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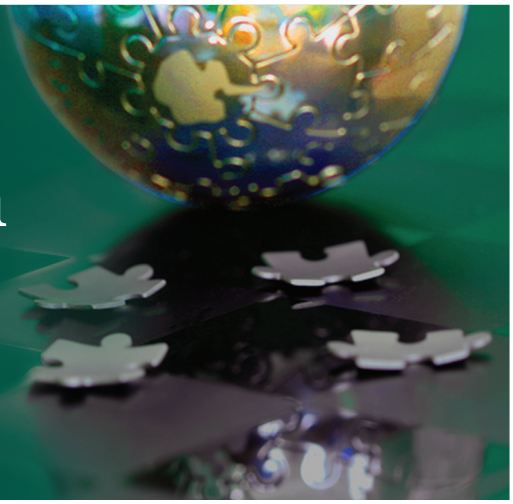
Summer | 2011

Antitrust & Competition
REVIEW



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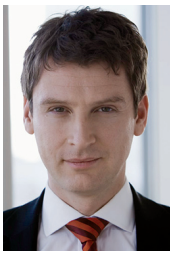
Mayer Brown's Global Antitrust & Competition group is uniquely positioned to offer up-to the minute guidance on a host of competition-related issues including mergers, cartel investigations and related litigation, distribution and licensing issues, and alleged abusive conduct by dominant firms and state aid. With offices in the Americas, Europe and Asia, as well as correspondent and other relationships with antitrust counsel throughout the world, our global team, which includes former enforcement agency officials, has a wealth of experience in managing multijurisdictional merger filings, advising on the applicability of national merger control regulations and securing merger control clearances throughout the world. The group also has extensive experience and success in representing clients in high-stakes civil and criminal litigation, including litigation before the US Supreme Court and the European Courts of Justice. Further, our antitrust lawyers in Hong Kong and China and in South America are skilled at navigating the range of competition laws in their regions and offer clients the benefit of extensive antitrust filing experience and strong relationships with key competition agencies.

Editors' Note

Britt M. Miller
Editor
Chicago
+1 312 701 8663
bmiller@mayerbrown.com



Jens Peter Schmidt
Editor
Brussels
+32 2 502 5517
jpschmidt@mayerbrown.com

Welcome to the Summer 2011 edition of the Mayer Brown *Antitrust & Competition Review*. In this issue we once again cover a wide range of topics from around the globe.

In the United States, minimum resale price maintenance remains a hot topic, with courts coming down on both sides of the issue. In our article on this topic, we review the rejection of a *per se* argument in a recent New York state court decision that conflicts with decisions out of California and Maryland on similar issues. We also examine "standard setting" as it has developed in the United States and suggest that with more countries struggling to develop their policies, they could benefit from the United States' experience.

Staying in the Americas but heading south of the equator, we also have an article about the use of Cease and Desist Commitments in Brazil. These agreements can be proposed by defendants in an antitrust prosecution as a means to avoid the hassles and expenses of protracted litigation, while still securing terms that both sides can live with.

From Europe we have articles covering two controversial topics. In the first, we examine the ability of Member States to refer antitrust actions to the European Commission. The consequences when a matter is referred can be significant both in terms of cost and delay, and we question whether there is now too much flexibility in the decision to make such a referral.

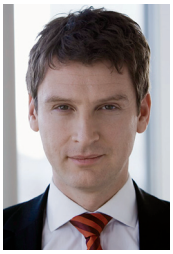
In the second article, we explore the controversial burden of proof employed when the corporate parents and other members of a corporate group are held jointly and severally liable for fines resulting from the actions of another member of the corporate group. Given the possibility of massive fines, this raises a significant risk and requires these parties to carefully review the extent of involvement and control exerted over other group members.

Finally, China's Antimonopoly Law continues to evolve. Although the law has been in effect since 2008, its application has been limited. Now, however, with the adoption of five new implementing rules, there are signs that China's regulatory authorities will be broadening their scope and be more aggressive with their enforcement efforts.

We hope you enjoy this issue of our Antitrust & Competition Review and, as always, welcome your thoughts and comments. ◆

Referrals of Merger Control Cases to the European Commission: Too Much Flexibility to the Detriment of Companies?

Jens Peter Schmidt
Isabel Simon



Jens Peter Schmidt
Brussels
+32 2 502 5517
jpschmidt@mayerbrown.com

Isabel Simon
Brussels
+32 2 551 5966
isimon@mayerbrown.com

European merger control law (Article 22 EUMR) provides that EU Member States can refer a merger that initially had been notified to EU Member States to the European Commission in Brussels. The provision is part of a sophisticated referral system that aims to ensure that the best-placed authority is investigating a transaction.

Article 22 EUMR provides the possibility for Member States to have the Commission examine potentially anticompetitive effects of a merger. The provision was initially introduced because some Member States did not have national merger control regimes. Nowadays, all Member States, with the exception of Luxembourg, have a merger control system, so one could expect that the number of referrals would decline. In actuality, however, Article 22 EUMR referrals are actually increasing. From 1990 until 2003, there were only seven referrals. Since 2004, seventeen cases have been referred to the Commission.[1] In particular, the German Federal Cartel Office and the British OFT make the most of the option to refer merger cases to the Commission.[2]

Requirements of Article 22 EUMR

PROCEDURAL CRITERION

Referral requests have to be made within 15 working days after a merger has been notified to a national competition authority or, if no notification is required, the merger otherwise has been made known to the Member State concerned. If no notification to a national authority is required, the 15-day period starts when the Member State has obtained sufficient information to make a preliminary assessment as to the existence of the criteria for making a referral request.[3]

SUBSTANTIVE CRITERIA

Article 22(1) EUMR provides two substantive requirements pursuant to which mergers are eligible for a referral. First, the mergers must affect trade between Member States. This includes all transactions that are able to exert an appreciable impact on trade, and applies to almost any (cross-border) deal of a certain size. Second, a concentration must have a significant effect on competition. This is the case if, according to a preliminary analysis of the national authority, there is a real risk that the transaction may have a significant adverse impact on competition.[4] The referring Member State is required to provide sufficient *prima facie* evidence in this respect. Both criteria are fairly easily met. So far, the Commission has never denied a referral request on the grounds that one of these requirements has not been fulfilled.

APPROPRIATENESS

In the Commission's view, referrals of concentrations that are already notified to national authorities should normally be limited to those cases (i) that appear to present a real risk of negative effects on competition and trade between Member States and (ii) where it appears that they would be best addressed at the EU level. The Commission has identified two categories where this would normally be the case.[5]

- Mergers that give rise to serious competition concerns in one or more markets that are wider than national in geographic scope, or where some of the potentially affected markets are wider than national, and where the main economic impact of the concentration is connected to such markets.
- Mergers that give rise to serious competition concerns in a series of national or narrower-than-national markets located in a number of Member States, in circumstances where coherent treatment of the case (regarding possible remedies, but also, in appropriate cases, the investigative efforts as such) is considered desirable, and where the main economic impact of the concentration is connected to such markets.

In practice, most referral cases fall under the first category, e.g., because EEA-wide markets are affected. As to the second category, the Commission accepts referrals if a transaction threatens to negatively impact several Member States. In all cases, the Commission will also take into account whether it is important to ensure a consistent application of remedies.[6] Even though the test of appropriateness limits the number of cases that are suitable for an Article 22 EUMR referral, it still leaves a large margin of discretion for Member States.

Scope of Investigation

The general rule is that once the Commission has accepted a referral request, it investigates the case on behalf of the referring Member States. Ideally, this would lead to one investigation by the Commission as opposed to several investigations by different authorities.

However, every competition authority makes its own decision on whether to refer a case. Thus, Article 22 EUMR allows partial referrals. For instance, in the case *ABF/GBI Business*, the Netherlands, France and Portugal joined a referral request by Spain, whereas Germany undertook its own investigation.[7] Two authorities, the Commission and the German Federal Cartel Office, cleared the merger subject to certain conditions. Because the affected markets were national, the decisions did not interfere with each other, as the Commission only investigated the transaction on behalf of the referring Member States, and the investigation was limited to the effect of the merger in the referring Member States.

If markets are wider than national, e.g., if an EEA-wide market is affected, the Commission will also investigate the effects of the transaction in the territory of Member States that have not referred the case.[8] In the case *GEES/Unison*,[9] worldwide markets were affected. The merger was jointly referred to the Commission by the British, German, French, Italian, Spanish, Austrian and Greek authorities. It also had been filed in Portugal and Ireland, which did not join the referral. Consequently, the Commission investigated the case for the whole territory of the EEA, while additional investigations took place in Portugal and Ireland.

Another effect of Article 22 EUMR is that the Commission can investigate mergers for countries where the transaction did not have to be notified in the first place. While it is debatable whether a referral request can only be made by countries in which a transaction has to be notified initially, it is undisputed that any other Member State can join other Member State's request, independent of whether the transaction is subject to a national investigation. Thus, the Commission investigates a merger on behalf of an authority that initially was not competent to investigate the case.

Consequences for Undertakings

Article 22 EUMR referrals are burdensome for the parties to a transaction. They lead to significant time delays and added costs. Normally, the national notifications are insufficient for the Commission to investigate the deal, so the Commission will ask for a full notification after it has accepted a referral. Given the Commission's practice to only accept formal notifications after an informal pre-notification period, the date of notification is not easy to predict. A referral can easily lead to a delay of one to two months from the first notification to a national authority and the actual notification to the Commission.

In multi-jurisdictional filings, in order to avoid surprises, it is sensible to consider pre-notification conversations with national authorities, especially with authorities that are known to be inclined to refer cases. If it becomes clear that a case is likely to be referred, parties could also consider to request a referral from Member States to the Commission pursuant to Article 4(5) EUMR, thus avoiding multiple national notifications. ◆

Endnotes

1 This includes referrals up to April 2011.

2 See Staff Working Paper accompanying the Communication from the Commission to the Council: Report on the Functioning of Regulation No. 139/2004, COM (2009) 281 final, para 135, according to which the UK requested four and joined two referrals, and Germany requested three and joined four referrals in the years 2004 to 2008.

3 Referral Notice, para 50, reference 43.

4 Referral Notice, para 44.

5 Referral Notice para 45.

6 COMP/M.5828—*Procter & Gamble/Sara Lee Air Care*, SG-Greffe (2010) D/4825, K (2010) 2245, decisions of 31 March 2010, para 16; COMP/M.5675—*Syngenta/Negocio Semillas Girasol Monsanto*, decision of 12 November 2009, para 22.

7 See COMP/M.4980—*ABF/GBI assets*, SG-Greffe (2007) D/207815, decision of 13 December 2007.

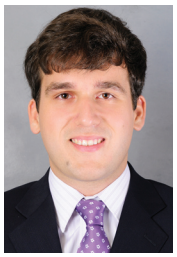
8 Referral Notice, para 50.

9 COMP/M.2738—*Gees/Unison*, SG (2002) D/229436, decision of 17 April 2004.

Public Antitrust Enforcement and the Cease and Desist Commitment in Brazil

Bruno D. Werneck, Tauil & Chequer Advogados
Gustavo Flausino Coelho, Tauil & Chequer Advogados

Bruno D. Werneck
Tauil & Chequer Advogados
São Paulo
+55 11 2504 4245
bwerneck@mayerbrown.com



Gustavo Flausino Coelho
Tauil & Chequer Advogados
Rio de Janeiro
+55 21 2127 4252
gcoelho@mayerbrown.com

There are many reasons why companies seek to avoid antitrust prosecution by the Brazilian antitrust authorities. There is, of course, the risk of being found guilty of a violation, as well as high legal costs and harmful effects on a company's corporate image. Moreover, depending on the outcome of a prosecution, companies may face lawsuits for treble damages and have to deal with unsatisfied consumers. For the agencies, protracted antitrust litigation is costly and diverts resources that could be used to prosecute other anticompetitive practices.

For these reasons, defendants and the Brazilian antitrust authorities often enter into a Cease and Desist Commitment (known as a *Termo de Compromisso de Cessação*, or TCC). These agreements have become an important element in handling a cartel prosecution in Brazil in recent years. In this article, we analyze the main aspects of a Cease and Desist Commitment, including (i) the general legal provisions surrounding it, (ii) which provisions are acceptable during the negotiation, (iii) the circumstances in which it may be advantageous to the prosecuted companies and (iv) the obligations commonly imposed upon defendants.

Introduction

Article 20 of Law no. 8,884/1994 (the Antitrust Law) establishes a strict liability rule under which any act that, by any means, intended or otherwise, produces the following effects is deemed a violation of the economic order: (i) limiting, restraining or otherwise injuring competition; (ii) controlling a relevant market;[1] (iii) arbitrarily increasing profits; or (iv) abusing a dominant position.[2]

In recent years, the Brazilian antitrust authorities (collectively known as the SBDC)[3] have been increasing their enforcement activities against anticompetitive practices. The number of investigations carried out by the Secretariat of Economic Law (SDE), of the Ministry of Justice and the amount of fines imposed by the Administrative Council for Economic Defense (CADE) are systematically increasing. In 2010, CADE imposed the largest fine in its history — nearly R$1.7 billion (approximately US$1 billion) — on a single company condemned for cartel formation.

This increased prosecution of anticompetitive practices, however, imposes higher costs on the antitrust authorities. From 2008 to 2010, the time spent by CADE in the analysis of preliminary inquiries increased from 159 to 288 days, and the analysis period for administrative proceedings increased from 268 to 567 days. In this context, the SBDC and defendants have incentives to reach an agreement that will benefit both parties. While companies can avoid

the costs of lengthy litigation, the depreciation of their corporate image and the potential of a large fine, the enforcement agencies can effectively provide disincentives for other competitors to repeat the practice, save resources that will be used for other antitrust enforcement purposes (e.g., to prosecute other companies or expedite the merger review process) and avoid court challenges to its decisions.

Therefore, Article 53 of the Antitrust Law provides the legal ground for the Cease and Desist Commitment, which can be proposed by the defendant to CADE. The agreement is similar to arrangements such as plea bargains and settlements in cartel investigations in the United States and the European Union. Several factors guide a company's decision on whether to propose a Cease and Desist Commitment.

Requirements for the Cease and Desist Commitment

Article 53 of the Antitrust Law sets forth some provisions that may be included in the proposal of the Cease and Desist Commitment to CADE: (i) obligations to be undertaken by the defendant to ensure that the practice will cease, and any other obligations deemed necessary; (ii) a fine to be imposed in the event of noncompliance with all or some of the obligations of the agreement; and (iii) a monetary contribution[4] to the Defense of Collective Rights Fund.[5] Additionally, Article 53 establishes that the Cease and Desist Commitment can only be proposed before the Judgment Session of the case.[6] If CADE accepts the proposal, the administrative proceeding—or preliminary inquiry—will be suspended; if the defendant fulfills all of its obligations, it will be dismissed.[7]

Besides the general conditions determined by the Antitrust Law, CADE can also require the defendant to undertake other obligations, such as pleading guilty. Neither the proposal nor the signing of a Cease and Desist Commitment amounts to a declaration of guilt. However, if CADE has solid evidence related to the existence of an unlawful practice, the party may be required to plead guilty in order for CADE to accept the proposal.[8] For example, in an administrative proceeding regarding price suggestion by an association,[9] CADE refused the proposal of a Cease and Desist Commitment because the defendant would not plead guilty. The agency compared the proposal with those presented in similar cases and concluded that the agreement would not compensate for the losses inflicted on consumers, thus creating an incentive for the continuation of the practice.

Other requirements that can be imposed by CADE are the obligations to cooperate in the investigation of the case and to take competition advocacy measures. In this context, the defendant may agree to: (i) provide educational material and lectures to its employees related to compliance with antitrust rules; (ii) make the content of the agreement available on its website; and (iii) provide information that will help the antitrust authorities in the investigations. If the defendant does not want—or is unable—to undertake some of the obligations required by CADE, it can propose to pay a higher monetary contribution.[10]

Because CADE is an administrative body, its decisions can be challenged in the Brazilian Federal Courts, according to the Federal Constitution. In cases of high fines imposed by CADE, defendants may prefer to extend the litigation in order to reduce the penalty or even to obtain a ruling that it is not guilty. However, this extended litigation increases the legal costs for both parties. Additionally, CADE has concerns regarding the respectability of its decisions, because those decisions can be changed or even reversed by the Brazilian Federal Courts. Thus, as part of the Cease and Desist Commitment, CADE can require that the defendant not challenge CADE's decision.

The acceptance or refusal of the proposal will depend on what is called "analysis of convenience and opportunity," i.e., whether the net effects of the agreement are beneficial to competition. The method of this analysis is clarified by CADE's case law.

Acceptability of the Proposal by CADE: The Rationale of the Analysis

The analysis of the Cease and Desist Commitment proposal by CADE is guided mainly by two aspects of the agreement: (i) the litigation costs the agency expects to save and (ii) the disincentives created by the agreement to other companies to engage in similar anticompetitive practices. Therefore, the Cease and Desist Commitment is an instrument to implement Brazilian antitrust policy and is used only when its net effects are beneficial to competition.[11] To simplify the analysis of CADE's rationale, we consider it in two situations in which the agreement can be proposed: (i) in investigations of unilateral conduct and (ii) in investigations of cartel formation.

CADE has already explained the rationale of its analysis in cases related to cartel investigations. According to CADE's leading case,[12] the defendant has three possibilities when it is under prosecution: (i) to continue the litigation, (ii) to apply for a Leniency Agreement and (iii) to propose a Cease and Desist Commitment.

If the defendant decides to continue the litigation, there will be costs related to (i) the possibility of an administrative fine imposed by virtue of condemnation and treble damage lawsuits in courts (X_p), and (ii) legal costs (C_p). If it decides to apply for a Leniency Agreement, there are also costs related to administrative fines and obligations (X_l), as well as costs created by the plea of guilt and cooperation with the antitrust authorities (Y_l). Finally, if it decides to propose a Cease and Desist Commitment, the costs will be related to the monetary contribution and obligations (X_{cdc}) and those created by pleading guilty and cooperating with the antitrust authorities (Y_{cdc}).[13] Additionally, the monetary contribution must avoid situations of insufficient punishment of guilty defendants (i.e., $X_{cdc} + Y_{cdc} < X_p$) or excessive punishment to the not guilty (i.e., $X_{cdc} + Y_{cdc} > C_p$).

The advantages of a Cease and Desist Commitment for the defendant cannot be greater than those offered by a Leniency Agreement, because the Brazilian antitrust authorities find the former less desirable than the latter. However, the analysis of "convenience and opportunity" of these two kinds of agreement must consider the different costs for each defendant of pleading guilty and cooperating with the antitrust authorities. Cartelists will not apply for a Leniency Agreement if these costs are too high. In this context, there are two different groups of defendants: (i) those that are willing to plead guilty and cooperate with the antitrust authorities (i.e., $(X_l + Y_l) < (X_p + C_p)$); and (ii) those that consider costs of pleading guilty and cooperating too high and will not apply for a Leniency Agreement (i.e., $(X_l + Y_l) > (X_p + C_p)$).[14]

For those in the first group, CADE will not accept their proposal of a Cease and Desist Commitment if it is more advantageous than a Leniency Agreement. For defendants in the second group, however, a Leniency Agreement is not a viable option. Accordingly, a Cease and Desist Commitment with the obligation to plead guilty and cooperate with the antitrust authorities will not be a viable option either. Thus, the best agreement for these defendants and CADE is one that imposes penalties similar to those likely if the litigation had continued, but with a mitigation (e.g., a lower fine), which will depend on the negotiations between the parties.[15]

With respect to unilateral conduct, CADE has not yet determined clear criteria for accepting Cease and Desist Commitment proposals. However, some of the adopted conditions regarding cartel investigations may apply: for example, the net effects of the agreement must benefit competition and should not insufficiently punish guilty defendants or over-punish the innocent. Additionally, the defendant's costs will be similar in both cartel and unilateral conduct investigations. The main difference is that, in unilateral conduct investigations, there is no possibility of a Leniency Agreement and, therefore, no conflict with a Cease and Desist Commitment.

Conclusion

The ultimate purposes of the SBDC are to enhance competition and protect consumer welfare. In order to achieve these goals, the Brazilian antitrust authorities must use their resources efficiently. Therefore, in some cases, the best option may be to reach a settlement that may benefit both parties—the public enforcement agency and the defendant.

A Cease and Desist Commitment may be used to implement the antitrust policy at the lowest cost possible. In the current context of increased public enforcement of the Antitrust Law by the Brazilian authorities, this agreement—along with others, such as Leniency Agreements and Performance Commitment Agreements—have great importance.

An agreement with the antitrust authorities can generate great advantages. A long antitrust litigation can be extremely harmful and expensive, and the ability to present the right proposal at the right time may be crucial to a defendant seeking to avoid high costs and a disastrous outcome in case of condemnation. It is therefore essential to negotiate and draft the Cease and Desist Commitment correctly in order to attain all the benefits that the agreement can offer. Considering the strength of current public enforcement, the ability to settle may determine the success of a defendant involved in antitrust litigation in Brazil. ◆

Observations in this article about Brazilian law are by Tauil & Chequer Advogados. They are not intended to provide legal advice to any entity; any entity considering the possibility of a transaction must seek advice tailored to its particular circumstances.

Endnotes

1 The achievement of market control through superior efficiency is not considered a violation under the Antitrust Law.

2 The dominant position is presumed when a company or group of companies controls at least 20 percent of a relevant market. However, this reference can be changed for specific sectors of the economy.

3 The SBDC consists of three authorities: (i) the Secretariat of Economic Law (SDE), of the Ministry of Justice; (ii) the Secretariat for Economic Monitoring (SEAE), of the Ministry of Finance; and (iii) the Administrative Council for Economic Defense (CADE), an independent administrative agency.

4 The monetary contribution is not considered a fine, because a Cease and Desist Commitment is an agreement between the authority and the defendant to cease the unlawful practice, not a condemnation by CADE.

5 In some cases—such as cartel formation and market division—the monetary contribution to the Defense of Collective Rights Fund is obligatory.

6 Additionally, Article 129-B of CADE's Internal Rules provides that the Cease and Desist Commitment can be proposed only once.

7 The suspension—and, if it is the case, the dismissal—affects only the defendant that entered into agreement with CADE. Other defendants will still be subject to investigation or prosecution.

8 If there were a Leniency Agreement in the case, the confession of culpability is mandatory, according to Article 129-G of CADE's Internal Rules.

9 Administrative proceeding no. 08012.009922/2006-59.

10 For example, in administrative proceeding no. 08012.001239/2004-10, the defendant alleged that it could not undertake the same obligations that were established in a Cease and Desist Commitment proposed in a similar case, but agreed to pay a higher monetary contribution.

11 The net effects are represented by the difference between the benefits of continuing the litigation (which will depend on the likelihood of condemnation) and the benefits of entering into agreement—i.e., the resources saved and the disincentives created.

12 Request no. 08700.004992/2007-43, in connection with the administrative proceeding no. 08012.011142/2006-79, judged by CADE on December 17, 2008 (Reporting Commissioner: Paulo Furquim de Azevedo).

13 Because the defendant may not plead guilty or cooperate with the antitrust authorities in the case of a Cease and Desist Commitment, Y_{cdc} can be equal to zero.

14 According to the Reporting Commissioner's vote in the judgment of the request no. 08700.004992/2007-43, the only mechanism CADE has to identify these two groups is the proper elaboration of the Cease and Desist Commitment. Therefore, it is important for the agency to carry out the negotiations in such a way that it can evaluate the costs of the defendant in connection with the plea of guilt and cooperation.

15 Since February 2009, when CADE issued its Resolution no. 51, the negotiation of the terms and conditions of Cease and Desist Commitments is being carried out by a Negotiation Committee formed by CADE members (not Commissioners), which assists the Reporting Commissioner until a final draft of the agreement can be submitted for the Commissioners' approval.

Standard Setting: Past, Present and Future

Richard M. Steuer
John Roberti
Adeel Bashir

Richard M. Steuer
New York
+1 212 506 2530
rsteuer@mayerbrown.com

John Roberti
Washington, DC
+1 202 263 3428
jroberti@mayerbrown.com

Adeel Bashir
Washington DC
+1 202 263 3834
abashir@mayerbrown.com

For decades, courts have dealt with issues concerning standard setting under US antitrust law.[1] However, the competition concerns raised in standard setting continue to be real and evolving. As antitrust agencies around the world develop their own views about how to analyze standard-setting activities, it is useful to consider the US experience, which has the longest history in this area. This article will examine those issues and consider new standard-setting challenges likely to arise in the near term.

What Is Standard Setting?

Standard setting is the process of creating uniformity in the production of interchangeable products. It typically occurs when competitors meet and agree to adopt one technology as their industry platform. This allows companies to invest in products that utilize the adopted technology and offers consumers greater choices to mix and match products among various competitors.

Because antitrust law is built on competition, however, an agreement to forestall competition among technologies may seem problematic. As the Supreme Court noted in *Allied Tube & Conduit Corp. v. Indian Head, Inc.*,[2] an "[a]greement on a product standard is… implicitly an agreement not to manufacture, distribute, or purchase certain types of products."[3] Indeed, this idea led some courts early on to apply a *per se* analysis in standard-setting cases.[4]

Standard setting is generally considered procompetitive, however, when it permits the creation of new products and enables efficiencies to be achieved through interoperability and otherwise.[5] Some procompetitive justifications include: setting safety standards; lowering costs of production; providing information to assist consumers in evaluating competing products; enhancing reputation within certain industries or professions through, for example, the establishment of ethical codes; deterring undesirable conduct that is not otherwise unlawful; and providing a speedier and more flexible means of regulation than government regulation.[6]

Thus, courts today have made clear that the rule of reason is the appropriate method of analysis for standard-setting cases,[7] and the *per se* rule is applied only when the standard setting is part of a scheme that itself is a *per se* violation.[8]

The Anticompetitive Concerns Associated With Standard Setting

At the same time, standard setting can still be anticompetitive under certain circumstances.[9] As the Supreme Court has noted, standard setting is "rife with opportunities for anticompetitive activity."[10] We consider some of these potential concerns below.

THE SELECTION OF A STANDARD AS AN EXCLUSIONARY ACT

Standard setting, by its nature, requires the selection of one particular method or technology to the exclusion of others. As a result, the adoption of a standard may lead to the failure of certain firms that utilize a different standard. Generally speaking, the failure to adopt a particular technology is not inherently anticompetitive.[11] Courts that have considered this point have held that unless the adoption of a particular technology (and the exclusion of another technology) was unreasonable, the standard-setting process will not be actionable.[12]

If a standard is adopted through improper means, however, there may be grounds for an action under the antitrust laws.[13] Focusing on the process or procedure employed in setting, enforcing or interpreting a standard is appropriate because it avoids the problems inherent in asking a finder of fact to determine whether the standard itself is reasonable. As the Fifth Circuit explained in *Consolidated Metal Products, Inc. v. American Petroleum Institute*,[14] "[n]either anticompetitive animus nor the other elements of a section 1 claim can be inferred solely from the incorrectness of a single business decision by a standard setting trade association. The 'reasonableness' of a restraint is judged by its general effect on the market, not by the circumstances of a particular application. An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a sound basis for antitrust liability."[15]

To illustrate, in *Allied Tube*, defendant steel conduit manufacturers opposed an attempt by a vinyl conduit manufacturer to have its product approved under relevant safety codes.[16] In defeating the proposal, the steel manufacturers packed the association with 230 persons to vote against including vinyl conduit in the standard.[17]

Similarly, *Hydrolevel Corp. v. The American Society of Mechanical Engineers, Inc.*,[18] involved competing technologies for safety cut-off probes for boilers. McDonnel & Miller, Inc., the dominant supplier of cut-off probes, used the standard-setting organization to spread damaging information to the market about plaintiff's competing cut-off probe, which utilized a different technology.

McDonnel had employees in key decision-making positions within the association. Those same employees secured an opinion from the association that plaintiff's cut-off probe did not meet the association's standards. McDonnel then used that opinion in the market to disparage plaintiff's product. Finding a violation of Section 1, the Second Circuit held that "[g]iven the effect and intent of the [association's opinion letter] and its subsequent misuse by [McDonnel], the restraint was surely unreasonable; it intentionally misinterpreted the Code so as to prevent [plaintiff] from selling its product."[19]

Furthermore, in *DM Research, Inc. v. College of American Pathologists*,[20] the First Circuit required a showing that the standard-setting process was used "as a predatory device by some competitors to injure others." The court stated that "normally there is a showing that the standard was deliberately distorted by competitors of the injured party, sometimes through lies, bribes, or of market foreclosure."[21]

But disseminating false or misleading statements may not be enough to establish the "improper means" necessary for a Section 1 violation. For example, in *Schachar v. American Academy of Ophthalmology, Inc.*,[22] the defendant association issued a statement describing a medical procedure as "experimental." Finding that the conduct in question was not an unreasonable restraint of trade, the court stated that "[i]f such statements should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas."[23]

In addition to showing improper means, the Section 1 plaintiff must prove that "but for" the defendant's conduct, the standard-setting organization (SSO) would not have taken the complained of action—whether that action involves adoption of a standard, denial of a standard or rejection of plaintiff's product under a standard.[24] The *Heary Brothers* court stated that proving causation requires "deconstructing the decision-making process," and that the fact finder must conclude

that the alleged restraint was "imposed *because of* the improper lobbying efforts of Defendant."[25]

THE PATENT HOLD-UP

A second general category of antitrust issues that may arise in standard setting is the patent hold-up problem. This occurs when participants in a standard-setting process agree on a standard that, unbeknownst to the majority of the members, is actually subject to intellectual property claim. Once the industry has locked itself into the standard, the patent holder surfaces and demands supracompetitive royalties. Had the standard-setting participants known of the intellectual property claim, the standard could have been designed around the patent, or the patent holder would have been required to negotiate rates at a competitive level. The US Federal Trade Commission (FTC or Commission) has been particularly concerned about this issue; it has litigated two cases and entered into two consent decrees that laid the groundwork for much of the analysis in this area.

Similar to the court in *Heary Brothers*, the DC Circuit in *Rambus v. FTC*[26] held that to be anticompetitive, deceptive conduct associated with the hold-up—like any other kind—must harm competition. There, the Commission ruled that Rambus's failure to disclose to members of the SSO the patent interests it held in proposed standard violated Section 5 of the Federal Trade Commission Act and Section 2 of the Sherman Act.[27] The DC Circuit, however, overturned the FTC's decision because the FTC failed to show that "but for" Rambus's deception, an alternative technology would have been selected by the SSO.[28]

By contrast, in *In re Dell Computer Co.*,[29] the FTC alleged that Dell had misrepresented to the Video Electronics Standards Association that a proposed design standard did not infringe on any patents that Dell possessed. After VESA adopted the standard, Dell informed certain members that the new design violated Dell's intellectual property rights.[30] The FTC challenged Dell's attempt to enforce its patent rights, claiming that its deception constituted a misappropriation of market power and violated Section 5 of the FTC Act and Section 2 of the Sherman Act.[31] Dell ultimately entered into a consent decree with the FTC whereby Dell agreed not to enforce its patent against anyone utilizing the VESA standard.[32]

Likewise, in *In re Union Oil Company of California*,[33] the California Air Resources Board claimed that Unocal engaged in anticompetitive conduct by making misrepresentations to the CARB and to competing gasoline refiners that it lacked, or would not assert, patent rights concerning proposed gasoline and emission standards. CARB claimed that Unocal did in fact assert its patents over the adopted gasoline standards, which entitled it to millions of dollars in royalties that were likely to be passed on to consumers.[34] An administrative law judge dismissed the complaint, concluding that the FTC lacked jurisdiction over a patent law case and that Unocal's conduct was protected by the *Noerr-Pennington* doctrine, which protects private entities from antitrust liability for attempts to influence the government. The relevant standard was established by CARB, a government agency.[35] The Commission reversed, finding that (i) the fraud exception to the *Noerr-Pennington* doctrine applied to communications between Unocal and CARB and (ii) even if those communications were protected, Unocal's deceptive statements to industry groups "would be actionable if they caused substantial competitive harm from their 'own force in the marketplace.'"[36] Unocal also entered into a consent decree under which it agreed not to enforce its patent.[37]

Moreover, in *In re Negotiated Data Solutions, LLC*,[38] the FTC claimed that N-Data violated Section 5 of the FTC Act because the company sought to break a licensing commitment that its predecessor-in-interest, National Semiconductor, made to the Institute of Electrical and Electronic Engineers. The IEEE adopted a standard that included National's patent-pending technology based on its commitment to make licenses on the new technology available to any licensee on a nondiscriminatory basis for a one-time fee of $1,000.[39] Once N-Data acquired the patent, it demanded sharply higher royalties on a per-unit basis.[40]

The Commission found that there was reason to believe that N-Data violated the Act.[41] It noted that N-Data's conduct was anticompetitive because its higher licensing fees would likely raise costs to use the standard, reduce the output of products using the N-Data technology, and reduce the incentive for firms to participate in IEEE and in other standard-setting activities.[42]

Finally, in *Broadcom Corp. v. Qualcomm Inc.*,[43] the plaintiff alleged that the defendant breached an agreement to abide by the SSO's policies on enforcing patent rights by licensing its technology on non-FRAND (fair, reasonable and nondiscriminatory) terms, resulting in the monopolization of markets for cellular telephone technology and components.[44] The Third Circuit reversed the grant of a motion to dismiss Sherman Act claims, holding that "(1) in a consensus-oriented private standard-setting environment, (2) a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, (3) coupled with [a standard-setting organization's] reliance on that promise when including the technology in a standard, and (4) the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct."[45]

The antitrust agencies have generally recognized that avoidance of the patent hold-up is procompetitive, and have allowed parties to negotiate royalties on potential technologies collectively as part of the standard-setting process. As the agencies explained in their Intellectual Property report, "negotiating licensing terms during the standard-setting process may increase competition between technologies that are being considered for inclusion in a standard," making application of the rule of reason appropriate.[46] "*[P]er se* condemnation is not warranted for joint SSO activities that mitigate hold up and that take place before deciding which technology to include in a standard."[47] However, "[n]either Agency advocates that SSOs adopt any specific disclosure or licensing policy, and the Agencies do not suggest that any specific disclosure or licensing policy is required."[48]

As a result, the US Department of Justice (DOJ) has issued guidance on several occasions suggesting that the collective negotiation of licenses in advance of setting a standard is likely not actionable under the antitrust laws.[49] As the DOJ explained in one letter:

> The Department concluded that a policy that requires patent holders to disclose and commit to their most restrictive licensing terms would permit SDO [standards-development organization] members to make more informed decisions when setting a standard because they would be able to compare alternative technologies based on differences in cost in addition to technical merit.... Although the proposed IEEE-SA policy does not require patent holders to publicly commit to their most restrictive licensing terms during the standard-setting process, the ability to make such commitments could generate similar benefits as patent holders may compete to offer the most attractive combination of technology and licensing terms.[50]

AGREEING TO MORE THAN WHAT IS REQUIRED

Standard setting can be unreasonably anticompetitive when participants agree to more than is necessary. For example, if participants agree to license nonessential technology as part of the standard-setting process, they risk a charge that they have unreasonably limited competition and innovation.[51] Similarly, there will be *per se*, and perhaps even criminal, liability if standard-setting organizations are used as a pretext to cartelize downstream products. As the DOJ and FTC report explained, antitrust enforcers "will still condemn as *per se* illegal activities designed to reduce or eliminate competition among members of an SSO—such as bid rigging by members who otherwise would compete in licensing technologies for adoption by the SSO or naked price fixing on downstream products by members who otherwise would compete in selling downstream products compliant with the standard."[52]

For the most part, however, if the standard-setting discussions are fair and open and do not go beyond the standard-setting process, they generally will be found to be lawful.

What Is Next for Antitrust Enforcement in Standard Setting

The legal groundwork for SSOs is fairly well-established. Organizations generally understand that they must set rules so that their processes are fair, and so that competitors are not excluded. Similarly, SSOs are more wary about avoiding patent hold-ups. Despite the difficulty in proving patent hold-up cases, companies that participate in standard setting seek to avoid the animus and expense that comes with accusations of unfair nondisclosure of intellectual property. While there may be future cases involving SSOs, we believe that they will be fewer and will likely follow the cases that have come before.

We believe that there are likely two areas where standard setting may result in more antitrust concerns. The first involves the role of the government in standard setting. While this was explored in the *Union Oil* case described above, the case settled prior to a decision on the merits by the FTC.[53] As the government encourages industry to work together in varied areas ranging from improving environmental compliance to cutting costs in health care, agencies will encourage more standard setting.

In this context, the government's role in standard setting is still evolving. Government standards carry with them the force of law, and they cannot be changed voluntarily, lock-in or not. If the government is duped, through unfair acts or patent hold-up, the actions of the participants may be covered by the *Noerr-Pennington* doctrine. While the FTC has suggested that the *Noerr-Pennington* doctrine's application will be limited in these contexts, we believe that there is more to be done.

Second, we believe that there will likely be more *informal* standard setting and break-offs from experienced SSOs. In standard setting, different stakeholders can participate and often have very different goals in mind. Upstream and downstream market participants may participate, for example, and each group may desire a standard that is advantageous to it. If the participants cannot agree, some may break off. It is in these informal settings—where participants may be less experienced in standard setting and less well-counseled—that the problems of unfairness and exclusion may arise. Company counsel should take extra care in advising clients about the risks in standard setting when the process is being undertaken outside the confines of an established organization.

Standard setting has been recognized as an antitrust concern for decades. The principles involved are important and likely to reoccur. Being mindful of the antitrust principles can reduce risks for companies while ensuring that the precompetitive benefits of standard setting are achieved. ◆

Endnotes

1 *E.g.*, *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961).

2 486 U.S. 492 (1984).

3 *Id.* at 500.

4 *See Radiant Burners*, 364 U.S. at 659-60 (holding that a refusal to supply gas to Radiant Burners was within the "classes of restraints which from their "nature or character" [are] unduly restrictive, and hence forbidden by both the common law and the statute.") (internal quotation omitted); *see also Silver v. New York Stock Exch.*, 373 U.S. 341, 347 (1963) ("[i]t is plain, to begin with, that removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulations, constitute a *per se* violation of § 1 of the Sherman Act").

5 US Dep't of Justice & Fed. Trade Comm'n, "Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition," at 34 (2007), *available at* http://www.justice.gov/atr/public/hearings/ip/222655.pdf (an "agreement among competitors about which standard is best suited for them…can produce substantial benefits [in many contexts]," allowing firms "to avoid many of the costs and delays of a standards war, thus substantially reducing transactions costs to both consumers and firms").

6 *See* Robert Pitofsky, *Self Regulation and Antitrust*, Prepared Remarks before the 34th Annual Symposium on Associations and Antitrust (Feb. 18, 1998); *see also Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308-09 (3d Cir. 2007) (private standard setting can "facilitate the sharing of information among purchasers of products from competing manufacturers, thereby enhancing the utility of all products and enlarging the overall consumer market," permit firms "to spread the costs of research and development across a greater number of consumers, resulting in lower per-unit prices," lower consumers' cost "of switching

between competing products and services, thereby enhancing competition among suppliers," "enhance competition in upstream markets," and reduce the "risk to producers (and end consumers) of investing scarce resources in a technology that ultimately may not gain widespread acceptance").

7 *See, e.g.*, *Allied Tube*, 486 U.S. at 501 ("When [ ] private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply the rule-of-reason analysis to product standard-setting by private associations.").

8 *See*, e.g., *Nat'l Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421 (7th Cir. 1965) (holding that an agreement between macaroni producers to limit the amount of durum wheat used in producing macaroni was a *per se* violation); *see also Standard Sanitary Mfg. Co. v. United States*, 226 U.S. 20 (1912) (where an association's rule concerning bathroom fixture quality was intended to facilitate collusion, it was condemned under Section 1).

9 *Allied Tube*, 486 U.S. at 500 n.5 (standard setting "might deprive some consumers of a desired product, eliminate quality competition, exclude rival producers, or facilitate oligopolistic pricing by easing rivals' ability to monitor each other's prices").

10 *American Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982).

11 *See, e.g.*, US Dep't of Justice Bus. Review Letter to the Am. Welding Soc'y, at 3 (October 7, 2002), *available at* http://www.justice.gov/atr/public/busreview/200310.pdf ("There is always a possibility that adoption of any standard, by private or public entities, could have some adverse effect on some competitors. To the extent that a product standard gains adherence by producers or consumers those products that fail to comply with the standard may suffer in the market place. However, the courts and antitrust enforcement authorities have recognized that standards can promote consumer welfare by reducing costs and facilitating competitive entry.").

12 *See, e.g.*, *Addamax Corp. v. Open Software Found.*, 152 F.3d 48 (1st Cir. 1998) (rejecting application of *per se* rule to a standard setting organization's failure to select plaintiff's software); *see also Golden Bridge Tech., Inc. v. Motorola, Inc.*, 547 F.3d 266 (5th Cir. 2008) (affirming summary judgment for defendants where plaintiff claimed that members of 3G wireless standard setting organization unlawfully removed its technology from the standard).

13 *See Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478, 488 (1st Cir. 1988) (requiring plaintiff to show that the defendants not only prevented the association from establishing a standard benefiting plaintiff, but "did so through the use of unfair, or improper practices or procedures"); *see also Heary Bros. Lightning Prot. Co., Inc. v. Lightning Prot. Inst.*, 287 F. Supp. 2d 1038, 1048 (D. Ariz. 2003) ("[o]nly improper manipulation of the standard-setting process constitutes an unreasonable restraint of trade").

14 846 F.3d 284 (5th Cir. 1988).

15 *Id.* at 297.

16 *Allied Tube*, 486 U.S. at 496-97.

17 *Id.* at 497.

18 635 F.2d 118 (2d Cir. 1980).

19 *Id.* at 124.

20 170 F.3d 53 (1st Cir. 1999).

21 *Id.* at 57.

22 870 F.2d 397 (7th Cir. 1989).

23 *Id.* at 400.

24 *Heary Bros.*, 287 F. Supp. 2d at 1051.

25 *Id.* (citing *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 300 (9th Cir. 1994)).

26 522 F.3d 456 (D.C. Cir. 2008).

27 *Id.* at 459.

28 *Id.* at 466.

29 121 F.T.C. 616, 1996 WL 33412055 (1996).

30 *Id.* at 617.

31 *Id.* at 618.

32 *Id.* at 620.

33 138 F.T.C. 1, 2004 WL 5662245 (2004), *available at* http://www.ftc.gov/os/adjpro/d9305/040706commissionopinion.pdf.

34 *Id.* at 6-7.

35 *Id.* at 7.

36 *Id.* at 37 (quoting *Allied Tube*, 486 U.S. at 510).

37 *In re Union Oil Co. of California*, No. 9305, 2005 WL 1541537 (F.T.C 2005), *available at* http://www.ftc.gov/os/adjpro/d9305/050610do9305.pdf.

38 No. 051-0094, 2008 WL 258308 (F.T.C. 2008).

39 *Id.* at *3.

40 *Id.* at *5.

[41] *Id.* at *6.

[42] Analysis of Proposed Consent Order to Aid Public Comment at 5, *In re Negotiated Data Solution, LLC*, No. 051-0094 (F.T.C. 2008) *available at* http://www.ftc.gov/os/caselist/0510094/080122analysis.pdf.

[43] 501 F.3d 207 (3d Cir. 2007).

[44] *Id.* at 304.

[45] *Id.* at 314; *see also Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683 (Fed. Cir. 2008) (affirming unenforceability due to inequitable conduct based on breach of a duty to disclose patents to standard-setting organization, but limiting unenforceability to products complying with the organization's standard).

[46] *Supra* note 5, at 37.

[47] *Id.* at 54.

[48] *Id.* at 48.

[49] *E.g.*, US Dep't of Justice Bus. Review Letter to the VITA (Oct. 30, 2006), *available at* http://www.justice.gov/atr/public/busreview/219380.pdf (discussing proposed policy requiring working group members to commit to license on FRAND terms and unilaterally declare their most restrictive licensing terms); US Dep't of Justice Bus. Review Letter to the RFID, at 7 (Oct. 21, 2008), *available at* http://www.justice.gov/atr/public/busreview/238429.pdf (joint licensing of essential patents to comply with high-frequency radio identification and labeling standards; organization "appears reasonably likely to yield some tangible cost savings by limiting the threat of hold up and royalty stacking and by lowering transaction costs" by making members' patents available on RAND terms, but not all owners of potentially blocking patents are members, "potentially limiting efficiency gains").

[50] US Dep't of Justice Bus. Review Letter to the IEEE, at 10 (April 30, 2007), *available at* http://www.justice.gov/atr/public/busreview/222978.pdf (addressing IEEE policy allowing patent owners to commit to licensing standards for patents included in IEEE standards).

[51] *Supra* note 10, at 3.

[52] *Supra* note 5, at 37.

[53] Author Roberti was trial counsel for the FTC in this case.

Parental Liability in the Setting of EU Antitrust Fines: Recent Case Law Provides Further Guidance

Nathalie Jalabert Doury

Nathalie Jalabert Doury
Paris
+33 1 53 53 36 37
njalabert-doury@
mayerbrown.com

Undertakings that violate either article 101 (anticompetitive agreements) or 102 (abuse of dominance) of the EU Treaty are subject to fines by the European Commission of up to 10 percent of their annual worldwide turnover.

The concept of an "undertaking" covers any entity engaged in an economic activity, regardless of its legal status, even if that economic unit consists of several persons: natural or legal. Where such an economic entity infringes the rules of competition, that entity is liable for that infringement.

In the context of groups, the maximum fine may be calculated on the basis of the turnover of the company that took part in the infringement or a company higher in the group to which it belongs. Moreover, all entities liable within the group will be held jointly and severally liable for payment of the fine.

Indeed, the EU Court of Justice has ruled that the European Commission may target a parent company if the parent exercises "decisive influence" over the subsidiary. Such decisive influence may be established (i) *in concreto*, notably where there is evidence that the parent company gives instruction to the subsidiary, and (ii) on the basis of a rebuttable presumption where the parent company holds 100 percent of the shares of the subsidiary. It is then up to the companies concerned to rebut the presumption by evidencing the lack of exercise of control.

Considering the possibly dramatic impact of such decisions on the final amount of the fine, parental liability issues arise now in almost every case. A number of recent court decisions have clarified the applicable rules, providing a more precise view of the risk of increased fines within groups of companies.

One Hundred Percent-Held Subsidiaries: *Probatio Diabolica* or Reversal of the Burden of Proof?

The presumption of decisive influence applicable to 100 percent-held subsidiaries has been applied by the European Commission in numerous cases; this presumption has yet to be successfully rebutted by a company, either before the European Commission or before the courts.

The way the presumption is applied has attracted much criticism: the European Commission and the courts impose a high burden of proof on parent companies seeking to demonstrate a lack of decisive influence over their subsidiaries. This lack of a decisive influence—just like the lack of an infringement—is among the most difficult elements to establish, as it can only rely on negative elements, which never materialize like positive facts and actions.

Further, this presumption widely applies. The Court of Justice has confirmed in the *Alliance One* case[1] that the presumption

arising from 100 percent ownership of the capital can apply not only in cases where there is a direct relationship between the parent company and its subsidiary, but also in cases where that relationship is indirect (in that case three successive holding companies).

The presumption also applies to newly acquired activities within a group. In the *Gas Insulated Switchgear* case,[2] corporate parent Areva argued that it could not be held liable for the first period after acquiring the company in question as Areva did not have the expertise in the sector and kept most of the management in place, only recruiting a new member of the board, so far unrelated to the group. The General Court rejected these assertions as not supported by evidence. The General Court also held that it could not rule out that the external recruitment allowed Areva to equip itself with the expertise and organization necessary to enable the company to exercise joint control.

Numerous companies have argued that the standard of proof makes the presumption impossible to rebut, amounting to a true "*probatio diabolica*." So far, the Court of Justice has maintained its case law.[3] However, in the *Thyssen* case,[4] Advocate General Bot for the first time called into question this presumption and whether it amounted to a reversal of the burden of proof that would necessarily impair defense rights. Advocate General Bot suggested that the presumption should have to be corroborated by other facts that prove that the parent company exercised decisive influence over its subsidiary. So far, the Court has not followed that suggestion.

In the *General Quimica* case,[5] the Court of Justice reviewed in depth the General Court's judgment on the arguments presented by the parent company to rebut the presumption. First, the parent company claimed that it had given the subsidiary very clear instructions to end any anticompetitive practice, and the fact that this instruction was not applied evidenced the lack of decisive influence. The General Court ruled to the contrary, finding that the parent company's instruction was evidence of the exercise of influence, and rapidly set aside a number of other arguments. On appeal, the Court of Justice annulled this part of the judgment on the ground of insufficient motivation and also criticized the General Court for insufficiently assessing the various elements brought forward by the claimant. However, at the end, the Court of Justice remanded the judgment, based on a more detailed motivation.

Several additional important judgments are anticipated in the coming months on the same issue. Notably, in the *Monochloracetic* acid case,[6] Elf Aquitaine claims that the European Commission and the General Court wrongfully applied the presumption to a pure holding company, only coordinating the investments within a decentralized group.

The Evidence of Decisive Influence

The conduct of a subsidiary may also be attributed to the parent company where that subsidiary, despite having a separate legal personality, carries out, in all material respects, the instructions given to it by the parent company, rather than acting on its own in the market. In such cases, regard is particularly given to the economic, organizational and legal links between those two legal entities.

The Commission cannot merely find that the parent company is in a position to exercise decisive influence over the conduct of its subsidiary. Rather, the Commission must also check whether that influence was actually exercised, it being noted that such evidence is not necessarily to be found in the specific area in which the infringement occurred.[7]

Criteria that are taken into consideration include:

- Appointment of managers coming from the group and/or exercising group functions aside from the management of the subsidiary;
- Approval of precise annual budgets by the parent company;
- Evidence that the business plans of the subsidiary had been amended on the basis of suggestions by the parent company;
- Communication for prior approval by the parent company of draft plans made by the subsidiary; and

- Provision of detailed day-to-day management information to the parent company.

The Court of Justice has further stressed that the mere fact that the group has a decentralized structure and/or that the subsidiary has a dedicated local management and its own resources does not prove, in itself, that the company decides upon its conduct independently of its parent company.[8]

Holding Companies

In the *Alliance One* case,[9] the General Court clarified which companies within the group can be held liable for exercising decisive influence. According to the court, the company or companies found to have exercised a decisive influence shall not include holding companies, which have no activity on their own and which have purely financial interests in the company engaged in the infringement. Therefore, such companies are not to be held jointly and severally liable for the payment of the fine.

This judgment was adopted in a case where the European Commission had established *in concreto* the exercise of decisive influence, and it remains to be seen whether the Court of Justice would extend that requirement to the 100 percent shareholding presumption.

Parental Liability in the Context of Joint Ventures

The recent case law has also established that responsibility for an infringement can be attributed to one or several parent companies of a full-function joint venture.

For the purpose of merger control rules, a full-function joint venture is defined as a jointly controlled undertaking "performing on a lasting basis all the functions of an autonomous economic entity."[10] Such full-function joint ventures therefore qualify as mergers that are likely to fall within the scope of the EU merger control rules. The joint control and autonomy condition aspects of the merger control rules would normally preclude the joint venture from carrying out, in all material aspects, the instruction of any controlling undertaking.

However, the General Court ruled in the *Alliance One*[11] case that where an undertaking is under the control of two or more undertakings or persons, those controlling undertakings or persons are, by definition, able to exercise decisive influence over controlled undertaking. When there is evidence that such decisive influence was actually exercised (based on similar criteria as the ones detailed above for sole control), it is possible to hold the various undertakings or persons that exercise joint control liable for the unlawful conduct.

Conclusion

The EU parental-liability doctrine will probably continue to evolve and be refined — hopefully toward a stricter control on the criteria taken into account by the European Commission and a fair burden of proof allocation between the European Commission and companies. In the meantime, companies need to consider the doctrine when structuring a group and assessing the risk of antitrust fines. ◆

Endnotes

1 GCEU, 27 October 2010, *Alliance One International v. European Commission*, case T-24/05.

2 GCEU 3 March 2011 *Siemens v. European Commission* e.a., case T-110/07 e.a.

3 CJEU 10 September 2009, *Akzo Nobel v. European Commission*, case C-97/08P.

4 CJEU 29 March 2011, *Thyssen Krupp v. European Commission*, case C-352/09 P.

5 CJEU 20 January 2011 *General Quimica v. European Commission*, case C-90/09P.

6 CJUE, Advocate General Opinion 17 February 2011, *Elf Aquitaine v. European Commission*, case C-521/09 P.

7 GCEU, 27 October 2010, *Alliance One International v. European Commission*, case T-24/05.

8 *Ibid.*

9 *Ibid.*

10 Article 3(b) of the Merger Regulation N°139/2004 and Jurisdictional Notice 2008/C 95/01.

11 GCEU 27 October 2010, *Alliance One International v. European Commission*, case T-24/05.

China: Anti-Monopoly Law

Hannah Ha
Gerry O'Brien
Helen Hai

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Hannah Ha
Hong Kong
+852 2843 4378
hannah.ha@
mayerbrownjsm.com

Gerry P. O'Brien
Hong Kong
+852 2843 4355
gerry.obrien@
mayerbrownjsm.com

Helen Hai
Guangzhou
+86 20 8755 1584 x305
helen.hai@mayerbrownjsm.
com

In August 2007, the Committee of the National People's Congress — China's top legislature — adopted the Anti-Monopoly Law of the People's Republic of China (AML) and thus joined the ever swelling ranks of nations with a comprehensive cross-sector competition law.

Although the AML has been effective since 1 August 2008, the scope of enforcement has been relatively limited. Merger review remains a primary focus, with at least 200 M&A deals having been notified for review as at 31 December 2010, resulting in one prohibition decision and six cases in which transactions were approved subject to behavioural and/or structural remedies.

Enforcement in relation to other areas of the AML remains muted, with the two Anti-Monopoly Enforcement Authorities (AMEAs) tasked with enforcing the AML prohibitions targeting restrictive agreements and abuse of a dominant market position largely focused on developing implementing rules to more clearly explain the scope and application of these 'conduct' prohibitions. In December 2010, this process was significantly advanced with the adoption of a total of five new implementing rules relating to the conduct prohibitions. This raised expectations for broader and more vigorous enforcement of the AML during 2011 and at the time of writing there are signs this expectation is being realised.

Overview of the AML Enforcement Framework

The AML establishes a two-tier enforcement structure under the State Council, the chief executive body. Pursuant to this structure, an Anti-Monopoly Commission (AMC) coordinates the AML-related work of three AMEAs, each of whom is allocated enforcement responsibility in relation to one or more key prohibitions in the AML (or specific categories of business activity that may be challenged under those prohibitions). The AMC is also charged with tasks such as conducting relevant research, drafting competition policies and guidelines, and organising studies on the state of competition in China.

The Ministry of Commerce (MOFCOM) acts as the secretariat for the AMC, and through its Anti-Monopoly Bureau is the AMEA with responsibility for merger review.

In relation to the conduct prohibitions, enforcement responsibility is divided between the Department of Price Supervision within the National Development and Reform Commission (NDRC) and the Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau of the State Administration of Industry and Commerce (SAIC). These AMEAs are also involved in administering a fragmented range of laws incorporating antimonopoly elements which pre-date the AML, such as the

1993 Anti-Unfair Competition Law and the 1997 Price Law. However, as enforcement of these pre-AML laws has been limited and in many respects incohesive, neither the NDRC nor the SAIC brought well developed investigation and enforcement methodology to their AML-related roles.

The NDRC, a government agency with broad responsibilities that include ensuring price stability in key areas of China's economy, is responsible for enforcing the AML conduct prohibitions in the context of price-related infringements. The SAIC is responsible for non-price-related infringements of the same prohibitions.

There remains uncertainty regarding how this jurisdictional division will work in practice, given the potential for anti-competitive arrangements to incorporate both price and non-price elements. The SAIC and NDRC have implemented case coordination mechanisms to try and resolve this issue and have even jointly handled some cases to date. However, as there are indications the two agencies may take divergent views on some enforcement issues going forward (discussed further below), the AMC will have an important role to play in ensuring appropriate case allocation and coordination.

Merger Review

M&A deals must be notified to MOFCOM if they qualify as a 'concentration' (a term defined by implementing rules in a similar, but not precisely equivalent, manner to the way the term is used in the context of the EU merger control system) and if the parties involved achieve certain global and/or China turnover thresholds. A number of implementing rules have been adopted by MOFCOM to provide guidance on the required content of notifications and the process for MOFCOM's evaluation. The substantive test applied by MOFCOM in merger review is whether a transaction will or is likely to have the effect of eliminating or restricting competition in China. Once MOFCOM is satisfied a submitted filing is complete, a two-stage review process applies. Merger review is discussed further in the 'China: Merger Control' chapter.

Conduct Prohibitions

The AML conduct prohibitions are worded in a manner that broadly resembles the prohibitions relating to restrictive agreements and abuse of a dominant market position in the EU system. Each prohibition is broadly stated and includes a non-exhaustive list of examples of conduct that would be deemed to fall within the scope of the prohibition.

For example, the prohibition of monopoly agreements is divided into two parts. The first part relates to 'horizontal' agreements (i.e., agreements between competitors) and references examples such as price-fixing, market sharing and joint boycotts. The second part relates to "vertical" agreements (i.e., agreements between trading partners) and references practices relating to resale price maintenance as examples. The confined scope of the vertical examples has led to speculation that challenges to other types of restrictions (such as exclusivity terms in distribution agreements) will only be permitted under the prohibition of abuse of dominance. However, this is yet to be confirmed.

There is text in the AML suggesting the 'hard-core' horizontal monopoly agreement examples referenced in the AML will be deemed to restrict competition to an extent that renders them automatically unlawful, unless they qualify for a general exclusion from the monopoly agreement prohibition. It does not appear that the same applies to the vertical monopoly agreement examples, and, thus, it is understood that assessment of the impact on competition of relevant vertical restraints, such as resale price maintenance restrictions, is a necessary step in any review of their legality.

The general exclusion provides that an agreement that may otherwise breach the monopoly agreement prohibition will be lawful if it has a valid object (such as achieving certain operational efficiencies or specified public interests), benefits consumers and will not seriously restrict competition.

In relation to the abuse of dominance, the examples of 'abuse' conduct listed in the AML include making sales at unfairly high or unfairly low prices and (where

it cannot be justified) refusing to trade with willing trading partners, selling at below-cost prices, imposing discriminatory terms or unreasonable trading conditions, and engaging in product tying practices.

The recently finalised implementing rules relating to these broadly worded prohibitions have only partly eased business sector concerns about their ability to ensure compliance, as the rules offer significantly less guidance than business operators in jurisdictions such as the EU and US will be used to receiving in the context of the key conduct prohibitions in those jurisdictions.

There are three main substantive implementing rules relating to the conduct prohibitions: the SAIC's Rules on Prohibition of Abuse of a Dominant Market Position and Rules on the Prohibition of Monopoly Agreements, and the NDRC's Anti-Monopoly Pricing Rules, as well as several further implementing rules pertaining to related procedural matters. Reflecting the division of enforcement responsibilities, the substantive NDRC rules discuss price-related violations of both conduct prohibitions, while non-price-related violations of the same prohibitions are discussed in the two substantive SAIC rules.

Each of the substantive rules restates the relevant conduct prohibitions and various associated articles in the AML, and the volume of additional guidance and explanation regarding the prevailing enforcement methodology is limited. As a consequence, while there are some textual indications that the AMEAs are drawing heavily on European practice in developing their approach to enforcement, the extent to which this will be borne out in practice remains to be seen.

For example, the Anti-Monopoly Pricing Rules supplement the AML text by providing several examples of lawful justifications for below-cost pricing (e.g., when business operators are urgently disposing of fresh produce or seasonal products), but do not explain the NDRC's approach on potentially contentious issues, such as the measure of costs used to identify below-cost pricing and whether it is necessary to show reasonable prospects of recoupment of losses in the future. Similarly, neither the SAIC or NDRC rules provide new information to supplement or elaborate on the very general text in the AML referencing the general exclusion from the monopoly agreement prohibition.

Overall, while the willingness of the SAIC and NDRC to consult widely on AML-related implementing rules has been welcomed, the slow pace of their development and their limited scope means antimonopoly compliance in China will continue to be a challenging area.

For the time being, the level of concern this is generating among foreign and domestic business operators is relatively low, as publicised AMEA antimonopoly enforcement during 2009 and 2010 largely focused on cartels in politically sensitive sectors such as staple food production and sales (although other sectors have been impacted, such as mobile communications, insurance, concrete supply and real property management). Additionally, action was mainly taken under the authority of pre-AML laws in respect of which the AMEAs continue to exercise enforcement authority, such as the 1997 Price Law. Beyond this, the SAIC and NDRC have, until recently, seemed content to issue caution letters and informal warnings to domestic business operators in many other areas of the economy engaging in antimonopoly practices (particular where these enterprises are state-owned), and they appear to have made slow progress in investigating the many complaints understood to have been made against large domestic enterprises such as internet search engine provider Baidu.

However, with a broad framework of implementing rules relating to the conduct prohibitions now providing at least a modicum of enforcement transparency and predictability, the SAIC and NDRC are visibly expanding their enforcement efforts.

For example, according to information released via its website in January 2011, the SAIC relied on its powers under the AML to impose a 200,000 renminbi fine (and order ceasing of illegal activities) on an association of premixed concrete suppliers in Jiangsu Province and a 530,723.19 renminbi fine (and order confiscating illegal profits of 136,481.21 renminbi) on

five standing association members. It is understood that after an investigation lasting more than six months, the SAIC determined the association had coordinated unlawful market sharing practices amongst members, in breach of the monopoly agreement prohibition.

Other recent enforcement action reported by the AMEAs includes the imposition (under the authority of pre-AML law) of a 500,000 renminbi fine on Zhejiang Fuyang Paper Manufacturers Association by the NDRC. The fine, announced on 4 January 2011, related to a price-fixing arrangement that the association facilitated during 2010.

Notwithstanding the recent rise in publicised enforcement of antitrust-related laws in China, the scope and level of enforcement clearly remains limited by reference to the size of China's economy and in comparison to many mature antitrust systems. It remains to be seen whether recent cases such as those mentioned above will mark the commencement of more vigorous efforts in this field and a widening of the scope of AMEA investigations to include more focus on arrangements other than hard-core cartels.

A shortage of sufficiently trained staff is perhaps the biggest obstacle to this. While the SAIC is understood to have around 1,000 competition enforcement staff at all levels, only a small fraction of these are highly trained and involved in coordinating efforts at the national level. At the NDRC, the staffing situation is understood to be even more problematic. However, each of the AMEAs is continuing to hold regular seminars and training sessions to improve the capabilities of staff with AML-related responsibilities. Additionally, the SAIC and NDRC are taking steps to facilitate better case management by, and coordination with, their subordinate offices at provincial levels to whom some key enforcement tasks have been delegated.

In the short to medium term, however, resourcing limitations are likely to cause the SAIC and NDRC to be very selective in choosing investigation targets. This, and recent efforts by AMEAs to strengthen cooperation with foreign antitrust regulators (such as the signing in the first quarter of 2011 of new memorandums of understanding to facilitate enhanced cooperation between the UK Office of Fair Trading and each of the NDRC and SAIC) has heightened anticipation that the AMEAs may, in the short term, focus on becoming more involved in multi-jurisdictional anti-cartel enforcement, where it can to some extent leverage off information gathering and investigation by other bodies.

Administrative Monopoly

The AML prohibits government agencies and organs from abusing their administrative powers to curb competition. Inclusion of this type of prohibition in the AML was widely welcomed, given the tendency for local government agencies to try and protect local enterprises through taxes and trade restrictions that stifle inter-provincial and inter-regional commerce.

However, the AMEAs are provided with no powers to punish contraventions in this area. Instead, the AML contemplates that contraventions will be referred to a superior agency of the perpetrator, with proposals for imposing discipline on that perpetrator and rectifying the situation. To date, there do not appear to be any developments in terms of enforcement or the content of recent implementing rules that suggest the AML provisions in this area are likely to prove a more effective or more utilised tool for combating administrative monopoly practices than the many previous legislative initiatives in this area.

Investigation Powers

The AMEAs are given broad powers under the AML to investigate suspected contraventions of all of the key prohibitions in the AML besides administrative monopoly. These include powers to engage in onsite inspections, conduct interviews, and seize relevant electronic and printed materials.

The AMEAs are required to provide business operators under investigation with an opportunity to be heard in relation to the relevant allegation or case. Further, the AMEAs must keep confidential any commercial secrets obtained when carrying out investigations.

Penalties and Remedies

In relation to monopoly agreements or the abuse of a dominant market position, the AMEAs have the power to make 'cease-and-desist' orders, confiscate illegal gains, and impose fines.

The level of fines that can be imposed range from up to 500,000 renminbi in cases where an unlawful monopoly agreement has not yet been implemented, to up to 10 percent of a business operator's turnover in the preceding year in other cases involving a breach of the conduct prohibitions. Nothing in the AML or relevant implementing rules suggests that the turnover considered in this context is only that derived from business operations in China or the product market concerned by the relevant contravention.

At the present time, the fines being imposed by the NDRC and SAIC in relation to identified AML violations or violations of anti-cartel provisions in pre-AML laws are commonly quite low by international standards. It is expected that penalty levels may increase substantially once the NDRC and SAIC are satisfied that domestic enterprises better understand required standards of behaviour under China's antimonopoly laws.

While the AML itself does not criminalise contraventions of the conduct prohibitions, a number of China's criminal laws are worded vaguely enough to be invoked in all manner of circumstances — including where cartels are identified. Indeed, there were reports that executives of a rice noodle manufacturer in Guangxi were held in criminal detention while the NDRC investigated their alleged participation in a cartel in early 2010. While it is hoped that the AMEAs will strive to provide business operators with some clarity and comfort in this area, the fact remains that the application of China's criminal laws remains an area where a degree of opaque standards and politically influenced decision making can always be expected. Accordingly, it is likely the risk of criminal prosecution in relation to cartel participation and even other forms of antimonopoly behaviour will remain a low but live risk for the foreseeable future.

Leniency

The AML allows for leniency to be exercised where companies 'own up' to participation in prohibited conduct and cooperate in investigations. However, this is an example of an area where potential inconsistency is evident in the implementing rules of the SAIC and NDRC.

Both the NDRC Rules on Anti-Price Monopoly Administrative Law Enforcement Procedures and the SAIC Rules on Industry and Commerce Authorities' Prohibiting Monopoly Agreements provide that a business operator who actively reports involvement in an unlawful monopoly agreement (such as a price cartel), and provides significant evidence regarding that violation, may qualify for a fine reduction.

According to the relevant NDRC rules, the fine reduction will be 100 percent for the first reporting entity, no less than 50 percent for the second reporting entity, and no more than 50 percent for other reporting entities. However, the relevant SAIC rules do not mention specific fine reduction percentages for the second-in-time and any later reporting entity.

There are no reported cases of application of these specific leniency provisions to date. However, there have been recent instances where the NDRC has appeared to apply a form of leniency to business operators involved in conduct addressed by the NDRC in accordance with pre-AML laws. For example, the NDRC announced in June 2010 that significant fines had been imposed on a group of rice noodle manufacturers in Guangxi province, due to their involvement in a joint action to increase prices in the region. However, a number of plants that cooperated with the investigation received only warnings.

Civil Actions

Parties who suffer loss as a result of a business operator's contravention of the AML can institute a civil action to recover that loss. The Supreme People's Court (SPC) has designated the relatively well-regarded and well-trained intellectual property divisions of the People's Courts to handle AML cases

at first instance, and is developing judicial interpretations that will address matters such as standing and burden of proof. However, as discussed below, the ongoing work on development of civil action rules has not prevented a limited number of civil actions in this area from being permitted to proceed.

According to official records released by the SPC at the end of June 2010, 11 civil action cases under the AML had been submitted to and accepted by China's people's courts at that time. While it is clear further cases have arisen since that time, no comprehensive records on the precise number of cases are understood to be available. It is also not clear whether other potential cases are being rejected by the courts for any reason; however, this is not inconceivable given that the courts may be reluctant to hear cases involving state-owned enterprises or foreign multinationals, or involving particularly complex issues, before more authoritative guidance is provided on the appropriate handling of such cases.

Among the 11 cases reported by the SPC up to June 2010, 10 are antimonopoly civil actions and one is an antimonopoly administrative action. In relation to the civil actions, the claims of the plaintiffs mostly focused on abuse of dominant market position. Only one case concerned the monopoly agreement prohibition. Interestingly, a large number of the plaintiffs have been law practitioners in China, some of those claims were for nominal damage amounts and thus appear designed for purposes such as to try and elicit clarification on key AML interpretations from the people's courts.

At the time of writing, it is understood that no plaintiff's claims under the AML have been sustained by the people's courts. Instead, each concluded case has involved either a court decision against the plaintiff or withdrawal of the case by the plaintiff (usually in the context of a settlement agreement with the defendant). In the cases in which the court has decided against the plaintiff, a common reason was that insufficient evidence was provided to establish the relevant market and/or the defendant's dominant position. Accordingly, few of the decided cases appear to have required or involved a conclusive determination of whether relevant conduct by the defendant would constitute unlawful abuse of dominance, and thus published jurisprudence in this area does not significantly assist understanding of the scope of the AML conduct prohibitions.

It is understood that several key issues that may be dealt with in the SPC's judicial interpretations remain under debate, such as whether civil actions should in future be limited to follow-on actions following administrative enforcement of the AML, and whether a double damages system should be implemented to encourage civil litigation.

Conclusion

At the time of writing, the AML has been in effect for over two and a half years. Although progress has been made in relation to the development of a broad framework of implementation rules to guide AML enforcement and compliance, it is suggested that the law's impact on market behaviour in China remains relatively low outside of sectors that have traditionally been a major focus of NDRC supervision, such as staple food sales.

As noted above, this situation may be changing, and it can be expected that the attention paid to the AML conduct prohibitions (and the calls for more clarity in this area) will increase dramatically once there are signs regular and vigorous investigation of complaints against large domestic companies and foreign multinationals is under way, and as the claims of private action litigants in this area become more sophisticated and compelling.

In the meantime, business operators in China who are keen to ensure compliance with the law to mitigate risk will continue to face considerable challenges due to the lack of clear standards and guidance on enforcement methodology. In this context, adherence to relevant international standards such as those prevailing in mature antitrust jurisdictions such as the EU and US, with adjustments in those few areas where the Chinese authorities have signalled their own approach and enforcement priorities, appears to be the prudent way forward. ◆

New York's Attempt to Apply *Per Se* Rule to Minimum Resale Price Maintenance Rejected

Richard M. Steuer

Richard M. Steuer
New York
+1 212 506 2530
rsteuer@mayerbrown.com

In early 2011, a New York trial-level court issued a highly anticipated decision dismissing a case brought by the New York Attorney General against mattress manufacturer Tempur-Pedic. In the decision, the court rejected charges that Tempur-Pedic had entered into minimum resale price maintenance agreements with retailers, thereby committing a *per se* violation of the state's General Business Law. *People v. Tempur-Pedic International, Inc.*, No. 400837/10 (N.Y. Sup. Ct., N.Y. Cty., dated Jan. 14, 2011).

In granting Tempur-Pedic's motion to dismiss, the court held that the only relevant bilateral agreements between Tempur-Pedic and its retailers were retail advertising agreements, which restricted price advertising but did not contain provisions on the prices retailers actually charge. These advertising agreements were accompanied by a unilateral retail pricing policy, which provided that Tempur-Pedic would suspend shipments to discounters. Although the advertising agreements included language requiring the retailers to agree to Tempur-Pedic's termination policies, the court held that those policies could not properly be considered part of the advertising agreements themselves.

There was evidence that Tempur-Pedic occasionally contacted retailers it suspected of violating its pricing policy in order to clarify that policy with them. However, while recognizing that coercion followed by compliance may sometimes create a bilateral oral agreement, the court ruled that there was not enough evidence presented here to support such an agreement.

Borrowing from federal law, particularly the US Supreme Court's *Colgate* and *Monsanto* decisions, the court held that the State had failed to prove the existence of bilateral resale price maintenance agreements, because of a lack of evidence that retailers had communicated their acquiescence or agreement not to sell at discount prices. Notably, the State had relied on an unusual provision of New York law rendering minimum resale price contracts unenforceable, rather than on the New York antitrust statute, which makes certain anticompetitive conduct illegal. The court held that the provision in question only could render contracts unenforceable, not unlawful, *per se* or otherwise. The State argued that, regardless, it had the power to enjoin an unenforceable contract, not just an illegal contract; however, the court rejected that argument on the ground that Tempur-Pedic's unilateral policy statement did not amount to a contract at all.

If the New York Attorney General discovers a genuine bilateral agreement between a manufacturer and a retailer fixing minimum resale prices in New York, would the Attorney General try again to apply a rule of *per se* illegality?

The court's decision (unless overturned) provides little basis for adopting such a theory under any provision of New York law.

In any event, as the State of California interprets California's antitrust law to render minimum resale price maintenance agreements *per se* unlawful, and the State of Maryland has adopted legislation explicitly applying *per se* illegality, the defeat of the New York Attorney General does not provide the last word for products that are marketed nationwide. ◆

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