenner Introduces Antitrust Study Commission Legislation (June 27, 2001), *at* http://judiciary.house.gov/judiciary/news_062701.htm.

3 *Id*.

4 Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051-60, 116 Stat. 1856 (2002).

5 *Id*. § 11054(a).

6 Deborah A. Garza of Fried, Frank, Harris, Shriver & Jacobson LLP, in Washington, D.C., serves as chair of the Commission, while Jonathan R. Yarowsky of Patton Boggs LLP, also in Washington, D.C., serves as Vice-Chair. The remaining ten commissioners are Makan Delrahim, former Deputy Assistant Attorney General for International, Policy, and Appellate Matters in the Antitrust Division of the U.S. Department of Justice; Bobby R. Burchfield, Esq., McDermott, Will & Emery, Washington, D.C.; Dennis W. Carlton, Deputy Assistant Attorney General for Economic Analysis of the Department of Justice Antitrust Division; W. Stephen Cannon, Chairman, Constantine Cannon, LLP, Washington, D.C.; Jonathan M. Jacobson, Esq., Wilson, Sonsini, Goodrich, Rosali, New York City; Donald G. Kempf, Jr., formerly, Executive Vice President, General Counsel, Chief Legal Officer, and Secretary for Morgan Stanley, New York City; Sanford M. Litvack, Esq., Hogan & Hartson LLP, Los Angeles; John H. Shenefield, Esq., Morgan, Lewis & Bockius LLP, Washington, D.C.; Debra A. Valentine, Vice President, Secretary, and Associate General Counsel, United Technologies Corporation, Hartford, Connecticut; and John L. Warden, Esq., Sullivan & Cromwell LLP, New York City. Andrew J. Heimert, former attorney in the Office of Policy & Coordination within the Bureau of Competition at the FTC, serves as Executive Director & General Counsel of the Commission;

Susan S. DeSanti, former Deputy General Counsel for Policy Studies at the FTC serves as Senior Counsel of the Commission. Deborah P. Majoras resigned her position on the Commission upon her appointment as Chairman of the FTC.

7 Pub. L. No. 107-273, § 11053.

8 *Id*. § 11058.

9 The issues initially selected for study include Civil Procedure & Remedies; Criminal Procedure & Remedies; Immunities & Exemptions; Intellectual Property; International; Mergers, Acquisitions, and Joint Ventures; Regulated Industries; and Single Firm Conduct. Antitrust Modernization Commission, Issues Selected for Study (Jan. 13, 2005), *available a*t http://www.amc.gov/pdf/meetings/study_issues.pdf.

10 The ten working groups are Criminal Remedies; Enforcement Institutions; Exclusionary Conduct; Immunities and Exemptions; International; Merger Enforcement; "New Economy" Issues; Civil Remedies; Robinson-Patman Act; and Regulated Industries. Antitrust Modernization Commission, Study Group Participants (Jan. 12, 2007), *available at* http://www.amc.gov/pdf/meetings/Study_Group_Participants_List_rev2.pdf.

11 15 U.S.C. §§ 1011-15. Other common exemptions on which the Commission decided to focus for illustrative purposes include the Webb-Pomerene Export Act, 15 U.S.C. §§ 61-66, and the Export Trading Company Act, 15 U.S.C. §§ 4001-21. Antitrust Modernization Commission, Immunities and Exemptions Discussion Memorandum (July 11, 2006), *available at* http://www.amc.gov/pdf/meetings/IE-Statutory%20DiscMemo060711fin.pdf.

12 Antitrust Modernization Commission, Immunities and Exemptions Discussion Memorandum (July 11, 2006) at 1, *available at* http://www.amc.gov/pdf/meetings/IE-Statutory%20DiscMemo060711fin.pdf.

13 *Public Hearing, Antitrust Modernization Commission* (Mar. 21, 2006) (testimony of Deborah Platt Majoras, Chairman, Federal Trade Commission) at 9, *available at* http://www.amc.gov/commission_hearings/pdf/060321_FTC_DoJ_Transcript_reform.pdf.

14 *Id*.

15 7 U.S.C. § 852.

16 Antitrust Modernization Commission, Potential Recommendations for Review (July 2006), *available at* http://www.amc.gov/pdf/meetings/ReportOutline060720circ.pdf; Antitrust Modernization Commission, Tentative Recommendations (Jan. 11, 2006), available at http://www.amc.gov/pdf/meetings/list_of_recommendations_jan_11v3.pdf.

17 *Id*.

18 *Id*.

19 *Id*.

20 *Id*.

21 15 U.S.C. §§ 1011-15.

22 *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

23 The Supreme Court set forth the following test to determine whether an activity should be considered the business of insurance: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry." *United Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 120 (1982) (emphasis added).

24 15 U.S.C. § 1012(b); *id*. § 1013(b).

25 Comments of the Office of the Attorney General of New York State In Response to the Request for Public Comments on Immunities and Exemptions (July 15, 2005), *available at* http://www.amc.gov/public_studies_fr28902/immunities_exemptions_pdf/Office_of_NY_AG_revd.pdf.

26 *Id*.

27 The Commission has until July 15, 2007 to submit its report, three years after the Commission's first meeting. Pub. L. No. 107-273, § 11058, 116 Stat. 1856 (2002). The Commission shall cease to exist 30 days after the report is submitted. *Id*. § 11059.

28 The ETCA allows U.S. exporters to lower exporting costs by sharing information regarding foreign markets, negotiating freights rates, and operating joint sales facilities, as well as other joint activity that may otherwise violate the federal antitrust laws. 15 U.S.C. §§ 4001-21.

29 Letter from Senator Charles E. Grassley to Antitrust Modernization Commission (June 20, 2006), *available at* http://www.amc.gov/public_studies_fr28902/immunities_exemptions_pdf/060620_grassley_ie.pdf.

30 Letter from Senator Trent Lott and Senator Thad Cochran to Antitrust Modernization Commission (July 12, 2006), *available at* http://www.amc.gov/public_studies_fr28902/immunities_exemptions_pdf/060712-Lott_Cochran_IE.pdf.

31 Letter from Senator Craig Thomas, *et. al.*, to Antitrust Modernization Commission (June 13, 2006), *available at* http://www.amc.gov/public_studies_fr28902/immunities_exemptions_pdf/060613_Thomas_et_al.pdf.

32 The Webb-Pomerene Act exempts from the antitrust laws agreements or acts in the course of export trade by an association created for the sole purpose of engaging in such trade. 15 U.S.C. §§ 61-66.

33 *The McCarran-Ferguson Act: Implications of Repealing the Insurers' Antitrust Exemption: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., 2nd Sess., (June 20, 2006).

34 The Medical Malpractice Insurance Antitrust Act of 2005, S. 1525, 109th Cong. (2005), introduced by Senator Leahy along with Senators Edward M. Kennedy (D-MA), Richard J. Durbin (D-IL), John D. Rockefeller (D-WV), Barbara L. Boxer (D-CA), Russell D. Feingold (D-WI), Kenneth L. Salazar (D-CO), Barack H. Obama (D-IL), and Barbara A. Mikulski (D-MD).

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35 *The McCarran-Ferguson Act: Implications of Repealing the Insurers' Antitrust Exemption: Hearing Before the S. Comm. on the Judiciary*, 109th Cong., 2nd Sess., (June 20, 2006) (statement of Sen. Patrick Leahy), *at* http://judiciary.senate.gov/member_statement.cfm?id=1952&wit_id=2629.

36 Letter from Senator Mike DeWine and Senator Herbert Kohl to Antitrust Modernization Commission (October 1, 2004), *available at* http://www.amc.gov/comments/senatesubcomm.pdf.

37 *Id*.

38 *Id*.

39 The House Oversight and Government Reform Committee is the main investigative committee in the U.S. House of Representatives, having jurisdiction to investigate any federal program and any matter with federal policy implications. Its oversight responsibilities include reviewing and studying conditions or circumstances that may indicate the necessity or desirability of enacting new or additional legislation. Rule X, clause 1, Rules of the House of Representatives (as amended by H.R. 6, 110th Cong. (2007); *id*. at clause 2, 3.

"Scope of Legal Privilege" continued from page 12

Endnotes

1 Landgericht Bonn, Decision of 29 September 2005, Ref.: 37 Qs 27/05. While usually seizure requires a court order, in cases of exigent cirumstances the FCO itself may order the seizure of objects. The Bonn district court is solely competent to hear complaints against orders issued by the FCO.

2 Additionally, the FCO can also initiate administrative proceedings based on the Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen—GWB). While both proceedings may include the seizure of objects which may be of importance as evidence of the investigation, the scope of privilege differs.

3 The legal standard for the seizure of attorney-client communication as a result of administrative proceedings is the principle of proportionality and, finally, constitutional law. For constitutional reasons, administrative seizure can only take place at business premises. While the attorney privilege applies to these cases, the defense privilege does not, since administrative proceedings do not involve criminal allegations which are a pre-condition for the applicability of the defense privilege.

4 ECJ, case 155/79, *AM & S Europe v Commission*, [1982] ECR 1575.

5 CFI, joined cases T-125, 253/03 R, *Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd v Commission*, [2003] ECR II-4771; partially annulled by the judgement: ECJ, case C-7/04 P(R), *Commission v Akzo Nobel Chemicals Ltd. and Akcros Chemicals Ltd*, [2004] ECR I-8739.

6 Questionably, the court did not consider, the rule set-out in the *Hilti* decision of the CFI, that notes summarizing advice received from outside counsel are covered by this principle; *see* CFI, case T-30/89, *Hilti v Commission*, [1990] ECR II-1439.

7 Please note: This privilege is not applicable where the FCO initiates administrative proceedings.

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particularly notable that whereas in *Trinko*, the Supreme Court distinguished the alleged conduct on all three bases, the lower courts' decisions apparently have not required defendants to do so; rather, the courts place the burden on the plaintiff to fit within the mold of *Aspen Skiing*.

Paula Garrett Lin, New York

Endnotes

1 *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 409 (2004).

2 *Id*. at 402.

3 *Id*.

4 *Id*. at 403.

5 *Trinko*, *supra* note 1, 540 U.S. *at* 403-404.

6 *Id*. *at* 404-405.

7 *Id*. *at* 407 (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

8 *Trinko*, *supra* note 1, 540 U.S. *at* 408.

9 *Id*. *at* 409.

10 *Id*. *at* 408-409 (discussing *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 72 U.S. 585, 593-94, 608, 610-11 (1985)).

11 *Id*. *at* 409 (emphasis in original).

12 *Trinko*, *supra* note 1, 540 U.S. *at* 409.

13 *Id*. at 410.

14 *Id*. The Court also noted that its conclusion would remain unchanged even if it chose to recognize the essential facilities doctrine, because the main requirement for invoking the doctrine–unavailability of access to the essential facility–was not present. Rather, in *Trinko*, the 1996 Act had extensive provisions for access, "making it unnecessary to impose a judicial doctrine of forced access." *Id*. *at* 411.

15 *Trinko*, *supra* note 1, *at* 412.

16 *Id*. at 414 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)).

17 *Id*.

18 *Id*. (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 233 (1993)).

19 *Covad Commc'ns Co. v. Bellsouth Corp.*, 374 F.3d 1044, 1049 (11th Cir. 2004).

20 *Id*.

21 *Covad Commc'ns Co. v. Bell Atlantic Corp*., 398 F.3d 666, 673 (D.C. Cir. 2005). Separately, the D.C. Circuit did permit allegations that Bell Atlantic had refused to sell Covad's DSL service to would-be customers to survive the motion to dismiss. *Id*. *at* 675. In so doing, the court found that Covad had sufficiently pleaded that this refusal had caused Bell Atlantic short-term economic loss. *Id*. *at* 675-76. It also found Bell Atlantic's claim that the refusal was economically justified was a question of fact not appropriate for resolution on a motion to dismiss. *Id*. *at* 676.

22 *Metronet Servs. Corp. v. Qwest Corp*., 383 F.3d 1124, 1132 (9th Cir. 2004).

23 *Id*. *at* 1134.

24 *America Channel, LLC v. Time Warner Cable, Inc*., No. 06-2175 (DWF/SRN), 2007 WL 142173, *at* *1, *9-*10 (D. Minn. Jan. 17, 2007).

25 *Id*. *a*t *10.

26 *Id*. *at* *11.

27 *Kinderstart.com LLC v. Google, Inc*., No. C 06-2057 JF (RS), 2006 WL 3246596, *at* *3, *10 (N.D. Ca. July 13, 2006).

28 *Id*. *at* *10.

29 *Id*.

30 *In re Educational Testing Service Praxis Principles of Learning and Teaching: Grade 7-12 Litig.*, 429 F. Supp. 2d 752, 758-59 (E.D. La. 2005).

31 *Id*.

32 *Dealer Computer Servs., Inc. v. Ford Motor Co*., No. Civ.A. H-06-175, 2006 WL 801033, *at* *4-*5 (S.D. Tex. March 28, 2006).

33 *Id*. *at* *5.

"Authorized Generics" continued from page 6

The FTC report could have some impact on the enactment and the nature of any legislation. Some past FTC reports, such as the Generic Drug Entry Prior to Patent Expiration ("Generic Entry Study"),[36] have recommended legislation. Other times, however, the Commission has concluded that there is no competitive concern warranted. This was the case for instance, with the Pharmacy Benefit Managers ("PBM Study").[37]

Where the subject of an FTC report presents a competition related problem that the antitrust laws do not address, there is a stronger basis for legislation. As described above, it is difficult to conceive of how the licensing of an authorized generic, without more, could ever be a violation of the antitrust laws. However, this would not preclude the possibility of a recommendation for legislation if the FTC determines that authorized generics are, on net, anticompetitive.

The question remains as to whether Congress will wait. Normally, the prospect that this study could lead to recommended additional legislation may also defer consideration of any other legislation relating to Authorized Generics. However, the slow pace with which the FTC study has proceeded may cause Congress to decide not to wait, particularly if no federal register notice announcing the next phase of the report appears soon.

A second possibility apart from legislation is that the study will lead to government enforcement actions. In recent years, one accepted means of case generation at the FTC was the discovery of information in an unrelated investigation. For example, companies who submit documents in response to a Second Request have found themselves being subjected to investigations for unrelated conduct. Given the breadth of information that the Commission seeks, it would not be surprising if one or more investigations arises from this study. It is unlikely that the investigations will involve the novel theories that some commentators urge, but there could well be investigations.

Finally, it is almost certain that the FTC study will, as promised, add to the economic literature on the subject of authorized generics. While the controversy about incentives and effects run deep, there has been little systematic economic analysis in this area. The FTC study will certainly provide this. However, given the nature of the controversy, the study could well be interpreted in many ways, and extend the disagreements, rather than resolve them.

John Roberti, Washington, D.C.

Endnotes

1 A version of this article appeared in the July issue of the "Antitrust Health Care Chronicle," published by the ABA Antitrust Section's Healthcare Committee.

2 *See* William K. Hubbard, Letter to Stuart A. Williams, Chief Legal Officer Mylan Pharmaceuticals Inc. re: Docket Nos. 2004P-0075/CP1 and 2004P-0261/CP1 at 2 (Jul. 2, 2004) (Food and Drug Administration Response to Citizen Petitions of Mylan Pharmaceuticals Inc. and Teva Pharmaceuticals USA, Inc.) (hereinafter, "*FDA Letter Response to Mylan Petition*") (The Food and Drug Administration has defined an authorized generic to be "a product approved under a new drug application (NDA), by that NDA holder, under that NDA, but at a lower price and not under the 'brand' name, possibly through a different channel of distribution.").

3 *See* 21 U.S.C. § 355 *et. seq*.

4 21 U.S.C. § 355(b).

5 21 U.S.C. § 355(j).

6 21 U.S.C. §355(j)(2)(A)(vii).

7 21 U.S.C. §355(j)(5)(B)(iv).

8 *See*, *e.g.*, Generical Pharmaceutical Association, GPhA Statement on PhRMA Assessment of Authorized Generics (June 28, 2006), *available at* http://www.gphaonline.org.

9 *Teva Pharmaceutical Industries, Ltd. v. Crawford*, 410 F.3d 51 (D.C. Cir. 2005); *Mylan Pharmaceuticals, Inc. v. Food and Drug Adminstration*, No. Civ.A. 104CV242, 2005 WL 2411674 (N.D.W. Va. Sep. 29, 2005); *FDA Letter Response to Mylan Petition*.

10 *FDA Letter Response to Mylan Petition* at 2.

11 *Id*.

12 Letter from Alex Sugerman-Brozan to Office of the Secretary, Federal Trade Commission (June 5, 2006) p. 4, *available at* http://www.ftc.gov/os/comments/genericdrugstudy3/060605pal.pdf (Prescription Access Litigation Project comments relating to the FTC Study on Authorized Generics) (hereinafter, "PAL Comments").

13 Letter from David Balto to Donald S. Clark (June 6, 2006) p. 3, *available at* http://www.ftc.gov/os/comments/genericdrugstudy3/060606balto.pdf (American Antitrust Institute, Consumer Federation of America, Families USA and US PIRG comments relating to the FTC Study on Authorized Generics) (hereinafter, "AAI Comments").

14 *See* Comments on Proposed Information and Document Requests, FTC Authorized Generic Study, submitted by Ronald W. Davis, (June 4, 2006), *available at* http://www.ftc.gov/os/comments/genericdrugstudy3/060604davis.pdf. (hereinafter, "Davis Comments").

15 Letter from Robert A. Armitage, Eli Lilly and Company, to Office of the Secretary, Federal Trade Commission (June 5, 2006) p.3, *available at* http://www.ftc.gov/os/comments/genericdrugstudy3/060605lilly.pdf (Eli Lilly comments relating to the FTC Study on Authorized Generics) (hereinafter, "Eli Lilly Comments").

16 Letter from Tim Gilbert to Office of the Secretary, Federal Trade Commission *at* 2 (June 5, 2006), *available at* http://www.ftc.gov/os/comments/genericdrugstudy3/060605gilberts.pdf (comments to FTC Authorized Generics study submitted on behalf of a major generic drug company) (hereinafter, "Gilbert Comments").

17 *FDA Letter Response to Mylan Petition* at 13.

18 Pub. L. 109-171.

19 *See* David A. Balto, We'll Sell Generics, Too, *Legal Times*, March 20, 2006.

20 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-90 (1986) ("cutting prices in order to increase business often is the very essence of competition").

21 Brooke Group, 509 U.S. at 222.

22 *Id*. at 222-26.

23 Areeda and Hovenkamp ¶ 723d, 726c.

24 *United States v. AMR Corp.*, 140 F. Supp.2d 1141, 1204-1205 (D. Kan. 2001), aff'd, 335 F.3d 1109 (10th Cir. 2003).

25 AAI Comments p. 3.

26 *United States v. AMR Corp.*, 140 F. Supp.2d 1141 (D. Kan. 2001), aff'd, 335 F.3d 1109 (10th Cir. 2003).

27 AMR Corp., 140 F. Supp.2d. at 1216.

28 15 U.S.C. § 1. Because Section 1 requires a combination or conspiracy between two or more parties, unilateral issuance of an authorized generic by the pioneer drug company would not violate Section 1.

29 While some commentators for consumer groups suggested that the existence of authorized generics could make the possibility of anti-competitive settlements more likely, none suggested that a unilateral decision to offer authorized generics is unlawful under the antitrust laws. *See* PAL Comments; AAI Comments; Letter from William Vaughan to Federal Trade Commission (June 4, 2006), *available at* http://www.ftc.gov/os/comments/genericdrugstudy3/060604consumersunion.pdf (consumer union comments).

30 *See* Jon Leibowitz, FTC Commissioner, Exclusion Payments to Settle Pharmaceutical Patent Cases: They're B-a-a-a-c-k! (The Role of the Commission, Congress and the Courts, Address Before Second Annual In-House Counsel's Forum on Pharmaceutical Antitrust (April 24, 2006), (transcript *available at* http://www.ftc.gov/speeches/leibowitz/060424PharmaSpeechACI.pdf).

31 M. Howard Morse and Richard E. Coe, Authorized Generics Are Good For You, *Legal Times*, April 10, 2006.

32 *See* Press Release, Grassley, Leahy, Rockefeller Request Study on Impact of "Authorized" Generics, May 12, 2005, *available at* http://leahy.senate.gov/press/200505/051205b.html (reprinting letter to FTC dated May 9. 2005).

33 Letter from Deborah Majoras, Chairman, to The Honorable Charles E. Grassley, Nov. 4, 2005.

34 Agency Information Collection Activities; Comment Request, 71 Fed. Reg. 16779-16783 (Apr. 4, 2006).

35 For example, the FTC's pharmacy benefit manager study was initiated by a notice in March 2004, and the final report was issued on September 6, 2005. *See* Pharmacy Benefit Manager Conflict of Interest Study Public Notice (Mar. 26, 2004), *available at* http://www.ftc.gov/opa/2004/03/fyi0422.htm; Press Release, Federal Trade Commission, FTC Issues Report on PBM Ownership of Mail-Order Pharmacies (Sep. 5, 2005), *available at* http://www.ftc.gov/opa/2005/09/pharmbenefit.htm. Similarly, the FTC issued its Federal Register Notice for the Generic Entry Study in October 2000, and issued the report on July 30, 2002. *See* Agency Information Collection Activities; Proposed Collection; Comment Request, Federal Trade Commission, 65 FR 61334-04 (Oct. 17, 2000) and 66 FR 12512-03 (Feb. 27, 2001); Press Release, Federal Trade Commission, FTC Recommends Legislative Changes to Hatch-Waxman Act (Jul. 30, 2002), *available at* http://www.ftc.gov/opa/2002/07/genericdrugstudy.htm.

36 Federal Trade Commission, Generic Drug Entry Prior to Patent Expiration: An FTC Study (Jul. 2002), *available at* http://www.ftc.gov/os/2002/07/genericdrugstudy.pdf.

37 *See* Federal Trade Commission, Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies (Aug. 2005), *available at* http://www.ftc.gov/reports/pharmbenefit05/050906pharmbenefitrpt.pdf.

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attend to non-competition concerns and take into account the consumers' preferences.[12]

The Future Give and Take Debate Is Served

By all accounts, the Commission is trying to convey the message that the Single Market in all sectors, and specifically in energy, should be reinforced and that companies should be able to enjoy the available opportunities "*without unjustified interference from politicians*." And therefore, illegal acts should be punished with rigor; as Competition Commissioner Neelie Kroes has put it: "*No one should doubt the Commission's commitment to ensuring Europe's businesses can operate on a level playing field to the benefit of Europe's consumers, businesses and the economy as a whole.*"

However, the line which divides strict toughness and flexible scope for negotiation is thin. The facts suggest that the Commission is failing to efficiently tackle political interference. The law is abused and the available remedies seem insufficient. In practice, the Commission is exhausting all possible channels before judicial action is taken, maybe because judicial response is definitely not a timely and rigorous solution.

In the meantime, whereas E.ON seems to have decided to comply with the conditions imposed by the Spanish Authorities in order to close the deal, in most transactions, such a long legitimate interest discussion would sign the transaction's death certificate. In fact, deal-wise the current effects of the failed application of Article 21 of the ECMR can be already calculated; much worse, the number of deals contemplated which have been or will be dropped by fear of such political interference is immeasurable.

Will short-term national interests continue to jeopardize Europe's economic growth and international competitiveness? The debate is served and the effects on cross-border merger transactions in Europe are still to be seen; another hot potato for the German Presidency of the EU starting January 2007.

Arantza Golderos, Brussels

Endnotes

1 On 3 November 2006, in the context of an administrative appeal against a previous decision of the Spanish Energy regulator ("CNE"), the Spanish Government (Ministry for Industry) imposed several conditions on E.ON. As a result on 29 November 2006, the Commission sent a second formal notice to Spain in relation to the E.ON./ENDESA transaction. On 15 December 2006, and, upon the Commission's request, Spain modified some of the conditions. The current, and allegedly illegal conditions, oblige E.ON to not sell any of ENDESA's assets outside mainland Spain for at least 5 years; to keep the ENDESA brand for at least five years; to use domestically produced coal and to not adopt strategic decisions regarding ENDESA and affecting security of supply, contrary to the Spanish legal order.

2 Before an infringement procedure is formally opened, the administrative procedure within the Commission is a two-step process; the Commission sends a letter of "formal notice." If following this formal notice, there is no satisfactory reply the Commission may send a formal request called a "reasoned opinion."

3 Commission Decision of 25 April 2006, Case M. M.4110 E.ON/ENDESA.

4 The conditions were adopted on the basis of the powers granted by Royal Decree-Law 4/2006, on 27 July 2006, which modifies the competences of the CNE. Thus, the acquisition of more than 10% of the shares of companies active in regulated activities in Spain is subject to prior administrative authorization and conditions can be imposed to protect the general interest in the energy sector. Spain may be also taken to Luxembourg by Commissioner for Internal Market, Mr. McCreevy, because of the competences granted by this Decree to the CNE.

5 Prudential rules are aimed at maintaining the stability (and the confidence in stability) of the financial system, *i.e.*, the solvency and financial soundness of institutions and, on the other, at protecting users (depositors, investors) from losses resulting from inefficient management, fraud and bankruptcies of financial service providers.

6 Council Regulation (EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, O.J. L 395, 30/12/1989, p. 1-12.

7 *See* footnote 1 above, ENDESA/E.ON and footnote 8 below, ABERTIS/AUTOSTRADE.

8 Judgment of the European Court of Justice of 22 June 2004, Case C-42/01, *Portuguese Republic v. Commission of the European Communities*, ECR 2004, p. 0.

9 Commission Decision of 22 September 2006, Case M.4249, ABERTIS/AUTOSTRADE.

10 Another much publicized example of national interventionism has been the merger between the French Gaz de France and Suez; the transaction was claimed to have been put together by the French Government to impede Suez being taken over by the Italian energy operator ENEL.

11 According to the latest news, Spain will not rescind this condition.

12 F. Salerno, "Current Issues of EU Merger Control in the Energy Sector," [2007] E.C.L.R. Issue 1, p. 65-70. The author argues that because of the sensitivity of transactions in the energy sector, the consumers' views should be gathered; and that some consumers would still prefer to pay a higher price to the less efficient but national supplier, than to pay a lower price to a foreign supplier.

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