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Review
Winter 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

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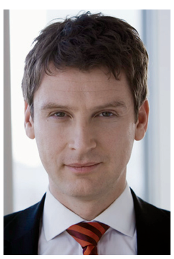

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Welcome to the Winter 2010 edition of the Mayer Brown Antitrust & Competition Review. This edition covers key enforcement issues in the United States, Brazil, the European Union and Asia.

In the United States we see two significant trends: (1) the FTC's focus on perceived "invitations to collude" between competitors during analyst, investor and public calls, and (2) the use by civil plaintiffs of the public statements of corporate executives as evidence of collusion when competitors pursue parallel market actions. John Roberti and Daniel Jones offer recommendations on how to minimize the risk that government and private plaintiffs will base their claims on public statements made by corporate executives.

In addition, we see increasing convergence between US and EU approaches to unilateral conduct. Chris Kelly and Lisa Lernborg offer insight into this convergence in the context of the Intel Antitrust Litigation.

In Europe, we find that one of the most recent EU General Court decisions on unilateral conduct has made it easier to find holders of pharmaceutical patents to be market-dominant. Gillian Sproul addresses how the AstraZeneca decision applies the reasoning of competition law to intellectual property rights and confirms a new category of abuse.

Manu Mohan discusses the debate in the European Union about whether companies can invoke an "inability to pay" defense against an EU Commission's fining decision while, in another article, Frédérick Amiel critically analyzes the EU Commission's suggested approach to information exchange among competitors. Finally, and relevant to in-house counsel and attorneys around the globe, Steve Smith analyses the recent European Court decision on legal privilege in cartel cases.

One of the most discussed topics in Asia is the prospective Hong Kong Competition Bill. According to John Hickin and Gerry O'Brien, however, the bill seems to raise more questions than it answers.

Finally, minority shareholdings and antitrust is a topic not only discussed in the United States and Europe, but also in Brazil, as Bruno Werneck and Gustavo Coelho report in their article on relevant influence.

We hope you enjoy this issue's informative articles. As always, we welcome your thoughts and comments and invite you to contact us with any feedback.

The New Realm of Antitrust from Public Disclosures

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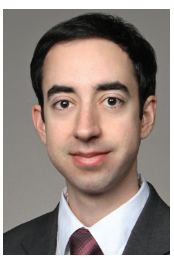

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A recent trend in US antitrust law has been a new emphasis on claims based on public disclosures. This trend has manifested itself in two ways.

First, the Federal Trade Commission (FTC) has revived the "invitation to collude" theory. This theory posits that a company that makes a specific and concrete offer to enter into an unlawful agreement may be found liable, even if the offer is never accepted. Illustrating this point, the FTC brought two cases, including one this past summer, based on alleged "collusive" statements made during calls with securities analysts and investors.

Second, in response to heightened pleading requirements, civil plaintiffs are looking for public statements that can be used as evidence of an actual agreement when competing companies take parallel actions. Over the past five years, the Supreme Court has made it clear that plaintiffs must be very specific when pleading an agreement of unlawful collusion (the "unlawful agreement theory"), advancing something more than generalized allegations to state a Section 1 claim. Public statements are a means for plaintiffs to do just that.

This article considers both the invitation to collude and the unlawful agreement theories and offers some practical suggestions to companies as they strive to limit their potential antitrust liability.

Invitations to Collude

An "invitation to collude" is an antitrust claim that involves a specific, directed offer from one competitor to another to agree on issues of competitive significance, such as price or output, which is not accepted. The first reported invitation to collude case was *United States v. American Airlines*, Inc.[1] In that case, American's president, Robert Crandall, called his competitor and said, "Raise your goddamn fares twenty percent. I'll raise mine the next morning . . . . You'll make more money and I will too."[2] According to the Fifth Circuit, all that remained before an unlawful agreement could be finalized was for the competitor to say "yes."

Unfortunately for Mr. Crandall, however, American's competitor had taped the conversation and turned the tapes over to the Department of Justice (DOJ). Unable to fit Crandall's conduct into a traditional Section 1 theory, the DOJ instead charged American and Mr. Crandall with an attempt to monopolize through an invitation to collude. Significantly, the Fifth Circuit emphasized, Mr. Crandall's words were "uniquely unequivocal" and "not ambiguous,"[3] which allowed the court to conclude that there was collusive behavior.

Since *American*, the US government has brought a series of invitation-to-collude cases under the Sherman Act and the Federal Trade Commission Act. These cases have typically involved a direct communication between competitors in which a specific and unequivocal offer was made and the only thing preventing an unlawful agreement from being formed was the offeree's decision not to accept the offer.[4]

For example, in *United States v. Microsoft Corp.*,[5] there was a meeting between Microsoft and Netscape that the district court concluded led to an invitation to collude. Netscape's CEO testified that, in a private meeting between executives of both companies, Microsoft proposed that Netscape withdraw from "the market for browsing technology for Windows," leaving Microsoft a single-firm monopoly in that market.[6] The court found that if Netscape had accepted Microsoft's offer, "this market allocation scheme would, without more, have left Internet Explorer with such a large share of browser usage as to endow Microsoft with de facto monopoly power in the browser market."[7] According to the government's version of events, that offer was exceptionally detailed and specific:

> [I]f Netscape would agree not to produce a Windows 95 browser that would compete with Internet Explorer, Microsoft would allow Netscape to continue to produce cross-platform versions of its browser for the relatively small market of non-Windows 95 platforms: namely, Windows 3.1, Macintosh, and UNIX. Moreover, Microsoft made clear that if Netscape did not agree to its plan to divide the browser market, Microsoft would crush Netscape, using its operating system monopoly, by freely incorporating all the functionality of Netscape's products into Windows.[8]

Notwithstanding the *Microsoft* decision, most of the invitation to collude cases have been brought pursuant to Section 5 of the FTC Act, not the Sherman Act.[9] The two most notable of these—*U-Haul* and *Valassis*—have come in the form of consent decrees based on statements made during analyst calls. This is not surprising. Invitation to collude cases have been (and are likely to continue to be) an area of emphasis for the FTC, and it would appear that the FTC is actively seeking to file such cases. Indeed, in a recent American Bar Association panel discussion, the FTC's lead lawyer explained that the FTC discovered the *U-Haul* case while doing a routine review of public disclosures.[10]

The U-Haul Consent

The FTC's most recent invitation to collude case was brought in early 2010 against U-Haul International (U-Haul), a "do-it-yourself" one-way truck rental business. The FTC alleged that U-Haul invited its closest competitor, Avis Budget Group, Inc. (Budget) to collude to increase prices on truck rentals: an invitation that Budget apparently did not accept.[11]

According to the FTC's complaint, U-Haul and Budget together comprise more than 70 percent of the one-way truck rental transactions in the United States.[12] The FTC alleged that in 2006, U-Haul's CEO and Chairman discovered that competition from Budget forced U-Haul to lower prices on rentals. To combat the downward pressure on prices, U-Haul's CEO allegedly invited Budget—both privately and publicly— to collude in order to obtain a price increase.[13]

U-Haul's private strategy was two-fold: U-Haul would raise rates and then contact Budget to communicate those rates and encourage a similar rate increase. If Budget did not follow U-Haul's price increase, U-Haul would then discipline Budget by lowering its prices below Budget's prices and inform Budget of the rate reduction.[14] In 2006, U-Haul's Chairman allegedly instructed local U-Haul dealers to communicate with counterparts at Budget and Penske using the following script:

> Are you tired of renting 500 miles for $149 and a $28 commission? Then, tell your Budget/Penske rep that U-Haul is up and they should be too.[15]

In the same document, the Chairman told dealers that they "know how to have this conversation and who to call to have it. We should be able to exercise some price leadership and get a rate that better reflects our costs."[16] Local dealers, according to the complaint, encouraged their counterparts to monitor U-Haul rates on websites. This strategy was successful in at least a few instances, according to documents obtained during the FTC investigation.[17]

The complaint further alleges that in 2008, U-Haul's Chairman employed a "public strategy" by using earnings conference calls—which were monitored by Budget—to communicate messages about pricing.[18] The complaint alleges that the CEO delivered the following five messages during the 2008 conference call:

- U-Haul was attempting to be a price leader and competitors should raise rates: "Me trying to get us to exercise price leadership…[is] another indicator to [Budget] as to, hey, don't throw the money away. Price at cost at least."[19]
- Budget's low pricing was unprofitable for the entire industry: "Budget appears to be continuing [to] undercut as their sole pricing strategy….It's when somebody decides they have to gain share from somebody that you get this kind of turbulence that results in no economic gain for the group, in fact probably economic loss. So I remain encouraged and the official position of Budget is that they're not doing this….But many a slip between the cup and the lip….If they cave on prices the net effect is we got less money."[20]
- U-Haul was waiting for a response from Budget: "For the last 90 days, I've encouraged everybody who has rate setting authority in the Company to give in more time and see if you can't get it to stabilize. In other words, hold the line at a little higher. And if [Budget] perceive[s] that we'll let them come up a little bit, I remain optimistic they'll come up, and it has a profound affect [sic] on us." [21]
- U-Haul would tolerate a 3 to 5 percent price differential from Budget: "Okay, what can we do to justify a price difference given that in many cases we're going to be above them? But it's not that hard in the economy to justify 3 or 5% with service in my belief….I'm not driving them hard on match, match, match. [22]
- U-Haul would not allow Budget to impede on its market share: "[I]f it starts to affect share I'm going to respond, that's all."[23]

Overall, the complaint alleges that these statements made it clear to Budget that U-Haul would raise their rates and maintain these new rates so long as Budget stayed within 3 to 5 percent of U-Haul's price and refrained from price cutting to gain market share.

The settlement order against U-Haul and its parent company AMERCO prohibits collusion or invitations to collude. The companies are prohibited from inviting a competitor to divide markets, allocate customers or fix prices, as well as from participating in, maintaining, organizing, implementing, enforcing, offering or soliciting any other company to engage in such conduct. The order expires in 20 years and includes provisions regarding compliance.

The Valassis Consent

The U-Haul consent decree is reminiscent of a similar FTC case from a few years earlier. In 2006, the FTC issued a complaint and consent judgment that condemned statements made during a securities analyst call as an unlawful invitation to collude.

In *In re Valassis Communications, Inc.*,[24] Valassis' CEO opened an analyst call with a prepared statement detailing the company's strategy to end a three-year price war with its only competitor in the advertising insert business, *News America*. Valassis' CEO stated that Valassis would quote customers of News America a price that was in effect three years prior and would not go below that price. Outstanding price quotes below that price level would shortly be revoked. Valassis' CEO promised to "defend our customers and market share and use whatever pricing is necessary to protect our share."

Valassis' CEO then stated that Valassis would watch for News America's reaction. "In the recent past *News America* has been quick to make their intentions known. We don't expect the need to read the tea leaves. We expect that concrete evidence of *News America's* intentions will be available in the marketplace in short order. If *News* continues to pursue our customers and market share, then we will go back to our previous strategy."[25]

The FTC staff condemned these statements as going "far beyond a legitimate business disclosure":

> Valassis specified how it proposed to split the business of those customers it shared with News America and explained what its pricing would be with regard to pending bids to four News America customers. Valassis historically had not provided information of this type to the securities community, analysts had no need for the information and did not report it, and Valassis had no legitimate business justification to disclose the information. Valassis would not have disclosed the detailed information except in the expectation that News America would be monitoring the call and except for the purpose of conveying its proposal to News America.[26]

The FTC staff concluded that Valassis' lack of any legitimate business purpose for its statements was essential to its case, and therefore the FTC would not challenge company statements to analysts unless this standard was met, because "[c]orporations have many obvious and important reasons for discussing business strategies and financial results with shareholders, securities analysts, and others." The FTC also reasoned that antitrust challenges are appropriate only in the "limited circumstances" where the "information would not have been publicly communicated, even to investors and analysts interested in [the company's] business strategy, but for [the company's] effort to induce collusion."[27]

As *Valassis* and *U-Haul* illustrate, antitrust enforcers (particularly the FTC) can and will scrutinize analyst calls for communications that (i) appear to be directed at competitors, rather than analysts or investors and (ii) lack an apparent legitimate business purpose. Executives participating in analyst calls should therefore be aware of the "invitation to collude" theory and should tailor their remarks accordingly.

Unlawful Agreement Theory—Challenges to Public Statements as Price Fixing

Section 1 of the Sherman Act prohibits agreements in restraint of trade.[28] The key, however, is that an actual agreement (and not merely an attempt to agree) must be proven. While companies may act in parallel with respect to pricing, output reduction or other competitively significant decisions, the Supreme Court has made clear that parallel behavior alone is insufficient to prove a Section 1 violation.[29] Therefore, plaintiffs must allege other facts and circumstances that, in combination with the parallel activities, may support an inference of concerted action.

Prior to 2007, most courts had adopted an extremely liberal pleading standard[30] and allowed plaintiffs to survive a motion to dismiss simply by making many generalized allegations of parallel conduct and vague additional facts and circumstances. Some plaintiffs' lawyers believed that simply by surviving a motion to dismiss, they would be able to force a settlement with the defendants based on nothing other than the potential discovery costs or the emails or other documents found during discovery.

With its decisions in *Bell Atlantic Corp. v. Twombly*[31] and *Ashcroft v. Iqbal*,[32] the Supreme Court has made such tactics less effective, as plaintiffs must now provide specific allegations of conspiracy. Lower courts have interpreted *Twombly* and *Iqbal* as requiring plaintiffs to allege specific facts in support of a collusion claim,[33] including dates and times of alleged meetings, participants in alleged meetings and similar details.[34]

In response to these heightened pleading requirements, plaintiffs started scouring the public record for usable material. Seizing on analyst call transcripts (which they claimed were evidence of signaling), plaintiffs began alleging that those calls, combined with parallel conduct, were sufficient to state a claim under the Sherman Act. In *Avery, et al. v. Delta Air Lines Inc.*,[35] for example, a plaintiff seeking to represent a class of airline passengers alleged that Delta and AirTran, two large competitors in providing flights in and out of Atlanta, Georgia, conspired to set the fees for the handling of baggage.

A main contention in the complaint was that AirTran's CEO made an offer to Delta during an analyst call. In response to a question from an analyst, AirTran's CEO noted that AirTran had the proper "programming" to initiate a first baggage charge, but explained that it had not done so because Delta, AirTran's largest competitor, had not initiated such a fee. When asked if AirTran would consider such a fee if Delta instituted one, AirTran's CEO stated: "We would strongly consider it, yes."[36]

Shortly after this call, Delta instituted a baggage handling fee, and AirTran followed.[37] The plaintiff claimed that the analyst call was a pretext for the price-fixing agreement.[38] A number of other plaintiffs brought similar complaints, and the cases were consolidated in a multidistrict litigation proceeding.

The plaintiffs subsequently filed a consolidated amended complaint placing unparalleled weight on investor calls as the basis for the alleged agreement between AirTran and Delta.[39] Specifically, the plaintiffs relied on statements made by Delta and AirTran executives in six earnings calls over the course of several months, in addition to executives' public statements at industry conferences and in press releases.[40] Plaintiffs' monopolization claims under Section 2 of the Sherman Act have recently been dismissed, but their Section 1 claim alleging an agreement in restraint of competition remains pending.[41]

Similarly, in *Pemiscot Memorial Hospital v. CSL Limited,*[42] the plaintiffs alleged that defendant Baxter International used analyst calls to signal CSL that it was willing to limit supply of Blood Plasma Proteins. The plaintiffs accused Baxter and CSL of signaling each other through analyst calls and cited an example from a Baxter International investor call, during which Baxter's CEO stated the following: "Why any of us would, for a very short-term gain, do anything to change [the current marketplace dynamics], I just don't see why we would. It wouldn't make sense and *from everything we read and all the signals we get, there is nothing that says anyone would do that. I think people are very consistent in the messages they deliver, which are pretty consistent with what we have told you today.*"[43]

Other recent complaints have also quoted statements from analyst calls to support the idea that competitors were signaling one another through these calls.[44] Such claims exponentially increase the pressure felt by executives of public companies, who must strive to strike a balance between frankly answering analyst questions while simultaneously avoiding potential exposure to antitrust liability.

Guidelines for Minimizing Antitrust Risk

Recent efforts by both the government and private plaintiffs make it clear that companies should pay particular attention to public statements made by their executives. To that end, we offer a few practical tips to keep in mind.

Know the danger zones. In general, the riskiest public statements are those that discuss future prices or output levels. If the statement is going to discuss one of these items, it first should be scrutinized by counsel. Likewise, if an executive is going to speak on a public analyst call or otherwise face questions from investors, analysts or the public, the company should prepare a question-and-answer sheet (again reviewed by counsel) that will assist the executive with the answers.

It is also best not to announce price increases or similar acts during public calls; instead, communicate these announcements to customers first, definitively and not conditionally, and only so far in advance as may be necessary. While there is no necessity to justify price increases, any announcements about the reasons for the increase should be based on the company's own costs, capacity and customer demand—not on those of "the industry."

Focus on your own company. Executives should focus solely on their own company and not presume to speak for "the market" or "the industry." This could lead to speculation that the industry has coordinated on pricing or that the executives are inviting the other players in the industry to do so. Any justification offered for a price increase or change in output should be in terms of the company's own costs and consumer demand: it should not, in any way, refer to actions already taken by a competitor. If speaking about the conditions in the industry as a whole, executives should avoid statements that call for specific changes in prices or supply.[45]

Be only as specific as you need to be. Many times, it will be possible to provide the necessary information to the investing public without providing too much detail to competitors. For example, if information about prices, output or costs is aggregated, the antitrust risk may be reduced. An important corollary to this admonition is to disclose what is necessary and no more.

Be definitive in explaining future actions. It is unwise to announce conditional market strategies based on the actions of a company's competitors. By announcing conditional or contingent plans, an antitrust plaintiff can argue that the announcement is nothing more than a signal meant to determine if competitors will agree. If competitors do act in conformance with the announcement, then plaintiffs will argue that a signal was received and an agreement was reached.

Avoid speculation. Similarly, it is wise to avoid speculation about what may happen in the future, particularly when making predictions about competitors' behavior. For example, it is generally not prudent to discuss the extent to which price increases will "stick." Likewise, with respect to price or output, it is unwise to discuss what any competitor (or the industry) is doing or might do with respect to price or output, or to address rumors of, or plans for, future competitor price increases.

Some things are better left unsaid. The best course is to avoid speculating about how competitors or the market may react. For example, it would be best to avoid discussions about whether a potential price increase will stick, or what the company might do if a competitor does or does not respond to the company's actions. Sometimes, the best answer is a decision not to respond.

Be aware of statements by competitors. Much of the compliance advice focuses on ensuring that companies avoid statements that could be misconstrued. However, an interesting challenge arises if a competitor makes a statement that could be taken as some sort of signal. In most circumstances, the best that can be done is to ensure that the contemporaneous record is both clear and preserved. If contemporaneous documents clearly reflect that a decision was made without regard to the alleged signal, they will greatly assist any defense. Most companies monitor public statements and disclosures from competitors, and this is perfectly lawful. The key is to ensure that this monitoring does not appear to be a means of communication. Documents describing these programs should be accurate and carefully written. It may even be wise to have the commentary reviewed by counsel.

Conclusion

Aggressive scrutiny of public companies' analyst calls by the private plaintiffs' bar and government enforcers may be a fact of life post-*Twombly* and *Iqbal*. However, by arming executives with simple guidelines to follow during analyst calls, companies can potentially minimize antitrust risk while still complying with both the letter and spirit of securities regulations promoting full and accurate disclosure. ◆

Endnotes

1 743 F.2d 1114 (5th Cir. 1984).

2 *Id.* at 1116.

3 *Id.* at 1119, 1122.

4 *See In re MacDermid, Inc.*, Docket No. C-3911 (F.T.C. Dec. 21, 1999) ("[O]n several occasions [after the licensing agreement expired, the respondent] invited [its competitor] not to compete…in North America in return for [competitor's] agreement not to compete…in Japan," "invitations, if consummated, [that] would have had the purpose and effect of allocating or dividing markets…and restricting competition, including price competition between [respondent and competitor]."); *In re Stone Container Corp.*, 125 F.T.C. 853, 854 (1998) ("Senior officers of Stone Container contacted their counterparts at competing linerboard manufacturers to inform them of the extraordinary planned downtime and linerboard purchases. In the course of these communications, Stone Container arranged and agreed to purchase a significant volume of linerboard from each of several competitors.…The specific intent of Stone Container's communications with its competitors was to coordinate an industry-wide price increase."); *In re Precision Moulding Co., Inc.*, 122 F.T.C. 104, 105 (1996) ("[T]he President and General Manager of respondent visited the headquarters of the new competitor and met with an officer thereof. During the meeting, the General Manager of respondent told the competitor that its prices for stretcher bars were 'ridiculously low.'"); *In re YKK (USA) Inc.*, 116 F.T.C. 628, 629 (1993) (an attorney for YKK sent a letter to the President of a competitor accusing the competitor of predatory tactics and asked the competitor to "stop engaging in these 'unfair' practices" by ceasing to offer free equipment to customers. Later, at a meeting with the competitor, YKK's attorney restated its request.); *In re AE Clevite*, 116 F.T.C. 389, 390 (1993) (respondent told an Australian competitor that its prices were lower than respondent's and that it was "ruining the marketplace." It thereafter faxed the competitor a comparative price list of its prices for certain locomotive engine bearings and prices in the United States.); *In re Quality Trailer Prods. Corp.*, 115 F.T.C. 944, 945 (1992) ("[T]wo representatives of Quality Trailer Products visited the headquarters of a competitor and met with an officer of the firm.…They told the competitor that its price for certain axle products was too low, that there was plenty of room in the industry for both firms, and that there was no need for the two companies to compete on price."); *United States. v. Ames Sintering Company*, 927 F.2d 232, 233–34 (6th Cir. 1990) (the defendant called its competitor and specifically proposed that they "enter into an agreement to 'rig' the bids so that both companies could maintain their previous share [of 40 percent and 60 percent, respectively]" and followed up with several calls on the subject over the next few days); *see also Biovail Corp. v. Hoechst AG*, 49 F. Supp. 2d 750, 771 (D.N.J. 1999) (at a private meeting between Hoechst and Biovail, Hoechst proposed that it "would refrain from instituting a patent infringement suit against Biovail if Biovail agreed to delay the launch of its generic form of Cardizem CD").

5 87 F. Supp. 2d 30, 45–46 (D.D.C. 2000), *rev'd in part on other grounds*, 253 F.3d 34 (D.C. Cir. 2001).

6 *Id.* at 45.

7 *Id.* at 45–47.

8 Plaintiffs' Joint Proposed Findings of Fact in *United States v. Microsoft Corp.*, No. 98-1232 (TPJ), ¶ 67.4(i), available at http://www.usdoj.gov/atr/cases/f2600/2613a_htm.htm.

9 Indeed, certain FTC commissioners have gone so far as to suggest that invitation to collude claims are not actionable under the Sherman Act. *In re U-Haul International, Inc.*, File No. 081 0157 (F.T.C. June 9, 2010) (concurring statements of Chairman Leibowitz and Commissioners Kovacic and Rosch).

10 Author John Roberti was also a panelist.

11 *In re U-Haul International, Inc.*, File No. 081 0157 (F.T.C. June 9, 2010) (Analysis to Aid Public Comment).

12 *In re U-Haul International, Inc.*, File No. 081 0157 (F.T.C. June 9, 2010) (Complaint ¶10).

13 *Id.* ¶¶11-12.

14 *Id.* ¶¶ 12-13.

15 *Id.* ¶ 14.

16 *Id.*

17 *Id.* ¶¶16-19.

18 *Id.* ¶¶ 20-26.

19 *Id.* ¶ 20a.

20 *Id.* ¶ 20b.

21 *Id.* ¶ 20c.

22 *Id.* ¶ 20d.

23 *Id.* ¶ 20e.

24 File No. 051 0008 (F.T.C. March 14, 2006).

25 *In re Valassis Communications., Inc.*, File No. 051 0008 (F.T.C. March 14, 2006) (Compl. Ex. A at 4), available at http://www.ftc.gov/os/caselist/0510008/060314cmpexha0510008.pdf.

26 *In re Valassis Communications, Inc.*, Analysis of Agreement Containing Consent Order to Aid Public Comment, 71 Fed. Reg. 13976, 13979 n. 11 (March 20, 2006).

27 *Id.* at 13978–79.

28 15 USC 1.

29 *Theatre Enterprises v. Paramount Film Distributing Corp.*, 346 US 537, 541 (1954); *In Re Flat Glass Antitrust Litig.*, 385 F.3d 350, 360 (3d Cir. 2004); *Blomkest Fertilizer, Inc. v. Potash Corp.*, 203 F.3d 1028, 1032 (8th Cir. 2000) (en banc).

30 *Conley v. Gibson*, 355 US 41, 45 (1957) ("a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

31 550 U.S. 544 (2007).

32 129 S. Ct. 1937, 1950 (2009).

33 *See, e.g., Tam Travel, et al. v. Delta Airlines* (*In re Travel Agent Commission Antitrust Litig.*), 583 F.3d 896 (6th Cir. 2009); *Marangos v. Swett*, 2009 WL 1803264, *2 (3d Cir. January 25, 2009); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, No. 08-md-1972 TSZ, 2009 WL 2581510 (W.D. Wash. August 18, 2009); *Bailey Lumber & Supply Co. v. Ga.-Pac. Corp.*, No. 1:08CV1394LG-JMR, 2009 WL 2872307 (S.D. Miss. August 10, 2009); *Burtch v. Milberg Factors, Inc.*, No. 07-556-JJF-LPS, 2009 WL 1529861 (D. Del. May 31, 2009).

34 *See, e.g., In re Travel Agent Commission Antitrust Litig.*, 583 F.3d at 905–06; *In re Urethane Antitrust Litig.*, 2009 WL 3337247, *8–9 (D. Kan. August 14, 2009).

35 No. 1:09-cv-1391 (N.D. Ga. Filed May 22, 2009).

36 The exchange during that call went as follows:

> [Analyst Question]: First check bag fee, you don't have one, do you and will you?
>
> [Response from AirTran Executive]: Good question. Let me tell you what we've done on the first bag fee. We have the appropriate programming in place to initiate a first bag fee and at this point we have elected not to do it, primarily because our largest competitor in Atlanta where we have 60% of our flights hasn't done it, and I think we don't think we want to be in a position to be out there alone with a competitor who we compete on has two-thirds of our nonstop flights and probably 80% to 90% of our revenue is not doing the same thing. So I'm not saying we won't do it, but at this point, I think we prefer to be a follower in a situation rather than a leader right now.
>
> [Analyst Question]: But if they were, you would consider, it's not a matter of fact.
>
> [Response from AirTran Executive]: We would strongly consider it, yes.

Complaint ¶20 (AirTran Q3 Investment Call, October 23, 2008).

37 Compl. ¶22.

38 *Id.*

39 *In re Airline Baggage Fee Antitrust Litig.*, No. 1:09-md-2089 (N.D. Ga. Filed February 1, 2010).

40 Compl. ¶¶ 32–59.

41 *In re Airline Baggage Fee Antitrust Litig.*, No. 1:09-md-2089 (N.D. Ga. Filed August 2, 2010).

42 No. 2:09-cv-03143 (E.D. Pa. Filed July 15, 2009).

43 Compl. ¶90 (emphasis added). The CSL complaint is derived from an FTC administrative complaint that sought to challenge a merger between CSL and Talecris. *In the Matter of CSL Limited*, Docket No. 9337 (F.T.C. filed May 27, 2009). The parties eventually abandoned this merger.

44 *E.g., In re Potash Antitrust Litig. II*, Direct Purchaser Amended Consolidated Class Action Complaint, MDL Docket No. 1996, Civil No. 1:08-cv-6910 ¶¶ 136–143 (N.D. Ill. Filed April 3, 2009); *In re Rail Freight Fuel Surcharge Antitrust Litig.*, MDL Docket No. 1869, Misc. No. 07-489 (PLF) ¶¶ 4, 11, 68 (D.D.C. filed April 15, 2008).

45 See 3A P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 1419e4, at 133–34 (2d ed. 2003) (distinguishing between speech that "deplore[s] prevailing prices as insufficient for industry solvency or for needed innovations" and speech that "specifically indicate[s] that the industry needs a 10 percent price increase"; the latter being "more dangerous than necessary to convey appropriate information to stockholders, customers, market analysts, and government officials").

Competition Law and Intellectual Property—New Forms of Abuse?

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A recent EU General Court judgment explores the application of competition law to intellectual property rights. In this case, the court upheld a 2005 European Commission decision finding that AstraZeneca[1] abused a market-dominant position by blocking or delaying parallel imports and the entry of generic versions of its ulcer drug, Losec.[2]

In its judgment, the court upheld two main findings of abuse: (i) obtaining patent extensions on the basis of misleading information and (ii) a marketing strategy involving withdrawal of Losec capsules and the marketing authorisations for them, combined with the launch of Losec tablets. However, the court reduced to €52.5 million the €60 million fine originally imposed on AstraZeneca, citing the Commission's failure to prove that AstraZeneca's marketing strategy had blocked parallel imports to Denmark and Norway.

The Relevant Market and Dominance

The court found that Losec's very high share of the supply of proton pump inhibitors (PPIs) gave AstraZeneca a dominant market position in the territories in which it engaged in the conduct challenged by the Commission.

The court endorsed the Commission's finding that the product market relevant to Losec was the market for PPIs alone, since these were substantially superior to other products with the same therapeutic use. It rejected AstraZeneca's argument that H2 receptor antagonists (H2 blockers), another form of ulcer treatment, should be treated as part of the same market on the basis that both fell within the same ATC level 3 classification. (The Anatomical Therapeutic Chemical [ATC] Classification System is used for the classification of drugs, and is also used by antitrust authorities to define the relevant product market.) The court upheld the Commission's finding that H2 blockers did not sufficiently constrain pricing of PPIs, which were therapeutically superior, and so were not part of the same market. The court made this finding notwithstanding the fact that PPIs constrained the pricing of H2 blockers. Further, it noted that PPIs were used to treat the more serious forms of ulcer conditions, while H2 blockers were used to treat less serious conditions.

Until the Commission's decision in this case, ATC level 3 had been the starting point for defining the relevant market in pharmaceuticals cases. The court upheld the Commission's narrower approach, which was based on the mode of action of PPIs as opposed to H2 blockers and therefore the equivalent to an ATC level 4 classification. This suggests that in the future pharmaceuticals markets will be defined more narrowly and that, in most cases, it will therefore be easier to find that the holders of pharmaceuticals patents are dominant.

The Abuse

The court's decision establishes that conduct relating to patent applications and extensions, and to marketing procedures, may constitute an abuse of market dominance, within the meaning of Article 102 of the Treaty on the Functioning of the European Union (TFEU), where that conduct blocks or delays competitors' market entry. The existence of other sanctions for misleading patent authorities does not detract from this finding, meaning that firms in a dominant position face dual liability.

The conduct at the centre of the case involved:

- A pattern of misleading representations made by AstraZeneca to patent attorneys, national patent offices and national courts in a number of Member States with a view to gaining extended patent protection for omeprazole, the active substance in Losec, through supplementary protection certificates (SPCs).[3] In what was found to be a departure from its normal practice in relation to other drugs, AstraZeneca had used the date of price approvals, rather than the (earlier) date of marketing authorisations, as the basis for its applications to extend protection of omeprazole. It had not informed the authorities of this.
- A marketing strategy combining three elements:
  - » selective requests by AstraZeneca for deregistration of market authorisations for Losec capsules in Denmark, Norway and Sweden,
  - » withdrawal by AstraZeneca of Losec capsules from those markets, and
  - » the launch by AstraZeneca of Losec multiple-unit pellet system (MUPS) tablets.

The Appeal

AstraZeneca appealed on the basis that it had not intentionally provided misleading information in order to obtain SPCs for Losec, and that the introduction of a new Losec formulation and the withdrawal of Losec capsules amounted to a legitimate commercial policy designed to protect AstraZeneca's business from competition from generic producers and parallel importers.

The General Court's Judgment of July 1, 2010

MISLEADING REPRESENTATIONS TO EXTEND PATENT PROTECTION

The court found that AstraZeneca did in fact make misleading representations in order to obtain SPCs to which it was not entitled. This type of conduct was not in keeping with the special responsibility of a dominant company not to impair genuine undistorted competition. Rather, it amounted to conduct that did not constitute competition on the merits.

AstraZeneca had argued that the existence of a fraudulent intention to cause harm to competition could not amount to an abuse of market dominance, but should be dealt with by the patent authorities under the relevant patent rules. It further argued that the competition authorities had Article 102 jurisdiction only over the enforcement (or threatened enforcement) of a fraudulently obtained patent or SPC.

The court disagreed: "...the submission to the patent offices of objectively misleading representations by an undertaking in a dominant position which are of such a nature as to lead those offices to grant it SPCs to which it is not entitled or to which it is entitled for a shorter period, thus resulting in a restriction or elimination of competition, constituted an abuse of that position." The court found that AstraZeneca's conduct had had an effect on competition from the time the SPCs were granted, despite the fact that they had not been enforced—their existence had kept competitors away. Further, the existence of a specific remedy for fraudulent representations in the patent system did not preclude the application of competition law.

DEREGISTRATION OF MARKETING AUTHORISATIONS

The court confirmed that the launch of Losec MUPS and the withdrawal of Losec capsules from the market did not in themselves constitute an abuse: they were not capable on their own of blocking competition from generic products and parallel imports. However, when these activities were combined with the deregistration of marketing authorisations for Losec capsules, they were capable of having this effect. The court rejected AstraZeneca's argument that the withdrawal of the registrations was justified on the basis of avoiding ongoing pharmacovigilance requirements. It found that there was no evidence of this in AstraZeneca's documentation and that the withdrawals had been selective—registrations had been maintained in some countries but not others. Finally, the withdrawals were not necessary to enable AstraZeneca to launch Losec in tablet form.

Reduction in Penalty

Although the court upheld the substance of the Commission's decision, it reduced AstraZeneca's fine by €7.5 million to €52.5 million. The court found that the Commission had failed to prove that deregistrations of marketing authorisations for the Losec capsule in Denmark and Norway were specifically capable of restricting parallel imports.

What Happens Next?

This is the first time that the EU courts have had the opportunity to apply Article 102 TFEU to the way in which a dominant pharmaceutical company protects and uses its intellectual property rights. AstraZeneca has appealed to the Court of Justice on a number of grounds. It is hoped that the Court of Justice, which hears appeals on points of law only, will provide guidance on these issues. Judgment is unlikely to be issued for at least one year.

Implications of the Judgment

In the meantime, the General Court's judgment creates greater risks for the holders of pharmaceuticals patents—the court's endorsement of a narrower approach to market definition will make it easier to find that pharmaceutical companies are dominant.

Further, the judgment highlights the need for firms that may be dominant in any sector to take particular care not to mislead when applying for patents or patent extensions. The effect of the judgment is that, where companies depart from normal practice in drawing up an application, they should draw this departure to the authorities' attention. Even a genuine error in the information provided for the purpose of obtaining protection could potentially constitute an abuse if it is shown that the company discovered the error but did not inform the patent authorities. The fact that fraudulent or misleading conduct can be sanctioned under the patent regime does not prevent it from also being an abuse.

Additional liability may arise from other activities that are lawful when viewed separately but, when combined with yet other activities, exclude competition from other drugs, or generics or parallel imports. For a company in this situation to defend itself against allegations of abuse, it must be able to show sound justification for its conduct, evidenced in documentation produced before the conduct occurred. ◆

Endnotes

1 AstraZeneca AB and AstraZeneca Plc.

2 Case T-321/05, Judgment of July 1, 2010; Action brought on August 25, 2005—AstraZeneca/Commission, OJ 2005/C 271/47—against Commission Decision of June 15, 2005, relating to a proceeding under Article 82 of the EC Treaty and Article 54 of the EEA Agreement (Case COMP/A. 37.507/F3 AstraZeneca) [2006] OJ L322/24.

3 SPCs are granted according to the provisions of Council Regulation 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products (OJ L 182). SPCs grant longer patent protection to pharmaceutical products, not exceeding five years after the expiration of the patent. SPCs were introduced to take into account of the lapse of time between patent registration and market authorisation.

Hong Kong's Competition Bill—More Questions than Answers?

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On July 2, 2010, a new Competition Bill was introduced in Hong Kong's Legislative Council, moving the region one step closer to adoption of its first comprehensive cross-sector competition law. This Bill follows years of debate and public consultation regarding the appropriate competition law model for Hong Kong, and failure by the government to fulfill an earlier commitment to introduce the Bill during the 2008/2009 legislative session.

A first reading of the new Competition Bill was conducted on July 14, 2010, just three days prior to the annual summer recess of the Legislative Council. A Bills Committee has now been established to scrutinize and debate the Bill.

While the contents of the Bill generally are in accord with previous government proposals, key details relevant to understanding the true scope and potential impact of the Competition Bill on the business sector are still to be provided. These missing details are likely to be a major focus of public and legislative debate.

In this article, we outline the key features of the Competition Bill and some of the uncertainties and concerns that have arisen in relation to it.

Objects of the Bill

According to its Explanatory Memorandum, the Competition Bill aims to prohibit conduct that prevents, restricts or distorts competition in Hong Kong. Interestingly, and in contrast to the usual practice of new competition regimes, the Bill does not include a more general statement of overarching objectives (such as the promotion of economic efficiency and advancement of consumer interests) which could serve to guide the future development of enforcement principles for the Bill's key prohibitions.

The Proposed Competition Commission

The Competition Bill provides for the establishment of an independent statutory Competition Commission that will be charged with investigating (but not adjudicating) alleged violations, bringing public enforcement actions for anticompetitive conduct and promoting public understanding on competition matters.

The Commission's investigation powers are quite broad, and they include a power to request information and documents, to question business operator representatives and, after obtaining a court warrant, to enter and search a premises.

Business operators can also apply to the Commission for a decision on whether an agreement or conduct qualifies for one of the exemptions to the proposed law. However, the Commission appears to have a wide discretion regarding whether or not to make a decision in such cases.

Interestingly, the Commission may also conduct market studies into matters affecting competition in Hong Kong. It remains to be seen whether this power is intended to be used in a similar manner to (and as commonly as) the market study powers held by bodies such as UK competition regulator the Office of Fair Trading. If the power is similar, it is anticipated that there may be calls for the Commission to examine (and press the government to make changes to) some of Hong Kong's unique market structures and arrangements that have long been a focus of competition concerns. These include a government land sales system which has been criticised for favouring powerful incumbent property developers over new market entries.

Key Prohibitions Under Two "Conduct Rules"

As expected, the Competition Bill sets out two main "conduct rules" of cross-sector application—a prohibition of agreements, decisions and concerted practices that prevent, restrict or distort competition in Hong Kong (the "first conduct rule") and a prohibition of the abuse of a substantial degree of market power (the "second conduct rule"). Both of these rules have extra-territorial reach and are focused on whether relevant agreements or conduct have the object or effect of preventing, restricting or distorting competition in Hong Kong, wherever the parties participating in the agreement or engaged in the conduct are located.

The clauses that set out the two main conduct rules also include a non-exhaustive list of examples of the types of behaviour which may breach the rules. For example, price-fixing and market-sharing behaviour are listed as examples of activities that may breach the first conduct rule, while predatory behaviour toward competitors is listed as an example of an activity that may breach the second conduct rule.

According to Schedule 1 of the Competition Bill, the first conduct rule will not apply to agreements or conduct that "enhance overall economic efficiency," and criteria for establishing such efficiencies are referenced in the Bill. Specifically, the exclusion will apply where the relevant agreement or conduct (i) improves production or distribution or promotes technical or economic progress, (ii) does not impose on the relevant business operators restrictions that are not indispensable to attainment of those efficiencies and (iii) does not afford the business operators the possibility of eliminating competition for a substantial part of relevant goods or services.

Notably, a broadly analogous exclusion under Europe's primary competition law also includes a fourth requirement—that a fair share of the benefits resulting from the agreement or conduct accrues to consumers. Omission of this requirement from the test for application of the Hong Kong exemption suggests that it may have a wider scope of application than the European exclusion.

Several important questions arise from the wording of the conduct rules in the Bill, including the following:

Are vertical agreements reviewable under the first conduct rule?

While the government has previously indicated that only horizontal agreements (i.e., agreement between competitors) may be targeted by the first conduct rule, and that is a focus of the examples provided, the relevant section of the Competition Bill appears on its face to be equally applicable to vertical agreements such as distribution or downstream supply agreements. However, there is still some expectation that the government will follow the approach adopted by Singapore when implementing its Competition Act earlier this decade, by introducing an exemption to the first conduct rule for all or most vertical agreements.

How will assessment of "substantial market power" occur?

While government representatives have previously suggested that a market share of 40 percent may be considered indicative of substantial market power, the Competition Bill does not contain any language referencing such indicative or presumptive market share thresholds. However, the Bill does provide that the Competition Commission must issue guidelines to indicate how it will interpret and give effect to the first and second conduct rules, and it is anticipated that such guidelines will explain the Competition Commission's preferred methodology for assessing market power.

Can abuse of substantial market power occur by reference to purpose rather than effects?

It is notable that the Competition Bill contemplates there may be contraventions of the second conduct rule by "object," whereas in many other jurisdictions unilateral conduct may only be challenged it if is shown to have a relevant anticompetitive "effect." There is some expectation that the government may be requested to revisit this issue during debate on the Bill, as concerns have been raised about the difficulty of distinguishing anticompetitive intent from an intent to simply engage in robust competitive (and ultimately lawful) market behaviour.

Does the second conduct rule apply to "collective market power" cases?

The wording of the second conduct rule suggests it may only be applied to challenge conduct by a single business operator, whereas broadly analogous prohibitions in most mature competition law regimes contemplate that relevant abuses of market power may also occur through the collective action of more than one business operator. Again, it is expected that the government will be encouraged to address this issue before seeking final passage.

Key Prohibitions under a Sector-Specific "Merger Rule"

The Competition Bill also includes provisions prohibiting mergers or acquisitions that have the effect (or likely effect) of substantially lessening competition in Hong Kong, unless they give rise to efficiencies that outweigh adverse competition effects or are exempt from the merger rule on the grounds of public policy. However, this "merger rule" will only apply in cases where at least one party holds a carrier licence or controls a business operator that holds a carrier licence, at least until such time as the government may determine that it is appropriate to broaden the scope of application of the prohibition.

There is no mandatory pre-notification for such mergers under the Competition Bill. Instead, the regulator is empowered to investigate mergers within 30 days "after the day on which it first became aware, or ought to have become aware, that the merger had taken place." After such time, the regulator may no longer initiate an investigation into a merger under the proposed law.

Notwithstanding the sector-specific nature of the merger rule, it seems from the broad wording of the Competition Bill that merger and acquisition (M&A) agreements involving business operators in other industry sectors may also potentially be challenged as agreements that violate the first conduct rule. However, as this seems contrary to previous government proposals, it is expected that the business sector will lobby the Hong Kong government to expressly exempt M&A deals from such review.

If this does not occur, many business operators who previously lobbied to have the merger rule confined to the telecommunications sector may in time come to support its cross-sector application. This is because it would provide clearer procedural mechanisms for obtaining advance approval and certainty for M&A deals, and would potentially subject M&A agreements to a less stringent competition test (determination of whether such agreements substantially lessen competition) than the test applying under the first conduct rule (determination of whether such agreements prevent, restrict or distort competition).

Judicial Enforcement Model and Private Actions

In accordance with previous government proposals, a judicial enforcement model will apply under the Competition Bill. Specifically, a Competition Tribunal will be established as a superior court of record and be empowered to hear and adjudicate on competition cases brought by the Competition Commission. Additionally, the Tribunal will be able to hear private actions brought by persons who have suffered loss or damage as a result of a contravention of the conduct rules. Such actions can either follow on from a determination of the court, or be stand-alone in nature.

Interestingly, private actions may be brought not only against a business operator that has contravened one of the conduct rules, but also against an individual "involved" in such a contravention (i.e., a person who aids, abets, procures or induces the contravention).

The Competition Tribunal is empowered to apply a full range of remedies for contravention of the conduct rules and merger rule, including:

- Pecuniary penalties not exceeding 10 percent of the total turnover (including global turnover) for the year(s) in which a contravention occurs.
- Any order the Tribunal considers appropriate, including an order restraining a person from engaging in any conduct that constitutes the contravention, an order requiring a person to dispose of operations, shares or assets and an order prohibiting a person from making or giving effect to an agreement.

The Tribunal may also disqualify directors where it determines that a company has contravened a conduct rule or the merger rule and it considers the director unfit to oversee the management of a company as a result of his or her conduct.

While the Competition Commission does not have adjudicative powers, it is empowered to accept commitments from business operators to take (or refrain from taking) action to remedy the anticompetitive effect of an alleged infringement of the previously mentioned rules.

Additionally, the Competition Commission may issue an infringement notice where it has "reasonable cause" to believe that a contravention of a conduct rule has occurred. Here, the Competition Commission may, instead of bringing proceedings in the Competition Tribunal, give the business operator the option to admit to the contravention and pay a sum not exceeding HK$10 million, refrain from any specified conduct and/or take any action required by the Competition Commission.

Exclusions and Exemptions

Various exclusions and exemptions are provided for in the Competition Bill, in addition to the general exclusion under the first conduct rule for conduct achieving net economic benefits (discussed further above). These exclusions and exemptions broadly resemble aspects of, and utilise terminology found in, the European competition law regime.

For example, the Competition Commission can grant block exemptions to particular categories of agreements that it is satisfied would generally benefit from the above-mentioned exclusion.

Additionally, conduct by business operators entrusted with the operation of services that have general economic interest will be excluded from challenge under the conduct rules in circumstances where application of those rules would impede provision of those services.

Conduct undertaken in compliance with a legal requirement is also immune from challenge under the Bill, and the Chief Executive-in-Council can also provide immunity to a business operator or certain of its practices where it is determined that there are exceptional and compelling reasons of public policy to do so, or in order to avoid conflict with an international obligation.

Finally, the conduct rules will not apply to the government or statutory bodies, unless such bodies (or certain of their activities) are specified in relevant regulation(s) that may be made by the Chief Executive-in-Council. This is a departure from previous government indications that certain statutory bodies that will be subject to the law would be listed in a schedule to the Competition Bill, and indicates that the government's protracted review of this issue is continuing.

Leniency

The Competition Bill contemplates the introduction of a leniency regime administered by the Commission, whereby business operators can receive immunity from fines in exchange for their cooperation with an investigation. The regime is only sketched broadly in the Bill, and it is expected that the Competition Commission would introduce detailed guidance on how applications for leniency will be made and considered in practice.

Concurrent Jurisdiction of the Existing Sectoral Regulators

If passed in its current form, the Competition Bill would provide two existing sectoral competition regulations in Hong Kong with concurrent jurisdiction alongside the Competition Commission: the Broadcasting Authority and the Telecommunications Authority. The current adjudicative powers of the existing sectoral regulators for competition law matters relating to their respective industry sectors would, however, be transferred to the Competition Tribunal.

Crucial Guidelines Still to Be Drafted

The Bill contemplates that the Competition Commission will draft guidelines that will provide further clarity on the scope and manner of application of the conduct rules and the merger rule. The experience of foreign competition regimes such as those in Europe and Singapore suggests such guidelines will need to include a detailed explanation of how the broadly worded conduct rules will be applied in practice and clearly identify the enforcement priorities of the Competition Commission.

Conclusion

After years of debate and consultation, Hong Kong now appears to be firmly on the path to introducing a cross-sector competition law. If the Competition Bill is enacted, the region will be the latest in a long line of Asian jurisdictions that have only recently joined (or are in the process of joining) the ranks of jurisdictions with comprehensive competition regimes—such as China, Malaysia and Singapore.

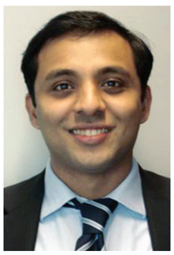
It is important that businesses operating in Asia are attuned to the proliferation of new competition law regimes in the region, and seek advice on how the developing regimes may impact existing and future business strategies and agreements. Businesses with operations or customers in Hong Kong may also wish to be involved in the ongoing debate and any future consultation processes relating to the new Competition Bill to ensure the final product is in line with international standards and does not create undue uncertainty or interruption of standard business practices.

For now, much of the public debate concerning the Bill is likely to focus on its broad range of exclusions and exemptions. Detailed discussion on the appropriate scope of the conduct rules, and where the Competition Commission's enforcement priorities for such rules will lie, may need to wait until the Commission begins work on guidelines related to these matters. The government has previously committed to ensuring that a public consultation process is held in relation to the development of such guidelines.

Finally, there is some expectation that a grace period will apply between passage of the Bill and commencement of the conduct rules, giving the business sector time to prepare for compliance with the law and the Competition Commission time to draft the above-mentioned guidelines. ◆

Inability to Pay Fines: Tough Criteria for Get-Out-of-Jail Card

Manu Mohan



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Speaking on the issue of competition and the economic and financial crisis, Joaquín Almunia, European Commissioner for Competition, made the following statement:

> The Commission will continue to enforce the competition rules, and will continue to protect law abiding companies and citizens from those who conspire against them. We will continue to set fines at a level that acts as a real deterrent.[1]

Sticking to this policy, the European Commission (the "Commission") has continued its strict antitrust enforcement and, as of October 18, 2010, has set fines totalling €1,668,904,832.00, which is already more than the total amount of fines imposed in 2009.

Meanwhile, there has been an increase in the number of Inability to Pay (ITP) fine applications from struggling undertakings, and in the last two years some of the applications have been allowed. No detailed guidance is available on the criteria for the assessment and grant of ITP claims, but the Commission has been trying to rectify this with details on procedure in its recent decisions and press releases.

Some stakeholders have responded to the recent consultation on Best Practices in Antitrust Proceedings by demanding more clarity regarding the imposition of fines. This includes demands for a separate Statement of Objections regarding fines, in an attempt to reduce the Commission's discretionary freedom. If the Commission responds by modifying the procedure for calculating fines and issuing a revised guideline, it could be expected that the criteria for assessment and grant of ITP applications would be explained in more detail than has been done in the current 2006 fining guidelines.

Background

Antitrust enforcement in the United States, and some of the national jurisdictions in Europe, includes prison sentences for individuals as one of the punishments. However, the Commission does not have this enforcement tool at its disposal, so fines remain the biggest deterrent to anti-competitive behaviour. In the results of a qualitative stakeholder survey of lawyers, economists, business and consumer associations, national competition authorities and companies on the performance of the Commission published on October 18, 2010, fines were recognised by the majority of respondents as being an effective deterrent, particularly as they have become so high. Hence, the Commission is wary of any excuses to avoid payment of fines.

The recent unprecedented financial crisis has, however, led to an increase in the number of ITP applications in the last two years. Paragraph 5(b) of the 1998 fining guidelines (the "old guidelines") briefly dealt with adjustments of fines when it provided that, "depending on the circumstances, account should be taken of the specific characteristics of the undertaking in question and their real ability to pay in a specific social context."

The inability to pay fines receives much more attention in paragraph 35 of the 2006 fining guidelines (the "current guidelines"), which states that a reduction would be based on objective evidence and not on a finding of an adverse or loss-making situation. Paragraph 35 also provides that the Commission will take into account the undertaking's inability to pay in a specific social and economic context. The current guidelines do not, however, provide more insight into the objective evidence required to substantiate a claim of ITP. The Commission has allowed the claims of ITP under the current guidelines in the following decisions, but the non-confidential versions of these decisions are not yet available.

Although it may not be related to the topic of ITP applications, in the previous decade the Commission also granted reductions for "crisis cartels," for example in the *Seamless Steel Tubes*[6] and *Alloy Surcharge*[7] cartel cases, considering them as attenuating circumstances. No reference was made in these decisions to any particular paragraph in the old guidelines when granting the reductions in fine. Although the Commission has in the past accepted crisis cartels, more recently it has rejected such claims (e.g., in the *Graphite Electrodes*[8] cartel).

Financial difficulties can also be taken into account by the Commission under paragraph 37 of the current guidelines, which provides that the particularities of a given case would justify departing from the general methodology for setting fines. It needs to be noted that this is different to the concept of ITP applications. While rejecting the claims of ITP under paragraph 35 of the current guidelines, the Commission has granted 70 percent and 20 percent fine reductions, respectively, in the *International Removal Services* cartel[9] and the *Calcium Carbide* cartel.[10] The grant of reductions by the Commission based on paragraph 37 is questionable, since it appears from the language of this paragraph that it is meant to apply to fine increases and not reductions. That question, however, is beyond the scope of this article.

In the case of *International Removal Services*, the Commission referred to paragraph 37 of the current guidelines. One of the factors taken into account was that the parent company of the infringing undertaking had been bought by another company that would have had to face the financial burden. In the *Calcium Carbide* cartel, the beneficiary of the reduction in fine was a small, independent trader that did not belong to a large group of companies, that was trading in high value materials with a rather low margin and that had a relatively focused product portfolio. No specific reference is made to paragraph 37 in the decision, but the Commission considered that the reduced amount would be a sufficient deterrent.

Decision/Period	Number of Applications	Applications Allowed	Percentage of Reduction
Heat Stabilisers[2] (November 2009)	3	1	Not known
Bathroom Fittings[3] (June 2010)	10	5	Fines of three companies were reduced by 50%; those of another two were reduced by 25%
Pre-stressing Steel[4] (June 2010)	13	3	25%, 50% and 75%, respectively
Animal Feed Phosphates[5] (July 2010)	2	1	70%

Assessment of ITP Claims

The assessment of ITP claims has gained more importance during the present economic crisis. The Commission had to achieve a fine balance by ensuring recovery of fines without putting the undertakings involved out of business. The Competition Commissioner has made it clear that the intention of fines is not to endanger "the viability of companies." Jeopardising the economic viability of an undertaking may affect the competitiveness of the market. The Commission claims it is willing to indulge in tempering of fines in cases of genuine need. The Commission, when assessing an ITP application, would typically consider:

- Risk of bankruptcy
- Causality between the fine and bankruptcy
- Asset loss
- Specific economic and social context

The assessment of the financial situation is usually made at the same time as the fine is being calculated on the basis of the financial data submitted pursuant to a request for information. The financial situation is ascertained from the evidence relating to the evolution of equity, profitability, solvency, liquidity in the recent past, the present and in future projections. The applicant will have to provide information relating to all responsible undertakings, as well as to shareholders and their financial ability to contribute depending on the circumstances of the case.

Information sought by the Commission may also relate to financial statements, cash flow, projections, details on relations with banks (such as loan contracts) and undrawn bank facilities and provisions. The applicant needs to be aware that projections that do not support healthy past financial reports, movements of cash, etc. will be treated with suspicion by the Commission and that refusal to submit information will limit the chances of success of the application. The financial data must demonstrate that there is a serious risk of bankruptcy.

The undertaking must also demonstrate that there is a causal link between the fine and the financial distress. It is hard to establish a causal link if there is pre-existing or long-standing distress or disproportion between a large company and a small fine. The data provided by the undertaking has to convince the Commission that the economic viability of the undertaking will be jeopardised if the original fine is enforced.

The condition of "loss of all asset value" provided in the current guidelines will be met if the assets were not to be acquired by new owners, thus paving the way for exit of the undertaking from the market. It may not constitute significant asset loss if the business were to be continued as a going concern, even if there is a declaration of bankruptcy.

In addition, the undertaking will also have to show a specific economic and/or social context. The decision of the Court of First Instance in *Tokai Carbon Co. Ltd v. Commission*[11] (Case T-236/01) may be interpreted to mean that a "specific social context" would include effects such as increase in unemployment or deterioration in the economic sectors upstream and downstream.

The Commission has also previously allowed for the reduction of a fine after considering the "specific economic context" detailed under Section 5(b) of the old guidelines. The decision of the Court of First Instance in *Fédération nationale de la coopération bétail et viande (FNCBV) v. Commission*[12] observed that the Commission had taken into account characteristics such as the drop in the consumption of beef as a result of the "mad cow" crisis in a sector that was already struggling; loss of consumer confidence linked to the fear of the disease; and the situation of farmers when granting a reduction of fines based on the economic context. A further reduction of 10 percent was given by the court in addition to the 60 percent reduction that was already allowed by the Commission.

Conclusion

The Commission is of the opinion that there is no obligation to take into account the poor financial situation of an undertaking because doing so would be tantamount to giving unjustified competitive advantage. The Commission apparently believes that granting a reduction to one undertaking might lead to distortion by favouring it over others, resulting in a risk that poorly managed companies will benefit. In addition, there may be temptations to engineer corporate structures to avoid payments of fines by making an undertaking insolvent.

The analysis is company-specific and aims to be objective and quantifiable to ensure equal treatment and preserve the deterrence aspect of EU competition rules. There is a significant burden on the companies to prove their applications of ITP, but a successful claim will lead to a reduction of fines. The Commission could also provide the option of granting payment of fines by instalments not covered by a bank guarantee. These claims may be more successful and important at the time of an economic crisis.

The Commission is already facing severe criticism on the method of calculation of fines. Published guidelines that reduce the element of discretion by prescribing criteria for assessment of ITP applications will help the Commission, as well as undertakings and practitioners. Until then, it can be hoped that the Commission will only bend, but not break, guilty companies with the fines. ◆

Endnotes

1 Press conference, Brussels, June 23, 2010.

2 Case COMP/38589—Heat Stabilisers, Press Release dated November 11, 2009.

3 Case COMP/39092—Bathroom Fittings & Fixtures, Press Release dated June 23, 2010.

4 Case COMP/38344—Pre-stressing Steel Press Release dated June 30, 2010.

5 Case COMP/38886—Animal Feed Phosphates, Press release dated July 20, 2010.

6 Case IV/E-1/35.860-B—Seamless Steel Tubes, OJ L 140, June 6, 2003, pp. 0001 – 0029.

7 Case COMP/F/39.234—Alloy Surcharge, OJ L 182, July 12, 2007, pp. 31–32.

8 Case COMP.D.2 37.444—Graphite Electrodes case, OJ L 265, October 5, 2001, pp. 15–41.

9 Case COMP/38.543—International Removal Services, OJ C 188, 11.8.2009, pp. 16-18.

10 COMP/39.396—Calcium Carbide and magnesium based reagents for the steel and gas industries, OJ C 301, 11.12.2009, pp. 18–20.

11 *Tokai Carbon Co. Ltd v. Commission*—Case T-236/01.

12 *Fédération nationale de la coopération bétail et viande (FNCBV) v. Commission*—Case T-217/03.

European Court of Justice Confirms Position on Legal Professional Privilege

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On September 14, 2010, the European Court of Justice ruled that legal professional privilege (LPP) should extend only to communications with external lawyers qualified in one of the EU Member States. The ruling was handed down judgment in Case C-550/07, *Akzo Nobel Chemical Ltd and Akcros Chemical Ltd v. European Commission*, confirming an earlier 1982 decision in the *AM&S* case.[1] The judgment brings to an end a bid to change the legal status of advice given by in-house counsel and lays open the possibility that communications between a company and its in-house counsel can be reviewed, seized and relied upon by the European Commission in competition law investigations.

Background

In February 2003, European Commission officials, assisted by officials of the UK Office of Fair Trading, carried out a dawn raid at Akzo's premises in Eccles, Manchester, UK. During the inspection, Akzo claimed the protection of LPP for two emails between Akcros's General Manager and Akzo's Competition Law Coordinator, a "Mr. S," who was enrolled as an Advocaat of the Netherlands Bar and was a permanent employee of Akzo's legal department. (Akcros at that time was a subsidiary of Akzo.) The head of the Commission's investigation team reviewed the documents, rejected Akzo's case and took copies of the documents.

The Commission formally rejected Akzo's requests that the documents be returned in a decision of May 8, 2003. Akzo appealed to the General Court, but its application was dismissed, on the basis that the communications were not with an external lawyer. On November 30, 2007, Akzo appealed to the Court of Justice for annulment of the General Court's judgment. On April 29, 2010, Advocate General Kokott issued her Opinion, recommending that Akzo's appeal be dismissed. A number of parties intervened in the proceedings, including the UK, Irish and the Netherlands governments and a number of bar associations.

The *AM&S* Case

In rejecting Akzo's claim in 2003, the European Commission relied on the 1982 judgment of the Court of Justice in the *AM&S* case. In that case, the Court held, taking into account the common criteria and similar circumstances existing at the time in the then-Member States, that the protection of communications between lawyer and client was subject to two cumulative conditions:

- First, the communications must be connected to the client's right of defence.
- Second, the communications must be with an independent lawyer—i.e., a lawyer who is "not bound to the client by a relationship of employment"—who is EU-qualified.

Akzo's Arguments and the Court's Response

Akzo's appeal invited the Court of Justice to reconsider its position from the *AM&S* case.

First, Akzo argued that the existence of an employment relationship does not override the lawyer's obligations of professional conduct and discipline. This was particularly the case with Mr. S, whose contract specifically required Akzo to respect his freedom to perform his functions independently, and which required Mr. S to comply with all the professional requirements imposed by the Netherlands Bar. The Court rejected this argument, on the basis that the requirement of independence meant the absence of any employment relationship between lawyer and client. Citing the Advocate General's Opinion, the Court held that "an in-house lawyer cannot, whatever guarantees he has in the exercise of his profession, be treated in the same way as an external lawyer, because he occupies the position of an employee which, by its very nature . . . affects his ability to exercise professional independence."[2] Economic dependence on, and close ties with, the employer reduce this independence below the level enjoyed by an external lawyer.

Akzo's second primary argument was that refusing privileged status to communications with an in-house lawyer breached the general EU principle of equal treatment, given that the professional obligations on in-house and external lawyers are the same. The Court rejected this argument, stating that fundamental differences such as significant variations in the level of independence enjoyed by an in-house and external lawyer justified the differential treatment.

Alternatively, Akzo argued that, even if the court upheld the *AM&S* principle, this principle should be reinterpreted in light of significant developments since 1982 both in the national legal systems of the specific Member States and in EU law. The Court rejected this argument, stating that it was not possible to identify any predominant trend toward protection of in-house legal advice among the EU Member States. Many Member States continue to exclude correspondence with in-house lawyers from the scope of LPP and do not allow in-house lawyers to be admitted to the National Bars, nor recognise them as having the same status as external lawyers. Further, the Court found that the rules that modernised EU law in 2004 did not suggest that it was necessary to change the status of in-house lawyers.

Addressing the additional arguments put forward by Akzo, the Court found that the absence of LPP did not breach rights of defence, nor the principles of legal certainty and national procedural autonomy.

Non-EU Lawyers

Non-EU lawyers expressed significant interest in clarifying their status during these proceedings. However, unlike the Advocate General, the Court did not take the opportunity to comment on whether LPP applies to communications between clients and external counsel qualified in countries outside the EU. In her Opinion, the Advocate General had taken a strong stance: "the inclusion...of lawyers from third countries would not under any circumstances be justified . . ."[3] Nevertheless, the Court's silence on this point is a clear indication that communications between clients and external counsel who are members of a bar association or law society in a third country outside of the European Union will continue to *not* attract LPP.

Implications

Although widely anticipated, the judgment will come as a blow to the international business and legal communities. Going forward, the judgment confirms the ability of the European Commission to request and review documents and advice prepared by in-house counsel—and communications with lawyers from third countries—in the course of an investigation. Given the categorical nature of the Court of Justice's decision, this position seems unlikely to change for some time. Companies will need to continue to take care over the manner in which sensitive in-house legal advice is sought and recorded, given that such advice cannot be shielded from regulatory oversight. ◆

Endnotes

1 Case 155/79, *AM&S v. Commission* [1982] ECR 1575.

2 Case C-550/07 P, judgment of September 14, 2010, at paragraph 47.

3 Opinion of Advocate General Kokott in Case C-550/07 P, April 29, 2010, at paragraph 189.

Minority Shareholding and Antitrust Law in Brazil

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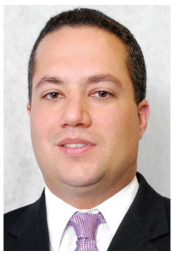

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The potential of minority shareholding to restrict competition is an oft-discussed subject in the antitrust world. There are many reasons to believe that a competitor's minority participation in its rival's business can affect the market. Even when it does not give the competitor control over its rival, such minority shareholding can generate effects that may impact competition in the relevant market, including: (i) unilateral effects regarding the reduced incentive to compete and (ii) coordinated effects in connection with the possibility of collusion. These effects, in turn, may give cause to anticompetitive practices such as the exchange of information between competitors, the interest of one competitor on the profits of its rival, the possibility of coordinated actions and the ability of one competitor to influence the decisions of other competitors and thereby reduce competition.

In Brazil, the current debate focuses on two main issues: (i) whether acquisitions of minority participation should be filed before the Brazilian antitrust system (SBDC[1]) for antitrust clearance and (ii) whether the decision-making agency (CADE) should use structural and behavioral remedies for such transactions. Both issues are discussed below.

Brief Background

Federal Law 8.884/94 (the "Antitrust Law") defines a "concentration act" as any act or transaction that may limit or otherwise restrain free competition, or that would result in one party gaining "control" of a relevant market of products or services.[2] Any such transactions must be submitted for merger review by the SBDC 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 belongs, is higher than BRL 400 million, or if the transaction results in a concentration of at least 20 percent of market share.

Therefore, it is important to understand whether acquisition of a minority position may harm competition or result in the control of relevant markets, thereby requiring that the transaction be submitted for merger review. It is also important for companies to know if minority participation could create—for antitrust purposes—a new economic group[3] or if it simply would be a regular investment of a company in another without competitive concerns.

Relevant Influence

The concept of relevant influence has been addressed in the past by CADE case law. Notwithstanding the control of a company by the majority shareholder, minority shareholding can also cause some influence in the company. Sometimes, this influence can be enough to affect the competition between the companies. CADE set some parameters to identify the relevant influence of a minority shareholder,[4] such as: (i) the opportunity to elect members of the board of directors and board of officers, (ii) fragmented shares among the shareholders, (iii) the possibility for the minority shareholder to exercise effective and continued influence, (iv) the existence of shareholders' agreements that grant decision-making powers to the minority shareholder in connection with specific matters, (v) existence of a contractual relationship and (vi) provisions that allow the minority shareholder to participate actively in the company decisions.

It is also important to refer to CADE's Precedent no. 2,[5] which exempts from merger review the acquisition of minority participation by a majority shareholder since this transaction does not impact competition or the control of the company.

Going one step further, Commissioner Carlos Emmanuel Joppert Ragazzo recently declared[6] that the absence of relevant influence of a minority shareholder means that the referred entities are not part of the same economic group. However, the Commissioner stated that the absence of relevant influence is not enough to discharge anticompetitive concerns.

With this latest decision, the question related to whether the minority participation would create a new economic group seems to be clarified: in the absence of relevant influence, the companies would not be considered part of the same corporate group. But the question regarding the potential anticompetitive effects of minority participation remains unanswered.

Recent Case Law and Remedies

Despite the fact that CADE previously analyzed some cases involving minority participation and the applicability of the Antitrust Law,[7] the April 7, 2010, decision regarding concentration acts[8] is now generally considered the leading case on the issue.

In that decision, the SBDC[9] analyzed the indirect acquisition of minority shares issued by Telecom Italia S.p.A. (Telecom Italia) by Telefónica S.A. (Telefónica), two major players in the telecommunication market. Telefónica controlled two important companies in the Brazilian telecom sector (Telesp and Vivo). Telecom Italia, on the other hand, controlled "Tim," one of the leading mobile services providers in Brazil. The acquisition of minority participation in Telecom Italia was made by Telco S.p.A. (Telco), an economic group of which Telefónica is the major investor. As a result of the transaction, Telefónica would have an indirect participation of 10.9 percent in Telecom Italia shares.

The SBDC's main concern was the competition between Vivo and Tim, two of the largest companies in the already highly concentrated mobile service market. Specifically, the SBDC was concerned that Telefónica's influence over Telecom Italia could restrict competition between these two companies.

In its judgment of the case, CADE provided some new guidance for identifying the relevant influence and its potential to harm the competition. First, it reinforced the concept of relevant influence previously set by the case law, focusing on the possibility of coordinated actions, the potential of one company to intervene in the decisions of the other, the interest of the minority shareholder on its rival's profit and the possibility of an actual influence of a competitor on another. However, the case set a new parameter for the antitrust analysis of the minority participation, which is the possibility that the minority shareholder could have access to essential information.

According to the relevant precedent, a minority shareholder's participation can be (i) active participation, when the shareholder has the control or the possibility of relevant influence over the company or (ii) passive participation, when the shareholder does not have the control or possibility of relevant influence over the company. Passive participation means the shareholder simply benefits from the company's profits as a regular investment, but does not exercise control.

Considering Telefónica's acquisition of Telecom Italia shares, CADE decided that even passive participation could give to the minority shareholder possible access to essential information. CADE determined that passive participation should also be divided into two types: passive participation with the possibility to access relevant information and passive participation without this possibility. With the first type, there would be concern about the anticompetitive effects of the minority shareholding, once the exchange of relevant information between the companies would be possible.[10] With the second type, however, the anticompetitive concern could be discharged once it becomes clear that the exchange of information is not possible.

In order to clarify the factors to be considered in a minor shareholding acquisition, the SBDC has identified market characteristics that will be subject to heightened scrutiny, such as: (i) concentration of market shares and number of players, (ii) barriers to entry, (iii) interaction and cooperation among the competitors, (iv) regular growth of demand, (v) homogeneity of products, (vi) reduced innovation, (vii) lack of information transparency for consumers regarding prices and market conditions, (viii) possible access by one competitor to information of its rivals, (ix) lack of market regulation and (x) low investments on marketing by the players. When the market has these characteristics, the minority participation has more potential to affect competition, even if the relevant influence is not possible. As a result, the possibility and the advantages of information exchange or coordinated actions also depend on the conditions of the market and not only on the corporate relations between the companies.

Against this backdrop, the acquisition of minority shares of Telecom Italia by Telco was approved by CADE, but was conditioned on some requirements set by a Performance Commitment Agreement.[11] These remedies were set basically to ensure (i) the passive participation or, in other words, the minority shareholding without the possibility of relevant influence, (ii) the elimination of interlocking directorates and (iii) the creation of "Chinese walls." The last two remedies are especially relevant, because they aim to prevent the companies from influencing the decisions of each other and from exchanging information between them. It emphasizes CADE's concern about the possibility of collusion and coordinated actions between the companies by the exchange of relevant information, even without active participation between rivals. Hence, the Performance Commitment Agreement sets forth behavioral remedies and partial structural remedies regarding interlocking directorates.

In order to guarantee the enforcement of the decision, ANATEL and CADE agreed to monitor the business of the parties in Brazil, including decisions from the board of directors and officers, market reports, independent auditing and *in locus* inspection. The competitors agreed to provide relevant information to both agencies in connection with their businesses in Brazil.

Conclusion

According to CADE precedent, transactions involving the acquisition of minority shares in various businesses are common but nonetheless subject to the Antitrust Law. In order to better assess the antitrust issues in connection with such transactions, CADE has focused its analysis of such transactions on the relevant influence thesis.

The remedies imposed by CADE in the recent transaction involving the telecom sector serve as a guideline for future minority share acquisition transactions. As illustrated by the telecom transaction, the antitrust authorities may subject the parties to significant monitoring obligations (and costs), and restrict the powers of the shareholders, in order to protect competition. ◆

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 *See* Bruno Dario Werneck & Gustavo Flausino Coelho, *Merger Control and Preliminary Remedies in Brazil–The Growing Enforcement of Antitrust Law*, Mayer Brown Antitrust & Competition Review (Spring/Summer 2010).

3 In case the antitrust authorities consider that the acquisition of minority shareholding creates a new economic group (i.e., a wider definition of an economic group), this definition might cause the filing of more transactions that originally would not meet any threshold for antitrust review.

4 Vote from Commissioner Ricardo Villas Bôas Cueva regarding concentration act no. 08012.010293/2004-48 on February 1, 2005.

5 Precedent CADE no. 2, from August 22, 2007: "The acquisition of minority participation on voting capital by a quotaholder that already has majority shareholding does not constitute the obligation to notify (article 54 of Federal Law no. 8,884/94) in the following circumstances: (i) if the seller did not have powers granted by law, statute or contract (i.a) to appoint director or officer, (i.b) to determinate commercial strategy or (i.c) to restrict any corporate act; and (ii) if the act does not include (ii.a) non-competition clause with duration greater than five years and/or geographic scope larger than the business area of the target company, and (ii.b) any clause providing controlling powers to the parties after the transaction."

6 Judgment of the concentration act no. 08012.008415/2009-41 on February 10, 2009.

7 For example, the concentration acts no. 08012.014090/2007-73, no. 08012.002529/2007-15, no. 08012.000476/2009-60 and no. 08012.005056/2010-11.

8 Judgment of the concentration act no. 53500.012487/2007 on April 7, 2010 (Reporting Commissioner: Carlos Emmanuel Joppert Ragazzo).

9 Please note that all antitrust cases involving the telecom sector must be submitted for analysis of the National Telecommunications Agency (ANATEL). ANATEL issues a non-binding opinion in order to assist CADE for the final administrative decision. Thus, all references to the SBDC regarding the telecom sector should also include ANATEL as an extraordinary member of the Brazilian antitrust system.

10 The disclosure of information to a rival can harm competition if it facilitates coordinated actions and collusion, which will depend on the conditions of the market. Thus, the characteristics of the relevant market must also be considered in the analysis of a minor shareholding acquisition and its anticompetitive effects.

11 The Performance Commitment Agreement (*Termo de Compromisso de Desempenho – TCD*) is an agreement that CADE enters into with the parties in order to set forth some conditions (remedies) to approve a transaction. Please note that the Performance Commitment Agreement is executed by virtue of the final decision by CADE.

Information Exchanges in the Draft Horizontal Guidelines: What Should We Expect?

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The European Commission has released draft horizontal guidelines[1] meant to replace existing guidance that was adopted in 2001. These guidelines apply to so-called "horizontal agreements"—i.e., cooperation between actual or potential competitors. They detail the methodology followed by the European Commission when assessing frequent types of cooperation, such as production and R&D agreements, purchasing and commercialization agreements or standardization.

One of the most anticipated developments in the draft guidelines concerns information exchanges. These were not addressed by the previous guidance and constitute a complex subject in a number of respects.

First, information exchanges take place in very different contexts: industry statistical exchanges, exchanges of information ancillary to other horizontal agreements, exchanges of information to monitor compliance with the agreed terms in a cartel, exchanges of information that are themselves likely to be qualified as a cartel, etc. The specific context weights significantly on the competitive assessment, and it is difficult to draw a general line from the case-by-case analysis carried out in the various European precedents.

Another difficulty is that information exchanges are very often pro-competitive, as they can lead to an intensification of competition or significant efficiency gains. However, market characteristics, as well as the exact type of information exchanged, can lead to a different conclusion. For example, a collusive outcome is more likely in tight oligopolies where demand and supply are relatively stable.

In addition, several National Competition Authorities have released their own information exchange guidelines, and they diverge to some extent with the European Commission's methodology.[2]

The subject of information exchanges, therefore, clearly called for more explicit guidance. From that point of view, the draft horizontal guidelines:

- Synthesize in a single document the frame of analysis presently applied by the Commission and the European courts;
- Illustrate the Commission's approach with practical examples; and
- Outline the cases where efficiency gains may be taken into consideration and thus enable companies to benefit from Article 101 (3) of the Treaty on the Functioning of the European Union.

It should be noted that the Commission suggests no safe harbor concerning information exchanges. The final draft guidelines are expected to be published in late 2010 or early 2011.

An Analytical Framework Explained

The draft horizontal guidelines describe the Commission's frame of assessment based on three main criteria:

THE MARKET ECONOMIC CONDITIONS

- The concentration degree in the market is a significant element to analyze such practices. In our view, two items deserve particular attention: first, the companies involved in the exchange have to cover a sufficiently large part of the relevant market; second, "sufficiently large part of the market" cannot be defined in the abstract and must depend on the specific facts of each case and the type of information exchange in question.
- A collusive outcome is more likely in symmetrical market structures: when companies are homogenous in terms of costs, demand, market shares, product range, capacities, etc., they are more likely to reach a common understanding on the terms of coordination. However, information exchanges may also allow a collusive outcome to occur in more heterogeneous market structures. The companies may identify their differences and overcome them through coordination.
- A transparent market will incite market players to collude more than will a less transparent market. In this context, the transparency is the combination of both the preexisting level of transparency and how the information exchange changes that level, and it will determine how likely it is that the information will have negative appreciable effects.
- The simplicity of the market will be considered. Companies may find it difficult to reach a collusive outcome in a complex market environment. However, the Commission outlines how the use of information exchanges may simplify such environments.
- The market's stability will also be considered. Collusive outcomes are more likely where the demand and supply conditions are relatively stable. In an unstable environment, it may be more difficult for a company to know whether its lost sales are due to an overall low level of demand or to a competitor offering particularly low prices. Thus, it will be harder to sustain a collusive outcome.

THE CHARACTERISTICS OF THE INFORMATION EXCHANGE SYSTEM

- Frequent exchanges of information facilitate a better understanding of the market and increase the risk of a collusive outcome. The Commission considers that the more frequently information is exchanged, the more likely it will be that members' common understanding of the market by the members will be significant, and the more their capacity to control deviating behaviors will be increased. However, in its decision *T-Mobile Netherlands* in 2009,[3] the court indicated that such analysis depends on the structure of the market. It is possible that an isolated exchange may constitute a sufficient basis for the participating undertakings to concert their market conduct (i.e., reach a common understanding on the terms of coordination) and thus to successfully substitute practical cooperation between them for competition and the risks that it entails.
- The transparency between producers and consumers is another key element of the equation. The probability that a collusive practice will be implemented is more important if the practice only benefits the members participating in the system.

THE TYPE OF INFORMATION EXCHANGED

- The nature of the data: Only the exchange of commercially sensitive information is likely to be caught by Article 101(1) TFEU. The case law has considered that the exchange of certain data, such as customer lists, production costs, quantities, turnovers, commercial strategies, plans, investments, R&D programs and results, etc., is more likely to be prohibited under Article 101(1) of the TFEU. However, concerning quantities, exchanges of information may generate efficiency gains by enabling, for instance, a better allocation of production resources between competitors. As for prices, the *Ahlström Osakeyhtiö and others v. Commission* case[4] demonstrates that if the prices exchanged are known to all, the competitive risk decreases. In conclusion, only the exchange of commercially sensitive data is likely to be adjudicated under Article 101 TFEU.

  In general, the exchange of aggregated information is not regarded as being likely to be prohibited by competition law, as the law does not permit the information to be individually identified. Conversely, the Commission considers that individualized information allows meeting attendees to have a better perception of the market and enables them to rapidly implement retaliatory measures against deviating companies.

- The age of data: One could believe that the exchange of old and historical data does not constitute an anticompetitive practice. However, this does not apply to every case, as it depends on the concerned sector and on its specific characteristics.

The Efficiency Gains

In the draft guidelines, the Commission addresses the question of potential efficiency gains that may be generated by exchanges of information. This evolution is in line with the more general context of a growing economic analysis in competition law.

Notably, the Commission considers that in certain situations, exchanges of information may be a source of efficiency, when the exchanges help direct production toward other markets where there is a strong demand, when exchanges allow companies to detect which consumers carry lower risks and should benefit from lower prices, or and when information communicated about the costs borne by competitors enables companies to be more competitive by developing internal incentive mechanisms. However, the Commission insists that, *in fine*, the benefits of such exchanges to the consumers must outweigh the restrictive effects on competition.

Specific Features to Be Considered under EU Rules

In our view, three features of the European Commission's approach to information exchanges deserve particular attention. Companies are not always fully aware of these specific considerations, which bear important consequences under EU law.

- The exchange of public data also has to be assessed under EU antitrust rules. According to the European Commission, even if the data is in what is often referred to as "the public domain," it is not genuinely public if the costs involved in collecting the data discourage, to a sufficient degree, other companies and buyers from accessing it. For information to be genuinely public, obtaining it should not be more costly for buyers and companies unaffiliated with the exchange system than for the companies exchanging the information. The fact that information is exchanged in public may decrease the likelihood of a collusive outcome on the market to the extent that competitors unaffiliated with the information exchange, potential market entrants and buyers may be able to constrain potential restrictive effects on competition. Similarly, information exchange about input prices can lower search costs for companies and could ultimately benefit consumers.
- Sharing the information with potential new entrants and clients weights significantly on the assessment of the anti- and pro-competitive effects of an information exchange under EU rules. Indeed, exchanging the information in public may decrease the likelihood of a collusive outcome and provide benefits to all, thus fulfilling the condition that any restrictive effect be outweighed by efficiency gains passed on to consumers.
- Cartel liability for exchanges of information may arise, under certain circumstances, from the mere receiving of information during one single meeting. Indeed, under the Court of Justice *T-Mobile* ruling,[5] the exchange of information during a single meeting can establish cartel liability, even when the exchange was one-way. In such circumstances, the only way to avoid cartel liability is to walk out immediately and visibly from the room in order to publicly distance from the restrictive arrangements resulting from that meeting. ◆

Endnotes

1 Draft Communication from the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, May 5, 2010.

2 French and UK competition authorities have also studied this issue through the thematic study of the French Competition Authority (2010) and the discussion paper of the OFT (2010).

3 CJUE, 4 November 2009, case no. C-8/08.

4 C-89/85, C-104/85, C-114/85, C-116/85, C-117/85 and C-125/85 to C-129/85.

5 See our June 10, 2009, Legal Update at http://www.mayerbrown.com/publications/article.asp?id=6902&nid=6.

The *Intel* Antitrust Litigation and What It Means for Competition Policy

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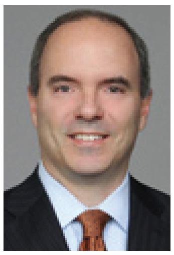

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In the last decade, cases such as *Microsoft* and *GE/Honeywell* have seen the European Commission (Commission) and the US antitrust authorities reaching substantially different outcomes on the same or similar factual bases. But the US leg of Intel's global competition law saga suggests that US antitrust enforcement policy as to unilateral conduct might be moving closer to the Commission's position. Is this an exception, or a sign of things to come?

"New" US Antitrust Policy—Much Ado about Nothing?

During his election campaign, President Obama vowed to "reinvigorate antitrust enforcement, which is how we ensure that capitalism works for consumers."[1] He promised "an antitrust division in the Justice Department that actually believes in antitrust law. We haven't had that for the last seven, eight years."[2] Christine Varney, President Obama's choice as Assistant Attorney General in charge of the Antitrust Division of the US Department of Justice (DOJ), echoed this rhetoric when she withdrew the prior administration's policy statement on Section 2 of the Sherman Act. Announcing "a shift in philosophy," Varney said that "the Antitrust Division will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers."[3]

These assertions of vigorous enforcement indicated that faith in the markets' ability to self-correct was no longer a guidepost for US antitrust policy. The *New York Times* quickly recognized the new policy as being more closely aligned with that of the Commission,[4] so did a *Wall Street Journal* commentator, who called the realignment "a huge mistake."[5] Yet, more than one year later, the DOJ has yet to bring a case demonstrating its break with the previous administration's Section 2 policy. The situation is different, however, at the Federal Trade Commission (FTC).

In suing Intel last December exclusively under Section 5 of the FTC Act (Section 5), which prohibits "unfair methods of competition," the FTC moved beyond what DOJ could ever do under Section 2 (which requires plaintiffs to show conduct fundamentally inconsistent with competition on the merits). As Intel's discounting presumably profited its computer manufacturer customers, some US courts would have been skeptical of a Section 2 challenge. Freed from the Sherman Act, the FTC adopted what amounts to a Commission-style abuse-of-dominance theory.

The *Intel* Saga

By its own account, Intel has sold between 70 and 85 percent of the x86 microprocessors (also called central processing units or CPUs) for use in computer systems. Intel has competed aggressively, in particular with its principal competitor, Advanced Micro Devices (AMD). The result has been a series of enforcement actions by several competition authorities and private plaintiffs even before the FTC filed suit:

- In 2005, after the Japan Fair Trade Commission ruled that Intel had abused its monopoly power, Intel accepted a "cease and desist" order.
- Also in 2005, AMD sued Intel in US federal and Japanese courts; the case settled in November 2009 with Intel paying AMD $1.25 billion.
- In 2008, the South Korea Fair Trade Commission fined Intel $26 million for offering rebates to personal computer makers in return for not buying competitors' CPUs.
- In May 2009, the European Union (EU) slapped Intel with a €1.06 billion fine for abuse of dominance, the largest abuse-of-dominance fine handed out to date under EU competition law.
- Just as the AMD case was settling, the New York State Attorney General beat the FTC to the punch, suing Intel in US federal court for violations of Section 2 of the Sherman Act and the corresponding New York State antitrust statute, characterizing Intel's discounting as "bribery" of its original equipment manufacturing (OEM) customers.
- The following month, the FTC filed its administrative suit (the Complaint).

After this global series of cases that seemingly addressed the same basic concern, what did the FTC's case add?

In the EU case, Intel received a hefty fine and was also required to cease the following specific practices:

- Rebates given to computer manufacturers on the condition that they bought all, or almost all, of their CPUs from Intel.
- Payments to a major retailer for stocking only computers with Intel CPUs.
- Direct payments made to computer manufacturers to halt or delay the launch of products containing a competitor's CPUs.

The fact that AMD was still able to compete and innovate was insufficient to negate Intel's so-called abuse of dominance: from an EU perspective, Intel's rebate practices led to less choice for consumers and prevented AMD from competing on a level playing field. This led to a determination that Intel had abused its dominant position.

Given that the Commission and the FTC kept "each other regularly and closely informed on the state of play of their respective Intel investigations...and shar[ed] experiences on issues of common interest,"[6] it is not surprising that many of the FTC's allegations were reminiscent of the European case. But the scope of the FTC's case exceeded that of the European Union. The FTC's complaint reached beyond CPUs; the FTC staff determined that Intel had also sought to derail competition from makers of graphics processing units (GPUs). Also, the range of conduct the FTC found "unfair" extended well beyond what the Commission identified. Albeit in language less vivid than the New York Attorney General's, the FTC complaint enumerated a broad range of allegedly illegitimate tactics meant to keep Intel's competitors' CPUs and GPUs from reaching end-users. These included:

- Using market-share discounts that prevented customers from buying more than a set percentage of their CPUs from Intel's rivals.
- Using volume discounts and bundled discounts (discounts on one product predicated on purchase of another product) that, in the FTC's view, amounted to below-cost pricing.
- Threatening customers with the loss of benefits such as discounts, technical support, guaranteed supply and patent liability indemnification if they bought any CPUs from competitors.
- Inducing computer manufacturers that bought competitive CPUs to agree to use suboptimal means of distribution for the computers containing those CPUs.
- Designing its software compiler to generate object codes that ran more slowly on competitors' CPUs, attributing the performance difference to the competitors' CPUs rather than its compiler, and allowing industry benchmarks to be developed based on the compilers' work, unfairly damaging the competitiveness of rival CPUs.
- Encouraging Nvidia, the leading GPU maker, to develop GPUs compatible with Intel CPUs, and then curtailing interoperability once Intel saw

the GPUs as potential substitutes for the CPUs themselves.

- Delaying standards development in order to skew the standards in its favor.

The FTC framed this conduct in Section 2 terms, alleging that Intel maintained monopoly power in the relevant x86 CPU market and that it attempted to monopolize a GPU market. But what the FTC complaint describes more than anything else is a rough, high-stakes competition between Intel and AMD, whose technological advances and aggressive marketing forced Intel to respond in kind. This could have meant trouble for a claim guided by Sherman Act principles. But Section 5 allows the FTC to "consider…public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[7]

The FTC's pure Section 5 gambit, untethered to Sherman Act standards, has attracted criticism. As one commentator put it, reliance on Section 5 evaded "the strict requirements of proof of competitive harm embedded into Section 2 of the Sherman Act."[8] It was not lost on observers that AMD's survival and, indeed, its own aggressive competitive responses to Intel (including continuing innovation), made it difficult to discern the consumer harm that Section 2 would have demanded. More generally, the notion of unfairness is in tension with traditional US antitrust law theory. In contrast, unfairness appears explicitly in EU competition law: in Article 102 of the Treaty on the Functioning of the EU (TFEU), "unfair" describes a type of prohibited conduct. Moreover, in *Michelin II*, the Commission expressly characterized Michelin's rebate system as unfair to dealers.[9]

Liberated from the Sherman Act's constraints, the FTC sought even more extensive relief than the Commission had obtained, ranging from prohibitions of the alleged misconduct to affirmative mandates on interactions with customers and competitors. Notably, though, the FTC did not seek to block pure volume-based discounts; its core objection evidently was to the use of commitments that locked Intel's customers into limits on the chips that they would buy from Intel's rivals.

This carve-out for volume discounts is a key element of the relief that Intel agreed to entering a Consent Order to settle the FTC case. The Consent Order also explicitly allows Intel to win all of a customer's business if the customer has asked Intel to bid for it, and to enter into exclusive agreements with customers with which it has invested significantly in joint product development. The prohibitions FTC sought on "near exclusiv[ity]" are gone as well. Even so, the Consent Order does contain much of the relief that the FTC sought. Intel may not:

- Condition discounts and other customer benefits on exclusivity or on limitations on purchases of competitors' chips.
- Use bundled discounts or retroactive discounts that would yield below-cost pricing under the test the Ninth Circuit adopted in *Cascade Health Solutions v. PeaceHealth*.[10]
- Change any of its products so as to degrade competitive products without an improvement in the Intel product.

In addition, Intel must:

- Take extensive steps to remedy the compiler issue the FTC identified, including reimbursement of compiler customers for remedial modifications of their software.
- Maintain interoperability for six years through a Standard PCI bus interface, and provide an annual "interface roadmap" to Nvidia, its GPU competitor.
- Assist its competitors by (i) amending its licenses to allow disclosure of certain license rights to third-party foundries and customers, and (ii) restraining its ability to enforce patent rights against them after a change in control.

These affirmative duties are highly unusual in the United States: they appear to dictate conduct that would seem to undercut Intel's own incentives to invest in innovation. Ordinarily, for example, one would not expect a firm to face antitrust liability for terminating its licenses to competitors that merge with customers to which the firm has disclosed competitively sensitive information. But in forcing Intel to modify its license terms, the FTC Decree seems to contemplate that it is better for competitively sensitive information to fall into the hands of Intel's competitors, despite the obviously anti-competitive potential, than to allow Intel to terminate a licensee.

Similarly, a requirement that a firm maintain existing interfaces for a period of time appears to discourage innovation. The FTC, by its own account, "is concerned that Intel's past conduct has weakened AMD and Via [a Taiwan-based x86 producer]." [11] One might have expected the Commission to obtain relief like this; instead, it is the FTC that has gone further—favoring open competitive access to Intel's products over continued Intel innovation. But as the FTC itself has said, the Consent Order's terms "do not necessarily reflect the applicable legal standards under the Sherman Act, Clayton Act, or the FTC Act; indeed, the legal standards applicable to some of these practices remain unsettled by the Supreme Court and the federal courts of appeal."[12]

Whether these legal standards "remain unsettled," or perhaps simply remain at odds with the FTC's policy views, the FTC-Intel settlement means that, for now, the US courts will not put the FTC's theories to the test. But the FTC is no doubt looking to develop more cases in winner-take-all, high-tech markets. If it succeeds, the FTC is virtually certain to again utilize Section 5 rather than be limited, as the DOJ must, by the Sherman Act's rigors. Eventually, then, the FTC may force the issue as to whether US antitrust law, and not just one enforcement agency, is converging with EU competition law. In the meantime, it remains to be seen if the AMD and FTC settlements will have any bearing on Intel's plans for its appeal against last year's EU decision. ◆

Endnotes

1 *See* http://www.politifact.com/truth-o-meter/promises/promise/395/strengthen-antitrust-enforcement/.

2 "Obama eyes media with promise of antitrust push," Reuters (May 18, 2009), available at http://uk.reuters.com/article/idUKN1849107920080518.

3 US Department of Justice Press Release, "Justice Department Withdraws Report on Antitrust Monopoly Law" (May 11, 2009), available at http://www.justice.gov/atr/public/press_releases/2009/245710.htm.

4 Stephen Labaton, "Obama Takes Tougher Antitrust Line," the *New York Times* (May 12, 2009), available at http://www.nytimes.com/2009/05/12/business/economy/12antitrust.html.

5 George Priest, "The Justice Department's Antitrust Bomb," the *Wall Street Journal* (June 2, 2009), available at http://online.wsj.com/article/SB124390028132574485.html.

6 European Commission Press Release, "Antitrust: Commission imposes fine of 1.06 billion euros on Intel for abuse of dominant position; orders Intel to cease illegal practices—questions and answers" (May 13, 2009), available at http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/235&format=HTML&aged=0&language=EN&guiLanguage=en.

7 *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

8 Josh Wright, "The Case Against the Section 5 Case Against Intel" (January 7, 2010), available at http://truthonthemarket.com/2010/01/07/the-case-against-the-section-5-case-against-intel-cross-posted/.

9 Commission Decision 2002/405, 2001 O.J. (L 143) 1. The General Court upheld the Commission's decision. Case T-203/01, *Manufacture Française des pneumatiques Michelin v. Commission*, 2003 E.C.R. II-04071.

10 515 F.3d 883, 903 (9th Cir. 2008).

11 Analysis of Proposed Consent Order to Aid Public Comment, *In re Intel*, No. 9341 at 8 (F.T.C. August 4, 2010) (Intel Analysis), available at http://www.ftc.gov/os/adjpro/d9341/100804intelanal.pdf.

12 Intel Analysis at 2.

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