MAYER • BROWN

Review
Spring/Summer 2010

Antitrust & Competition
REVIEW

About Our Practice

Mayer Brown's Antitrust & Competition practice offers up-to-the-minute guidance concerning merger control, cartel investigations, distribution and licensing issues, alleged abusive conduct by dominant firms and state aid. Our group, which includes former US and European enforcement agency officials, has members located in our offices in the Americas, Asia and Europe as well as correspondent and other relationships with antitrust counsel throughout the world that enable us to provide truly global coverage. Our global resources and experience enable us to represent clients in high-stakes litigation, including litigation before the US Supreme Court and the European Courts of Justice; and represent clients in criminal and civil investigations. Further, our antitrust lawyers in Hong Kong and China are skilled at navigating the range of competition laws in the region, and offer clients the benefit of extensive China antitrust filing experience and strong relationships with key competition agencies. Our global capacity also allows us to manage multi-jurisdictional merger filings and advise on the applicability of national merger control regulations and to secure merger control clearances throughout the world.

Editors' Note

Welcome to the Spring/Summer 2010 edition of the Mayer Brown *Antitrust & Competition Review*. Since our last edition, the global antitrust world has been increasingly active on all fronts.

For example, in the United States, the Federal Trade Commission (FTC) started the year by publishing new Hart-Scott-Rodino thresholds, marking the first time they have been lowered since the statute's passage. Similarly, after years of criticism for allegedly not challenging horizontal mergers forcefully enough, the Department of Justice's (DOJ's) Antitrust Division and the FTC announced draft revisions to the Horizontal Merger Guidelines.

In addition, with the passage of sweeping health care legislation and a renewed focus on the agricultural industry, the DOJ has taken a particular interest in "ensur[ing] that [health care] reform is achieved, competition is maintained, and consumers are benefited" and in "promot[ing] diversity and competition among American farmers."

Finally, just a few weeks ago, the US Supreme Court issued its highly anticipated decision in *American Needle Inc, v. National Football League, et al.*, establishing a new test for determining whether related parties are single entities for purposes of Section 1 of the Sherman Act.

In Europe, the new group of European Commissioners was approved by the European Parliament and took office on February 10, with Joaquín Almunia taking over the post of Competition Commissioner from Neelie Kroes. Revised insurance, motor vehicle and vertical exemptions have been adopted and are now in force, with draft research and development and horizontal regulations published for consultation in May. The Commission has also adopted revised guidelines on its rules for assessing vertical agreements and is consulting on new guidelines on horizontal agreements (the "horizontals" package is due to be adopted at the end of the year).

In the European Courts, Advocate General Jan Mazák of the European Court of Justice (ECJ) issued his opinion in Deutsche Telekom's closely watched appeal of the General Court's ruling upholding the EC's imposition of a €12.6 million fine for an alleged abusive margin squeeze; the appeal marks the first time the ECJ has been called upon to consider the question whether a margin squeeze constitutes a stand-alone abuse of dominant position.

And in a case that has implications reaching far beyond the antitrust and competition world, Advocate General Juliane Kokott issued her much-anticipated opinion in *Akzo Nobel Chemicals Ltd. and Akcros Chemicals LTD v. European Commission*, in which she recommended that communications between company employees and in-house counsel not be protected from disclosure in the context of EC investigations and proceedings.

Meanwhile in the United Kingdom, the first-attempted full criminal prosecution pursued by the Office of Fair Trading against four executives of British Airways collapsed in May, casting doubt over how the regulator handles criminal and civil investigations in parallel, including in leniency cases, reliance on the immunity applicant for the gathering and retention of key evidence.

In Asia, on March 30, China's competition authorities published a significant decision against a price cartel involving

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domestic rice noodle producers—a decision that suggests the possibility of criminal liability for cartel conduct. In addition, on May 25, China's State Administration for Industry and Commerce released draft regulations under the country's anti-monopoly law on the abuse of monopolies, market dominance and administrative power. In Malaysia, the Parliament approved two bills in April that will establish that country's first comprehensive competition law and competition enforcement agency. Hong Kong is expected to follow with its own similar legislation within the next few months. Regulatory enforcement in surrounding jurisdictions continues to escalate, with Singapore's Competition Commission recently announcing its first finding of abuse of dominance against a domestic ticketing business and India's Competition Commission reportedly pressing for an investigation into alleged abuse-of-dominance conduct by the country's National Stock Exchange.

Antitrust and competition issues are making a strong showing in other parts of the world as well. For example, the Federal Competition Commission of Mexico (the *Comisión Federal de Competencia*) recently issued a ruling confirming that Telcel, Mexico's largest mobile phone carrier, has substantial power in the market for mobile telephone services in Mexico. The ruling opens the door to the possible imposition of specific obligations related to rates, quality of service and information.

In Canada, the new amendments to that country's Competition Act (passed on March 12, 2009) came into force in March 2010. The amendments replace the prior "conspiracy offence" with new per se criminal prohibitions against competitor agreements to fix prices, restrict production or allocate sales, customers or territories; increase the maximum penalties for such violations of the Act; and empower the Canadian Competition Bureau (CCB) to seek civil relief regarding any other type of agreement that has the effect of substantially lessening competition. On March 31, the CCB also issued draft guidance for mergers: they provided information on the payment of fees, on the process for determining the complexity of a proposed transaction and on what is required to commence the applicable service standard.

In Spain, the *Comisión Nacional de la Competencia* (CNC) recently initiated proceedings against Endesa (the largest electric utility company in Spain), alleging possible abuse of dominant market position in violation of Article 2 of Spain's Competition Act.

And, finally, in another example of coordinated global antitrust regulatory activity, several electrical car parts manufacturers were raided simultaneously by US, EU, and Japanese antitrust authorities, touching off parallel cartel investigations in all three regions.

It is against this ever-evolving landscape of global antitrust and competition law that we bring you this edition of the *Antitrust & Competition Review*. The articles in this edition cover key enforcement issues in virtually all major regions of the global economy. Many of them emphasize the ongoing judicial and regulatory tension between penalizing anticompetitive conduct and supporting legitimate competition aims, with the scales tending to tip in favor of an increased emphasis on stronger enforcement. Others highlight the current industries that are coming under increasing scrutiny by competition regulators.

From the United States, we offer two articles: an analysis of the Third Circuit's *Feesers* decision in which the court overturned a rare plaintiffs' verdict in a Robinson-Patman Act (RPA) case and added to the longstanding history of judicial criticism of the RPA; and a discussion of the ongoing judicial and regulatory tension in the United States and the European Community between those who would apply antitrust analysis only to product enhancements that do not benefit consumers, and those who would permit courts to assess whether genuine technological advances should nevertheless be condemned as "predatory innovations" that harm competition.

In addition, we have included a brief update on the article from our December 2009 edition discussing *William O. Gilley Enterprises, Inc. v. Atlantic Richfield, Inc.* As our last edition went to print, the US Court of Appeals for the Ninth Circuit withdrew its earlier decision reinstating claims under Section 1 of the Sherman Act that were based solely on the aggregate competitive effects of non-conspiratorial parallel conduct and issued a *per curiam* opinion reaching the opposite result. The court has since denied rehearing, and the time to petition the US Supreme Court has expired, so the revised decision will stand.

From South America we bring you an article discussing the growing enforcement of antitrust law in Brazil. As our new colleagues from Tauil & Chequer explain, although Brazil's Antitrust Law allows post-closing notification of merger and acquisition transactions, final approval of such transactions can be delayed if concerns are raised over potentially anticompetitive behavior that may cause irreversible damage to the relevant market.

From Europe we offer three articles: a profile of the new European Commissioner for Competition—Joaquín Almunia; a discussion of the new European Union Insurance Block Exemption Regulation (IBER), which significantly restricts the types of cooperation allowed among insurers and reinsurers; and an analysis of a relatively recent development in UK competition law—specifically, that the UK's enforcement focus on relationships between suppliers and their retailer customers has unintentionally deterred potentially beneficial environmental and public health collaborations between competitors, as companies become more and more concerned that such collaborations might be viewed as anticompetitive.

Finally, from Asia we bring you an article discussing the overhaul of Thailand's Trade Competition Law, which thus far has been widely viewed as having no impact on domestic competition. The revisions—being directed by the Council of State—are expected to restructure the Trade Competition Commission, increase transparency in administering and enforcing the law, strengthen penalties, and balance competition between state-owned enterprises and the private sector.

As always, we hope you find these articles interesting and informative and invite you to contact us with any thoughts, comments, or questions you may have. ◆

Merger Control and Preliminary Remedies in Brazil—The Growing Enforcement of Antitrust Law

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The antitrust authorities in Brazil have been increasing enforcement of that country's antitrust laws since 1994. That was the year when Brazilian Federal Law no. 8,884/1994 (the "Antitrust Law") was enacted, creating the current Brazilian antitrust system (SBDC),[1] its enforcing authorities, regulations and structure.

Background

The Antitrust Law is worded very broadly with respect to merger control. It defines a "concentration act" as any act or transaction that may limit or otherwise restrain free competition, or would result in one party gaining "control" of a relevant market[2] of products or services. Any such transactions must be submitted for merger review by the Brazilian antitrust authorities. Even if the transaction has no impact on the control of the market, there is also a turnover threshold that must be scrutinized. A transaction must be submitted for review by the antitrust authorities if the turnover in Brazil in the last financial year, by at least one of the economic groups to which one of the parties to the transaction belong, is higher than 400 million reais.[3]

During 2009, the merger review process developed significantly after some interesting decisions by the Brazilian antitrust authorities. The recent fast-track procedure is one such example. Considering that most of the transactions filed before the SBDC do not lessen competition—i.e., do not present horizontal overlap or vertical integration—the two Secretariats in charge of antitrust analysis decided to create a fast-track procedure to expedite merger clearance and become more efficient.[4]

The Antitrust Law appoints the Administrative Council for Economic Defense (CADE) as the decision-maker, and the Secretariats, the Attorney-General's Office and the Federal Prosecutor Office's as assistants charged with collecting the requisite information regarding a transaction and drafting non-binding opinions. CADE's six commissioners and chairman meet and decide whether to approve the transaction or not.

In order to avoid instability, CADE needed to provide the market and its players with a solid framework governing mergers. This mission was accomplished through the issuance of CADE's Internal Regulation[5] (and its amendments[6]), which enhanced legal certainty. The Internal Regulation details all of the working procedures of the administrative body, types of investigations, the duties of commissioners and, in particular, the different remedies and alternatives to handle a competition case.

Preliminary Remedies

There are two possible preliminary remedies to address a potentially suspect merger: (i) the Transaction Reversibility Preservation Agreement (APRO); and (ii) the Preliminary Injunction. Since Brazil has a post-closing merger review system that requires the parties to file the transaction with the SBDC within 15 business days from the execution of the first bidding document, these remedies are intended to insulate the market from the possible effects of a particular transaction.[7]

After the filing, the antitrust authorities may determine that a specific concentration act does meet the standards for a special treatment by virtue of its potential to restrain competition in a relevant market. In these cases, CADE can suggest that the parties involved in the transaction negotiate the terms and conditions of the APRO.[8] The final writing of the agreement will be approved by the reporting commissioner of the case and submitted for the approval of CADE's board. Note that CADE has the power to address the relevance and convenience of executing the APRO with the parties and assist them in drafting an agreement that will guarantee that competitive conditions will persist throughout the merger analysis review process before the SBDC.

When market players decide to negotiate and enter into a relevant transaction in Brazil, normally there is a period when the antitrust authorities are not aware of the proposed deal. In this scenario, it is possible that third parties could file a preliminary injunction before CADE to maintain the competition *status quo* prior to the consummation and approval of a deal. This request is possible when the danger in the delay (*periculum in mora*) and the probability of the alleged claim (*fumus boni iuris*) are proved. Thus, such request will be decided on an expedited basis by the assigned commissioner, and timely adjudicated by CADE's board. The CADE retains the ability to revoke or modify any preliminary injunction it grants.

The preliminary injunction may be granted *ex-parte* (*inaudita altera pars*) when the matter is considered extremely urgent. Otherwise, the commissioner in-charge will ask the parties to submit position statements within five days of the request for preliminary injunction which the commissioner will then consider in rendering his initial decision. The commissioner can also request non-binding opinions from the Secretariats and the Attorney-General's Office.

CADE's powers to freeze the transaction's effects by means of the preliminary injunction are very broad and can reach any corporate or business decision that may interfere with the competitive operation of the market. The Internal Ruling mentions the following acts that the parties are not allowed to do while the preliminary injunction remains in force: (i) any type of corporate amendment; (ii) change facilities, transfer or waive rights regarding assets, including trademarks, patents, and lists of clients and suppliers; (iii) use trademarks and products of the other party; (iv) change structure, logistics, distribution and marketing practices; (v) administrative changes that result in dismissal of workers and transfer of personnel to other working sites for the purpose of integration; and (vi) interrupt investment plans previously decided by the acquired company.

Please note that both preliminary remedies mentioned herein are only applicable to sensitive transactions with the potential to restrain competition. The execution of an APRO is considered the best option by CADE's commissioners, as, theoretically, it would be more enforceable as it is a product of the parties' agreement. The preliminary injunction is a unilateral action by the CADE and provides an opportunity for other interested parties and governmental agencies to get involved and request the preservation of competition.

Recent Case Law

Despite the economic crisis, Brazil's macroeconomic situation in the last few years has allowed for some key mergers and acquisitions in significant sectors of the economy (energy, financial, petrochemical, pharmaceutical, telecom, engineering, retail outlets, food). In light of the SBDC's limited resources, the relevant and complex transactions can take as long as 18 months to be finally approved by CADE.[9] As a result, APROs recently were executed by the involved parties in several transactions.[10]

Comparatively, there is only one relevant preliminary injunction of note. In February 2010, a major Brazilian company called CSN (Companhia Siderúrgica Nacional) filed an *ex-parte* preliminary injunction with respect to the acquisition of shares of the Portuguese company Cimpor by the Brazilian cement company, Votorantim. Cimpor is a cement company, and the transaction involved Votorantim and the French cement company Lafarge. The complaint was based on CSN's knowledge of confidential and strategic information about Votorantim, which had announced the purchase of 17 percent of Cimpor from Lafarge, and the growing concentration in the Brazilian cement market. Note that this transaction had not yet been submitted to CADE for approval, but the preliminary remedy allowed CSN to request the preservation of market conditions.

The opinion of the Secretariat for Economic Law of the Ministry of Justice (SDE) was delivered four days after the preliminary injunction was filed. In it, the SDE agreed with CSN's claim and recommended that CADE grant the order. However, the involved parties—Votorantim, Lafarge, and Camargo Corrêa—requested the negotiation of an APRO, which was the commissioner's choice.

Consequently, one month after the initial complaint by CSN, CADE's board approved the execution of three separate APROs by the companies involved. CADE's board did this in order to maintain the *status quo*, including the protection from disclosure of all of Cimpor's commercial information, until CADE's final decision regarding the "concentration act."

This recent decision confirmed SBDC's preference to execute APROs and avoid unilateral preliminary injunction decisions. But this decision also highlights the importance of a third-party claim before the Brazilian antitrust authorities. Even if the injunction is not granted, the execution of an APRO is a success as the practical effects are the same.

In February 2010, the closing of another major transaction involving Pão de Açúcar and Casas Bahia, two great economic groups in Brazil, also resulted in the execution of an APRO. Because of the overlapping of functions between the two groups (several small- and medium-sized cities have retail stores held by the two groups) and the potential abuse of market power created by the new combination, CADE negotiated an APRO with the companies to prevent any anticompetitive effects until it could review the transaction in more detail and issue its final decision on the substance.

According to the terms of that APRO, the parties agreed to keep: (i) the normal functioning of the several stores, including the normal amount of employees; (ii) the normal operation of the distribution centers; (iii) the intellectual rights, trademarks and investment in propaganda and marketing duly separate; (iv) the commercial structure duly separate, including the agreements with respective suppliers; (v) the separate entities and the operation of the furniture provider of Casas Bahia; and (vi) the credit concession policy of the companies in all stores. By addressing the main concerns about the transaction in the APRO, the Brazilian antitrust authorities were able to secure additional time to analyze and discuss the competitive impacts of the deal and best evaluate the possibilities of approval.

Conclusion

The availability of preliminary remedies under the Antitrust Law confirms that Brazil is on the right track in developing its antitrust enforcement. Merger control is essential for that purpose since it allows the SBDC to have updated information from the different relevant markets and to control *ex ante* potential abuses of a dominant position.

In a global market, international mergers and acquisitions take place every now and then, and it is important to comply with local antitrust laws in order to avoid problems before, during and after the deal is consummated. In Brazil, the Antitrust Law allows post-closing notification of the transaction, and its completion is not delayed by virtue of the SBDC analysis period. Thus, the normal scenario is to complete the merger or acquisition and then wait for the authorities' approval. However, as explained above, there are other ways to stall a transaction in Brazil while it is being duly analyzed by the SBDC and thereby avoid potentially anticompetitive behavior that may cause irreversible damage to the relevant market.

In order to avoid these types of situations, large companies that are contemplating substantial mergers in Brazil should consider voluntarily negotiating an APRO with the Brazilian antitrust authorities and thereby avoid the hassle of a third party challenge to the transaction. ◆

Endnotes

1 SBDC is composed of three administrative entities that are jointly responsible for the antitrust enforcement: (i) Secretariat for Economic Law of the Ministry of Justice (SDE); (ii) Secretariat for Economic Monitoring of the Ministry of Finance (SEAE); and (iii) Administrative Council for Economic Defense (CADE).

2 The control of a relevant market of products or services is presumed when one of the parties involved in the transaction or the resulting entity owns 20 percent or more of a certain relevant market. This market share criterion is one of the thresholds established by the Brazilian Antitrust Law.

3 The decision to limit the turnover requirement to Brazil (and not worldwide) can be considered as an improvement fostered by CADE to avoid the analysis of transactions with no domestic effects. This restriction was established by Precedent n. 1, published in the Brazilian Official Gazette on October 18, 2005.

4 Joint Ordinance no. 1, as of February 18, 2003, issued by SDE and SEAE.

5 Resolution no. 45, of March 28, 2007, issued by CADE.

6 Amended by Resolutions no. 46, as of September 4, 2007; no. 47, as of June 4, 2008; no. 51, as of February 4, 2009; and no. 52, as of May 13, 2009.

7 Preliminary documents, such as MOUs and LOIs should be reviewed to make sure that they will not be seen as the first bidding documents executed by the parties for purposes of triggering the obligation to institute a merger review proceeding before the Brazilian antitrust authorities.

8 Although unusual, the parties also have the right to request the negotiation and execution of the APRO by CADE.

9 The Brazilian Constitution grants the right to any company or citizen to appeal to the judicial courts against any administrative decision. Thus, CADE's final decision can be challenged before the judiciary branch. Recently, CADE has faced several challenges against its decisions to condemn parties for antitrust violation before the Brazilian courts.

10 For quick reference, the following is a list of relevant transactions that were subject to APROs: (i) Oi–Brasil Telecom (2008); (ii) Medley–Sanofi-Aventis (2009); and (iii) Sadia–Perdigão (2009).

Innovation in the Balance? Courts and Agencies Take Another Look at Product Innovation and the Competition Laws

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The antitrust laws generally seek to promote consumer welfare by condemning restraints on the competitive process, whether imposed by agreement among competitors or through the exercise of power by a dominant firm. Competition promotes consumer welfare both by leading to reduced prices and by increasing pressure to improve the quality of products and services. Because improved quality results from innovation, product innovation generally is viewed as a benefit of competition rather than a threat to it. And many courts and commentators have recognized that judges are ill-situated to sit as referees of product design. As a result, a firm generally does not violate the antitrust laws when it changes or refines its products, even if an innovation helps the firm acquire or maintain a monopoly.

In recent decades, however, courts and commentators have expressed concern that "[s]ome innovations both harm rivals and fail to benefit consumers."[1] The usual setting for predatory innovation claims involves a product design decision that allegedly forecloses competition for one or more products that are complementary to a monopoly product, insulating the current monopoly or creating a new one. If a change in product design is grounded in anticompetitive motives, courts may be inclined to examine more closely whether the innovation is in fact an improvement, and may conclude that a purported innovation instead was predatory. Some courts and enforcers, moreover, appear willing—even eager—to balance the benefits of a technological innovation against its effects on competition.

The principal debate is between those who would apply antitrust analysis only to design changes that do not provide benefits to consumers, and those who would permit courts to assess whether genuine technological advances nonetheless should be condemned—and subjected to potential treble-damages liability in the United States—because the innovation also harms competition. But even the threshold question of whether a design element is a genuine improvement necessarily incorporates policy judgments that are likely to be subjective and colored by the surrounding market circumstances. And the legal status of innovation by a dominant firm is further complicated by the uncertain status of intent as a factor to be weighed against consumer benefits—rather than treated merely as a separate necessary element of monopolization and attempted monopolization claims.

In this article, we discuss the predatory innovation jurisprudence in the United States, including the first appellate decision to address the issue comprehensively in nearly a decade. We also survey the approach to predatory innovation in the European Community, and consider indications that a more aggressive approach by prosecutors in both jurisdictions may be imminent.

The Evolution of Predatory Innovation Jurisprudence in the United States

The first modern predatory innovation claims in the US courts were raised more than 30 years ago and addressed computer and photography technology.[2] In *California Computer Products*, for example, a manufacturer of peripheral computer equipment alleged that IBM changed its disk drive design "solely for the purpose of frustrating competition" from peripheral device manufacturers, a claim that failed in the face of uncontroverted evidence that the changes reduced costs and improved performance.[3] Other plaintiffs took aim at Kodak's release of new products that were incompatible with its old ones, unsuccessfully asserting a duty of timely predisclosure of design changes to competitors in complementary markets.[4]

The early courts rejected these "technological predation" claims because a monopolist has "the right to redesign its products to make them more attractive to buyers."[5] Yet the early courts did acknowledge the possibility that an antitrust claim might rest on specific anticompetitive conduct associated with the introduction of a new product, so long as a court did not have to balance the benefits of a product improvement against its anticompetitive effects.

The US Court of Appeals for the Ninth Circuit held that a design improvement is "necessarily tolerated by the antitrust laws," unless the monopolist abuses or leverages its monopoly power in some other way when introducing the product.[6] To hold otherwise "would be contrary to the very purpose of the antitrust laws, which is, after all, to foster and ensure competition on the merits."[7]

The next wave of predatory innovation claims—and the first claims to succeed—came at the turn of the century. First, the US Court of Appeals for the Federal Circuit in the *C.R. Bard* decision affirmed a jury verdict imposing attempted monopolization liability that was based on a change in product design.[8] Bard had modified its biopsy gun to accept a new needle and then patented both the needle and the interface between gun and needle. The court of appeals affirmed, based on the jury's finding that the design change was made "for predatory reasons, i.e., for the purpose of injuring competitors in the replacement needles market, rather than for improving the operations of the gun."[9] The court acknowledged that there was evidence that the new design made loading and unloading the gun easier.[10] A dissenting opinion protested the imposition of "antitrust liability premised on a theory that development of new products is illegally anticompetitive when the new product requires competing suppliers to adjust their product accordingly."[11]

Yet, on the face of the decision, *Bard* seems to support the view that anticompetitive intent and effects may be sufficient to impose liability for a product innovation—even a patented one—that provides benefits to consumers. This test remains the law of the Federal Circuit, the US court responsible for all appeals from cases brought under the patent laws. Two judges who concurred in the denial of rehearing *en banc* minimized the value of the decision as antitrust precedent, however. They emphasized that the *Bard* opinion reflected the defendant's failure to take issue with the legal standard applied at trial, leaving the court of appeals only the task of reviewing the evidence for sufficiency under an arguably incorrect standard.[12] It remains to be seen how thoroughly a future Federal Circuit panel will consider the *Bard* decision to be analytically binding.

In the most prominent example of a predatory innovation claim, the US government successfully litigated that theory in the *Microsoft* case.[13] The US Court of Appeals for the District of Columbia Circuit held that Microsoft had unlawfully maintained its operating system monopoly by integrating its Internet Explorer browser into the Windows 98 operating system. To evaluate the claim, the *Microsoft* court applied a general balancing test derived from Sherman Act Section 2 jurisprudence.[14] Under that approach, the plaintiff first must demonstrate that the challenged conduct had an anticompetitive effect. The defendant may rebut that *prima facie* showing with evidence of a procompetitive justification for its conduct. The court then weighs the procompetitive benefits against the anticompetitive effect.[15]

The court affirmed liability on the ground that Microsoft failed to show that its product integration "serve[d] a purpose other than protecting its operating system monopoly."[16] Thus, in place of the seemingly more subjective test of *Bard*, where the benefits of a design might be overcome by anticompetitive intent, the *Microsoft* court approved a balancing test under which courts might weigh the benefits of any product innovation shown to have actual anticompetitive effects. Yet the court avoided the toughest questions arising from that test by declaring that there was no evidence of consumer benefits.

Several lower-profile predatory innovation claims surfaced in the next decade. In *HDC*, the principal appellate decision in that period, the US Court of Appeals for the Eighth Circuit in three short paragraphs applied a burden-shifting analysis that would impose liability only where evidence undercut a proven, legitimate business justification or where evidence showed anticompetitive motivation.[17] The plaintiff claimed that a medical equipment manufacturer had violated the antitrust laws when it changed the design of a machine used in dialysis to render the plaintiff's reprocessing solution incompatible (while the manufacturer's own solution could be used). The court affirmed summary judgment because the defendant offered a valid business justification for the product modification and the plaintiff presented no evidence of anticompetitive intent. It was unclear whether the court would have required proof both that the justification was not valid and that the change was undertaken with anticompetitive intent, or whether instead either element might have been sufficient to support liability.[18]

The trial courts, meanwhile, evaluated similar claims in several different markets. One court refused to dismiss a complaint that a drug manufacturer's product changes and discontinuance of old products suppressed competition and announced that it would apply a *Microsoft*-style balancing test to the evidence."[19] A different court rejected a claim that a manufacturer of insulin infusion pumps had violated the antitrust laws by changing the way that its pumps connected to the infusion "sets" that attach to a patient's body, and effectively tying the sale of its pumps to the sale of its sets.[20] That court held that the competitor's tying and attempted monopolization claims failed because the competitor could produce a compatible set, as other companies had done.

In a third case, the court permitted a plaintiff to go forward with its pleaded claim that Xerox illegally maintained monopoly power by making frequent and unnecessary changes to the design of its ink sticks and its printers' feed channels.[21] The court explained that the alleged anticompetitive effect would subsequently be weighed against any evidence that the modifications improved the product or otherwise served valid business reasons. After the evidence was developed, however, the court granted summary judgment against the competitor based on a failure to prove monopoly power.[22]

Earlier in 2010, in the first significant appellate decision to address predatory innovation in nearly a decade, the US Court of Appeals for the Ninth Circuit attempted to clarify the analysis, this time in the medical device setting. The plaintiffs in *Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP* made sensors for pulse oximetry systems.[23] They claimed that the defendant unlawfully maintained a purported monopoly over the sensor market by introducing a patented pulse oximetry system that was incompatible with generic sensors.

Reaffirming (but somewhat strengthening) its early approach in *California Computer* and *Foremost Pro Color*, the Ninth Circuit drew a bright line that ended the analysis of innovation once some benefit of the change had been proved: "If a monopolist's design change is an improvement, it is *necessarily* tolerated by the antitrust laws, unless the monopolist abuses or leverages its monopoly power in some other way when introducing the product."[24] The court emphatically rejected the balancing contemplated in *Microsoft* and other decisions, finding "no room in this analysis for balancing the benefits or worth of a product improvement against its anticompetitive effects."[25]

The court believed that any effort at "weigh[ing] the benefits of an improved product design against the resulting injuries to competitors" would be "unadministrable" because "[t]here are no criteria that courts can use to calculate the right amount of innovation."[26] Given the unknown indirect benefits of a "seemingly minor technological improvement," courts would have "to weigh as-yet-unknown benefits against current competitive injuries." The entire exercise—and the threat of it—would "dampen[] ... technological innovation."[27] Thus, unless the monopolist also engaged in "coercive conduct," the court left "the ultimate worth of a genuine product improvement" to be "judged only by the market itself."[28]

Moreover, the Ninth Circuit squarely rejected the relevance of evidence that a firm improved its product with anticompetitive intent.[29] Instead, the court of appeals found undisputed evidence that the patented sensor design facilitated the introduction of new types of sensors with added capabilities at less cost to consumers, and that there was no evidence of coercive conduct. Thus, the court affirmed the grant of summary judgment against the Section 2 claim.

The Ninth Circuit's refusal to entertain a balancing test adds some certainty and predictability to the analysis of allegedly predatory innovations. Nonetheless, there remains a fair potential for policy-driven factual disputes over whether a particular design change represents a "genuine improvement."[30] That is especially so in courts that may be less attentive than the *Allied Orthopedic* panel to the downstream, future benefits of minor innovations.

The Analysis of Predatory Innovation Claims in the European Community

The approach toward predatory innovation in the European Community appears to embrace a balancing analysis more forthrightly than most US decisions. The leading case is the European Commission's March 2004 *Microsoft* decision, which found that Microsoft had abused its dominant position in the PC operating system market by tying Windows Media Player to its Windows PC operating system. The European Commission determined that Microsoft's bundling of the technologies and its refusal to communicate interface information could eliminate competition, diminish innovation incentives and impair technological development. After determining that the disclosure of interoperability was widespread in the industry, the Commission held that Microsoft's conduct could not be justified by its intellectual property rights in the technology. But the Commission focused on the failure to communicate interoperability information rather than on the product design *per se*.

The 2004 Commission decision held that a refusal to communicate information protected by intellectual property rights infringed Article 82 [now Art. 102] of the European Community Treaty if, all things considered, the positive impact of proscription on the level of innovation in the whole industry outweighed the negative impact on the dominant undertaking's incentives to innovate.[31]

The Court of First Instance upheld the Commission's decision, articulating a three-step analysis for predatory innovation claims.[32] First, the Commission must come forward with a *prima facie* case of infringement of the competition provisions. Second, the dominant undertaking may establish an objective justification for the challenged conduct. And third, the Commission may rebut the undertaking's arguments and evidence and demonstrate that the justification put forward should not be accepted. The court explained that only "exceptional circumstances" could justify "encroach[ing] upon the exclusive right of the holder of the intellectual property right by requiring him to grant licences to third parties seeking to enter or remain on that market."[33] But it found Microsoft's ability to block competitive innovation sufficiently exceptional to warrant relief.

In evaluating the claim against Microsoft, however, neither the Commission nor the Court of First Instance undertook an in-depth analysis of the past trajectory or projected developments of technological innovation in media players. Rather, Microsoft's innovation was deemed predatory because it blocked innovation and entrenched Microsoft further in its own dominant position without providing sufficient benefits to outweigh the harm. Although both the US and EC Microsoft decisions endorsed a balancing approach, in the US decision there were no procompetitive effects to balance. Only the EC was required to take the next step and weigh the net value of a technological innovation—or, more precisely, a dominant party's intellectual property rights in some aspects of that innovation.

The Commission's December 2008 Guidance Paper on Enforcing Article 82 seems to recommend a more aggressive stance that goes beyond the approaches of both authorities in their respective Microsoft decisions. Although the Guidance Paper explicitly recognizes a role for efficiencies, including "technical improvements," those benefits would provide a shield against enforcement only when the dominant firm can "guarantee" that no net harm to consumers is likely to arise.[34] Moreover, the dominant firm must show that the conduct at issue is "indispensable" to realization of the efficiencies, with "no less anticompetitive alternatives that are capable of producing the same efficiencies."[35] Even where efficiencies have been, or likely are to be, realized by the indispensable conduct, and they "outweigh any likely negative effects on competition and consumer welfare," the allegedly efficient conduct in question may still be viewed as illegal under an additional, broad catch-all principle that "exclusionary conduct which maintains, creates or strengthens a market position approaching that of a monopoly can normally not be justified on the grounds that it also creates efficiency gains."[36]

The Guidance Paper suggests a degree of government scrutiny of the net benefits of innovation that far exceeds anything seen so far in the United States or the European Union, in an analysis almost diametrically at odds with the recent *Allied Orthopedic* decision.

It remains to be seen whether and how this approach manifests itself in enforcement actions. The Commission's 2009 Statement of Objections served on Microsoft appears to have relied on settled principles of tying as a distribution method, rather than addressing technological tying of the Internet Explorer browser to the Windows operating system. Because Microsoft and the Commission entered into a comprehensive settlement in December 2009, however, the precise contours of the Commission's theories are not public and were not tested by either a final Commission decision or by the courts. Microsoft's undertaking to settle the case required it to offer a menu of browser options to Windows users and to provide competitors with specified interoperability information for a variety of high-market-share products. That suggests that, at least as a matter of remedy, the Commission preferred to focus on failures of disclosure rather than on any anticompetitive effects potentially stemming from technical decisions. Basing liability on a failure to disclose technical information that is protected by intellectual property rights may raise similar questions about the susceptibility of technological innovation to antitrust liability, however.

Current US Antitrust Enforcement Policy—Convergence?

The US antitrust enforcement agencies have shown some interest in pursuing European-style agency and judicial balancing of the consumer benefits and competitive harms presented by technological innovations.

The December 2009 complaint by the US Federal Trade Commission (FTC) against Intel includes one theory that touches on predatory innovation.[37] In part, the complaint alleges that Intel is attempting to maintain a monopoly over central processing units (CPUs) by eliminating the threat posed by the increasing capabilities of graphics processing units (GPUs), while also acquiring a monopoly in the GPU market.[38] The FTC contends that Intel is foreclosing competition by integrating GPUs on Intel CPUs below cost, and is impairing interoperability between Intel CPUs and competitors' GPUs.[39] The FTC also alleges that Intel revised its compiler and library software to reduce performance of competing CPUs and that "[m]any" of the changes had "no legitimate technical benefit."[40] The complaint suggests both skepticism about the benefits of Intel's product changes and a willingness to balance any benefits against the asserted anticompetitive effects.

The FTC asserts claims of pure "unfair competition" under Section 5 of the FTC Act, as well as claims that incorporate the traditional standards of the Sherman Act.[41] The FTC Act, at least in theory, provides the FTC more flexibility to address conduct that does not violate the antitrust laws but that the agency finds harmful to competition.[42] That approach may result in greater subjection of design decisions to review for competitive effects, though the effects would be limited to agency prosecutions; private parties cannot sue for violations of the FTC Act.

There also are strong indications that the Antitrust Division of the US Department of Justice is likely to be more aggressive in scrutinizing unilateral conduct by dominant firms. For example, the Division withdrew its September 2008 Report on *Competition and Monopoly: Single-Firm Conduct Under Section 2 of* *the Sherman Act* because it raised "too many hurdles to Government antitrust enforcement."[43] Assistant Attorney General Christine Varney rejected the Report's "skepticism regarding the ability of antitrust enforcers—as well as antitrust courts—to distinguish between anticompetitive acts and lawful conduct," and its "concern that the failure to make proper distinctions may lead to 'over-deterrence' with regard to potentially procompetitive conduct."[44]

Expressing a "strong[] belie[f] that antitrust enforcers are able to separate the wheat from the chaff in identifying exclusionary and predatory acts," Ms. Varney firmly endorsed a strong form of the balancing approach outlined in the DC Circuit's *Microsoft* decision (but, as the *Allied Orthopedic* court pointed out, not actually applied due to a lack of evidence):

> [W]e will need to look closely at both the perceived procompetitive and anticompetitive aspects of a dominant firm's conduct, weigh these factors, and determine whether on balance the net effect of this conduct harms competition and consumers.[45]

Varney promised that the Division would "aggressively pursu[e] enforcement of Section 2 of the Sherman Act" under that balancing analysis. Like the FTC action against Intel, Varney's statement suggests a more intrusive role for US antitrust enforcers in product design decisions by alleged monopolists.

Conclusion

The enforcement approaches in the United States and the European Community have converged somewhat with respect to predatory innovation claims. Agencies in each jurisdiction have expressed a strong preference for qualitative balancing of the burdens and benefits of technological innovation by dominant firms. At the same time, the most recent pronouncement by a US appellate court firmly rejects the notion that antitrust enforcers or courts should second-guess any innovation shown to have even modest consumer benefits—though deciding what constitutes a genuine product improvement itself may trigger a round of qualitative balancing. The aggressive stance of the current leadership of the US enforcement agencies may soon lead to a collision with judicial reluctance to intrude on product design decisions—or to a change in the law.

At the same time, the approach outlined by the European Commission may lead to more restrictions on dominant firm product design in that jurisdiction, at least if the European courts approve an expanded role for antitrust evaluation of technological changes. Of course, no firm that hopes to survive will retreat from innovation as a result of these enforcement trends. Compliance programs should ensure, however, that the record underlying product design changes will provide no basis for enforcement agencies or disappointed competitors to exploit predatory innovation theories. ◆

Endnotes

1 Areeda & Hovenkamp, *Fundamentals of Antitrust Law* 6-32 (3d ed. 2009 supp.).

2 *See, e.g., Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 281 (2d Cir. 1979); *California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727 (9th Cir. 1979); *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983).

3 *California Computer Products*, 613 F.2d at 739, 744; *see also Memorex Corp. v. IBM*, 636 F.2d 1188 (9th Cir. 1980); *Transamerica Computer Corp. v. IBM*, 698 F.2d 1377, 1382-83 (9th Cir. 1983).

4 *Berkey Photo* and *Foremost Pro Color*, *supra.*

5 *Foremost Pro Color*, 703 F.2d at 545.

6 *Id.* at 545.

7 *Id.* at 544.

8 *C.R. Bard, Inc. v. M3 Systems, Inc.*, 157 F.3d 1340 (Fed. Cir. 1998).

9 *Id.* at 1382.

10 *Id.*; *see also id.* at 1370 (Newman, J., dissenting in part).

11 *Id.* at 1372 (Newman, J., dissenting in part).

12 *C.R. Bard, Inc. v. M3 Systems, Inc.*, 161 F.3d 1380 (Fed. Cir. 1998) (Gajarsa, J., joined by Clevenger, J., concurring in denial of rehearing *en banc*).

13 *United States v. Microsoft Corp.*,253 F.3d 34 (D.C. Cir. 2001) (*en banc*).

14 *Id.* at 58-59.

15 *Id.*

16 *Id.* at 66-67.

17 *HDC Med., Inc. v. Minntech Corp.*, 474 F.3d 543, 550 (8th Cir. 2007).

18 *Id.*

19 *See Abbott Labs. v. Teva Pharms. USA, Inc.*, 432 F. Supp. 2d 408, 420-424 (D. Del. 2006).

20 *Medtronic Minimed Inc. v. Smiths Med. MD Inc.*, 371 F. Supp. 2d 578 (D. Del. 2005).

21 *Xerox Corp. v. Media Sciences International, Inc.*, 511 F. Supp. 2d 372 (S.D.N.Y. 2007).

22 *Xerox Corp. v. Media Sciences, Inc.*, 660 F.Supp.2d 535 (S.D.N.Y. 2009).

23 592 F.3d 991 (9th Cir. 2010).

24 *Id.* at 1000 (emphasis added).

25 *Id.* at 1000.

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.* at 1001.

30 *Id.* at 1002 (finding no material factual dispute on that point in *Allied Orthopedic*).

31 *See Microsoft Corp.* [2004] Commission Decision Recital 783.

32 Case T-201/04, *Microsoft Corp. v. Comm'n*, 2007 ECR II-3601 (2007 WL 2693858), at ¶ 688.

33 *Id.* ¶ 691.

34 European Commission, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 4-5, 6 (December 3, 2008) (Guidance Paper), ¶ 30.

35 *Id.*

36 *Id.*

37 FTC Complaint, *In the Matter of Intel Corporation*, Docket No. 9341.

38 *Id.* ¶¶ 8, 16-26, 75-91.

39 *Id. ¶ 18.*

40 *Id.* ¶ 8.

41 Compare *id.* ¶ 97 (asserting only "unfair methods of competition" under FTC Act § 5) with *id.* ¶¶ 99, 101 (invoking standards for attempted monopolization and monopolization under the Sherman Act Section 2).

42 One Commissioner dissented from the decision to assert claims under the more restrictive standards of the Sherman Act, rather than rely exclusively on the FTC Act. *See In the Matter of Intel Corporation*, Docket No. 9341, Concurring and Dissenting Statement of Commissioner Thomas Rosch.

43 'Vigorous Antitrust Enforcement in this Challenging Era' Christine A. Varney, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Remarks as Prepared for the United States Chamber of Commerce, May 12, 2009, at 6.

44 *Id.*

45 *Id.* at 6, 13.

A New Competition Law Framework for the Insurance Sector: The New Block Exemption Regulation

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On April 1, 2010, a new Insurance Block Exemption Regulation (IBER) came into force in the European Union. It was published on March 24, 2010, together with an explanatory communication,[1] and replaces Regulation 358/2003/EC, which expired on March 31, 2010.

The revised IBER will significantly restrict the types of cooperation among insurers and reinsurers that are automatically exempt from competition law. Two forms of cooperation exempted in the previous regulation are no longer exempted in IBER:

- Joint establishment and distribution of non-binding standard policy conditions for direct insurance
- Joint establishment, recognition and distribution of technical specifications of security devices.

The rationale is that these are not insurance-specific and, therefore, their inclusion in IBER is unnecessary. However, the European Commission (Commission) plans to address both of these types of agreements in new guidelines on horizontal cooperation agreements, currently under review.

IBER will remain in force until March 31, 2017. Insurers will have a six-month grace period until October 1, 2010, to assess whether existing arrangements qualify under IBER.

Continued Exemptions

IBER will continue to exempt the other two types of cooperation arrangements exempted in the previous regulation on the basis that they are specific to the insurance sector:

- Establishment and distribution of joint calculations, tables and studies
- Establishment and operation of co-insurance and re-insurance pools.

However, the scope and scale of these two exemptions have been reduced.

Joint Calculations, Tables and Studies: Key Changes

Calculation of risk is a key issue in pricing all insurance products, and access to statistical data is crucial. The Commission considers that cooperation in this area is pro-competitive and specific to the insurance sector.

TYPE OF INFORMATION THAT CAN BE EXCHANGED CUT BACK

Previously, companies could jointly establish and distribute average cost calculations. Now, however, they can cooperate only up to an earlier point, i.e., jointly compiling and distributing information necessary to make those calculations. Similarly, although insurance firms formerly could jointly exchange and distribute mortality and other life tables, IBER allows only the joint compilation and distribution of information necessary for the construction of mortality and other life tables.

CONDITIONS APPLICABLE TO THE COMPILATIONS, TABLES OR STUDY RESULTS ARE AMENDED AND EXPANDED

The conditions on which insurers and reinsurers can benefit from this exemption have been amended and expanded. The materials must be made available on affordable, reasonable and nondiscriminatory terms to any reinsurance company and, unless nondisclosure is justified on grounds of public security, to any interested third party, such as a consumer organisation, requesting a copy. The materials must not contain any indication of the level of commercial premiums.

Insurance and Reinsurance Pools: Key Changes

Subject to certain conditions, IBER covers agreements between two or more insurance companies with respect to the setup and operation of co-insurance and/or reinsurance pools for common coverage of a specific category of risk. The Commission considers that risk-sharing for certain types of risk, where individual companies are commercially reluctant or unable to insure the entire risk alone, is key to ensuring that these risks are covered.

TYPES OF COVERED CO-INSURANCE AND CO-REINSURANCE POOLS

The Commission has previously expressed concerns that co-(re)insurance on the subscription market usually involves premium alignment, which may restrict competition. Consequently, IBER will not apply to ad hoc co-insurance or co-reinsurance arrangements on the subscription market, where a certain part of a given risk is covered by a lead insurer and the remainder is covered by follow insurers.

METHOD OF CALCULATING MARKET SHARE

A pool falls within the exemption only if the market share of the parties does not exceed 20 percent (co-insurance) or 25 percent (co-reinsurance) in any relevant market. In calculating market share, pool members now need to calculate their gross premium income earned on the relevant market not only within, but also outside the pool. In practice this will mean that some pools that were previously exempted will no longer fall within IBER and will need to be assessed in accordance with the general exemptions conditions of Article 101(3) of the Treaty.

INCREASED MARKET SHARE THRESHOLDS

IBER sees a 3 percent rise in the flexibility percentage for market share thresholds below which the exemption will apply. Pools with market shares (calculated according to the new rules set out above) that exceed the 20 percent or 25 percent threshold by a maximum of 5 percent will continue to benefit from exemption for two years. Where their market share exceeds the relevant thresholds by more than 5 percent, the grace period is one year.

WIDER DEFINITION OF NEW RISKS

Pools covering new risks benefit from more lenient treatment. The definition of new risks now covers a risk whose nature has changed so materially that it is not possible to know in advance what subscription capacity is necessary in order to cover that risk. This reflects the concern expressed to the Commission during its consultation on the draft that the uncertainty surrounding the previous definition of new risks meant that parties might be reluctant to cooperate on these types of risks.

The Future

The Commission indicated that it had become aware, during the review process, that many insurers relied on the previous exemption for pools to provide blanket protection, without assessing whether the particular arrangements complied with IBER. The Commission has now made it clear that, together with national competition authorities, it will monitor the insurance industry, and pools in particular, to ensure that they correctly assess whether their agreements meet the exemption conditions. The Commission has also indicated that it will not shy away from taking enforcement action when necessary to ensure that companies comply with IBER.

The revised IBER comes at a time when the US House of Representatives has passed the Health Insurance Industry Fair Competition Act, which would amend the 1945 McCarran-Ferguson Act by repealing the blanket exemption for health and medical malpractice insurance issuers from federal antitrust laws. If this Act is passed by the Senate,[2] alongside the enforcement of the much-restricted new IBER in the European Union, there will be increasing pressure on insurance and reinsurance companies in both the European Union and the United States to assess the extent to which their current agreements and practices comply with competition law. ◆

Endnotes

1 Commission Regulation of March 24, 2010, on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector; Explanatory Communication from the Commission on the application of Article 101(3) of the Treaty to certain categories of agreements, decisions and concerted practices in the insurance sector.

2 The Bill is currently before the Senate and had its Second Reading on March 1, 2010.

Whither the Robinson-Patman Act? The Impact of the Third Circuit's *Feesers* Decision

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The US Third Circuit Court of Appeal's January 2010 opinion in *Feesers, Inc. v. Michael Foods, Inc. and Sodexho, Inc.*,[1] which overturned a bench verdict for the plaintiff Feesers and directed the district court to enter judgment for the defendants, represents yet another decision in a recent series of cases that have raised the bar for plaintiffs to bring and sustain price discrimination claims under the Robinson-Patman Act, 15 U.S.C. § 13(a) (RPA). The reversal in *Feesers* was particularly significant because this probably was the most prominent recent case in which a plaintiff had prevailed on the merits of an RPA claim.

Both the history of the case and the court's decision provide guidance with respect to the proof required to establish the "competitive injury" element of a price discrimination claim under Section 2(a) of the RPA. At the same time, however, the decision leaves open a number of important questions raised by the case.

Case History 2004-2009

At the outset, the Third Circuit made the observation in a footnote that as long as the RPA remains on the books, it will continue to "flummox" and confuse the federal courts.[2] This case arguably is a textbook example of such confusion, as demonstrated by the many twists and turns in its complicated procedural history.

Michael Foods manufactured processed egg and potato products that were sold to institutional customers such as schools, hospitals and nursing homes. Feesers was a regional distributor that served an area of approximately 200 miles around Harrisburg, Pennsylvania, and that purchased Michael Foods products and resold them to institutional customers who operated their own food services, also called "self-ops." Sodexho (now "Sodexo"), on the other hand, was a food service management company that took over and ran food services for institutions that decided to outsource that function. As part of this service, Sodexo negotiated pricing with suppliers such as Michael Foods and then arranged for a distributor to purchase the food and resell it. Sodexo's services typically were sold through a request for proposal (RFP) bidding process.[3]

Feesers claimed Michael Foods sold food products to Sodexo at discounts not made available to Feesers, which resulted in institutional customers choosing Sodexo, and Feesers losing institutional sales.[4] In 2004, Feesers brought suit in the US District Court for the Middle District of Pennsylvania alleging Michael Foods had violated RPA Section 2(a) by engaging in price discrimination,[5] and that Sodexo had violated RPA Section 2(f) by inducing that discrimination. Feesers sued solely for injunctive relief.[6]

In May 2006, the district court granted summary judgment to the defendants.[7] The court found that Feesers had established three of the four elements of a *prima facie* price discrimination case under RPA Section 2(a): purchases by two different purchasers in interstate commerce; the product sold to the two purchasers was of the same grade and quality; and the defendants discriminated in price between the two purchasers.[8] However, the district court found that Feesers had failed to establish the fourth element—that the discrimination resulted in competitive injury.[9]

In August 2007, the Third Circuit reversed, holding that the district court had applied the wrong standard in determining that Feesers and Sodexo were not in competition.[10] In particular, the court of appeals ruled that the district court had erred by finding that Feesers and Sodexo were not at the same "functional level" in the chain of distribution, and by requiring Feesers to show proof of actual competitive injury in the form of lost sales to Sodexo based on the different prices the two companies were paying Michael Foods.[11] The Third Circuit remanded the case with instructions that the district court apply the correct standard for competitive injury, which it defined as Feesers needing to prove "(a) that it competed with Sodexo to sell food and (b) that there was price discrimination over time by Michael Foods."[12]

In April 2009, following a bench trial, the district court entered judgment for Feesers and enjoined Michael Foods from discriminating between Feesers and Sodexo.[13] Among other things, the district court found that:

- Feesers and Sodexo competed for the same customers, and that customers switched between the two;
- There was a substantial difference in the prices Michael Foods charged Feesers and Sodexo—including a 59 percent difference for Michael Foods' top 11 products—over a sustained period of time; and
- These price differences were a major element of Sodexo's strategic planning and marketing efforts to convert self-op institutions into users of Sodexo's food service management services.[14]

The district court also ruled that Michael Foods did not qualify for the "meeting competition" defense. That defense requires the seller to show that it reduced its price in a good faith effort to meet, but not beat, a competing offer.[15] The court found that Michael Foods failed to meet this standard because, while it based its pricing on market intelligence as well as on Sodexo's claims that Michael Foods' prices were higher than competitors' prices, it did not seek or obtain more detailed information about the prices competitors were offering.[16]

In response to the April 2009 injunction, Michael Foods terminated its sales to Feesers. As a result, the district court found Michael Foods in contempt and ordered it to sell to Feesers on the same terms as Sodexo. The defendants appealed, resulting in the Third Circuit's January 2010 decision.

The Third Circuit's January 2010 Decision

The Third Circuit reversed the district court's judgment for Feesers, holding that Section 2(a)'s competitive injury requirement was not satisfied because Feesers and Sodexo were not competing purchasers at the time Michael Foods made the discriminatory sales to Sodexo. According to the court, the central question was whether Feesers and Sodexo were competing for the same sales from the same customer. In answering that question, the court relied heavily on the Supreme Court's 2006 decision in *Volvo Trucks*,[17] and the Third Circuit's own 2008 decision in *Toledo Mack*.[18]

Both of those cases involved a bid market in which the claimed discrimination related to customer-specific discounts requested by a vehicle dealer from a manufacturer prior to the dealer winning the bid. On these facts, the courts in both cases held that the plaintiffs failed to prove competitive injury because the alleged price discrimination did not relate to the same customer. In particular, in *Toledo Mack*, no dealer actually purchased the vehicle from Mack Trucks until after winning the bid, at which point the "relevant market" was limited to the single, winning bidder.[19]

Under *Volvo* and *Toledo Mack*, a court determining whether the plaintiff has established competitive injury must look at both "the nature of the market and the timing of the competition."[20] According to the Third Circuit, in the bid markets at issue in those cases and in *Feesers*, the competition between the purchasers was complete before the sale of the product was made because there was no sale until the winning bidder was chosen. In particular, Feesers and Sodexo would compete to persuade a customer to use Feesers, a distributor, or Sodexo, a food service management company, but it was only after Sodexo was chosen that the customer would purchase Michael Foods products through Sodexo.[21] As result, there were no competing purchasers at the time of sale, and Feesers' RPA claim failed.[22]

The Third Circuit also stressed that its ruling was consistent with the guidance in *Volvo* and *Toledo Mack* to interpret the RPA narrowly because it often has "anticompetitive effects" that are at odds with the "broader policies of the antitrust laws."[23] *Toledo Mack* was even cited for the proposition that the court will interpret the RPA narrowly, "even if doing so will result in "elevat[ing] form over substance."[24] On the other hand, the court appeared to limit the scope of its decision by stating in Footnote 18 of the opinion that, "[n]otably, we do not hold that the sales of products by the manufacturer to two purchasers must always occur prior to the competition between the two purchasers. Our holding is limited to bid markets that closely resemble the markets in this case, *Volvo Trucks*, and *Toledo Mack*."[25]

Finally, the Third Circuit held that the injunction against Michael Foods for contempt did not survive its ruling, that there was no liability for Michael Foods under Section 2(a) or for Sodexo under Section 2(f), and that the case was remanded to the district court with instructions to enter judgment for the defendants.[26] Because the court's decision was based solely on the issue of competitive injury, it did not deal with several other issues raised by the defendants on appeal, including the district court's ruling regarding the "meeting competition" defense.[27]

What Does the Feesers Case Mean for Compliance with the RPA?

There are a number of important takeaways from the Third Circuit's opinion that counsel can use when advising clients about compliance with the RPA, including:

- The decision is part of a long-standing trend of opinions and commentary expressing hostility toward the RPA and calling for it to be repealed or narrowly construed.[28] The court's particularly harsh criticism of the RPA in this case is likely to reinforce this trend, notwithstanding the court's attempt to limit the opinion to bid markets.
- With respect to bid markets, however, the opinion can be read as holding that the RPA has no application to such markets. At the very least, it provides greater latitude to parties participating in bid markets that resemble those in *Volvo*, *Toledo Mack* and this case, in which the competition has ended when the sale is made, with respect to the likelihood that the RPA will be applied to their discount programs.
- The case does not directly address sales made out of inventory acquired before the competition takes place between the parties. However, the author understands from Michael Foods' counsel that products already in inventory were purchased by Sodexo's distributor at a price similar to that charged to Feesers, and Sodexo's discounted price was not applied until Sodexo was chosen as a winning bidder and the product was to be sold to its customer. If that is correct, the court's reasoning that there was no discriminatory sale until after competition had ended would appear to apply.
- The Third Circuit did not address the district court's ruling on the "meeting competition" defense, which appeared to require the seller to obtain verification of the competing offer, a ruling arguably at odds with the Supreme Court's holding in *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69 (1979).[29] The district court's decision, if followed by other courts, could restrict the availability of the "meeting competition" defense.
- The circuit court's statement in Footnote 18 (that it is not holding that sales by a manufacturer always must take place prior to competition by the purchasers) is difficult to reconcile with the rationale for the court's decision. The result may be that those persons trying to interpret the case will be "flummoxed" as to the meaning of that statement.

Further Proceedings

The case is not over. Feesers petitioned for a rehearing and rehearing *en banc* but the petition was denied by the Third Circuit in a brief order issued March 4, 2010.[30] Feesers now plans to petition for a writ of *certiorari* in the US Supreme Court which, if granted, will give the Supreme Court an opportunity to provide further guidance regarding the RPA's "competitive injury" requirement. Assuming that the current opinion survives, however, the Third Circuit's January 2010 decision should be seen as yet another blow against the continued viability of the RPA. Nevertheless, as the court noted, the RPA remains on the books, and parties and their counsel must continue to wrestle with how best to comply with it to avoid lengthy and expensive litigation like that in the *Feesers* case. ◆

Endnotes

1 *Feesers, Inc. v. Michael Foods, Inc. and Sodexho, Inc.*, 591 F.3d 191 (3d Cir. 2010).

2 *Id.* at 206, n. 17.

3 *Id.* at 193-96.

4 *Id.* at 193, 196.

5 Section 2(a) provides in part: "It shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a).

6 591 F.3d at 196.

7 *Feesers, Inc. v. Michael Foods, Inc. & Sodexho, Inc.*, No. 04-Civ-576, slip op. (M.D. Pa. May 4, 2006).

8 *Id.* at 10-18.

9 *Id.* at 21-24.

10 *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 208 (3d Cir. 2007).

11 498 F.3d at 213-16.

12 *Id.* at 213 (citing *FTC v. Morton Salt Co.*, 334 U.S. 46 (1948)).

13 *Feesers, Inc. v. Michael Foods, Inc.*, 632 F. Supp. 2d 414 (M.D. Pa. 2009).

14 632 F. Supp. 2d at 422-23, 434 and 451.

15 *Id.* at 451.

16 *Id.* at 452-59.

17 *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

18 *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008).

19 591 F.3d at 201-02.

20 *Id.* at 197-98.

21 *Id.* at 203-04.

22 *Id.* at 203.

23 *Id.* at 198-99, 204-05.

24 *Id.* at 199 (citing *Toledo Mack*, 530 F.2d at 228). The court also argued that the RPA should not be applied to this case because "[t]he price discrimination identified by Feesers bears 'little resemblance to [the] large independent department stores and chain operations' the statute was originally intended to target." *Id.* at 204-05 (citing *Toledo Mack*, 530 F.3d at 227 and *Volvo*, 546 U.S. at 181). This point seems debatable. The court's opinion identifies Sodexo as the world's largest private food purchaser, while Feesers is a regional distributer, suggesting this case presented the very kind of "David and Goliath" situation the statute was intended to address.

25 *Id.* at 206, n. 18.

26 *Id.* at 208-09.

27 *Id.* at 194.

28 See *id.* at 198-99, n. 12, and the authorities cited therein. In addition, in its 2007 report, the Antitrust Modernization Commission appointed by President Bush called for the RPA to be repealed. Antitrust Modernization Commission, Report and Recommendations, http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf, (April 2007), at 313.

29 In *A&P*, the Supreme Court held the requirements of the "meeting competition" defense had been met where Borden, the seller, reduced prices to A&P based on A&P's claim that Borden's first bid was "not even in the ballpark," notwithstanding that Borden asked for, but was not able to obtain the details of the competing bid from A&P. 440 U.S. at 82-84.

30 *Feesers, Inc. v. Michael Foods, Inc. and Sodexho, Inc.*, Nos. 09-2548, 09-2952, 09-2993, order (3d Cir. Mar. 4, 2010).

Thailand to Overhaul Trade Competition Law

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Criticised for being ineffective, the Trade Competition Act B.E. 2542 of Thailand (Trade Competition Law) is facing an overhaul. The law regulates trade by restricting monopolistic and unfair trade practices in Thailand in order to level the playing field for all businesses. The Ministry of Commerce is expected to propose its amendments to the Cabinet before August 2010.

The Trade Competition Law

Promulgated on April 30, 1999, the Trade Competition Law replaced the Price Fixing and Anti-Monopoly Act of 1979.

The Trade Competition Law seeks to promote free and fair trade competition and restrict any trade practice that creates a monopoly or reduces or restricts competition. The following anticompetitive trade practices are prohibited under the Trade Competition Law:

- Abuse of market dominance
- Mergers that cause monopolies/unfair competition
- Collusive practices that create monopolies/reduction of competition
- Agreements that restrict purchase of goods or services directly from overseas
- Unfair trade practices.

A business operator who fails to comply with the provisions of the Trade Competition Law could be subject to imprisonment for a period of one to three years and/or a fine ranging from THB 2 million to THB 6 million.

The Trade Competition Law applies to all business operators, including manufacturers, sellers, importers and buyers. It does not apply to government sectors, state enterprises, agriculturalists/cooperatives or other businesses exempted by law.

The Trade Competition Law is enforced by the Trade Competition Commission (the Commission), which consists of the Minister of Commerce, the Permanent Secretary of the Ministry of Commerce, the Director General of the Department of Internal Trade, the Permanent Secretary of the Ministry of Finance, and 8-12 "qualified persons with knowledge and experience in law, economics, commerce, business administration or public administration."

The Commission is empowered to do the following:

- Consider complaints
- Prescribe rules for business operators with a market dominant position
- Consider applications for business mergers
- Initiate the joint reduction or restriction of competition
- Give orders for suspension, cessation, correction or variation of activities by business operators.

Ineffectiveness Concerns

The Trade Competition Law is widely seen as playing no role, and having no impact, on the trade practices of business operators. It fails to influence overall competition in the domestic market. Business operators have little fear of committing any prohibited trade practice proscribed by the Trade Competition Law.

The law's ineffectiveness has been attributed to several causes, such as:

- Lack of due process and transparency in administering and enforcing the law
- Broad discretionary authority of the Commission
- Lack of clear rules or guidelines for implementation
- Ineffective structure and composition of the Commission, which contributes to its lack of independence.

The Bill

The Minister of Commerce, Pornthiva Nakasai, assigned the Department of Internal Trade to study and examine the Trade Competition Law and prepare a draft bill (the Bill) to be presented to the Cabinet for its consideration.

The Bill aims to rectify or eliminate several issues which are considered obstacles in enforcing the Trade Competition Law. It is anticipated to focus on:

- Changing the structure and composition of the Commission by including representatives from public or consumer organisations to solve the conflict of interest issue
- Upgrading the status of the Office of Trade Commission to an independent body
- Increasing transparency in administering and enforcing the law
- Strengthening the penalties imposed on business operators who violate the law
- Creating fair competition between state-owned enterprises and the private sector by expanding the scope of the law to apply to state-owned enterprises that operate businesses that compete with the private sector.

In addition, concerned parties are advocating the need to establish guidelines and definitions of technical terms specified in the Trade Competition Law, such as merger, market dominance, monopoly and price discrimination.

Current Status

The first draft of the Bill was proposed to the Cabinet for consideration in early March 2010. However, the Council of State suggested to the Minister of Commerce that the Bill be revised, because it contains some problematic provisions that again could become an obstacle in enforcing the law. The Cabinet approved the withdrawal of the first draft of the Bill by the Minister of Commerce for further revisions.

Conclusion

The Bill will have to face further revisions and public hearings before it is passed. It will face strong opposition from parties whose interests it will adversely affect. However, an overhaul of the law is essential to elevate from paper to practice the lofty objective of the law—free and fair trade. Competition should be defined and re-defined to adapt to changing economic and business climates. This will ensure the benefits of competition are not hampered by any anticompetitive activities. ◆

Hub-and-Spoke Cartels: A UK Phenomenon?

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The concept of using the existing competition rules, including those dealing with cartels, to police information exchanges between competitors, whether they are engaged in such exchanges directly, or via a third-party intermediary, is not, nor should it be, contentious. What matters is the nature of the information being exchanged, the intent behind the exchange and whether it can be characterised as having negative effects on competition—or indeed whether it is evidence of broader, hard-core cartel activities such as horizontal price fixing.

In the United Kingdom, following decisions by the Office of Fair Trading (OFT) in 2003 in respect of replica football kits[1] and toys,[2] the question of what constitutes illicit indirect information exchange (sometimes referred to as a "hub-and-spoke" or an "A-B-C" cartel) was clarified by the Court of Appeal.[3]

> (i) [where] retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one),
>
> (ii) B does in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and
>
> (iii) C does, in fact, use the information in determining its own future pricing intentions,
>
> then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition. The case is all the stronger where there is reciprocity: in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will use that information to influence market conditions by passing that information to (amongst others) A, and B does so.[4]

Following this judgment, the OFT launched a number of investigations into the grocery sector. Early resolution settlements were reached with a number of parties concerning an investigation into dairy products in December 2007[5] and tobacco products in July 2008.[6] A further investigation encompassing grocery retailers and their suppliers is ongoing[7] and others, involving services to consumers, may materialise.

All of these cases have focused on indirect information exchanges between retailers via their suppliers.

Horizontal Collaboration

As mentioned above, there is nothing novel about concluding that the exchange of certain information between competitors can have negative effects and, hence, be contrary to competition law. Equally, there can be little dissent to the view that an illicit information exchange is no less harmful merely because the information was channelled through a third party.

The United Kingdom has nevertheless seen a particular enforcement focus, especially in the retail sector, on relationships between suppliers and their retailer customers. This focus has unintentionally deterred potentially beneficial collaborations between competitors (e.g., those with environmental or public health objectives, such as reductions in plastic bag use or concerns over minimum pricing for alcohol), over concerns that such collaborations might infringe competition law.

As companies seek to ensure ongoing compliance with the UK competition laws, there has been understandable concern, both from retailers and suppliers, as to how far they need to go to protect their interests and how practically they can do this in environments as traditionally fast moving as retail.

In practice, the OFT will continue to assess each information exchange on its merits. When seeking to bring infringement proceedings in an A-B-C cartel arrangement, the evidentiary burden on the OFT—and on any prosecuting authority—will remain high in proving the necessary degree of collusion between all participants.

Short-Form Opinions

Recognising that uncertainty over regulatory treatment of information exchanges can itself have negative effects on competition, the OFT held a roundtable discussion on competitor collaboration in October 2009. Following this event, the OFT announced that it is proposing to try a short-form opinion procedure aimed at providing guidance on a novel or unresolved issue of wider interest arising in the context of a specific proposal. In essence, this process is intended to provide businesses with pre-emptive guidance in the likelihood that a particular proposed collaboration meets the exemption criteria contained at Section 9 of the Competition Act 1998 and Article 101(3) of the Treaty on the Functioning of the European Union.

While full details of how this procedure will work, and a decision on the adoption of the first candidate cases are yet to be finalised, the development is to be welcomed. It is not expected that this will result in a return to notification of all potential collaborations between competitors, but it should nevertheless provide greater security going forward for businesses that wrestle with the dividing line between permissible and illicit information exchange.

Conclusion

In many respects, while the various retail investigations in the United Kingdom have placed hub-and-spoke arrangements firmly in the spotlight, this is neither a novel interpretation of existing competition rules, nor a uniquely UK phenomenon. Indeed, similar investigations have recently been launched by both the Dutch and German authorities, which suggests that further enforcement action in this area internationally is to be expected. ◆

Endnotes

1 *OFT Decision of 1 August 2003 into Price-fixing of Replica Football Kits.*

2 *OFT Decision of 21 November, 2003 into Agreements between Hasbro UK Ltd, Argos Ltd and Littlewoods Ltd fixing the price of Hasbro toys and games.*

3 *Argos Ltd and another v Office of Fair Trading, JJB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318.

4 *Ibid., paragraph 141.*

5 OFT announced early resolution settlements had been reached with a number of dairy processors and retailers on 7 December, 2007 (http://www.oft.gov.uk/news/press/2007/170-07). A further settlement was reached in February (http://www.oft.gov.uk/news/press/2008/22-08).

6 OFT announced early resolution settlements with a number of manufacturers and retailers on 11 July, 2008 (http://www.oft.gov.uk/news/press/2008/82-08).

7 Unannounced inspection visits to a number of retailers and their suppliers was widely reported in the press in April 2008.

New European Commissioner for Competition, Joaquín Almunia

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Joaquín Almunia, the new Commissioner for Competition, is no newcomer to the European Commission ("EC" or the "Commission"), as he has held the portfolio for economic and monetary affairs for the past five years. And, while that position had been a rather low-visibility one, Almunia attracted significant media interest in the wake of the recent financial and economic crisis. During his first term, Almunia gained the confidence of EC President José Manuel Barroso, who entrusted him with one of the EC's most important political portfolios.

When Pedro Solbes returned to Madrid to become Finance Minister in 2004, Almunia took over as the European Commissioner of Economic and Monetary Affairs. Earlier, Almunia had been a member of the Spanish Parliament from 1979 to 2004, and was leader of the Spanish Socialist Party for three of those years. In the 1980s and until the early 1990s, Almunia held minister posts both for Employment and Social Security and for Public Administration.

Almunia inherits the competition portfolio from the Dutch Commissioner, Neelie Kroes, who secured a second mandate in a new role as Commissioner for Digital Agenda. Almunia, who has a degree in law and economics, has big shoes to fill: under Kroes' tenure, the Commission imposed record fines and opened proceedings against some of the world's largest companies. Furthermore, against the background of the financial crisis, state aid rules that had attracted little interest in previous years created an important role for the Commission in various restructuring plans.

Not surprisingly, Almunia's confirmation hearing in the European Parliament centered on the economic crisis and how competition policy fits into the plans to regain economic growth and competitiveness. He made it clear that bail-out plans for banks would have to ensure a level playing field and that all types of banks—whether public or private—should be treated equally. The plans for collective redress carried on from the previous Commission must continue, in Almunia's opinion, to avoid abuses such as in the US class action system. Overall, Almunia's performance in the hearing was considered good although the Parliamentarians put little pressure on him, allowing him to remain vague on the way forward in competition policy.

Current debates in Brussels focus on topics such as due process, the Commission's fine scheme and private enforcement of competition rules. Regarding the latter, Almunia has shown that he is not afraid of re-assessing the preparatory work done by the previous Commission: recently it was announced that a new round of consultations would take place towards the end of the year with the goal of establishing common principles for collective redress schemes for both consumer and competition law initiatives. This means that work on these initiatives will re-start from scratch despite proposals ready in the drawers since 2009.

In a January 2010 consultation on new best practices for investigations and decisions and the submission of economic evidence, as well as on a Hearing Officer's guidance paper, the Commission received a number of comments demanding tighter and more independent controls on its actions. Some stakeholders even debated whether a broader reform of EC procedures may be needed. To this end, some reflect on new structures that would separate investigations from actual decision-making. While so far the Commission has been lukewarm to such propositions, this still might trigger further debates to which Almunia might have to react in one or the other way.

In his first speeches the Commissioner stressed that the EC's competition law activities need to be based on sound legal and economic analysis, which will be central in a number of reviews of competition law acts that are currently approaching adoption or that will be tackled during Almunia's mandate. Ongoing projects include the new Specialisation and Research & Development Block Exemption Regulations and the Guidelines on Horizontal Agreements. In relation to the cooperation agreements guidelines, businesses hope for more guidance and legal security regarding information exchanges between competitors and standard setting—two issues that have been central in recent cases.

It is yet to be seen what Commissioner Almunia's stance will be on a number of issues; for example, whether the Commission will step up efforts to ensure competition in the digital economy, and whether additional measures will be taken to ensure fair antitrust proceedings. The Commissioner certainly has a lot on his plate during his new mandate. ◆

Editorial Update: US Ninth Circuit Rehears *Gilley*, Changes Result but Retains Some Provocative Reasoning

In the last issue of the *Antitrust & Competition Review*, we explored the implications of a decision of the US Court of Appeals for the Ninth Circuit that reinstated claims under Section 1 of the Sherman Act that were based solely on the aggregate competitive effects of non-conspiratorial parallel conduct, in *William O. Gilley Enterprises, Inc. v. Atlantic Richfield, Co.*, 561 F.3d 1004 (9th Cir. 2009).[1] On December 2, 2009, as the last issue went to press, the Ninth Circuit withdrew its decision and issued a *per curiam* opinion reaching the opposite result.[2] The court has since denied rehearing, and the time to petition the US Supreme Court has expired, so the revised decision will remain in place.

The new decision affirms the district court's dismissal of an action alleging that nine petroleum refiners violated the Sherman Act by entering into a series of bilateral exchange agreements involving gasoline that meets the standards of the California Air Resources Board. The new opinion removes many of the troubling aspects of the withdrawn opinion discussed in the earlier article. Because it does not permit the plaintiff to rely on unpleaded theories to sustain a complaint that is insufficient on its face, the new opinion is in considerably less tension with the pleading standards set forth in the US Supreme Court's recent decisions in *Twombly* and *Iqbal*.[3] And the revised decision does not provide direct authority for the notion that a plaintiff may show market power by aggregating the volume of commerce in contracts among different defendants not acting in concert. But it does suggest that such claims might be valid.

The Ninth Circuit now agrees with the district court that the complaint's "broad allegations encompass conspiracy claims that are precluded by" an earlier state court decision rejecting similar conspiracy claims.[4] Departing from its earlier decision, the Ninth Circuit viewed the complaint as asserting, "not … that the bilateral agreements, in themselves, restrain trade, but that they facilitate or make it easier for the defendants to coordinate their actions to restrain trade."[5] That is, the complaint pleaded only a "network of exchange agreements that arguably allowed the defendants to unlawfully coordinate their production and output."[6]

The new opinion, however, also asserts that the plaintiffs could have proceeded on a rule of reason claim, at least in theory, if they had sufficiently pleaded that the bilateral exchange agreements themselves had actual anticompetitive effects "when aggregated."[7] The Ninth Circuit held, however, that the amended complaint did not give the defendants fair notice of this claim under the standards of *Twombly*.[8] In the absence of any allegations that each agreement had a discrete effect on competition that could be viewed together with the separate effects of other exchange agreements, the mere fact that defendants entered into these agreements was not enough to sustain a claim. The court further held that aggregating the agreements to show market power would not show that the defendants' changes in production resulted from anything but independent self-interested efforts to maximize profits.[9]

Thus, the decision includes language that could be cited to support new theories attempting to aggregate the competitive effects of parallel conduct. But unlike the withdrawn opinion, the revised decision reinforces *Twombly*'s holding that allegations of parallel conduct alone are insufficient to allege an antitrust violation.

In one significant change, the new decision no longer addresses whether a district court can screen a pleaded theory for economic common sense at the pleading stage. In the withdrawn opinion, the panel majority rejected the notion that the trial court could assess the economic plausibility of the allegations in an antitrust complaint, notwithstanding the Supreme Court's recognition that the sufficiency of a complaint "turns on the suggestions raised by [the alleged] conduct when viewed in the light of common economic experience."[10] The change leaves district courts in the Ninth Circuit free to construe and apply *Twombly* directly when evaluating antitrust complaints. It remains for another panel, on another appeal, to articulate how much economic common sense can enter into that evaluation.

Endnotes

1 Donald M. Falk & Tai Lui Tan, *Rescuing a Rule of Reason Claim by Aggregating the Effects of Noncollusive, Noncoercive Agreements—A New Litigation Threat for Industry Standard Contracting Practices?* Mayer Brown *Antitrust & Competition Review* 24 (Issue 2, December 2009).

2 *See* 588 F.3d 659 (9th Cir. 2009).

3 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

4 588 F.3d at 667.

5 *Id.* at 668.

6 *Id.* at 669.

7 *Id.* at 665.

8 *Id.* at 667, 669.

9 *Id.* at 669.

10 *Twombly*, 550 U.S. at 565.

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