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ANTITRUST

IN THIS ISSUE

The Places We Go: Developments in International Competition Law

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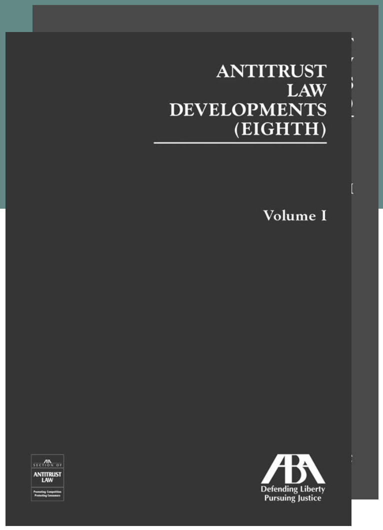

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SECTION OF ANTITRUST LAW

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AMSTERDAM, THE NETHERLANDS

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SPRING 2017

from the Section Chair

The Internationalization of Competition Law

Dear Colleagues,

IN THIS ISSUE OF *ANTITRUST*, Judge Diane Wood reflects on the growth of our practice beyond U.S. borders. She should know; she was there at the beginning. In 1995, when she left her position as the Deputy Assistant Attorney General in charge of International, Appellate, and Policy at the Antitrust Division and assumed her seat on the Seventh Circuit, the OECD was the principal forum for countries to discuss common issues. It had about 30 members then. The International Competition Network was still six years away.

We might be forgiven if we regarded the internationalization of competition law to be a phenomenon of this young century and an export of the United States. The ICN, its own formation inspired by a report[1] commissioned by the Antitrust Division, has grown from its 14 founding countries in 2001 to over 130 today. OECD now hosts nearly 90 countries at an annual Global Forum on Competition, the first of which was held in 2001. No longer is the international portfolio a specialty of Justice Department officials and a handful of multinational law firms. Today it is hard to find many in our field who are not working with colleagues around the globe.

U.S. lawyers often think of the Sherman Antitrust Act (1990) as the first antitrust statute, although Canadians remind us that their Competition Act came a year earlier. In fact, the practice is not native to either country. The Americas imported it from England and Europe. Not often cited these days but important orientation for law students, the first cases that appeared in Posner's *Antitrust Cases, Economic Notes and Other Materials* (1974) took readers back to the King's Bench, and to litigation that was defining markets before the Pilgrims were sailing for Plymouth. One of the most famous duels was *Darcy v. Allein*, a.k.a. *The Case of Monopolies* (1602), in which the court considered the consequences of market power and exclusionary behavior. Coordinated behavior came to the Bench in such cases as *Mitchel v. Reynolds* (1711), which recognized reasonable restraints and began to articulate what we now call the rule of reason.

Parliament reinforced the common law with the Statute of Monopolies (1624), which sought to encourage innovation by offering limited protections, but left most commerce to the mercies of the marketplace. More recent, but venerable by now, are statutes addressing joint conduct that appeared to be obviously unreasonable. France, for example, condemned cartels with Le Chapelier Law of 1791. The Sherman Antitrust Act was a late entry in these annals, the other US laws later still.

It is no coincidence that a more enlightened competition policy preceded the Industrial Revolution. Adam Smith saw the connection and described it in *The Wealth of Nations* (1776). In analysis that remains eloquent, and relevant, today, he found that prosperity comes from trade among individuals, among markets, and among countries. Competitors who restrain trade, he observed, often enrich themselves at the expense of their customers. Countries that restrain trade, he concluded, enrich hardly anyone, with the possible exceptions of the fortunate few who administer the restraint and the patrons they protect. Inevitably, however, protectionism diminishes the wealth of nations. Many historical experiments since have confirmed his conclusions. Consumers behind closed borders live in poverty. Consumers in open markets enjoy unprecedented prosperity.

The more sophisticated methods and records of the modern era indicate that policies protecting competition continue to deliver substantial benefits, in economies of all levels of maturity. In the United States, the FTC estimated that its merger actions alone have saved consumers three billion dollars. Cartel fines reach comparable levels each year. None of these estimates, of course, include the value of the market economy that flourishes under the conditions that antitrust enforcement preserves.

Economics continues to play a central role in the practice and policy of antitrust today. It may be impossible to measure the world-wide wealth that ancient antitrust and nascent economics helped grow. The more sophisticated methods and records of the modern era indicate that policies protecting competition continue to deliver substantial benefits, in economies of all levels of maturity.[2] In the United States, the FTC estimated that its merger actions alone have saved consumers three billion dollars.[3] Cartel fines reach comparable levels each year.[4] None of these estimates, of course, include the value of the market economy that flourishes under the conditions that antitrust enforcement preserves.

Nor should we rest on our laurels. The more rigorous we make antitrust, the more we base it on the foundation of economics, the more it will preserve markets and protect consumers. The articles in this issue show how that can be done. From merger control to cartel enforcement to global distribution, and much more, these pieces point the way to a 21st century that will continue to enhance the wealth of individuals and the wealth of nations. Turn the page, enjoy the scholarship, and take satisfaction in a pursuit that improves the lives of billions of consumers around the world. ■

With best regards,

Bill

William C. MacLeod
Chair, ABA Section of Antitrust Law
2016–2017

[1] International Competition Network, History, http://www.internationalcompetitionnetwork.org/about/history.aspx ("recommendations made by the International Competition Policy Advisory Committee (ICPAC)")

[2] *See* Deborah Feinstein, Director, Bureau of Competition, Fed. Trade Comm'n, International and Crossborder Coordination and Collaboration, Remarks at the United States-Mexico Chamber of Commerce Mid-Atlantic Chapter (Mar. 10, 2016) (describing studies), https://www.ftc.gov/public-statements/2016/03/international-crossborder-coordination-collaboration.

[3] Prepared Statement of the Federal Trade Commission on The FTC at 100: Where Do We Go from Here? *Before the U.S House of Representatives Comm. on Energy and Commerce Subcomm. on Commerce, Manufacturing, and Trade* (Dec. 3, 2013), https://www.ftc.gov/sites/default/files/documents/public_statements/prepared-statement-federal-trade-commission-ftc-100-where-do-we-go-here/131203ftcat100.pdf.

[4] *See, e.g.*, Press Release, U.S. Dep't of Justice, Antitrust Division Issues 2016 Annual Spring Update (Apr. 8, 2016), https://www.justice.gov/opa/pr/antitrust-division-issues-2016-annual-spring-update.

Editor's Note: Uncertainty and Opportunity in International Competition Law Enforcement

BY GREGORY G. WROBEL

Vanessa Turner of our editorial board introduces the cover theme for this issue in a separate Introduction, appropriately so given her pivotal role in work on the theme and the perspective she offers as a UK citizen working in Brussels. This Note in turn will be brief, focusing on (potentially considerable) uncertainties and opportunities in competition law enforcement in the United States, European Union, and China.

U.S./EU Agency Enforcement

The Brexit process raises both substantive and procedural uncertainties that will gain more clarity as negotiations unfold, but for now the predicates for EC competition law enforcement appear largely unchanged under the continued leadership of EC Commissioner Vestager.

The recent U.S. elections give rise to typical uncertainties, in particular over who will lead and serve in senior staff positions in the Antitrust Division and Federal Trade Commission. The current cycle of uncertainty may transcend the norm, and as this issue goes to publication too little is known to provide any clarity.

The Antitrust Division obtained preliminary injunctions from district courts in January 2017 blocking two proposed mergers of large health insurers. The parties in one of the transactions terminated their merger agreement, and in the other transaction the buyer filed an appeal and the seller filed a lawsuit seeking to terminate the transaction. District court proceedings also remain active following remand from the Seventh Circuit in the FTC's challenge to an Illinois hospital merger, and the DOJ may seek Supreme Court review of the Second Circuit ruling that American Express Company's credit card anti-steering policy directed at merchants did not violate Section 1 of the Sherman Act.

These court proceedings will now be managed by new leadership in the DOJ and FTC, and may be an early signal of change, or status quo, with agency enforcement policies. These cases affect only U.S. (not international) markets, and so will not reveal how U.S. and non-U.S. agencies will interact going forward with multijurisdictional merger review and conduct investigations. Several large mergers are now under review or may be soon, and these transactions will be opportunities for new leadership in the U.S. agencies to coordinate with other enforcement agencies globally on merger review.

Apart from merger enforcement, one area of apparent divergence—discussed in articles for the theme focused on big data—is application of monopolization (U.S.) and abuse of dominance (EU) standards to single-firm conduct. U.S. agencies have not disclosed any ongoing non-merger investigations related to big data, while pending investigations and enforcement actions in the EU and by Member States reflect active concerns with big data practices.

Competition law issues over big data collection, analysis, access, and use appear likely to grow in importance, and a number of leading firms that use big data operate globally, so this area of civil non-merger enforcement may be an opportunity for U.S. and non-U.S. agencies to work toward convergence on enforcement standards.

China Agency Enforcement

China's Anti-Monopoly Law (AML) is still new relative to competition laws in other major economies, and courts in China have issued few if any decisions reviewing application of the AML to merger transactions, or price and non-price conduct, as articles in the theme reflect. Enforcement actions and formal guidance by the agencies responsible for the AML continue to evolve, although not always on parallel paths to U.S. or EU standards.

These important differences in procedure and substance present uncertainty, in particular for western competition law practitioners, whose analytical approaches for dispute resolution and compliance counseling derive from legal systems with a tradition of judicial review and a body of case law to use for guidance.

International Cooperation

The DOJ and FTC issued revised Antitrust Guidelines for International Enforcement and Cooperation in January 2017, with a new section focused on the growing number of cooperation agreements now in force with and among U.S. and non-U.S. competition agencies.

Gregory G. Wrobel, Editorial Board Chair of Antitrust*, is a shareholder and head of the Antitrust Practice Group of Vedder Price P.C. All opinions expressed herein are his alone and do not necessarily reflect those of his firm or any of its clients.*

Despite the uncertainty inherent in the election of a new president and the appointment of new DOJ/FTC leadership, the global proliferation of these agreements is an opportunity for continued cooperation, in particular for hard-core cartel conduct, even if potential changes in U.S. trade policy may challenge the status quo in global commerce.

Private Enforcement

Notable private competition law claims have been filed recently in the UK, and EU Member States are taking steps to implement the 2014 EU Directive on private claims, including by indirect purchasers. These developments bring both uncertainty and opportunity for lawmakers, courts, antitrust attorneys in private practice, and private parties seeking redress in EU Member States, as they grapple with issues of procedure and substance which have arisen for many years under U.S. antitrust laws and procedural rules.

Private enforcement remains active as well under U.S. antitrust law. The growth of private claims in the EU will present new opportunities for multijurisdictional coordination among parties and counsel, and new challenges about sharing discovery information, claims of privilege under differing legal standards, and cross-border use of agency enforcement actions as evidence of culpability, among other issues.

China has seen very little private enforcement under the AML, which presents inherent uncertainty over the potential for greater private enforcement in the future.

Judicial Review

The new U.S. President has submitted a nomination for a pivotal appointment to the U.S. Supreme Court, which may impact decisions on whether to accept antitrust cases for review and the outcome of these cases. The new president, in early actions unrelated to antitrust law, has also signaled the potential for a more confrontational approach to federal courts, which may give rise to uncertainty over the role and persuasive influence of the Solicitor General as an advocate in antitrust cases before the Supreme Court.

Perhaps most notable about EU judicial review is the acknowledgment by the President of the EU General Court that cases have taken far too long for final review, and that there have been too few cases submitted for review for judicial precedent to remain current, in particular given that parties have settled more cases with the EC in recent years rather than appeal to the EU courts.[1] The President's remarks reflect uncertainty over the pace of judicial review and the substance of legal standards that the court may develop over time, but also opportunities to test the promise of more prompt action in the future. The growth of private competition law enforcement may also prompt increased review by EU courts.

As noted above, there has been very limited judicial review in China of cases under the AML, which presents uncertainty over the role that courts in China may have in shaping substantive standards and procedural rules under the AML.

ANTITRUST will continue our discussion of these important issues as uncertainties resolve into more concrete challenges—and opportunities—for parties, antitrust practitioners, enforcement agencies, and courts. ■

[1] Melissa Lipman, *EU Court Chief Sees "New Era" of Speed for Antitrust Suits*, LAW360 (Jan. 27, 2017) (noting that 80 new competition cases were filed for review in 2010, but only 18 in 2016).

Introduction
Antitrust in the Globalized World: Where to Next?

BY VANESSA A. TURNER

As issue editor for this edition of Antitrust, I am very pleased to introduce this international-themed Spring issue of the magazine. As a British citizen, a European, and an antitrust lawyer, having worked all of my career both with and in the United States,[1] the political events of 2016 may have tremendous implications. Combine this with the fact that—in a world of globalized antitrust—enforcers beyond the traditional agencies in the U.S. and Europe are becoming increasingly active, and you then have two significant and interesting questions: who will lead the antitrust charge in future, and in what direction?

The U.S. is generally considered the "founding" antitrust jurisdiction (though Canada was, in fact, the first country to pass competition legislation in 1889, one year before the Sherman Act, and Germany would lay claim to this in Europe) and the U.S. has long been the dominant "exporter" of antitrust doctrine, principles, and practice. It is hard to imagine that there is any antitrust jurisdiction among the now more than 130 that has not been deeply influenced by U.S. thinking. This notwithstanding, in more recent times some see the European model of antitrust as more influential.[2] But what will the future look like?

The International Competition Network (ICN), which has grown from its 14 founding jurisdictions in 2001 to over 300 member organizations today, has done much to harmonize and coordinate global antitrust enforcement, which is highly desirable from the perspective of business and overall economic efficiency.[3] This harmonization has been modeled mainly on the U.S. and/or EU ways of thinking. However, the newer jurisdictions, in Asia in particular, have shown that they will sometimes also take different approaches. On the one hand, many would argue that these have not always been based on pure antitrust principles, and there are also questions in relation to how some jurisdictions are applying their antitrust laws to state-owned enterprises. On the other hand, the newer jurisdictions have also been innovative in some areas, from which more "traditional" enforcers may be able to benefit.

Vanessa Turner is a partner at Allen & Overy LLP in Brussels and London (admitted to the English and German bars) and an Associate Editor of Antitrust.

In addition to geographic shifts and expansion of public antitrust enforcement and leadership, we are also seeing a trend towards significantly increased private antitrust litigation outside of the U.S., though often without the full panoply of treble damages and opt-out class actions.[4] All of this has strategic implications—and raises new coordination challenges—for internationally-operating companies.

This issue of Antitrust includes a range of articles from different jurisdictions, providing counsel and in-house lawyers with practical guidance to navigate advising in international antitrust waters. Some pieces look at themes across the globe—for example, Anna Lyle-Smythe and Jodie-Jane Tingle's contribution on gun jumping, where we see a relative convergence in enforcement attitudes. Other contributions compare the U.S. and EU approaches and suggest increasing divergence—the treatment of big data and data protection contribution by Paul Lugard and Lee Roach being a prime example. Hartmut Schneider, Sarah Licht, and Nicole Callan look at antitrust and intellectual property guidelines across multiple jurisdictions. Other pieces look at the increasing impact of Chinese antitrust enforcement on companies—and not just in China—in relation first, to mergers in Cunzhen Huang and Fei Deng's cross-jurisdictional comparative study of recent merger enforcement in China, second, on IPRs in Charles Pommiès, Peter McDonald, and David Shen's contribution on IPRs under Chinese antitrust law, and finally, antitrust enforcement more generally, as explored in Andrew Foster's contribution on China's three regulators.

The contributions in this issue suggest to me that the monopolistic or at least duopolistic antitrust world order may be changing. China, for example, is clearly flexing its antitrust muscles.[5]

There will be further specific jurisdictions to watch in the future too—Singapore, South Korea (the KFTC imposed fines of around $1.6 billion on companies in 2016, a significantly higher amount than the Chinese antitrust authorities), India, Hong Kong, Brazil, and South Africa, to name only some.

For companies and counsel operating internationally, and for the sake of global economic and enforcement efficiency, we need to support international inter-agency cooperation, coordination, convergence and comity, all the more given the rise of nationalist agendas and anti-globalization headwinds in a number of key jurisdictions.[6]

On the second question—the future direction of antitrust—should the events of 2016, which raise so many questions about Western capitalist societies, also make us think anew about antitrust?

Although jurisdictions differ in their approaches to antitrust enforcement—administrative systems versus court-based systems, criminal enforcement against cartels versus administrative sanctions, for example—there are core principles that are generally common to all, even if as Judge Diane Wood points out in her interview in this issue, they are not always applied identically: merger control based on some sort of "Significant Lessening of Competition" test, prohibition of anticompetitive agreements and constraints on monopolization or the abuse of a dominant position.[7]

The questions are, however, whether these are enough or too much, and whether the current interpretation of these rules is still appropriate today, particularly in an ever increasingly digital world? Do we need to re-evaluate whether these long-established principles and the way they are implemented are indeed hitting their ultimate goals, the mission of antitrust? For a discussion of whether we are even clear on what that mission is, the interview with Eleanor Fox and William Kovacic makes interesting reading.

Former Acting AAG Renate Hesse last year referred to the concept of "economic fairness"[8]—equal access for all to the economy. European Competition Commissioner Margrethe Vestager rarely misses an opportunity to use the word "fair" in her major policy speeches. Are they on to something? Brexit and the 2016 U.S. presidential election suggest significant dissatisfaction with the status quo and in particular with the way globalization has turned out for some. Does antitrust have a role here?

Renate Hesse's concept of fairness involved antitrust enforcement promoting "the interests of the public over the power of the few" by not allowing "companies to grab unearned monopoly power over markets that they can wield at the expense of consumers, workers and would-be competitors" or as she stated:

> To say it another way, competition is fair because it gives a chance to the small business owner to succeed in her business venture, because it delivers lower prices to consumers, and because it drives the innovation that improves products, business processes, and more. Competition among employers to attract workers is fair because it yields higher wages, better benefits, and safer working conditions. In general, competition is fair because it distributes these rewards broadly to participants in the economy. But when companies harm competition—choking off competition or agreeing with rivals not to compete—they infect the economy with unfairness by accumulating power that the few can wield at the expense of the broader American public.[9]

In Commissioner Vestager's view:

> Our world has never been better off. Freer trade has brought competition to markets that used to be closed. It has made us more productive, and helped people and ideas to circulate, creating innovations that have changed our lives.
>
> But despite this, many people are unhappy. They see the executives and shareholders of big companies getting richer, and they ask—is this economy for everyone, or only for a lucky few? That's a fair question. And a crucial one. Because unless we can show that an open economy is good for everyone, that openness will be challenged more and more fiercely.
>
> I'm convinced that open markets can give everyone their fair share of the benefits of growth. But that will only happen if we choose the right policies, and work to make them a success. And one of those policies is competition. Competition enforcement certainly can't provide all the answers on its own. But it can make a difference. . . . .
>
> And competition enforcement also sends a message of fairness. That public authorities are here to defend the interests of individuals, not just to take care of big corporations. . . .
>
> And that means that as competition enforcers, we have a responsibility to make a difference. We have the power to do a lot of good. And we need to make sure we use that power to answer people's most pressing concerns.[10]

In a sense, this is uncontroversial. It is consistent with a system that promotes competition on the merits and efficiency, to the benefit of society at large. Perhaps more controversial is whether we are actually living up to these goals in practice? Is antitrust still up to date?

The anti-establishment wave of 2016 has challenged previously accepted wisdoms. The antitrust world could—and to my mind should—use the current mood as an opportunity to consider how this essential branch of the law can, not only maintain, but enhance, its critical role for the economy.

It would be beyond the scope of this note to suggest the answers to the present questions in antitrust. But others have already started the thinking process on how antitrust could deal with today's new challenges, as evidenced by articles in this issue.

For example, the debate on the potential importance of data in antitrust, ubiquitous in antitrust circles in 2016, is clearly not going away, likewise the issue of IPRs and antitrust and innovation. The contributions in this issue by Rachel Brandenburger, Logan Breed, and Falk Schoning's in relation to merger control thresholds and innovation, on big data by Paul Lugard and Lee Roach, and on IPRs under Chinese antitrust law by Charles Pommiès, Peter McDonald, and David Shen provide thought-provoking perspectives on this. A number of economists are concerned that antitrust enforcement is currently not good at dealing with dynamic efficiencies and thus may not be paying sufficient attention to innovation, which can have a greater consumer welfare enhancing effect than (only) price competition.[11] The appropriate solutions may not yet be clear, including whether more or less intervention might ultimately be the best strategy, but antitrust enforcement will need to find them.

Further challenges are posed by the digital or online and sharing economy,[12] and the links here to unfair competition, consumer and data protection law. In Europe we have seen Member States heading in different directions on how to deal, for example, with online hotel booking cases or the likes of Uber and Airbnb. There is still divergence on how to deal with multi-sided markets. A degree of competition between enforcers may be positive, but only if ultimately a sound experience-based review results in an optimized and harmonized approach across the international plane to enable businesses to thrive.

Coming back to the concept of "economic fairness," others have suggested that many markets are becoming too concentrated and perhaps merger control is not working as it should,[13] that too many deals are let through, some on the basis of allegedly spurious economics[14] or with ineffective remedies.[15] I would hesitate to say whether this is true or not,[16] and there may be other explanations for market concentration—the increasing importance of IPRs, or network effects perhaps? Or is greater concentration inherent in globalization itself? But should antitrust enforcers not do more to take stock and review their outcomes to see what has worked and what has not to ensure equal access for all to the economy? There is now a wealth of international comparative data to undertake such retrospectives. Antitrust, if it is to be taken seriously, should check its predictions against outcomes, and be ready to adjust accordingly.

A nascent branch of economic research is that looking into the impact of common ownership, cross-shareholdings of institutional investors, in oligopolistic markets.[17] These economists suggest that this common ownership is having a harmful impact on prices in such markets and on overall economic growth and inequality levels. In 1950, institutional investors owned about 7 percent of the U.S. stock market; today they own almost 70 percent. This degree of ownership concentration—unknown since the U.S. Gilded Age in the second half of the 19th century—now applies across multiple sectors, including investment banks, tech companies, and pharmaceutical companies. The economic argument runs that when a single investor owns large stakes in competing firms, the investor will want firms to keep prices high and wages low as price and wage competition lowers profits and stock values. There is some research to suggest that this theory is borne out by empirical evidence that demonstrates, for example, that airline ticket prices increased as much as 10 percent because of common ownership and that increases in bank fees and reductions in interest rates to savers occurred from common ownership of banks.[18] If this is even partially correct, it would seem essential that antitrust enforcement thinks further about this potential blind spot.

Separately, there would now appear to be an unwelcome risk that we see a greater tendency towards non-competition principles creeping into antitrust enforcement beyond legitimate policy priority setting, calling into question the independence of antitrust enforcement agencies. The lack of political independence in enforcement, or the role in decision-making of other industrial policies has been a criticism of some of the more recent antitrust jurisdictions. The more established agencies, including those that are part of the executive, have until now jealously guarded their independence and proven that independence can be largely maintained within a political context. The European Commission is currently pushing to promote greater powers and independence of all national competition authorities in the EU. Great strides have been made internationally to keep other policy goals out of competition enforcement. But the wave of protectionism currently sweeping parts of the globe—in particular in the more established antitrust jurisdictions—should put us on guard. Especially in the current political climate, antitrust agencies cannot afford to be out of touch with policy making. But there is a balance to be struck.

Obviously, many will disagree with the ideas set out above and take the view that less is more. And we should certainly not shy away from looking at this either. The antitrust community prides itself on being fact-based in its analysis. Whichever way we go, let us review, build on, and enhance our discipline.

The direction of antitrust over the next few years is not clear. Some jurisdictions may become more interventionist, some likely less. And there may be more scrutiny of what aims antitrust is serving, including from outside the traditional antitrust community. One thing however seems clear: the debate in our globalized world will not be confined to the U.S. or the EU. ■

1 As well as working in law firms, I have also spent time as a special advisor at the FTC, and as a Cabinet member of the Competition Commissioner in the European Commission.

2 For an in-depth discussion of U.S. and EU influence on antitrust globally, see the interview with Eleanor Fox and William Kovacic, *infra* this issue. Specifically in relation to cartel enforcement, note also that although one year clearly cannot be considered a trend, it is nevertheless interesting that while financial sanctions imposed on cartels (traditionally an area of antitrust enforcement dominated by the U.S.) rose in many jurisdictions in 2016, they declined sharply in the U.S. *See* Catherine Belton, *Global Cartel Fines Hit New High, Powered by $4.1bn in EU Alone*, Fin. Times (Jan. 5, 2017) (based on Allen & Overy, *Global Cartel Enforcement—2016 (Full Year) Cartel Report* (Jan. 5, 2017), http://www.allenovery.com/cartelfines); *See also* Maria Jaspers & Gerald Miersch, *Recent Developments in the European Commission's Anti-cartel Enforcement*, *infra* this issue.

3 The OECD and UNCTAD have also contributed to this.

4 The entry into force of the EU Damages Directive at the end of 2016 is a noteworthy development in this regard. See Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European

Union, O.J. (L 349) 1, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN.

5 Eleanor Fox and William Kovacic provide highly insightful thoughts on antitrust in China in their interview.

6 For an in-depth discussion of international comity principles, see the contribution by Benjamin G. Bradshaw, Julia A. Schiller, and Remi Moncel, *International Comity in the Enforcement of U.S. Antitrust Law in the Wake of* In Re Vitamin C, *infra* this issue.

7 For further discussion on this topic, see the interview with Eleanor Fox and William Kovacic, *infra* this issue.

8 Renata Hesse, Acting Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Justice, And Never the Twain Shall Meet? Connecting Popular and Professional Visions for Antitrust Enforcement, Opening Remarks at 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016), https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-opening.

9 Whether this view is shared by Hesse's successors at the DOJ will have to be seen.

10 Margrethe Vestager, European Commissioner for Competition, Competition for a Fairer Society, Speech at 2016 Global Antitrust Enforcement Symposium (Sept. 20, 2016), https://ec.europa.eu/commission/2014-2019/vestager/announcements/competition-fairer-society_en.

11 *See, e.g.*, Tony Curzon Price & Mike Walker, *Incentives to Innovate v Short-term Price Effects in Antitrust Analysis*, 7 J. Eur. Competition L. & Prac. 475 (2016); Benjamin R. Kern, Ralf Dewenter & Wolfgang Kerber, *Empirical Analysis of the Assessment of Innovation Effects in U.S. Merger Cases*, 16 J. Indus., Competition & Trade 373 (2016).

12 *See* Lewis Crofts, *Merkel Says Changes to Competition Law Needed to Tackle Digital Monopolies*, MLex (Dec. 6, 2016).

13 *See Too Much of a Good Thing: Profits Are Too High. America Needs a Giant Dose of Competition*, Economist (Mar. 26, 2016), http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing; Council of Economic Advisers, Benefits of Competition and Indicators of Market Power (Apr. 2016).

14 *See* Jesse Eisinger & Justin Elliott, *These Professors Make More than a Thousand Bucks an Hour Peddling Mega-Mergers*, Pro Publica (Nov. 16, 2016), https://www.propublica.org/article/these-professors-make-more-than-thousand-bucks-hour-peddling-mega-mergers.

15 *See, e.g.*, John E. Kwoka, Jr., *Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes*, 78 Antitrust L.J. 619 (2013). *But see* The FTC's Merger Remedies 2006–2012. A Report of the Bureaus of Competition and Economics (Jan. 2017) (stating that remedies were effective in most of the cases approved by the FTC), https://www.ftc.gov/system/files/documents/reports/ftcs-merger-remedies-2006-2012-report-bureaus-competition-conomics/p143100_ftc_merger_remedies_2006-2012.pdf.

16 The German Monopolkommission's most recent report on concentration levels in Germany for the top 100 companies found a slight decline in concentration levels and in cross-investments and board overlaps between these 100 companies, http://www.monopolkommission.de/index.php/de/them/konzentrationsbericht.

17 *See, e.g.*, Eric Posner, Fiona Scott Morton & Glen Weyl, *A Monopoly Donald Trump Can Pop*, N.Y. Times, Dec. 7, 2016, https://www.nytimes.com/2016/12/07/opinion/a-monopoly-donald-trump-can-pop.html?_r=0; Eric A. Posner, Fiona M. Scott Morton & E. Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, Antitrust L.J. (forthcoming), https://ssrn.com/abstract=2872754; José Azar, Martin C. Schmalz & Isabel Tecu, *Anti-Competitive Effects of Common Ownership* (Ross School of Business Working Paper No. 1235, Apr. 2015), http://www.crai.com/sites/default/files/publications/Anti-competitive-effects-of-common-ownership-0415.pdf; José Azar, Sahil Raina & Martin C. Schmalz, Ultimate Ownership and Bank Competition (July 23, 2016) (suggesting a new more effective measure of concentration, the generalized HHI (GHHI), in place of the traditional HHI measure), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252.

18 *Id.*

Interview with Judge Diane Wood, Chief Judge, Seventh Circuit Court of Appeals

Judge Diane Wood

Editor's Note: *Our interviewee, Judge Diane Wood, is the Chief Judge of the U.S. Court of Appeals for the Seventh Circuit. She is also the 2015 recipient of the Antitrust Division's prestigious John S. Sherman Award in 2015 for her contributions to the field of antitrust, making her only the 11th person and the first woman to earn that award.*

As Bill Baer said in presenting her this award, Judge Wood, in her two decades on the bench, has earned a reputation as a thoughtful and persuasive jurist. She is the author of a number of important antitrust opinions, including one of the most influential decisions defining the limits on the extraterritorial application of the U.S. antitrust laws under the Foreign Trade Antitrust Improvements Act (FTAIA), Minn-Chem, Inc. v. Agrium, Inc.*, in which she wrote the unanimous en banc opinion for the Seventh Circuit. All the other courts of appeals to decide the question since then have agreed with Judge Wood that the FTAIA defines an element of an offense rather than a limitation on a court's power to hear a case.*

Judge Wood is a noted scholar of antitrust law and a lead author of one of the premier casebooks in antitrust, Trade Regulation*. She has also long been one of the leaders in shaping U.S. antitrust enforcement policy in the international arena. As a visiting professor at Cornell Law School in 1985, Judge Wood helped the Antitrust Division revise the Division's first* Antitrust Enforcement Guidelines for International Operations*. From 1993 to 1995, she served as Deputy Assistant Attorney General in the Antitrust Division, overseeing appellate matters, legal policy, and international enforcement. In that role, she was the moving force in publishing another revision to the International Guidelines, which came out in 1995 and remained in place for over 20 years until the DOJ and FTC published an updated version earlier this year.*

Judge Wood has long been a forceful advocate for increased international cooperation in antitrust enforcement. In a 1995 address to the DePaul Law Review Symposium, she foresaw the need for antitrust enforcers around the world to agree on core principles: "As the economic world shrinks, it will be vitally important to ensure the effective enforcement of competition laws that are designed to maximize consumer welfare and economic efficiency . . . ." Her foresight helped lead to the creation of the International Competition Network in 2001, which as she says in our interview, has since become an effective vehicle for promoting cooperation and convergence among the more than 130 jurisdictions on every continent but Antarctica that now have competition laws.

In this interview, Judge Wood offers her views on the benefits to consumers of the global spread of competition law over the last 25 years, as well as on some of the issues the proliferation of those laws has caused for businesses that operate in multiple jurisdictions. She also offers her views on how the seeming backlash against free trade and globalization both in the U.S. and Europe may impact competition policy and what actions governments might take to mitigate some of the concerns being expressed. Associate Editor William Kolasky interviewed Judge Wood for ANTITRUST *on Jan. 12, 2017, along with Editorial Chair Gregory Wrobel and Articles Editor Lisa Fales.*

GREGORY WROBEL: Good afternoon, Judge Wood. On behalf of the editorial board of ANTITRUST magazine, we are grateful and pleased that as part of the cover theme for the Spring 2017 issue, you have agreed to share comments with us about international competition law and enforcement and about the recent updates to the Antitrust Enforcement Guidelines for International Operations of the U.S. Department of Justice and Federal Trade Commission.

WILLIAM KOLASKY: Judge Wood, thank you very much for agreeing to talk with us. Since you were at the Justice Department nearly 25 years ago, antitrust has become a truly global enterprise. Back then, fewer than 40 jurisdictions had competition laws. Today, more than 130 do. What do you think accounts for the spread of antitrust over this period?

JUDGE DIANE WOOD: Probably several things account for it. At that time, the spread of antitrust was beginning to gain momentum. The European Union had, just a few years earlier in 1989, added a merger regulation to its competition laws and many countries were modeling their laws on the EU laws.

Around the same time, Mexico, a year or so before NAFTA took effect, decided to pass a state-of-the-art competition law, which became very influential throughout Latin America. Other Latin American countries were also seeing this as the useful way to do several things—to achieve consumer benefits; to achieve market access; and to help prevent corruption through a more transparent market.

Plus, of course, as of 1993 to 1995, we weren't too many years away from the fall of the Soviet Union. And many of the Central and Eastern European countries were looking to become full-pledged members of the international community.

WILLIAM KOLASKY: What benefits do you think the spread of antitrust over the last 20 to 25 years has delivered to consumers around the world?

JUDGE WOOD: That's a tough question to answer, because there is probably a good empirical study in there somewhere. But certainly what we were hoping, and I think has happened in many places, is that the benefits of competition, including lower prices, better quality, and more choice for consumers around the world, have spread.

I will comment that in many countries, and the United States may be one of them, there's always a little bit of tension, because sometimes the advocates for antitrust are large corporations that are hoping for what I just referred to as market access. They want to be able to break into another country. From a U.S. point-of-view, that means you're talking about distributional restraints. And as you know, at least domestically, our law of distributional restraints is a rule of reason-based approach at this point.

WILLIAM KOLASKY: What about in other jurisdictions around the world: have they, too, been moving toward more of a rule of reason approach with respect to distributional restraints? Or do they still have per se illegality with respect to some vertical restraints?

JUDGE WOOD: Certainly the most important other jurisdiction is still going to be the European Union for a long time. And they have moved in what we would call a rule of reason direction. As you know, they now have economists on staff. They've changed their guidelines for distributional restraints.

As the EU has matured, they've been a little less worried about exclusive territories drawn around national boundaries. And they now have safe harbors for non-price vertical restraints, so I think they've moved in a rule of reason direction at least with respect to non-price restraints. Vertical price restraints still tend to be more sensitive.

So I think, at the EU level anyway, there's now a fair amount of common ground. If you talk about the Asian countries, however—for example, if you talk about the Chinese anti-monopoly law—I think you're still seeing a difference in philosophy that's pretty important.

WILLIAM KOLASKY: Can you comment on that difference in philosophy?

JUDGE WOOD: Well, I think the inspiration for that law, which is not surprising, is that the Chinese are interested in protecting their own market. I think there are a lot more efforts within that law to regulate business practices. As you know, our law is pretty structural. We have very strong prohibitions built into Section 1 of the Sherman Act.

And we even prosecute hardcore cartels criminally. But we have a more careful approach for single-firm behavior because we don't want to deter competitive actions. Ultimately, of course, we'll enforce. But we've taken to heart Learned Hand's admonition that the successful firm, having succeeded, shouldn't be turned upon.

And I'm not sure that philosophy is embraced in countries like China. I think they're more worried about the specifics of what the big firms are doing. One of my co-authors in my antitrust casebook, also a Department of Justice alumnus, Doug Melamed, said that during his period at Intel, the jurisdictions they were worried about, in order, were, number one, the European Union, number two, China, and number three, the United States. I thought that was very telling.

WILLIAM KOLASKY: That is very telling and very interesting. Going back to the benefits you described earlier in terms of lower prices and greater choice, do you think those benefits and the contribution that the antitrust laws has made to them are appreciated by the public at large?

JUDGE WOOD: Probably not. I think that's probably why you asked me that question.

I think antitrust law is hard for the public to understand. What they certainly do understand is high prices. And so you'll remember that when we've had, let's say, spikes in the price of gasoline at the pump or spikes in other kinds of prices, there's very often a great public cry for antitrust enforcement action, either by the Federal Trade Commission or by the Department of Justice.

And I can recall generations of FTC chairs going to Congress and trying to explain that, "Yes, we're looking at this. But we can't really stop the market." And other than intervening with actual price controls, which would be quite antithetical to antitrust, we are usually not in a position to do much about it. I think the public is also—going all the way back to 1890 when the law was passed—aware, however, that if a big firm seems to be bullying somehow, that doesn't strike them as correct.

Whoever the big firm *du jour* is—whether it's Microsoft or whether it's Google or whether it's, in earlier years, IBM or Standard Oil—when they are trying to squeeze other people out of markets, or deny access to gateways that you might need for network industries, then I think the public gets a sense of unfairness.

WILLIAM KOLASKY: Let's turn to the flip side of this. What problems do you think the proliferation of antitrust laws has created? You mentioned Intel, and the fact that they worry more about the EU and China than about the U.S. So, more generally, do you see the spread of antitrust creating problems, especially for multinational businesses?

JUDGE WOOD: Well, sure. It's a challenge for any business that's doing business in countries with standards that are inconsistent. This is actually the same concern that Richard Whish and I were asked to investigate way back in the early '90s, when we did our study for the OECD on mergers that are reviewed in more than one jurisdiction. At the time, we were shocked to find that for one of the transactions we had been asked to investigate, the companies thought they might be reviewed by 21 different authorities. They finally whittled it down to, I think, nine—if I remember correctly. Which they thought was still a large number of merger filings to have to make, and authorities to have to persuade that their merger was consistent with whatever the standards were: efficient, helpful, whatever.

Well, 21 does not sound like anything today, given the number of jurisdictions with mandatory merger notification regimes we now have today. Somebody might think that they got a break if that's all there were.

So here are a couple of other problems. Number one, when is it that a company becomes so big that it should be considered a dominant firm? We've known for years that the threshold for dominance, if you will, is quite different in the United States—I'll call it 70 percent—than in Europe, where the threshold remains much lower. The idea of a firm being dominant, therefore, gets triggered at a much lower level there.

And once you're dominant, or once you're a monopolist, you are under stricter scrutiny by the antitrust authorities and by the courts backing up those authorities than you are when you're just a little guy. Pretty much everybody understands that if you have no market power, you're probably not going to be bothered under either Section 2, or Article 102, or whatever other law we're talking about.

So dominance is one area where you still see a lot of differences. Another I mentioned briefly is the law governing distributional restraints. I think the differences are narrowing, but they're still there. And merger control is approached differently. There are other theoretical differences that I think are less important.

The Europeans still take the position that there may be some kind of collective dominance theory. We gave up on that back in the '80s with the FTC's cereals cases and the other cases that we had back then. But there are still big differences. So if companies are trying to serve all masters in a world where it's really just a global market, that's going to be hard for them.

LISA FALES: Judge Wood, you pointed out that there are significant differences among the various enforcement regimes—in merger review, dominance standards, and distribution standards. Going back, then, to one of your earlier answers, do you think those differences are driven mostly by differences in philosophies among the various antitrust enforcement regimes that drive their enforcement?

JUDGE WOOD: That's a very good question and one I've asked myself many times. I think I wrote a paper many years ago, actually, in which I was exploring whether antitrust was a one-size-fits-all area of law or whether it needed to be tailored more to local circumstances.

I think there is some tailoring to local circumstances that is appropriate. Here are a couple of things that I would look at. One thing is how is the law enforced? In the United States, we have a very welcoming approach to enforcers. We have two federal agencies, we have all 50 state attorneys general, and we have every private party that is injured in its business or property. It's an all-comers approach. That means we need to spend more time worrying about over-deterrence.

We need to make sure that the cases that are being pursued are worthy cases to be pursued because anybody with $450 can file a complaint in federal district court. Countries that have a single public authority in charge of their competition law enforcement, which is the normal model around the world, don't have to worry as much about that over-deterrence problem.

What they have to worry about instead is under-deterrence. They have to worry about whether the authority is devoting its resources to the right places, what happens to the cases that they can't reach—and I can remember discussing this with the authorities of many countries about their approach to deciding which cases they should devote their resources to and, also, what kinds of remedies are possible.

This is something that's noticeable with the European Commission. They are less reluctant to impose conduct remedies, let's say, in their dominance cases because those remedies are enforced by the Commission itself. They don't have to go to a federal district court judge who's going to sit there and worry about every last little tweak in the telecommunications policy, as we had to in the case of the AT&T consent decree here in the U.S.

That, of course, changed with the enactment of the Telecommunications Act of 1996, but it's a good example of how we do it and maybe why we have a different approach, under which we think: "We don't want that kind of remedy as a normal matter because of the way we have to implement it." That's one thing.

Another thing that varies is the economic structure onto which the competition law is superimposed. In our case, antitrust law grew up with the country, beginning at the end of the 19th century when new business forms were just being developed. Our economy continued to grow at a tremendous clip throughout the 20th century, and now into the 21st, and our antitrust laws have developed with it.

If you then compare, say, the African countries deciding to enact competition laws, they have had very different experiences. They don't necessarily have the same entrepreneurial business culture that we have here. And then there are countries like South Africa, where a huge part of the population has been badly suppressed in its efforts to participate in the market.

You can understand, then, why they may have different goals set out in their competition laws and why they may have adopted a somewhat different set of principles.

WILLIAM KOLASKY: That's a natural segue into a couple of questions about our remedial structure as compared to that of other countries. As you know, the United States is one of only 14 countries that have criminal sanctions for hardcore antitrust violations and we're probably the only country that regularly puts individuals in jail for those violations.

As a judge who has now been on the bench for roughly 20 years, do you think criminal sanctions for individuals are important to effective deterrence? And would you urge more countries to criminalize cartel behavior?

JUDGE WOOD: Well, it's a big question. I have to say, in the United States, where we do not have civil fines for antitrust violations, unlike Europe and a great number of other places, criminal sanctions are an important deterrent. That's an interesting piece of the puzzle, too, because sometimes a civil fine might be just the right middle ground.

Even though, of course, you don't want the fine to be so small that it's just a slap on the wrist. But, corporations are run by people. And it seems to me that holding the responsible corporate officers to task for what they've done—whether it's an antitrust violation, or a securities violation, or a mortgage foreclosure, or whatever it may be—is actually probably focusing on the right set of people.

They are the ones who can change the corporate culture. And so I've never been all that bothered by the fact that we, in appropriate cases, pursue the individuals. Actually, the comparison I would make is to the *Arthur Andersen* case. Remember how upset people were that the Department of Justice went against Arthur Andersen the firm, instead of the accountants who had been doing whatever they were doing and who had been responsible for the Enron mess?

And people objected to the Department's strategy. They said, here are all these innocent people losing their jobs—lots of perfectly honorable accountants and business analysts, not to mention the staff working with them. Why should you go after the firm when you could be much more targeted by going after the responsible individuals? I think there may be some truth to that.

WILLIAM KOLASKY: The other way in which our remedial structure differs from that of many other countries—and you've alluded to this—is we have long made private remedies available to the victims of antitrust violations. That is now beginning to change with more other countries, especially in Europe, starting to adopt private remedies for antitrust violations.

Having been a judge for roughly two decades, do you view these private remedies as important in terms of compensating the victims for the effects of the violation as opposed to simply having civil fines that go into the treasuries of the governments?

JUDGE WOOD: Well, that's also a very big question. I would encourage the antitrust bar to take a step back and look at the whole system. My essential feeling is that it's a good thing that we have private rights of action. And they have been exercised, I think, in many appropriate cases where people really do get their treble damages.

But as you know, this is just a piece of the picture. Look, for example, at Rule 23(b)(3) class actions. Who is running them? How are they addressed? What's the remedial structure? Do the damages, at the end of the day, even if there's a class settlement, which is the way they're invariably resolved, really get paid to the victims of the anticompetitive behavior?

What do you do with all the money that nobody files a claim for? Does it go to some *cy pres* recipient? Does it escheat to the state? There are a lot of administrative problems with the way this system works. And it could stand improving, not just for antitrust, but for any area of law where a large group of people have been injured by a common practice, and they're deserving of some sort of financial relief but we have only very clumsy ways to get it to them.

LISA FALES: I'm curious about what you think accounts for the proliferation of class actions in the United States?

JUDGE WOOD: Well, I'm going to take a little bit of issue with that. I just went to a symposium—there are lots of them going around this year. But I went to one in November at the University of Pennsylvania. And I was laughing because I pointed out that this was a title that only a legal nerd could love. The title was, something like: "Celebrating the 50th Anniversary of the 1966 Amendments to Rule 23 of the Federal Rules of Civil Procedure." Now, that was really the title. It's worth pausing on, though, because the class action as we know it is 50 years old. It was born in 1966 when Rule 23 was amended; before that, there were no class actions to speak of. Actually one of the things that prompted, by the way, the amendment in 1966 was antitrust, with the electrical price-fixing cases from around the early '60s. But that's what gave us the (b)(3) class action, which is what we're talking about.

In a (b)(3) common question class action, the common question has to predominate for the class action to be a superior method of proceeding. What we've been seeing since then is a set of efforts to bring this under some kind of control. We have the Supreme Court looking carefully at what does it take to have a common question. What does it mean to be typical? What are we going to do about the agency problems between the class and the lawyer and the named representative? You have the *Walmart* case, which was a huge development in this area, tightening up on those things. In light of these developments, I'm not sure that there are more class actions now.

People are still bringing them, in many areas. But the Supreme Court has now required a great deal more work for the plaintiff who wants to bring a class, and that means money. It's expensive to gather proof on commonality and on predominance. And it continues to be unclear about where issue classes come in, which could be quite important for antitrust.

You may know that the Advisory Committee on Civil Rules of the Judicial Conference is putting out some public comments, various proposals to amend Rule 23. And so over the next year or so, you may want to keep your eye on that.

WILLIAM KOLASKY: One more question about class actions. It's been 20 years since the 1997 amendments to Rule 23, which added Rule 23(f) allowing for appeals to the courts of appeals from decisions to either grant or deny class certification. After that amendment, the Seventh Circuit—your court—was one of the courts that took the lead in trying to bring greater rigor to the class certification process. How well do you think that's worked?

JUDGE WOOD: I think it's worked pretty well. I mean, the main thing that we did in some of our early cases was to say, for example, if you're going to be relying on expert testimony, as you probably will be in an antitrust case, you've got to go through the Rule 702 *Daubert* exercise.

Why should we go to all this trouble to certify a class action if you don't have anything but junk science behind you? So that's what I mean by saying we're front-loading the cost more as time is going on. Rule 23(f), I think, has done a nice job in letting the courts of appeals pick the cases that seem more in need of some kind of immediate appellate intervention.

In our court, we handle it through the motions process. It's a little bit hard for the outside world to get a sense of what's going on; and it's not because we don't want you to. But when I say the motions process, it means when I'm motions judge—which it sometimes feels like is all the time—there's a cycle of six months and it just goes through automatically.

I'll get a Rule 23(f) request. And if I and the other two motions judges that week think that this is a case where there is a new question—or a death knell, or whether a bet-the-company kind of case, whatever the reasons may be—then we'll say yes and accept the appeal.

At that point you know about the case because it's out there in the open. There's a class appeal. But the denominators—the full set of requests—are because you have to dig around in the court's motions rulings. Because if we decide that it's just OK to wait until a final judgment, truth be told, we often never see it because the case probably is settled anyway.

And you know what the litigation rates look like, less than two percent of cases in the federal courts of all types actually go to trial. It's just a very, very small number.

WILLIAM KOLASKY: Returning to international issues, we've talked about the benefits the spread of antitrust has provided to the public generally. But over the past year, we seem to be seeing something of a public backlash against globalization generally. We saw that in the Brexit vote in England. Some people would say we saw that in the results of the 2016 election here in the U.S. What effects do you think this backlash to globalization—if I can call it that—may have on the commitment of countries around the world to having free-market economies protected by strong competition laws?

JUDGE WOOD: Well, it's a complicated question. Let me offer a couple of reactions. First of all, I actually think competition law is on a pretty solid footing. The reason—or at least the reason for my optimism—is that as antitrust was beginning to really spread in the 1990s, you may remember that there was a great push on the part of many people to pull competition law into the World Trade Organization, which of course was brand new in 1995. I happened to be an opponent of that because I wasn't sure that there was enough consensus around the world about what we were really talking about when we said competition law. I also had the sense that it was the kind of law that was going to be stronger if it went from the grassroots up, as opposed to from the top down from Geneva or from anywhere else, such as Brussels or Washington.

What happened, instead of the WTO, which I still think would have been a mistake, was the International Competition Network, which is alive and well, and functioning quite effectively. And the nice thing about the ICN is that it is completely voluntary. Everybody who has chosen to have a competition law can be a member.

People get together and they discuss best practices. I think there's been a tremendous amount of useful learning among countries that are relatively new to this area. I think people feel that it's their law. And I would say, countries that I have visited give me that impression as well.

It's their law, and so they don't think anybody else in some other country told them to do it. Now, the thing that does concern me, and this is an area that I always had a big interest in, is the intersection between competition law and trade law, because, obviously, the health of our markets in many sectors depends on vigorous competition from companies all over the world, not just from the United States.

Just to take a couple of examples, if you're asking how does competition operate in the automobile industry, you'd be crazy if you didn't include the European producers and the Japanese producers and the Korean producers and whoever else; lots of other companies. Never mind locating a factory in Mexico; there are just so many other companies from so many different countries.

If you're talking about airframe competition, you can't talk only about Boeing and not Airbus; that would be crazy. The market depends on competition. And if you happen, as I do, to fly United Airlines all the time, sometimes you're in an Airbus 320 and sometimes you're in a Boeing 737-900.

It's clear that the airlines like having the choice. And if international trade begins to diminish those choices, it is going to have an effect on competition too.

WILLIAM KOLASKY: That is a natural segue into the next question, which is, as you say, the intersection between competition policy and trade policy. It's probably a little known fact that John Sherman was better known during his lifetime for the Sherman Tariff Act than he was for the Sherman Antitrust Act.

One of the reasons for his sponsorship of the Sherman Antitrust Act was his recognition that if you were going to raise barriers to foreign commerce, you need strong antitrust laws to assure adequate domestic competition. Have you given any thought to—assuming the United States moves in the direction of greater protectionism—what effect, if any, that should have on the enforcement of our antitrust laws domestically?

JUDGE WOOD: Well, I certainly hope that the first doesn't happen. The Smoot-Hawley Tariff Act of 1930 did not work out well either for the United States or the world. For that reason, the way I have thought we should attack this problem is, number one, to take it very seriously. I think if this election taught us anything, it's that a great number of people feel that the burden of free trade has fallen disproportionately on them, and that the benefits—if there are some—are not enough to balance off against that burden. If I had been running the world during the election, I would have said—and would say now, too, if I were speaking to Congress—what we need is to spread that burden in a more equitable way.

If we all like buying TVs for $500 instead of $800, then we shouldn't just place all the burden of the free trade that gives us those lower prices on one set of people. That, of course, is just one industry but there are many others for which it is just as real.

You may remember that in the Trade Act of 1974, there's a title called Adjustment Assistance. That title deals with worker adjustment assistance; it deals with community adjustment assistance; and it deals with business adjustment assistance. It essentially says—I'm paraphrasing and probably being a little too generous—if you lost your job because of disruptions due to international trade, then we're going to help retrain you, we're going to help you move to another area if you need to, and we're going to acknowledge that you are being asked to bear a big part of the burden of trade.

In my view, where free trade delivers a national benefit at your expense, the country owes you some recompense. I analogize it to building a highway through your backyard, which may be helping the entire community. But if they build that highway, they're going to compensate you for the use of your land. You shouldn't be donating your backyard to the public.

I think that people in those communities throughout this country that have suffered from international trade—that have watched factories close down and that have watched jobs go away—need a better answer than, "Well, it's good for you." You know, they don't want to hear that. And I understand that. I wouldn't want to hear that either.

WILLIAM KOLASKY: That is a very thoughtful answer to a difficult question. To shift gears a little bit, you are credited with being one of the principal authors of the 1995 International Guidelines. In November of last year, the FTC and DOJ published a proposed set of updated guidelines to take account of developments over the past 20-plus years. Have you had a chance to read the proposed update? And I'd be interested in hearing what your overall reaction to it is.

JUDGE WOOD: Well, I looked at it quickly, but not as carefully as I would like to if I had the time. I think it makes a great deal of sense to do this now. The Supreme Court has issued decisions in this area. The courts of appeals have issued important decisions.

Our whole understanding of what it means to talk about extraterritorial jurisdiction has become more finely tuned, which is one of the subjects of Justice Breyer's book, *The Court and the World: American Law and the New Global Realities* (2015). It's quite appropriate for the Guidelines to reflect those changes, and to reflect the changes about the various doctrines that implicate foreign governments too.

And, of course, the need for international cooperation is greater than ever. With 130 countries in the world now having competition laws, you better be cooperating, to the extent you can. We still have tremendous restrictions on how much we can cooperate, and I'm sorry that the efforts to create a network of actual bilateral cooperation agreements didn't go very far. I think it's still a good idea but it's something that really hasn't taken off.

LISA FALES: Judge Wood, are there particular areas of the 1995 Guidelines that you think could use particular attention in terms of proposing changes?

JUDGE WOOD: The one thing that we were trying to do in the 1995 Guidelines, and maybe overachieved on, is we were trying to ask the question, what is different about the international setting? And the one message that we wanted to be very clear on, is that the underlying law is not different.

We do not, in American antitrust laws, discriminate against people based on their nationality. If a foreign firm wants to acquire a U.S. firm—putting Exon-Florio to one side, which is not an antitrust law—the same standards apply as if a U.S. firm wants to do it.

We wanted to be very clear that the assumptions of the law did not have anything to do with the international setting. What does make things different? Clearly, the reach of our process and how far out we're going to look for foreign activities that have an effect within the United States. That's one of the areas that I think—there are probably more examples—is a good place to put their attention.

WILLIAM KOLASKY: Along those lines, in terms of the extraterritorial reach of the U.S. antitrust laws, that obviously raises the question of the Foreign Trade Antitrust Improvement Act or FTAIA, as it has come to be called. You were also the author of what I think has been one of the most influential FTAIA decisions over the last ten years, the *Minn-Chem* case.

That case involved, if I recall, two critical issues. The first is whether FTAIA is a substantive statute or a jurisdictional statute. The second is what the standard should be for determining whether the effect of anticompetitive conduct outside the United States on U.S. commerce is sufficiently direct to bring it under the U.S. antitrust laws.

On both those issues, most of the courts that have issued decisions since then have largely followed your en banc decision in *Minn-Chem*. But there are still a number of older courts of appeals cases from before *Minn-Chem*, which still treat the FTAIA as a jurisdictional statute.

I don't know whether it's appropriate to ask you whether you think the Supreme Court needs to resolve that circuit conflict, or whether that is something that will just resolve itself naturally over time.

JUDGE WOOD: Well, as you know, in the *Minn-Chem* decision, which was a unanimous opinion of the en banc Seventh Circuit, we understood the Supreme Court's cases in other areas, particularly the *National Bank of Australia v. Morrison* case, to demand more precision in the use of the concept of jurisdiction in the sense of Rule 12(b)(1) subject matter jurisdiction. We still get occasional cases like that. I think that as the other circuits have the issue put squarely in front of them, they also will follow *Morrison*.

The Supreme Court itself has really tried to say, "Wait a minute. If you're just talking about the power of the federal court to hear the case and to say "yes or no," unless Congress has been very specific, we don't assume that that power has been taken away. Actually, Justice Scalia pioneered this principle in the dissenting part of his opinion in the *Hartford Insurance* case. He was saying, "We're not talking here about the power of the court to hear the case. We're talking about whether the law that Congress wrote actually reaches this conduct." That is the 12(b)(6) issue, not a 12(b)(1) issue. I think they're going to get it. But we'll see.

WILLIAM KOLASKY: Thank you. Greg, Lisa, do either of you have any other questions?

GREGORY WROBEL: I noticed a news report in the last few days about an indictment in the United States regarding bid rigging over financial indexes, against individual defendants who are U.K. citizens. Their counsel have criticized the indictments because U.K. authorities had investigated the matter fully and decided there wasn't an adequate basis for criminal charges. Which leads to the question whether you see a role for international comity considerations in connection with criminal enforcement of antitrust and competition laws?

JUDGE WOOD: Well, I won't say too much about that since it's pending. But I will say that as the 1995 Guidelines state—and I believe this is still going to be stated in the updated Guidelines—at a minimum, as prosecutorial discretion is exercised by the Department of Justice, the Department has always been committed to considering the interest of foreign nations in the type of comity that you're talking about. But beyond that, I should probably not comment.

WILLIAM KOLASKY: That leads to one more question. Greg mentioned the word "comity," and I've been struggling to figure out how to ask a more general question about comity because that's another issue that is covered by the updated international Guidelines.

Some of the organizations that have commented on those updated guidelines have suggested that they put too much emphasis on the courts deferring to the executive agencies with respect to issues of international comity. Is that an area that you would feel comfortable commenting on?

JUDGE WOOD: Well, I don't have too much to say about that. I mean, we have separation of powers. And so if the Department of Justice wants to come argue something before us, the courts will listen attentively.

WILLIAM KOLASKY: Thank you, Judge Wood.

JUDGE WOOD: Well, thank you, very interesting questions.

WILLIAM KOLASKY: And your answers were even more interesting.

GREGORY WROBEL: Judge Wood, thank you again for taking the time to talk with us today. I am sure our readers will find your comments as insightful as we do. ■

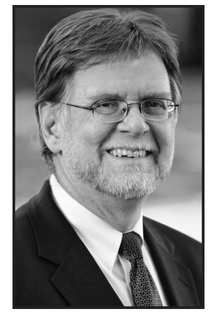
Interview with Professors Eleanor Fox and William Kovacic

Editor's Note: *Professors Eleanor Fox and Bill Kovacic are two icons in our field, with unique perspectives on the past, current, and future state of antitrust, both here in the United States and worldwide. As this interview reveals, they are also prime examples of how leaders in our field can hold fundamentally different views on the underlying purpose and policy of antitrust laws, yet remain close friends and colleagues who can discuss these issues without the hyperbole that we sometimes see from different antitrust camps.*

Certainly, Professor Fox laments the fact that, at least in our modern antitrust jurisprudence, there is little focus on outsiders' access to markets and their positive contributions to the market dynamic. As for Professor Kovacic, it is fair to say he adheres more to the "consumer welfare" school of thought, but highlights in frank terms that this concept has taken on a life of its own and is somewhat malleable in the hands of practitioners and judges. And both Professors Fox and Kovacic implicitly acknowledge a likely shift to the "right" compared to the last administration. Finally, Professor Kovacic makes the point that perhaps the longest lasting impact of the new administration will be the choice of federal judges (both at the district and circuit courts, as well as the Supreme Court), as this could have the greatest influence on antitrust jurisprudence in the years to come.

This interview was conducted for ANTITRUST *on January 11, 2017, by Associate Editor James Keyte.*


Eleanor Fox


William Kovacic

JAMES KEYTE: Thank you both again for joining us. How did you both get interested in antitrust?

ELEANOR FOX: I graduated from law school in 1961 and I started to practice in 1962. Antitrust got interested in me before I got interested in it. In my first job, I was assigned to a very big litigation—an antitrust litigation. It was *United States v. Decca Records and Music Corporation of America*. Decca Records owned Universal Pictures Studios. It was a huge conglomerate media merger case and I cut my teeth on it.

I was in the litigation department in my law firm, and antitrust was part of the litigation department. I did a huge amount of merger work and some monopoly work. Those were the days of the Wild West merger cases. There were lots of "midnight mergers"—announced in the press days before closing—and I handled a lot of preliminary injunction motions, on both sides. I also handicapped mergers for arbitrageurs. The law was sociopolitical at the time; against power and excessive business concentration. There were different rules and standards at the time but we had guidance from Supreme Court cases and practice. We knew where the lines were drawn and where the cliff was. And we were able to give pretty accurate advice as to the risks of a merger.

JAMES KEYTE: And this was even pre-*Vons*?

ELEANOR FOX: Yes, about the time of *Von's*.

So, after antitrust found me, I did find antitrust. Antitrust has been the major part of my professional life. It has been endlessly fascinating. We've moved from the time of sociopolitical antitrust, when the law was against privilege and power and for the underdog, to the revolution in the early 1980s, shifting to economic efficiency.

JAMES KEYTE: And Bill, how about yourself?

BILL KOVACIC: The main influence on my interest came from two professors who taught me at Columbia Law School. The first was Harlan Blake. Harlan was the co-author of a formative antitrust case book. "Trade regulation," as it was called, was a first-year elective in the second semester. I took the course, and in an abundance of generosity on his part (after I expressed an interest in a measure that would become known as the Hart-Scott-Rodino Antitrust Improvements Act), Professor Blake said, "I'm a close acquaintance of the staff director of the Senate subcommittee that's developing the legislation. If you don't have any plans for the summer ahead I'd be glad to write you a letter of introduction after I've read your exam."

I bet all of my chips on the antitrust exam, and it paid off. Blake wrote a letter to Howard O'Leary, who was the staff director for Senator Phil Hart's Senate Antitrust Subcommittee. In my interview, O'Leary explained that the subcommittee had several demanding projects and said, "If you're here for only a summer, it really doesn't help us a lot." I was about to thank him for the interview and leave, but he added: "If you're willing to stay with us for a year, you're on." I got a leave of absence and spent the next year as a research assistant, working principally on the development of Hart-Scott-Rodino, which was enacted soon after I went back to school in the fall of 1976.

The other Columbia faculty member who guided me was Harvey Goldschmid. Like Blake, he was an exceedingly generous person. He supervised an independent research project for me and introduced me to Jack Kirkwood, who headed the Planning Office in the Federal Trade Commission's Bureau of Competition. Jack had put together a university-quality faculty of researchers, including Bob Lande, Neil Averitt, and Jim Hurwitz. I joined them in 1979. Harvey's care for me made it all possible.

So I was the very fortunate beneficiary of two academics who not only shaped my interest in competition law but also formed my view about what a good teacher does. They generously assisted me in ways they need not have done. They went out of their way to help. Blake and Goldschmid shaped my professional interests in two ways: they drew me to competition law and inspired me to be a teacher, and to teach in a certain way.

JAMES KEYTE: That's the perfect transition to my next question. I'll start with Bill. What were your initial or early views concerning the proper role of antitrust laws in in the U.S., and has that changed over the years?

BILL KOVACIC: Both Blake and Goldschmid were strong adherents of the structuralist view set out in commentary such as Carl Kaysen's and Donald Turner's *Antitrust Policy* (1959) and the report of the Neal Commission, a body convened by Lyndon Johnson toward the end of his presidency. These and other works argued that the great disappointment of U.S. competition law since 1890 was its failure to deal effectively with large firms. They prescribed a robust role for government enforcement to break up concentrated sectors and proposed legislation to accomplish the same ends.

Blake and Goldschmid endorsed these views; and I embraced them as well. I was, in many respects, a disciple of theirs and had great enthusiasm for the deconcentration cases launched in the 1960s and the 1970s, such as the Justice Department's suits against AT&T and IBM, and the FTC's cases against Xerox, the breakfast cereal industry, and the petroleum refining industry. As a student, I saw the DOJ cases and the FTC's shared-monopoly cases as exemplars of antitrust doing a good job on the frontier of policy making.

My view changed when I went to the FTC in 1979. My first assignments in the Bureau of Competition Planning Office were to do research on the FTC's "no fault" monopolization proposals and to assist the team handling the petroleum shared monopoly case. My research project at Columbia for Harvey Goldschmid dealt with how to break up firms through litigation or deconcentration legislation, Harvey introduced me to Jack Kirkwood to consult with the Planning Office on the feasibility of splitting up large, existing enterprises. What changed for me is that I saw that carrying out these measures is a lot harder than the commentary and reports made it look. I had no sense of the institutional hurdles to doing that, and I quickly observed the limits on the capacity of public enforcement agencies, legislators, and courts to do that kind of work in an effective way—to do an accurate diagnosis of the problem and to come up with an effective cure.

In short, I woefully underestimated the institutional challenges to carrying out a major restructuring program. I lost my enthusiasm for the structural de-concentration proposals. More generally, the experience made me much more attuned to how the actual capacity of the relevant institutions determines what you can and should do.

JAMES KEYTE: And Eleanor, what were your initial views concerning the proper role of antitrust, and has that changed over the years?

ELEANOR FOX: My initial views were very much informed by what the law was, what the Supreme Court held at the time. I believed in antitrust as a bulwark against power and privilege, and for the underdog. That seemed a quite normal and natural role for antitrust.

I was very influenced by a number of both events and people I worked with along the way. I was the head of the New York City Bar antitrust committee and had very close contacts with the heads of the Senate and House committees, Senator Hart's committee and Senator Rodino's committee. I testified a lot on the Hill on the various bills that came up and enjoyed that policy part very much.

Another part of my life was Betty Bock. Betty was the head of research at the Conference Board and she put together an annual program, which my dear senior partner Whitney Seymour titled "The Bock Festival," in which Betty brought together and indeed orchestrated the diverse philosophical views underlying antitrust.

The political spectrum included Walter Adams on one end (a structuralist and empiricist, whom I very much admired) and Harold Demsetz on the other. Bob Bork, Ira Milstein, Tom Leary, Fred Rowe, Louis Schwartz, Mike Scherer, and Morrie Adelman were in virtually all of these events, and Whitney often gave the keynote speech. Betty facilitated the debate on the sociopolitical and political economy underpinnings of antitrust. The "great orchestra" was a combination of academics, lawyers, economists, and business people across the spectrum, from experts very concerned about too much concentration of economic power to those very concerned that antitrust was interfering with the daily business of business.

Betty also organized small roundtables in which we vetted the issues in a smaller group. The conference and roundtables touched on the same issues and tensions that we debate and experience today—business power, government power, government intervention—which do you worry about more? When I teach my students the early antitrust cases and dwell on the policy perspectives of the first Justice Harlan and of Justice Holmes, I think of Betty.

JAMES KEYTE: Let me follow up on this topic and get right to the kind of question that's often debated: what are both of your views on the role of "consumer welfare" as a guiding principle of antitrust? This certainly has worked its way into the cases in recent decades. Let's start with you, Eleanor.

ELEANOR FOX: I have a particular view on that which is probably not shared by about 95 percent of the American antitrust bar. I grew up on an antitrust that was about the robustness of competition and access to markets. It wasn't about consumer welfare, although consumers were of course a part of the picture. American antitrust took the turn to a particular economic usage of "consumer welfare" through Bill Baxter in the early 1980s, adopting Chicago school philosophy and methodology. The term meant that antitrust enforcement was inappropriate unless the conduct or transaction decreased consumer surplus and was not otherwise justified by efficiencies. This has always seemed to me to be too narrow and too static.

BILL KOVACIC: At one level I see the genius in the phrase by which Robert Bork in *The Antitrust Paradox* (1978) and other commentators changed the conversation. They moved the focus of competition away from its egalitarian roots toward doctrine and policy grounded in economic effects. They picked a brilliant label to do that. If you asked a focus group of specialists "are you for consumer welfare or against it," I don't know who's going to stand up and object.

The real question is what does "consumer welfare" mean? Do competition, and competition law, advance consumer welfare, or not? One meaning of the phrase is that the fate of individual firms, by itself, ought not to be antitrust's overriding concern. That's a useful contribution because it forces recognition that competition does nothing if not displace and disrupt existing firms and ways of doing business. The best-known passage in Joseph Schumpeter's *Capitalism, Socialism and Democracy* is a short chapter titled "The Process of Creative Destruction." Here Schumpeter uses the imagery of warfare to describe how the new product, the new service, the new form of organization, the new source of supply obliterates incumbent firms. Were antitrust only concerned with the well-being of individual enterprises, it might strive to halt the competitive forces that destroy them. The term "consumer welfare" helps remind us that the welfare of consumers is the appropriate object of antitrust's attention, and not the survival of specific firms. Competition is inherently destructive, and we accept the destruction because of the larger benefits it confers on society.

At the same time, "consumer welfare" leaves open the question of what consumers, as citizens, truly desire. The answer is that consumers have varied and often conflicting desires. The discussion about consumer perspectives arguably overlooks a source of political turmoil seen around the world today. If you ask, "Do individual citizens like competition," their answer likely is yes if we focus solely on their experience as purchasers of goods and services. As purchasers, citizens like the possibilities that competition generates. But if you ask the same people whether they like competition in their status as employees or residents of communities that depend on the vitality of local employers, many will express doubts or say no. The same process of displacement and commercial upheaval that creates the more attractive goods and services also destroys firms and can undermine the economic foundations of the communities in which such firms reside. So what do consumers want? They want competition when they are buying goods and services, but many have an ambivalent or hostile view of competition when creative destruction shatters their employers and turns their communities upside down. This second face of competition is frightening.

JAMES KEYTE: Let me move more specifically to what we're focusing on in this issue of ANTITRUST magazine—international subjects. Eleanor, in what ways has the U.S. been an exporter of antitrust laws and economics over the years, and how has that evolved in your experience?

ELEANOR FOX: The U.S. has always been an exporter of antitrust and it's been so in a couple of different ways. One way is simply pride in what we developed. It worked for us, to limit power and remove obstacles to make markets work better and to involve people in markets on their merits. We thought that we had a very good formula and that everybody else ought to look at it; they might want to adopt it, too.

The other sense is more direct. We certainly exported antitrust just after World War II, under the Marshall Plan to Europe and, as part of the Allied occupation, to Japan. We exported antitrust in order to export economic democracy. Markets can be a force against concentrated political power. So it was in post-World War II.

We also tried to export our antitrust to Central and Eastern Europe upon the fall of the Berlin wall at the end of 1989. European officials also were trying to export their laws, and they won. One reason was that European competition law is more amenable to what the Central and Eastern European nations needed to ease themselves into markets and break the back of government power and state-owned enterprises that were obstructing the movement to markets.

JAMES KEYTE: Was that because it was more of an administrative-based approach or a code-based approach?

ELEANOR FOX: The administrative form probably helped but it wasn't the bigger point. The bigger point was: the U.S. does not have a history of statism; that's never been a major problem, but in Europe it was *the* major problem in terms of getting markets to work.

The companies were state owned or recently privatized. They were privileged through state ownership. That privilege had to be taken away. The anticompetitive acts of the state-owned companies had to be controlled in order to help the market work. EU law addresses these problems.

Of course the other point is that the countries wanted to join the European Community and they had to adopt EU law in order to join the European Community. It was a necessary condition.

While the EU model won in preference to the U.S. model, the Americans still made a huge contribution through technical assistance. Jim Rill, Janet Steiger, and their teams made a huge impact.

Did America export "American" antitrust economics? We successfully exported the idea of the importance of economic analysis, but we never exported to Europe the Chicago school premises that markets are almost always robust; except for cartels, the law should almost never intervene; when it intervenes, it messes things up. We did export that point of view successfully to Chile where the "Chicago boys" had a big impact. The Chicago boys were Chicago-trained Chilean economists.

And then there came a time, maybe 10 years ago now, when the American antitrust export lost its shine and the EU gained a stronger grip as a model for the rest of the world.

JAMES KEYTE: And Bill, I know you've been an exporter yourself in some sense. So what is your perspective over the years on the U.S. as an exporter of antitrust law and economic, either principles or guidance?

BILL KOVACIC: As Eleanor suggests, the importance of the United States as an exporter varies according to the specific aspect of competition law we're discussing. Relatively few of the 130 jurisdictions with competition laws have adopted the U.S. litigation model and its supporting institutions. The EU administrative enforcement regime is by far the world's dominant "operating system." Nearly 80 percent of the world's competition systems rely on an administrative agency that takes decisions and imposes sanctions subject to judicial review. Many countries have adopted his model to facilitate accession to the European Union. The administrative model also is more attractive to, and compatible with, the civil law regime that most of the world's countries employ. A civil law country looking for an antitrust "product" that runs best on its existing system of public administration ordinarily will select an administrative enforcement model. And yes, as a footnote, the FTC provides such a model for the United States, but litigation in the federal courts is the country's principal means for enforcement. It is not surprising that the U.S. litigation model has not been widely copied.

The U.S. influence as an exporter has been much greater in other dimensions of competition law. Many of the world's competition law systems have adopted substantive tests and analytical concepts developed and tested in the United States. One striking example is merger review. U.S. enforcement experience and agency guidelines—notably, the DOJ 1982 and 1984 Guidelines, and the DOJ/FTC Guidelines of 1992 and 2010—have created the modern global vocabulary of merger control and supplied the key analytical concepts for the examination of horizontal transactions.

A second important illustration involving substantive standards is the treatment of hard-core horizontal restraints. The U.S. has promoted the global adoption of a norm that regards cartels as grave antitrust offenses. No such norm existed in the 1970s when I was studying under Harvey and Harlan. Even 20 years ago, the world had not embraced an anti-cartel norm. Persistent U.S. policy advocacy and the determined application of powerful extraterritorial tools made cartel enforcement the center of what most agencies do today. Among other places, this is reflected in the speeches of the European Commissioners for Competition over the past 15 years. They have placed the prosecution of cartels at the top of the enforcement list. That is the consequence of a U.S. export. As Eleanor said, however, there are substantive areas of competition policy—notably, the treatment of vertical restraints and dominant firm conduct—in which the U.S. is not much part of the conversation today globally.

Another area of competition law in which the U.S. has had a major influence consists of implementation techniques. Premerger notification is one example. U.S. experience since 1976, with the enactment and implementation of Hart-Scott-Rodino, inspired the widespread global adoption of mandatory reporting requirements and waiting periods as procedures for merger control.

The use of leniency as a detection mechanism for the prosecution of cartels is a second example of an implementation method that many of the world's competition systems have adopted. The Anne Bingaman leniency reforms at the DOJ in the 1990s are the most significant modern enhancements in cartel detection. As refined in the past 25 years, they have transformed how anti-cartel enforcement takes place in the United States; they have had dozens of adopters around the world.

Because of its body of experience since the late 19th century, the U.S. has the largest reservoir of know-how about practical ingredients of conducting investigations and running cases—basic issues, such as determining what information to collect, how to analyze data, and how to prepare memos that set out a theory of harm and related facts. This know-how is uniquely broad and significant, and the enforcement practice of many agencies reflects what they have learned from their U.S. counterparts about how to develop cases. So those are ways in which the U.S. has been a major exporter.

JAMES KEYTE: Let me ask you both about China, specifically. Where do you see its antitrust law and policy headed in the next several years? Bill, you've been working directly on several projects involving China's antitrust system, so why don't you start?

BILL KOVACIC: Among all the jurisdictions that have had enacted competition laws since Canada established the first national law in 1889, no jurisdiction has gotten off to a more ambitious start than China. Its law is barely eight years old, and China has done things that many jurisdictions have never done, or took decades to get to. It's the most remarkable beginning of any competition system.

What's ahead for China? One is a basic reexamination of the enforcement framework. China has entrusted three institutions with enforcement: MOFCOM, NDRC, and SAIC. The Anti-monopoly Law is enforced by small units in these large conglomerate government departments. I predict that before China gets to the 20th anniversary of its Anti-monopoly law, and maybe when it reaches its 10th anniversary, China will evaluate the three institution enforcement configuration, consolidate the enforcement responsibility in a single institution that will not be part of another ministry but will be a standalone body that reports directly to the State Council.

Having experimented for a variety of reasons with the current framework, China is likely to undertake a fundamental restructuring that will put its system on a much better institutional platform. China also has embarked on an extraordinary initiative, called the Fair Competition Review Mechanism, to challenge state policies that distort competition. The FCRM mandates that all public institutions consider competition policy concerns and eliminate unnecessary restrictions on competition.

The FCRM has the potential to transform a major part of the Chinese economy. It reflects a commitment made in the recent plenums to give the market the "decisive" role in the economy and to make the rule of law a more central element of Chinese decision making. The FCRM would give competition policy an extraordinary role in shaping China's economy. The question mark is will the FCRM be implemented successfully, as it is so ambitious?

The last item is a continuing expansion in the role of the courts. China adopted private rights of action in its Anti-monopoly Law, but I don't think anyone fully expected private rights to become as important as they have been. They've been a source of exceptionally interesting jurisprudence, which in important respects that does not accept the point of view of the enforcement agencies. The courts have displayed impressive proficiency in analyzing competition issues. The Supreme People's Court has a number of judges with considerable expertise in competition law.

I think the courts have become a more and more significant player in the formulation of competition law. And, yes, indeed at some point—hard to predict when—they will actually hear and review decisions of the competition agencies, which would also be quite a breakthrough in China.

Among all the jurisdictions that have had enacted competition laws since Canada established the first national law in 1889, no jurisdiction has gotten off to a more ambitious start than China. Its law is barely eight years old, and China has done things that many jurisdictions have never done, or took decades to get to. It's the most remarkable beginning of any competition system.

—Bill Kovacic

JAMES KEYTE: That would be interesting indeed. Eleanor, what are your observations about China?

ELEANOR FOX: I agree with Bill entirely. I think China's competition and antitrust is a little miracle. When you think where China was eight years ago and that it has a communist government, but then realize that it's premier, Xi Jinping, promotes the idea that competition and markets are necessary to discipline the companies—even the state-owned enterprises that they care so much about—it is startling.

China's implementation of its antitrust law is remarkable. The Chinese enforcers and policy makers are hungry for knowledge and information about how the rest of the world implements competition policy. They're big learners and they're fast learners and I have great admiration.

I want to say a word about the charge that Chinese enforcement discriminates against Americans and others—but before I do I want to pick up another theme of Bill's. China is probably the most progressive jurisdiction in law on anticompetitive state restraints. The competition law expressly empowers the competition agencies to call out abusive restraints by provinces and all administrative bodies. These are usually restraints that privilege cronies or local champions. Although this is a very difficult area involving political and diplomatic dynamics, the Chinese competition authorities have already been successful in a number of instances.

I want to refer, as Bill did, to the Fair Competition Review. This is outstanding. There is now in place a mechanism to review all draft acts of government regarding economic activities of a market player. The review is particularly intended to catch discriminatory conditions for market entry or exit, and conditions requiring purchase of goods or services provided by the Administrator's friends. I think the rest of the world ought to learn from China.

JAMES KEYTE: Do you think China has benefited to some extent from what wasn't done in some other countries and now has a little bit of a head start?

ELEANOR FOX: Yes, that is right. Also, they are focusing on problems that are uniquely Chinese, or at least not uniquely American. Curiously, the problem of anticompetitive acts by state actors and excessively anticompetitive state measures is not usually on the teaching agendas for technical assistance. But it should be in the countries with a huge state-ownership heritage where some of the biggest barriers are state restraints. We have more to learn and adopt from China.

Shifting to the criticism: We hear a common Western complaint that China is applying its antitrust law in ways that are discriminatory and overreaching, and that it is often applying industrial policy rather than antitrust. I do think that China has applied industrial policy in a small set of high profile cases, especially involving natural resources. The Chinese competition authorities are not independent bodies and must listen to sister and higher authorities.

BILL KOVACIC: I'll just add that many Chinese competition law scholars emphasize that, on matters of process, China has a ways to go. Huang Yong, a professor at Beijing's University of International Business and Economics who is well known to the U.S. antitrust community, has said on many occasions that there is a need for what he calls greater professionalism and better process in the system—more disclosure, a fuller examination of evidence, a more rigorous testing of evidence. There's an awareness that there are many miles to go on that front.

It is important to keep in mind what the starting point was, which was no process at all. As one Chinese colleague put it in talking about the behavior of government departments, "We issue decrees, we do not issue explanations." Chinese agencies in the past have not explained what they do; they have just told people what to do.

In a way, the evolving practice of China's competition agencies provides a subtle and important template for a change of public administration throughout the country. Since 2008, the anti-monopoly agencies have moved toward revealing more information to the public about what they have done and why they have done it. That's an extraordinary change from the status quo of less than a decade ago.

ELEANOR FOX: Yes, and there is an accelerating process of cross-fertilization. We spoke of exporting antitrust before, but import/export is a stale model. Ideas get embedded through cross-fertilization. Regimes learn a lot from one another. This may have been started in the EU, I'm not sure, but when an agency has draft guidelines, it posts them on its website and invites outsiders, from jurisdictions around the world, to comment.

China does that. China publishes draft guidelines, and it gets lots of comments from the ABA Antitrust Law Section and others. There's a huge groundswell of cross-fertilization. The authorities, including the Chinese authorities, take on board ideas from all around the world.

BILL KOVACIC: Yes, those processes did not exist in China before 2008. The style of management by the State Council, the Communist Party, and the government departments was not to ask for comments about anything.

JAMES KEYTE: Let me follow up on that. While the U.S. historically has been more of an exporter of ideas, of processes, have you seen examples where the U.S. has become an importer—or a good listener—about ideas or processes in other countries that may be useful here?

BILL KOVACIC: One that stands out to me is the area Eleanor mentioned—the increased U.S. concern with public policies that distort competition. *Parker v. Brown* and its progeny created some pretty big holes in U.S. competition law that generally could not exist in Europe. The U.S. tolerates an extraordinary number of dispensations from competition. A lot of national policy in the 1970s and 1980s—notably, the deregulation of airlines, trucking, and the transport of freight by rail—sought to correct this. Since the 1950s, U.S. commentators from across the philosophical spectrum have called for increased attention to publicly imposed restraints. These include figures such as Walter Adams and Ralph Nader. In 1973, for example, one of Nader's research teams published The Monopoly Makers, which attacked a wide range of government restrictions on competition.

Because Chicago school advocates singled out government restraints as an area for reform, it became tagged as, in effect, a right-wing agenda element. The U.S. engagement with the rest of the world revealed a universal concern with public restraints and led the antitrust community to regard the subject as part of antitrust's mainstream. In particular, Europe's influence has made the role of the state a greater matter of concern on the U.S. antitrust agenda.

There are other areas in which I think the U.S. has been influenced, at least implicitly, by policy and practice abroad. One example is the modern U.S. federal enforcement habit of issuing closing statements more frequently when the agencies conduct major investigations but decide not to prosecute. That was exceedingly rare in the past. In the 1990s, the FTC did so once—when it decided not to oppose Boeing's acquisition of McDonnell Douglas. Over the past 15 years or so, the number of closing statements is much greater. I think that does reflect in part a European influence. On the whole I'd say it is very disappointing that there has been not more emulation. One example is the European Competition Network, through which DG Comp and the Member State competition authorities coordinate enforcement and develop common policies. We have no counterpart in the U.S. to engage the national agencies and our own states in a similarly deep and systematic collaboration. There's a lot to learn and absorb.

JAMES KEYTE: Eleanor, what are your thoughts?

ELEANOR FOX: I definitely agree with Bill. We do have a lot to learn. I think we have learned or absorbed some things from Europe that we do not always acknowledge.

There was a time at the height of Chicago school influence that antitrust got divorced from market realities. During this time many Americans argued that antitrust condemnation of exclusionary restraints was little more than a screen to protect inefficient competitors. Then there came a time when the U.S. agencies became more skeptical of exclusionary restraints as tools of monopoly power. Where did they turn for support?

All along, European law was identifying strategies used to exclude competitors and suppress competition and innovation, and their law did not seem to be protecting inefficient competitors, at least not usually. The European narrative bolstered the U.S. agencies' instinct for a more aggressive antitrust. Tom Rosch, when he was an FTC commissioner, cited European Union precedent in a number of his FTC speeches.

Also in matters of pay-for-delay, the FTC and DG Competition were mutually reinforcing in understanding the enormity of the consumer/patient harm caused by agreements between brand pharmaceuticals and their would-be generic competition whereby the brands paid the generics many millions of dollars to delay their entry.

JAMES KEYTE: Which are those countries that are emerging on the international antitrust scene that the average U.S. antitrust lawyer really hasn't given thought to or which are the hard chargers—those that are more on the scene even if they've been around?

ELEANOR FOX: We should put in that category the BRICS (Brazil, Russia, India, China, and South Africa). In a different category of more promise than action, I would add countries in Southeast Asia. Southeast Asia is increasing its antitrust profile in connection with its free trade area and customs union ASEAN. Similarly, African countries in COMESA and other free trade areas in Africa. Some of the regional free trade areas are new players on the block. They often comprise young and smaller jurisdictions that can use help from their neighbors in economies of scale and sharing of knowledge and know how. I would mention Kenya in Africa and Singapore in Southeast Asia.

JAMES KEYTE: Bill, what do you see out there with some of the countries, is it just that they are more active these days than in the past, even if they may have had some form of competition law?

BILL KOVACIC: I'm interested in the places that are building a framework that's going to last. I am less interested in sheer levels of enforcement activity and more interested in a program that builds an institution that can deliver good policy results over the long term.

My list of promising systems largely overlaps Eleanor's. Which systems do I particularly like? In Latin America, Mexico for sure, along with Brazil and Chile. There are a number of other systems that are pursing what may prove to be a significant makeover. Some of these were competition regimes that ascended dramatically in the '90s and then fell by the wayside. One that's got a very promising possibility for renewal is Argentina.

I have Kenya on my list as well, as one of the most promising in East Africa, and I would include South Africa, to be sure. Botswana is another jurisdiction—a small country, with a relatively small agency that is doing things the right way. In Asia, Singapore by far leads the class of relatively newer institutions. By that I mean those created within the past 25 years. Another interesting country to watch is the Philippines.

Let me mention another important example of a system that is seeking to carry out a basic retooling. Ukraine established its antimonopoly law in the early 1990s, but the system nearly fell apart in the wake of the Maidan revolution and Russia's occupation of Crimea. Ukraine's competition system is being reestablished now, in part with support from with a collaboration of international organizations and individual countries. The restoration of the Antimonopoly Committee of Ukraine is being led by an absolutely first-rate team of leaders and top managers. The AMCU is an older agency that is new again, and it has to clear a lot of hurdles on its way to being effective. If the enhancement of the AMCU succeeds, it can make a huge difference in determining whether or not Ukraine is sustained as a democracy.

JAMES KEYTE: Let me switch gears a bit and ask why do we have a lot of convergence on cartels and even some of the merger processes and the like, but divergence still seems to be the state of play for monopolization and dominance. Do you see that out there and do you think it'll change?

ELEANOR FOX: The divide—and let's call it the EU-U.S. divide—on monopolization and abuse of dominance is clear and predictable. But before I talk about the divide I want to highlight the core that's converged. We tend to forget the fact that, at least if the U.S. condemns the conduct, the EU would condemn it too, and that that's a pretty important category.

After we move away from the common core, there's both an ideological question and an empirical and market reality question. The European markets do not work as well as the U.S. markets in general, and more intervention is needed to make markets work in Europe than in the United States, just as a matter of economic realities and empiricism.

The other point is ideology. In the matter of single-firm conduct, the U.S., especially as recited in the *Trinko* case, is laissez faire; it makes assumptions that the EU does not make. The default presumptions are very powerful. For example: if you are acting as a single firm (not in conspiracy with competitors), you're probably going to do what's best for the market if government leaves you alone. That is because (the assumptions go) markets work well and will punish you if you try to harm competition.

JAMES KEYTE: Let me follow up. You mentioned *Trinko*, which treats monopolization in a sense as a prize that everybody wants. There was some startling language in there that monopolization is good because people will innovate to try to achieve it, as long as they don't misbehave. Do you see that as just a different view of dominance and the concerns about dominance in the EU, both in terms of philosophy and jurisprudence?

ELEANOR FOX: Yes, I do. The EU jurisprudence never conceptualizes achieving dominance as a prize to be won on merits, but as a privilege that comes with responsibilities. But of course—and here is where empirics intertwine with philosophy—dominance of European firms was traditionally not won but conferred.

Other perspectives common in Europe are also a mix of facts and philosophy. Markets have not worked well. That means dominant firms may have a lot of power, including incentives to keep out competitors. This can mean more trust in government (antitrust) than in dominant firms.

JAMES KEYTE: Bill, what are your thoughts on that subject?

BILL KOVACIC: Let me start with a more prosaic explanation, though it's not the only one. Forty years ago, the U.S. antitrust world turned. In 1977, the Supreme Court issued its decisions in *Brunswick* and *Sylvania*. In those decisions and in its later jurisprudence, the Supreme Court's revealed apprehension about how private rights of action function in the U.S.

All of the abuse of dominance jurisprudence in the United States since 1973 has been set in the context of private cases. *Otter Tail* in 1973 was the last time the Supreme Court saw the U.S. government agencies as plaintiffs standing before it. The government has appeared as amicus curiae in various Sherman Act Section 2 cases since 1973, but *Otter Tail* was the last time the government had its own case before the Court. So every Supreme Court Section 2 decision since 1973, and that's a long time, has come in the context of a private case. Time and time again, the Court's Section 2 decisions have referred to the possible overreaching of the U.S. system of private rights. The *Trinko* majority expressed anxiety about the use of private actions, and the same was true in *Matsushita*, which dealt with a conspiracy to monopolize. The apprehension about private rights is a recurring theme in the Court's antitrust jurisprudence. I'm not suggesting that the Courts perceptions that private rights over-deter are validated by strong empirical evidence. What is clear is that the Supreme Court believes they do. The same concern appears in *Twombly* and other decisions outside the single-firm conduct area.

To counteract perceived overreaching by the private rights regimes, the Court has altered substantive standards. In cases such as *Brooke Group*, the Court has make it harder for the plaintiff to establish liability. Were it not for this concern with private actions, I think U.S. jurisprudence would look more like Europe's abuse of dominance jurisprudence than it does today.

The other factor I'll mention is one that Eleanor pointed to: dramatically different perceptions about the market. Many European commentators have expressed dismay, bewilderment, or disappointment that Europe is not the same thriving source of new companies as the U.S., especially in the tech sector. Why does Europe lag behind the U.S.? One reason is that the market conditions that are conducive to new firm development and growth are much stronger in the United States than they are in Europe, where you have more rigidities that impede new business development, more difficulties in raising capital, and, in many countries, less appetite for risk.

If you tell an entrepreneur in the United States that you're going to fail, the answer will be "sure, and the next step will be a success." Business failure in many European countries is a source of serious stigma and disapproval. So, in Europe generally, the markets feature less dynamism, less regeneration, less resiliency. If you are in an environment where those limiting conditions prevail, you pay a lot more attention to the disappearance of an individual enterprise than you would otherwise. In the U.S., by contrast, those conditions are much more conducive to the development and entry and expansion of new firms.

When I take this collection of considerations together, I don't see the EU-U.S. divergence on dominant firm conduct issues changing any time soon.

JAMES KEYTE: Another aspect of divergence is that there is skepticism in the Member States and in the EU about whether concentration, even monopoly, leads to better innovation or whether more players in a marketplace leads to better innovation—there seems to be a distinct difference of views on that. Any thoughts on that?

ELEANOR FOX: I agree entirely with Bill that the Supreme Court is very concerned about private actions. However, I think that is only one important reason why the Court cut back Section 2 of the Sherman Act. In my own view, the majority, at least, have an independent ideology that supports more freedom for business firms.

It will be interesting to watch Europe, which now has private action vehicles in all of the Member States. If they should become robust, would Europe also then have compunctions like the U.S. does, causing shrinkage of their public enforcement? I don't think so.

There is a diversity of view even in the U.S. about what kind of market structure is most conducive to innovation. There's the old Schumpeter versus Arrow debate. I really don't think it is going to be resolved because resolution depends upon data we cannot get.

Even experts seem to have an intuition either that the economy is better off if we ease conditions of entry for outsiders or that it is better off if we give more space and profit opportunities to insiders.

JAMES KEYTE: Any follow up on that, Bill?

BILL KOVACIC: A crucial basis for the philosophical differences is a different perception about the resilience of the market. There also is a continuing debate about whether competition, or the lure of super-competitive profits, provides the strongest incentive to improve performance. There are lots of competing assertions about what empirical study can say about that.

A key difference, again, in the U.S., is the question of how long positions of dominance are going to last. A condition that shapes U.S. policy is the view that the U.S. market process is somewhat more conducive to new entry and expansion by other firms so that the periods of dominance will not be durable. What role competition law plays in ensuring that dominance is not durable is a separate, interesting question.

It remains a stark and interesting difference to compare the leading firms in the stock markets in the United States with the leading firms listed on the exchanges in Europe over the past 40 years. In the U.S. listings, you see a lot more change at the top. By contrast, there's more stability among the leading firms listed on the exchanges in Europe and, again, nothing to match the size and vitality of the tech market in the U.S. To be sure, there are pockets of technological dynamism in Europe, but nothing to match what's taking place in North America. The formative conditions in the two jurisdictions make a big difference.

ELEANOR FOX: Of course, durability of market power is important. You might say if power is fleeting we don't want to worry about it. But there's another point here which is: Do we care about the entrepreneur who has been squeezed out of the market for non-legitimate reasons? Think of Microsoft, doing all it could to set back Netscape/Java language, which threatened to destroy its power. Don't we care about the victim even if we could predict that Microsoft would lose its shine in a couple of years? Don't we want to condemn the abusive act?

JAMES KEYTE: Yes, and I guess the hard subject is when it's innovation itself that squeezes out the small person rather than some exclusionary behavior within that market.

ELEANOR FOX: Oh, that's a different story. If innovation itself causes harm to competition, that is not antitrust harm and the conduct is not an abuse. I think that the experts are on the same side.

[C]onvergence isn't everything, and countries have different economies and politics. They need laws that fit their terrain; they need to root their own law. Their law will not grow well unless it is sensitive to the soil on which it grows. So I think it's wrong headed to think we must converge. The real benefit of the project of convergence is—you're nudging law towards a better state.

—ELEANOR FOX

JAMES KEYTE: Let me return again, but at a more general level, to the ever-present topic of convergence. Always a good thing? Eleanor?

ELEANOR FOX: In my view there are some good reasons for convergence, but there are also reasons not to favor "hard" convergence. The good reason for convergence is: When you have 130 laws, business is just more efficient, it saves a lot of money, by uniformity. Convergence enhances predictability as well.

Also, the *process* of convergence is extremely useful for totally different reasons. It forces all of the players to come together and say, How do you do this? What do you think about it? It provides the forum in which the policy makers can assess benchmarks, think about best practices, glean commonalities, and make the law better.

However, convergence isn't everything, and countries have different economies and politics. They need laws that fit their terrain; they need to root their own law. Their law will not grow well unless it is sensitive to the soil on which it grows. So I think it's wrong headed to think we must converge. The real benefit of the project of convergence is—you're nudging law towards a better state.

JAMES KEYTE: Bill, what are your thoughts about when convergence is important and if there circumstances where it actually may be counterproductive?

BILL KOVACIC: There is a tension between achieving standardization that increases predictability, simplifies compliance, and reduces the cost of administering competition systems, on the one hand, and preserving possibilities for innovation, on the other. The modern history of leniency illustrates the benefits of decentralized experimentation. Leniency gained wide adoption because the U.S. tested major reforms in the 1990s, and other countries followed along. If we had waited to set a universal standard—waited until all jurisdictions agreed that leniency was a good idea before launching the experiment, we'd still be waiting. Leniency gained acceptance because one jurisdiction (the U.S.) tried it out and showed potential adopters that it worked.

I would offer one question about convergence and it's related to what happens in the new administration. The only way that you promote the conversation that Eleanor was talking about is by making a large investment in international organizations and international cooperation. Those organizations have taken a rhetorical beating in what might be called the "Brexit era," where various political figures and commentators have criticized international entanglements, doubted the benefits of organizations such as the OECD, the United Nations, and mocked the "elites" who cherish these institutions. A concern I would have about convergence, about cooperation and discussion and in internationalism is that, if you don't trust those institutions and you regard the people who participate in them with great suspicion, and you cutting way back on spending for international cooperation, then the U.S. loses influence because it is not part of the conversation.

JAMES KEYTE: Reading the tea leaves, what do you think we may see from the next administration?

ELEANOR FOX: If there is a "normal" Republican/Democrat divide, that is not what we will see at play. But there are signs indicating what we should be on guard against: (1) trading off competition for jobs, (2) preferring American firms, and (3) relaxing processes and transparency in antitrust decision making.

BILL KOVACIC: I have a confident prediction about one development. The big prize in the November election with respect to the economic regulatory state was the ability to pick federal judges. By the end of Barack Obama's presidency, there's a rough balance on the federal courts between the number of judges chosen by Ronald Reagan and the two Bush presidencies on one hand, and the judges picked by Bill Clinton and Barack Obama and Jimmy Carter on the other hand. The balance is almost 50/50 on a number of key courts, such as the U.S. Court of Appeals for the District of Columbia. The party of the president who makes appointments is not a perfect proxy for how judges will vote in economic regulation cases, but it's a fairly reliable predictor.

In the last eight years, compared to the choices made by his Republican predecessors since 1980, President Obama appointed a larger number of judges with a greater taste for government regulation. In many instances, the Obama appointees replaced judges who had a greater skepticism about regulation. The Obama appointments, coupled with the judges selected by Bill Clinton, were creating a judiciary more receptive to efforts by antitrust agencies to push the fences of doctrine outward. If Hillary Clinton had gained the presidency, she likely would have reinforced that trend. The antitruist agencies, and private plaintiffs, could have enjoyed a greater prospect of success in cases that push the frontiers. With Donald Trump in the White House, that's not going to happen.

Merger Control Revisited: Are Antitrust Authorities Investigating the Right Deals?

BY RACHEL BRANDENBURGER, LOGAN BREED, AND FALK SCHÖNING

START-UP COMPANIES THAT ARE lucky enough to be acquired by a larger industry player have not faced significant exposure to merger control procedures to date. Most jurisdictions around the world set filing thresholds based on revenues, or sometimes market shares, and many antitrust authorities are only able to investigate and challenge deals that meet those thresholds. As start-ups typically do not have high revenues or market shares in the early days of their life cycles, they often do not trigger merger filings when the founders sell-off their stakes to larger companies, even larger companies in the same sector as the start-up.

Combined with the growing emphasis that antitrust authorities are putting on innovation and big data as relevant factors in assessing the competitive effects of a merger, particularly in the digital economy and the life sciences sectors, this is giving rise to a debate around the world about which deals should be subject to merger control, what the appropriate metrics are for identifying those deals, and more generally how to assess the impact of innovation on competition.

Antitrust officials in the European Commission, the United States, Australia, Canada, Germany, Korea, and the United Kingdom, among others, have spoken out on one or more of these important topics over the past year. This article focuses on the debate in the EU and the U.S., and examines the approaches on both sides of the Atlantic.

Current Approaches to Determining Jurisdiction

Two fundamentally different approaches to the antitrust authorities' ability to review transactions currently exist. In most jurisdictions, only those transactions that meet certain pre-defined thresholds (usually revenues but sometimes market shares) are subject to merger review by the relevant antitrust authority. The EU Merger Regulation (EUMR) administered by the European Commission is an example of such a system.[1]

In contrast, in some jurisdictions the antitrust authorities can also review transactions that fall outside (i.e., below) the relevant thresholds. In such a case, the jurisdictional and the notification thresholds are not identical—unlike under the EUMR. Transactions that do not trigger the notification thresholds may nevertheless be reviewable by the relevant antitrust authority. In the U.S., for example, the federal antitrust authorities (the U.S. Department of Justice's Antitrust Division and the Federal Trade Commission) may, and sometimes do, conduct reviews of transactions that may raise substantive concerns even though they do not meet the Hart Scott Rodino (HSR) Act filing threshold, which is based on the value of the transaction and the turnover (i.e. sales revenue) or assets of the parties. Under Clayton Act Section 7, which prohibits all transactions that may tend to substantially lessen competition in a relevant market, the U.S. antitrust agencies can challenge any transaction—before or after consummation—regardless of whether that transaction is subject to HSR notification. The U.S. agencies have routinely availed themselves of that power. Between 2009 and 2013, the DOJ initiated 73 preliminary inquiries into transactions that were not reportable under the HSR Act, representing almost 20 percent of all the merger investigations opened by the DOJ during that period. Moreover, almost a quarter of those investigations yielded some type of remedy or challenge.[2]

The most prominent recent example is Bazaarvoice's acquisition of PowerReviews, a merger involving two companies in the digital economy sector. In 2013, the DOJ filed a lawsuit challenging the acquisition, which was not HSR reportable and had already been consummated.[3] The complaint alleged that Bazaarvoice's acquisition of PowerReviews eliminated the company's only significant rival. The DOJ alleged a market for online product ratings and reviews platforms used by U.S. manufacturers and retailers to display product ratings and reviews on their websites. In January 2014, following a trial, the court found that the acquisition violated Section 7. The court focused on "the plethora of [merging party] documents showing that, prior to the merger, Bazaarvoice considered PowerReviews its strongest and

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only credible competitor, that the two companies operated in a duopoly, and that Bazaarvoice's management believed that the purchase of PowerReviews would eliminate its only real competitor."[4] The court rejected arguments by Bazaarvoice that anticompetitive effects were impossible because any number of large technology companies could enter the market. In April 2014, Bazaarvoice agreed to sell all of the PowerReviews assets to a divestiture buyer along with other remedies to compensate for the deterioration of PowerReviews' competitive position that occurred as a result of the transaction.

While traditional filing thresholds such as revenue and market share are meant to capture transactions likely to give rise to competition concerns in most sectors, some antitrust authorities are now questioning whether the thresholds are adequate to identify potentially anticompetitive transactions in certain sectors, such as biotechnology and other high-tech. The potential for innovation or a unique repository of "big data" are often key features of these sectors—and some question whether a company's current small revenues might mask its likely future competitive significance. Further, they suggest that the large payments that purchasers are often willing to make for such companies, based on the target company's future sales in the marketplace rather than its current sales, indicate that current sales are not always an accurate way to assess a company's future competitive significance, and, therefore, whether or not it should be subject to merger control scrutiny. We return to this issue below.

The Rising Role of Innovation and Big Data in Substantive Assessment

Jurisdictional thresholds do not exist in isolation; their role is to screen transactions for those likely to raise competition issues and therefore merit the cost and delay of an investigation. It is therefore not at all surprising that the debate about the role of innovation and big data is not confined to discussion about whether the jurisdictional thresholds are the correct ones for today's innovative sectors but is also occurring in relation to the substantive review of transactions in a variety of sectors.

Innovation. The U.S. and EU antitrust agencies have previously mentioned "innovation" as a relevant factor in their merger analyses, and recent statements and enforcement actions on both sides of the Atlantic reflect the agencies' growing emphasis on innovation in their merger investigations and decisions. This is true in particular—but not only—in the life sciences and digital economy sectors. In the U.S., the revised Horizontal Merger Guidelines issued by the DOJ and the FTC in 2010 specified for the first time that the agencies "may consider whether a merger is likely to diminish innovation competition by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger."[5] The revised Guidelines explain that anticompetitive innovation reduction can take several forms. For example, the agencies may find that a transaction would reduce the merged company's incentive to continue with an existing product-development effort, or that there may be a reduced incentive to initiate development of new products.

Speaking in 2010, DOJ Assistant Attorney General Christine Varney emphasized that "innovation is the essential element not only of economic growth, but of human progress as well. We thus have a vital interest in seeing it flourish."[6] Varney's successor, Acting Assistant Attorney General Sharis Pozen, stated that the DOJ's recent enforcement record in mergers "recognized the central role innovation plays, and we have worked to ensure an open and level playing field that allows that innovation to occur."[7] In 2016, Acting Associate Attorney General Bill Baer said that the DOJ "take[s] into account the impact of a merger on innovation, on the intensity of research and development, and on the quality of products and services."[8]

FTC Chairwoman Edith Ramirez spoke in a similar vein. In 2014, she said:

> Promoting competition in high-technology markets is . . . a priority. Innovation drives economic growth and expands consumer welfare. Innovation also plays a central role in the competitive dynamics of high-tech markets. Firms in this sector are more likely to compete on the basis of new products and business models rather than on price. So the risk of harm to competition and consumers through a lessening of incentives to innovate tends to be more acute. Consistent with our 2010 Horizontal Merger Guidelines, we will be on the lookout for transactions in this area that raise competitive concerns.[9]

So have recent EU Competition Commissioners. In 2011, EU Competition Commissioner Joaquim Almunia underlined that "preserving and boosting innovation must lie at the heart of competition policy in general, which poses a specific challenge in merger control, because it is harder to predict the likely evolution of markets in dynamic industries."[10]

In 2016, EU Competition Commissioner Margrethe Vestager gave a speech entitled "Competition: The Mother of Invention" in which she said that "[o]ne of the simplest defences against innovation is to buy up rivals that create innovative products. That's why, when we look at high-tech mergers, we don't just look at whether they may raise prices. We also assess whether they could be bad for innovation."

Reflecting the relationship between jurisdictional and substantive issues, Vestager went on to explain:

> Our rules decide which mergers need to be notified to us based on the turnover of the companies involved. So when someone buys up an innovator, with a lot of good ideas but not yet much in the way of sales, we might not even have the chance to look at whether that merger will be bad for innovation. That's why I announced last month that we're looking at whether to change the thresholds for notification, to make sure we get a look at this type of merger.[11]

Most recently, in line with this, Commissioner Vestager stated that even if EU merger rules need to change, the

While innovation is often discussed in the context of life sciences transactions, mergers in other industries also demonstrate that innovation can play a crucial role in the competitive assessment of a merger.

European Commission has "to make sure that [it] doesn't put obstacles in the way of mergers that don't much affect competition in Europe."[12]

Shortly after taking office in 2015 as the Director General of DG Competition, Johannes Laitenberger explained the dual role that innovation plays in the European Commission's competition assessments: "First, we regard innovation as one of the efficiencies that may justify agreements or mergers that would be anti-competitive otherwise. Second, in the interest of competition and consumers, we must protect dynamic industries from mergers and anti-competitive practices that may threaten their efforts to innovate."[13] Laitenberger singled out the pharmaceutical and medical devices sectors as particularly noteworthy and called them "industries in which innovation can literally be a matter of life or death."

Although issued over ten years ago, the EU Horizontal Merger Guidelines speak about innovation.[14] They state that effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with "pipeline" products related to a specific product market.[15] They also note that a firm with "a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products" and that competition can be impeded where a transaction involves "one or more merging parties [that] are important innovators in ways not reflected in market shares."[16]

While innovation is often discussed in the context of life sciences transactions, mergers in other industries also demonstrate that innovation can play a crucial role in the competitive assessment of a merger. In *Hutchison 3G UK/Telefonica UK*,[17] for example, the European Commission was primarily concerned not only about higher prices and lower choice for customers but also that the transaction could "hamper innovation and the development of network infrastructure in the UK," since the merged entity would be party to the only two network-sharing agreements in the UK. In blocking the transaction, the European Commission was of the view that the true innovators in the sector are not mobile virtual network operators (i.e., customers of mobile network operators) but the mobile network operators themselves who actually own their own network.[18]

In the abandoned *Halliburton/Baker Hughes*[19] transaction, both the DOJ's and the European Commission's investigations found serious competition concerns about the impact of the transaction on innovation. DOJ Deputy Assistant Attorney General David Gelfand explained that "the merger of Halliburton and Baker Hughes would have raised prices, decreased output and lessened innovation in at least 23 oilfield products and services critical to the nation's energy supply."[20] In its investigation, the European Commission was concerned that "a reduction of the number of competitors could reduce the incentive to innovate, especially given that Halliburton and Baker Hughes compete fiercely with each other in developing new products."[21]

The DOJ also focused on innovation effects in its 2011 analysis of Google's acquisition of ITA Software, which had developed a critical software algorithm for flight search websites. The DOJ alleged that, after acquiring ITA, Google could deny ITA's software to other flight search companies or disadvantage their access to current or future versions. To address these concerns, the DOJ required Google/ITA, among other things, to (1) continue to license ITA's software to other flight search companies on fair, reasonable, and nondiscriminatory (FRAND) licensing terms, and (2) make available to other flight search services any upgrades to ITA's algorithm that it made available to other customers. In addition, Google committed to (1) continue to fund research and development of ITA's algorithm for at least two years at levels similar to what ITA had invested in recent years, and (2) develop and offer ITA's new "Instasearch" product to other flight search websites.[22]

"Big Data." "Big data" is another non-traditional competitive metric that may not be captured by traditional filing thresholds, and enforcement agencies are trying to grapple with it as they assess the likely effects of a transaction. Recently, the German and French competition authorities published a joint paper, *Competition Law and Data*,[23] suggesting that competition authorities should review the impact on competition when companies acquire or merge with other companies owning large datasets if those datasets are considered to be unique.

The report also highlights the difference between traditional markets and data-related markets. According to the report, whereas in traditional markets, low market shares or no horizontal overlap tend to indicate limited or no competitive concerns, in data-related markets, market shares are less relevant. The combination of different datasets itself can, the report finds, raise competition concerns if the combination of data makes it impossible for competitors to replicate the information extracted from it.[24]

EU Commissioner Vestager has voiced concerns similar to those identified in the German-French paper. She has underlined the impact that the possession of data can have on competition in the marketplace: "A company might even buy up a rival just to get hold of its data, even though it hasn't yet managed to turn that data into money."[25]

Big data also featured in the European Commission's recent investigation of Microsoft's acquisition of the professional social network, LinkedIn. Competitors raised concerns that, by gaining ownership of LinkedIn's dataset, Microsoft would be able to deny competitors access to that data, and, in doing so, obtain an unfair competitive advantage. The European Commission seems to have shared these data-related concerns because it cleared the transaction only after Microsoft submitted remedy commitments that enable rival professional social networks to continue to have access to Microsoft's Outlook programs. Microsoft also agreed that computer manufacturers will be able to disable the LinkedIn shortcut on desktop devices. While these commitments do not directly address the issue of access to a set of big data, the decision demonstrates that antitrust agencies will need to consider this new source of potential competitive harm in the future.[26]

The U.S. agencies have not yet brought a merger case based primarily on big data concerns. The FTC did not identify competitive concerns that it regarded as requiring intervention in its investigation of the Microsoft/LinkedIn transaction,[27] but it has recognized the importance of data in other merger investigations. For example, in the 2013 Nielsen Holdings/Arbitron transaction, the FTC alleged that the proposed merger would eliminate future competition to develop a national syndicated cross-platform audience measurement service that did not yet exist.[28] According to the FTC, the two merging companies were best positioned to develop this new product because they were the only firms with large, representative panels capable of reporting TV programming viewership, including individual demographic data, such as age and gender information. To resolve its concern that the merger would eliminate emerging competition for these future products, the FTC required Nielsen to divest certain assets and offer a royalty-free license to Arbitron's data for eight years so that an FTC-approved buyer could successfully develop a competitive service.

The Director of the FTC's Bureau of Competition, Deborah Feinstein, published a paper last year noting that "[m]ergers involving competing data providers can present unique, but not different, issues for competition analysis."[29] Feinstein stated:

> [[M]arket definition must account both for the dynamic nature of data, which must be updated and verified to retain its value, as well as the way that firms use data to compete. In some markets, data is the product—for instance, in the case of a database. In other markets, data is a key input, and firms compete to provide customized verification, analytics, or reporting to sophisticated customers.

She also noted that "entry conditions may be affected when incumbents have significant advantages over newcomers," including either a proprietary cache of big data or a unique ability to mine publicly available big data.

Customer data transfers can also give rise to privacy concerns in the context of merger transactions that involve the acquisition of big data sets. The European Data Protection Supervisor, Giovanni Buttarelli, has suggested that privacy

In order to review mergers of innovative companies that do not yet generate substantial sales, some jurisdictions are considering amendments to their merger control rules to catch competitively relevant transactions that do not trigger filings based on their current traditional revenue or market share thresholds.

should be part of merger assessments. In particular, he argues that "safeguarding personal data should play a role in merger review [to] help protect individuals' rights when massive databases merge, just as media pluralism must be safeguarded when news organizations merge."[30]

Such calls for reform raise a number of questions. For example, do antitrust authorities have the experience and are they well equipped to review data privacy concerns? Is there a need to add another layer of regulation in addition to the work the data privacy authorities already do? And if so, why for privacy but not for other important goals of general interest, such as environmental protection, for example? Or is there a particular reason why data privacy should be treated differently?

FTC Chairwoman Edith Ramirez identified similar issues in early 2016 when she said: "I think we have to be open to exploring new theories of harm and taking a hard look. I also think it's important, however, that we make sure that the data issues are truly competition issues rather than what might amount to a privacy question."[31] The FTC has also expressly stated that privacy can be a relevant non-price dimension of competition.[32]

Reshaping Filing Thresholds to Investigate the "Right" Deals

In recent months, a new trend has emerged in some jurisdictions whose merger control systems only permit reviews of deals that trigger the relevant filing thresholds. In order to review mergers of innovative companies that do not yet generate substantial sales, some jurisdictions are considering amendments to their merger control rules to catch competitively relevant transactions that do not trigger filings based on their current traditional revenue or market share thresholds. For example, Germany is in the process of implementing this year a new transaction value test for those deals that escape even the relatively low German revenue thresholds.[33]

The new German law provides for a new notification threshold based on transaction value. Currently, transactions are notifiable in Germany if all the undertakings concerned in a merger together generated at least €500 million (approximately $550 million) of turnover worldwide in the last financial year and one undertaking generated at least €25 million (approximately $27.5 million) of turnover in Germany and another undertaking generated at least €5 million (approximately $5.5 million) of turnover in Germany. The proposed amendment would require the transaction to be filed with the Federal Cartel Office even if the second domestic threshold of €5 million is not triggered provided that the transaction value exceeds €400 million (approximately $440 million) and at least one of the other undertakings is active or will be active in Germany.

The European Commission is considering reform of the EUMR along similar lines. In March 2016, Commissioner Vestager reflected on the existing merger control system, commenting that:

> The issue seems to be that it's not always turnover that makes a company an attractive merger partner. Sometimes, what matters are its assets. That could be a customer base or even a set of data. In the pharmaceutical sector, it might be a new drug that's been developed but not yet approved for sale. Or a company might be valuable simply because of its ability to innovate.
>
> A merger that involves this sort of company could clearly affect competition, even though the company's turnover might not be high enough to meet our thresholds. So by looking only at turnover, we might be missing some important deals that we ought to review.[34]

It remains to be seen whether the EUMR will be changed to reflect the U.S. and proposed German approaches to setting thresholds that include the value of transactions. As stated in the European Commission's White Paper in July 2014, "Effective and efficient competition policy requires appropriate and well-designed means to tackle all sources of harm to competition and thus consumers."[35] Setting the threshold tests appropriately is the first step in triggering the ability to engage fully in a substantive assessment of the impact that innovation and big data may have on the competitive process.

In addition, the more new innovative start-ups disrupt the economy, the more attention agencies consider they should pay to the competitive significance of innovative drugs, big data, the digital economy, internet platforms, and so on. Revising merger control thresholds can be a way for the antitrust agencies to demonstrate their focus and interest in protecting consumers in these new markets. More specifically, merger control provides an alternative tool to regulation and puts enforcement powers in the hands of the antitrust agencies.

The European Commission recently finished a formal consultation process dealing with the reform of the EUMR, including the effectiveness of the turnover-based jurisdictional thresholds. When the Commission launched the consultation in October 2016, it noted that the debate about turnover-based thresholds "may be particularly significant in certain sectors, such as the digital and pharmaceutical industries, where the acquired company, while having generated little turnover as yet, may play a competitive role, hold commercially valuable data, or have a considerable market potential for other reasons."[36]

While agencies may need to adapt their investigative tools to keep pace with changes in the marketplaces they investigate, including, of course, dynamic industries, any reforms should be carefully considered. In particular, agencies should strive to avoid reforms that might have unintended consequences in terms of (1) unduly burdening merging parties with filing obligations for transactions that could not have possible competitive effects, and (2) tying up the agency's resources on investigations of transactions that are unlikely to be anticompetitive, thereby reducing its ability to investigate efficiently and in a timely manner those transactions—or indeed any conduct—that could be anticompetitive.

In the European context, these considerations should, we suggest, be evaluated not only on an individual agency-by-agency basis but also by taking into consideration the work-sharing relationships that already exist among and between the European Commission and the "family" of national competition agencies in the EU Member States. For mergers, this is governed by the EUMR (and for antitrust investigations, Regulation 1/2003). Against that background, is there an "enforcement gap" as some claim? And if there is, how large is it? And what consequences, if any, does it have?

Proponents of the "enforcement gap" theory, who support the idea of broadening the thresholds, usually point to two acquisitions as evidence of the gap. The first is the acquisition of WhatsApp by Facebook,[37] both companies being leading providers of consumer messaging apps, and the second is the earlier acquisition of Doubleclick by Google,[38] involving the leading providers of online advertising space and intermediation services and ad serving technology. Neither of those mergers was notified to the European Commission because they fell below the revenue thresholds in the EUMR.

However, both mergers were, voluntarily, brought to the European Commission for review under the system that the EUMR has for referring cases between Member States and the Commission.[39] If the parties in these cases had not decided to take their mergers to the European Commission, the mergers would have been reviewed by antitrust agencies in at least three Member States in each case.[40] The appropriate question therefore seems to be a matter of whether the outcomes of the investigations would have been different depending on which agencies conducted the investigations rather than the mergers in those cases escaping scrutiny entirely. These particular mergers were cleared by the European Commission without remedies (Facebook/WhatsApp after a Phase 1 investigation and Google/Doubleclick after a Phase II investigation).

There is also the question of whether the thresholds of individual Member States' merger regimes sufficiently catch those innovation- or data-rich mergers with only national rather than EU impact. In the authors' view, that is a separate question from whether there is an enforcement gap at the EU level. At the national level, Member State competition authorities seem to have different views—the German Federal Cartel Office supports the expansion of its merger jurisdiction thresholds,[41] as we have explained above, whereas the Acting CEO of the UK Competition and Markets Authority is reported to have said that he sees no reason for any changes to the thresholds in the current UK merger regime.[42]

Aside from whether there is an enforcement gap, any revised thresholds should, of course, be consistent with the recommendations of the International Competition Network (ICN) and the Organization of Economic Cooperation and Development (OECD). The ICN's Recommended Practices for Merger Control Procedures provide that "[n]otification thresholds should be based exclusively on objectively quantifiable criteria. Examples of objectively quantifiable criteria are assets and sales (or turnover). Examples of criteria that are not objectively quantifiable are market share and potential transaction-related effects."[43] The ICN does not mention transaction value as one of the recommended criteria.

In its working paper for a 2016 Roundtable discussion, the OECD provides specific views of different agencies on transaction value thresholds and, in particular, stresses the additional importance of a separate local nexus requirement tying the test to the potential competitive effect in that jurisdiction:

> Another notification criterion is the value or size of the transaction. This criterion is objective, easily quantifiable and available to the parties. However, the value of the transaction is unsuitable to determine whether a transaction will have an impact on a specific jurisdiction.
>
> Only two OECD members adopt this criterion in their merger control thresholds—Mexico and the United States—and in both cases transaction value or size is not applied on its own but is instead coupled with additional notification criteria better suited to establish local nexus. The two main tools used to ensure local nexus in these cases are rules requiring the transaction to have local effects, and exemptions that take into account local turnover or assets.[44]

Although at face value, a value of transaction threshold may be regarded as catching a wider range of competitively significant transactions for review than revenue or market share thresholds do, a transaction value metric may, in fact, be a less reliable indicator of the competitive significance of a transaction involving innovative start-ups, for example, than supporters of such a reform hope. There are a number of reasons for this.

First, a transaction's value may not be as clear cut as simply the nominal purchase price. The purchase price may involve the option to receive shares or other non-cash consideration. It may also involve deferred payment terms or, as is not infrequent in startup buyout situations, complex earn-out provisions. Thus, at the least, guidance would be required as to how to determine the transaction relevant value for these purposes and the circumstances in which the relevant thresholds would and would not be satisfied.[45]

Second, even assuming a precise transaction value can be determined, what determines the level at which the threshold should be set? Is it set by analyzing purchase prices in a set of transactions over a period of time? If so, which transactions and over what period of time? And is it set once and for all, or is it occasionally or regularly revised? And, if it is revised, is it by reference to inflation, as some existing thresholds are, or to some other metric?[46]

Third, the thresholds should not (directly or indirectly) undermine incentives to invest in innovation created by start-ups and other companies. In particular, any changes in thresholds should avoid the perception (or reality) that they are a first step to sector-specific merger control, specifically for the digital and pharmaceutical industries. The prospects of selling off a business for an attractive price after successfully developing a new product is at least as important an incentive for founders and developers of innovative start-ups as it is for R&D efforts of major corporations. The importance of avoiding dis-incentivizing investment in innovation was recognized by, for example, the German Federal Government's Annual Economic Report 2016,[47] where the proposed amendments to the German merger control thresholds were first introduced. The report acknowledged the importance of start-up growth and emphasized initiatives to support start-ups in making their transition into the economy as simple as possible.

Fourth, as the OECD notes in its Working Paper,[48] sufficient nexus with the relevant jurisdiction of notification is required to ensure that only competitively significant transactions *in that jurisdiction* are reviewed by the relevant competition agency. While the new German provision introduces this concept,[49] it offers no guidance on when a company is "substantially active" in Germany. The European Commission has also raised this aspect in its consultation process and sought views on whether there should be (1) a general provision regarding the likelihood of a measurable impact within the EEA (together with specific guidance); or (2) industry-specific criteria.[50] Determination of local effects is a complex question, and this aspect of any change to the thresholds can be expected to have triggered a lot of discussion in the consultation exercise.

Last, any transaction value threshold, if adopted, should be set in a proportionate way so that the additional filing burden on merging parties is outweighed by the benefits of capturing those competitively relevant transactions that otherwise would have been missed. For instance, the German government expects an additional approximately three to nine cases per year to require notification to the Federal Cartel Office following the new threshold being set at €400 million.[51]

In sum, a transaction value threshold is likely to be neither clear cut nor easy to apply without risking inadvertent and maybe harmful side effects.

Reshaping the Substantive Assessment of Transactions

If the filing thresholds were changed to catch more start-up digital economy and pharma companies, the substantive review of such transactions often would hinge on a forward-looking, dynamic assessment of how they would affect innovation competition. Such investigations would require—even more than today—assessment of various factors that might not be relevant in most transactions.

For example, the success rates of start-up businesses in the industry might be a relevant consideration because the likely competitive effect might need to be discounted by the possibility that the target could have failed and ultimately exited the market absent the transaction. As usual, a thorough assessment of the substantive impact of the transaction in question would need to be carried out to determine whether or not there were compelling reasons to conclude that the transaction would adversely impact competition in the relevant market affected by the transaction. Market definition might be particularly important (and difficult) because, in today's world, many innovative concepts are capable of disrupting entire industries. More specifically, while market shares in a narrowly defined market segment might, on their face, suggest there could be competition issues, the overall effect of the transaction might be procompetitive if it enabled the acquirer to compete more effectively on the overall market or in other related markets. Competition agencies would find themselves having to assess and balance these increasingly complex considerations.

In the United States, FTC Chairwoman Edith Ramirez emphasized the "central role" that accurately assessing the impact on innovation is taking in merger investigations. In September 2016, she said:

> We also consider a merger's impact on future innovation where there is evidence that it is an important dimension of competition in the relevant market. We aim to ensure that a merger will not harm innovation by reducing incentives to invest in R&D or develop new products. Notably, about a third of FTC merger enforcement actions in the last decade allege potential harm to innovation as a likely anticompetitive effect, and it continues to be a central focus of many of our merger investigations.[52]

DOJ Deputy Assistant Attorney General Carl Shapiro sounded a similar note in 2010 when he said that "[i]n the realm of merger review, effects on innovation ultimately can be far more important than short-term pricing effects."[53]

The German Federal Government's Annual Economic Report 2016 also drew attention to the need for competitive assessments to consider, for example, the "peculiarities of Internet platforms (network effects, platform interdependencies, the pressure to innovate, user data and seemingly free services."[54] These are among the factors that competition agencies will need to consider and weigh when assessing whether a merged entity will have the market power and ability and/or incentive to hinder the entry or expansion of new entrants.

These are complex assessments for antitrust agencies to have to make as they raise novel and nuanced considerations. Initiatives such as the roundtable discussions the OECD has held on the digital economy[55] and the OECD and ICN Merger Working Group have held on nexus and thresholds[56] are welcomed as fora in which agencies can share and brainstorm these issues and seek to reach a consensus on approaches. In the digital and pharmaceutical sectors, as in other sectors with global reach or implications, consistent outcomes benefit businesses, investment initiatives, and ultimately consumers.

Conclusion

To ask whether the competition agencies are "investigating" the right transactions is timely in view of initiatives by the European Commission and the German Federal Cartel Office, among others, stimulated by the increasing role that start-up companies play in the digital economy and pharma sectors, and the increasing recognition that innovation competition is an important driver of robust, competitive markets and economic progress and well-being.

The answer is complex, as we have shown in this article.

Jurisdictional measures and substantive assessment factors are interrelated. Changes to one may have repercussions for the other. Equally, striking the right balance between agency intervention by way of merger investigations and encouraging investment in technological innovation, growth, and advancement, should weigh heavily in the debate about any changes to the current merger regimes.

This debate also raises the fundamental question of where to draw the dividing line between *ex ante* intervention by way of merger control and when to leave any intervention to *ex post* enforcement by way of investigations under Articles 101 or 102, or even sector inquiries under TFEU of the EU, or Sherman Act Sections 1 and 2 and FTC Act Section 5 in the United States.

The industry sectors that have sparked this debate are among the most rapidly changing around the world. Paradoxically, we do not see the need for major change to the merger regimes that review the transactions that are occurring in these sectors. The old adage "more haste, less speed" may be an apt guide for the debate that is currently occurring about possible changes to aspects of the merger regimes. Only if it can be shown that the current tools—both jurisdictional and substantive—are clearly not "fit for purpose," should changes be made, and then only if it is equally clear that the revised tools will not raise more problems than they solve. This requires a careful balancing of all the factors involved, as well as empirical evidence that competition has been reduced by transactions that should have been reviewed but did not trigger the relevant merger control thresholds. In our view, the case for change has not yet been definitively made. The jury is still out. ■

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Gun-Jumping Enforcement: A Comparative Analysis

BY ANNA LYLE-SMYTHE AND JODIE-JANE TINGLE

"Early implementation" sounds less dramatic than "gun jumping," but the formal legal terminology is perhaps the better foundation for testing compliance. Historically, fines have tended to be imposed only for wholesale failure to file, but recent cases show that the list of actions that can attract an authority's attention is broader than whether legal completion has taken place prior to clearance. This article explores existing case law in this area and considers how this area seems likely to develop, particularly given the stated intentions of some merger control authorities around the world to apply their early implementation rules more strictly.

The U.S. Department of Justice and the Federal Trade Commission are known for persistently pursuing gun-jumping cases, but other authorities have stepped up their game in recent years. Cross-border mergers thus face intensified risk of gun-jumping consequences, particularly in light of increased cooperation among international antitrust authorities. The risk is broader than one might think: fines have been imposed for gun jumping even in instances where the merger did not raise antitrust concerns, and even after the parties had filed and obtained clearance. Penalties reached unprecedented levels in 2016—the United States increased its maximum possible penalty by 250 percent to $40,000 per day of violation, and France imposed the highest gun-jumping fine seen globally to date: €80 million. The map at Figure 1 shows recent fines in the key jurisdictions covered by this article.

Despite the absence of published guidance or detailed decisions in the United States or Europe, antitrust lawyers tend to agree on what activities will constitute early implementation. This article provides the guidance that can be gleaned from international practice for the key issues faced by merging parties.

Enforcement in the United States

Legal Framework. Parties that fail to file a proposed acquisition that meets the thresholds under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) are likely to be subject to penalties.[2] In addition, a broader set of gun-jumping activities are prohibited in the United States under:

- The HSR Act, codified as Section 7A of the Clayton Act, which prohibits the transfer of "beneficial ownership"[3] prior to HSR clearance in the case of notifiable transactions,[4] and
- Section 1 of the Sherman Act, which prohibits anticompetitive agreements.[5]

Penalties. In 2016, the maximum civil penalty for gun-jumping violations under the HSR Act was increased from $16,000 per day to $40,000 per day.[6] Given that the penalty accrues on a daily basis, significant financial liability can be incurred quickly—up to $1.2 million per month or $14.6 million per year—albeit that, in practice, maximum penalties have rarely been imposed. In addition, criminal penalties for gun jumping can be imposed under the Sherman Act.[7]

In determining the level of the penalty to be imposed, the U.S. authorities look at factors, including the degree of culpability, any history of similar conduct, ability to pay, and effect on ability to do business.[8] Promptly reporting the violation will generally secure a reduction in the penalty. Like other jurisdictions, the FTC and the DOJ impose penalties for gun jumping even where the merger itself raises no antitrust concerns. As underlined by William Blumenthal, the former FTC General Counsel: "competitive effects . . . are largely immaterial to the Section 7A analysis."[9]

Case Law Developments. Continuing a long history of active enforcement, the U.S. authorities imposed three notable civil penalties for failure to file in 2016: $11 million on ValueAct (the highest penalty to date for an HSR Act violation),[10] $720,000 on Fayez Sarofim,[11] and $480,000 on Caledonia Investments.[12] Unlike other jurisdictions, the United States often allows parties "one free bite" for a first-time inadvertent failure to file: no penalty is imposed if a corrective filing is made. There is, however, no second chance—while Caledonia claimed its violation in 2016 was inadvertent, the FTC imposed a penalty because Caledonia violated the HSR Act in 1996.

Significant penalties have also been imposed where a buyer has exercised control over the target (through means other than legal completion) before completion. In *Gemstar-TV Guide*, the DOJ imposed the maximum civil penalty

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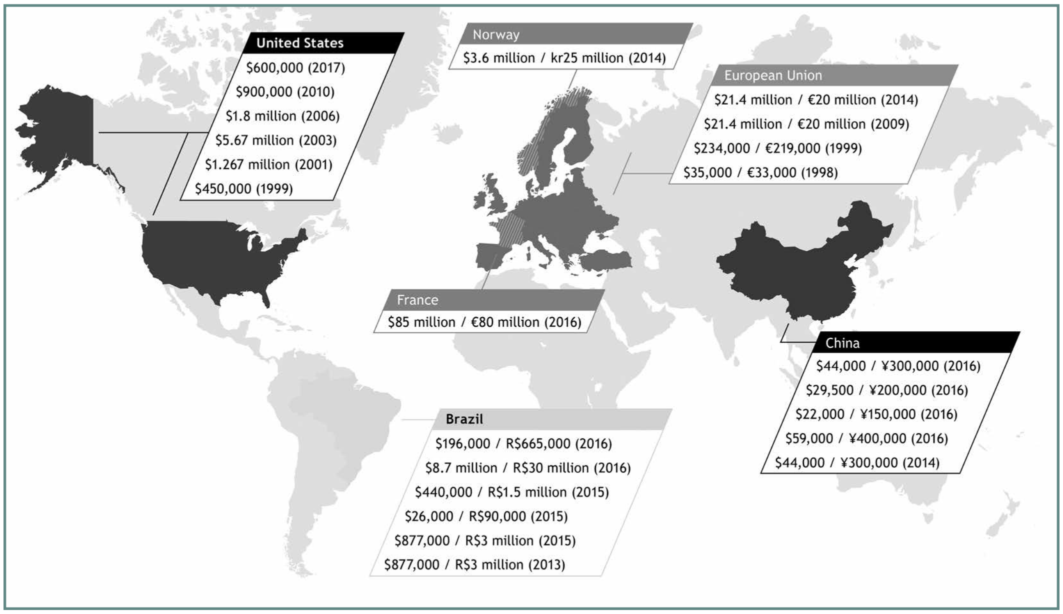

Figure 1:
Gun-Jumping Fines in the United States, Europe, Brazil, and China[1]

($5.7 million in total) on the parties for agreeing not to compete with one another (including through market and customer allocation, and price fixing) in the period between announcement of their transaction and legal completion of it.[13] The DOJ also imposed a $3.8 million penalty on Flakeboard America Limited, its parent companies, and SierraPine because "they closed a plant and allocated customers when they should have been competing vigorously" during the HSR waiting period.[14] For the same conduct, Flakeboard also had to disgorge $1.2 million in illegally obtained profits to the U.S. government for its violation of Section 1 of the Sherman Act.

In January 2017, Duke Energy Corporation paid a $600,000 civil penalty for prematurely acquiring control over the Osprey Energy Centre.[15] Prior to notifying the U.S. authorities under the HSR Act, Duke entered into a so-called tolling agreement with Osprey that immediately gave it control over Osprey's output and the right to receive the day-to-day profits and losses from Osprey's business. When announcing the penalty, the DOJ stated that it "remains vigilant" against gun jumping and reiterated that it would take action "when parties to a reportable transaction stop competing independently before the review period has ended."[16]

The DOJ has highlighted that "requiring a buyer's approval of the [target's] ordinary course contracts can prematurely transfer operational control"[17] in violation of the HSR Act. It has imposed penalties for such conduct of $900,000 on Smithfield Foods and Premium Standard Farms[18] and $1.8 million on Qualcomm and Flarion Technologies.[19] In *Computer Associates*, the DOJ imposed a $1.3 million civil penalty on the ground that the merger agreement imposed extraordinary conduct of business restrictions on the target,[20] e.g., the target needed the buyer's approval before entering into contracts with customers that contained discounts of more than 20 percent or that deviated from its standard contract terms.

U.S. cases also highlight that sharing competitively sensitive information between competing buyers and targets (including on prices, strategy, capacity, and customer details) prior to completion will not be tolerated.[21] Similarly, appointing executives too early will be gun jumping—the DOJ imposed a $450,000 penalty on Input/Output and Laitram for reorganizing staff and assigning officers from the target to new positions in the merged company.[22]

Enforcement in Europe

Legal Framework. In the European Union, Article 7(1) of the EU Merger Regulation (EUMR) prevents parties from implementing a transaction that meets the EUMR turnover thresholds until the European Commission has decided that it is compatible with the common market.[23] Coordination of activities of the merging parties prior to legal completion can also face sanction under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU), which covers anticompetitive agreements and concerted practices.[24]

Penalties. The Commission can impose fines of up to 10 percent of turnover for implementation prior to clearance.[25] The highest fines imposed by the European Commission to date have been significantly higher than those in the United States (€20 million, or around $21.4 million, compared to $5.67 million). Parties suspected of gun jumping may also be the subject of "dawn raids" under Article 13 EUMR.[26]

EU Case Law Developments. Two recent cases highlight the Commission's intention to stamp down on gun-jumping activity. In *Marine Harvest*, a salmon farmer and processor failed to file the acquisition of a 48.5 percent stake in its rival, Morpol, until eight months after completion. It was fined €20 million.[27] Similarly, Electrabel, an electricity producer and retailer, acquired close to 50 percent of the shares in its competitor Compagnie Nationale du Rhône and only notified the Commission four years later. It was also fined €20 million for its breach of the EUMR.[28] In both cases, the acquired stake amounted to de facto sole control, particularly as a stable majority at shareholders' meetings allowed the buyer to determine the target's strategic commercial decisions.

Unlike the United States, first-time inadvertent or negligent failure to file is no excuse. The Commission highlighted how Marine Harvest and Electrabel were both large European companies with significant EUMR experience and substantial legal resources. A reduction in the fine is, however, possible for voluntarily notifying and cooperating with the Commission.[29] While fines are likely to be higher where the merger raises antitrust concerns,[30] the Commission, like the FTC and the DOJ, will impose fines for gun jumping in any case, noting in *Electrabel* that "the fact that the transaction does not raise competition concerns does not take away from the seriousness of the infringement."[31]

The Commission noted in both *Marine Harvest* and *Electrabel* that the prohibition on implementing a transaction without clearance is a "cornerstone of the EU merger control system,"[32] adding in *Electrabel* that "[the] decision sends a clear signal that the Commission will not tolerate breaches of this fundamental rule."[33] In the earlier *A.P. Moeller* and *Samsung* cases, the Commission imposed much lower fines for unintentional failures to file (€219,000 and €33,000 (around $234,000 and $35,000, respectively)).[34]

The EU Merger Regulation. Article 7(2) EUMR specifies an exemption to the requirement to get clearance prior to implementation, namely that a public bid can be implemented provided it is notified to the Commission "without delay" and the buyer "does not exercise the voting rights attached to the securities in question."[35] A literal interpretation of Article 7(2) could lead to the conclusion that only the exercise of voting rights is prohibited by Article 7(2). In practice, it seems more likely that the Commission would also prohibit other actions that amounted to a premature exercise of control (such as restricting ordinary course activities), perhaps by analogy of being equivalent to the exercise of voting rights.

Other Case Law Developments in Europe. To date, the Commission has imposed fines only for failure to file, but a number of European national antitrust authorities have focused attention on activities beyond failure to file.[36]

France: When setting an unprecedented €80 million fine (around $85 million) on Altice and SFR in 2016, the French Competition Authority (FCA) said it was sending a "strong message" that companies cannot implement a merger before clearance.[37] Prior to FCA clearance, the parties had exchanged competitively sensitive information on a weekly basis and the buyer had made major strategic commercial decisions on behalf of the target, including in relation to new products, price promotions, and approval of contracts and tenders. The FCA emphasized that filing the deal did not eradicate the risk of gun jumping—the point of the merger regime is for the parties to hold separate until clearance, not just until they bring the deal to the authority's attention. Altice and SFR, responding to the FCA's fine, stated that "[t]he denounced practices, which aimed to make the new entity operational as soon as possible after obtaining clearance of the transaction, were performed in good faith, in the midst of legal uncertainty."[38]

Denmark: A merger agreement requiring KPMG in Denmark to terminate its affiliation with the international KPMG network immediately (and therefore before clearance of its merger with EY) was found to constitute gun jumping.[39]

UK (England and Wales): Filing is voluntary in the UK: clearance by the Competition and Markets Authority (CMA) is not required before a merger can complete. Nevertheless, fairly severe "hold-separate" measures can be (and often are) imposed by the CMA to ensure separation of the businesses pending completion of the CMA's review.[40] Given their aim, these hold-separate measures may provide further guidance of the types of activities that may constitute gun jumping in other jurisdictions. The CMA's main concern is that the merging parties cease to compete independently by: (1) integrating, or transferring ownership or control of, their businesses, (2) making any changes to key staff or the organizational structure, (3) jointly negotiating with, or combining lists of, customers and suppliers, (4) sharing competitively sensitive information, (5) integrating their IT, and (6) disposing of any assets.[41]

Enforcement in Brazil

Legal Framework. Gun jumping is prohibited in Brazil under Article 88, paragraph three of Law 12.529/2011, which states that merging parties cannot complete "any acts of economic concentration" before the Conselho Administrativo de Defesa Economica (CADE) has cleared the deal.[42] However, unlike other antitrust authorities, CADE has published a list of activities that are likely to constitute gun jumping "in order to better assist private agents, promote legal certainty, lower transaction costs, and facilitate the integration of lawful activities."[43] The gun-jumping activities fall into three categories:

- **Exchange of Competitively Sensitive Information.** This includes specific information on costs, capacity, expansion plans, marketing or competitive strategies, prices and discounts, agreement terms with major customers and suppliers, employee wages, non-public intellectual property or research and development information, and plans for future acquisitions.[44]
- **Anticompetitive Merger Agreement Clauses.** Clauses that impact the competitive relationship between the parties prior to completion are likely to raise concerns, such as non-compete obligations, clauses anticipating integration before clearance, and clauses enabling the buyer to interfere in the target's business strategy.[45]

- **Implementing the Merger Before Clearance.** Problematic conduct includes transferring or sharing assets, exercising voting rights, appointing executives, integrating sales forces, and carrying out joint sales and marketing.[46]

Penalties. Penalties include significant fines (up to R$60 million or around $17.5 million), nullity of the gun-jumping activities, and CADE opening administrative proceedings against the parties.[47]

Case Law Developments. In 2016, Cisco Systems and Technicolor were fined R$30 million (around $8.7 million)—ten times the size of CADE's previous highest gun-jumping fine—for implementing their merger prior to receipt of clearance in Brazil.[48] Following filing and clearance in the United States, Canada, Colombia, the Netherlands, and Ukraine, the parties issued a press release stating that "integration of the Cisco Connected Devices assets is starting immediately and the strategic collaboration agreement between Technicolor and Cisco is now moving into the implementation stage."[49] The parties attempted to dissuade antitrust concerns in Brazil by including a carve-out in the merger agreement that would keep the existing competitive conditions in place in relation to the Brazilian market, but CADE rejected this as difficult to monitor and unlikely to be effective, adding that the majority of international antitrust authorities, including the U.S. and EU authorities, do not accept carve-out agreements as a means of mitigating gun-jumping risk.[50]

CADE has also been vigilant about early implementation in other cases in the last two years. In December 2016, JBJ Agropecuária agreed to pay a fine of R$665,000 (around $196,000) for closing its acquisition of a meat company, Mataboi, before seeking clearance from CADE.[51] Blue Cycle (a joint venture between Shimano, RR Participações and Douek Participações) was fined R$1.5 million (around $440,000) in 2016 for entering into new contracts with Shimano, its parent company, for the exclusive distribution of bicycle parts in Brazil prior to clearance.[52] In 2015, GásLocal and Gasmig were subject to fines of R$90,000 (around $26,000) for failure to file until one year after completion.[53]

Like the U.S. and EU authorities, CADE is concerned about gun jumping even where the merger does not raise antitrust issues—as demonstrated by the R$3 million (around $877,000) fine imposed in 2015 on Goiás Verde for using the brands of its target company (Brasfrigo) on its website and packaging prior to clearance.[54] Imposing another fine of R$3 million on OGX for gun jumping, CADE noted that it did not nullify the transaction on that occasion.[55] It is, however, foreseeable that CADE could seek to unwind a future deal that jumped the gun in Brazil.

Enforcement in China

Legal Framework. China's Anti-Monopoly Law (AML) prohibits completion of transactions that meet the AML turnover thresholds prior to clearance from the Ministry of Commerce (MOFCOM).[56]

In the space of just a few years, gun jumping has become an enforcement priority for antitrust authorities globally. Increased cooperation between international antitrust authorities amplifies the risk of gun-jumping penalties in cross-border transactions. . . . Increased enforcement sits against a backdrop of an increased number of mergers and more pressure to make those mergers work.

Penalties. MOFCOM can impose fines of up to ¥500,000 (around $73,000) on each relevant party for failure to file and, more significantly, can adopt other measures necessary to unwind the transaction.[57]

Case Law Developments. MOFCOM regards gun jumping as a clear enforcement priority. MOFCOM is receiving a growing number of complaints—at least eight in 2016—over alleged failures to file mergers that meet the thresholds.[58] Since the AML came into effect in August 2008, there have been 11 published cases in which fines were imposed for failure to file.[59] MOFCOM has sent a clear message that the Chinese gun-jumping rules apply across the board, imposing fines on both international companies (including Canon,[60] Hitachi,[61] and Microsoft[62]) and domestic companies (including listed, private, and state-owned companies).

The average fines in China have been relatively low to date (¥150,000 to ¥400,000 or around $22,000 to $59,000), especially by U.S. or EU standards.[63] In October 2016, however, Shang Ming, the former Director-General of MOFCOM's Anti-Monopoly Bureau, reiterated warnings that companies failing to file in China will incur serious repercussions.[64] Fines may therefore be coupled with instructions to unwind the transaction for deals that raised antitrust concerns (none of the cases to date have done so). There have also been suggestions that AML's ¥500,000 cap on fines will be amended to allow higher fines to be imposed.[65] MOFCOM's increased emphasis on enforcement and willingness to name and shame necessitates vigilance if a transaction meets the thresholds in China.

Key Takeaways

Global Enforcement Priority. In the space of just a few years, gun jumping has become an enforcement priority for antitrust authorities globally. Increased cooperation between international antitrust authorities amplifies the risk of gun-jumping penalties in cross-border transactions.

Increased enforcement sits against a backdrop of an increased number of mergers and more pressure to make those mergers work. The biggest year ever for M&A was 2015, with an estimated $4.7 trillion worth of deals and 63 of them valued at $10 billion or more.[66] Clients are under pressure to realize the merger's efficiencies from day one, leading to tension between unlawful coordination, on the one hand, and the client's legitimate interests in early planning and fast integration on the other.

Comparing the Regimes in the United States, Europe, Brazil, and China. The authorities are all actively enforcing failure to file cases, regardless of whether the merger raises antitrust concerns. While the United States may continue allowing first-time violators off the hook, the other jurisdictions are not likely to do so. Authorities in the United States, Brazil, France, and Denmark have also pursued cases concerning activities beyond wholesale failure to file, and we expect the European Commission and MOFCOM to follow suit. Some direction can be gleaned from CADE's guidance and the CMA's hold-separate measures for merging parties that want to avoid being future "test cases."

For those willing to take risks, fines that can no longer be dismissed as a cost of business are at stake—particularly if other jurisdictions follow France's lead in setting fines at the €80 million level. Fines in China may be lower than in other jurisdictions now, but this may change. There is also the possibility that an antitrust authority such as CADE or MOFCOM could seek to unwind the transaction.

The best approach from a legal perspective is for the parties to remain entirely separate until completion, but there may be cause to relax the approach slightly in the period between clearance and completion. During that period, parties will, however, still be subject to Section 1 of the Sherman Act (and its equivalents globally) and will need to consider the position in any other jurisdictions where clearance is still awaited. A careful case-by-case analysis therefore seems to be required.

A Practical Approach to Mitigating Risk: Three Key Areas for Clients. Even in the absence of guidelines or detailed decisions in the United States and the European Union, we can draw some guidance from international practice for three key areas:

- **Negotiating the Merger Agreement.** Common merger agreement restrictions on material changes or unconventional operations are acceptable. If, however, the target is restricted to the extent that it can no longer pursue an independent business strategy, there is a risk of gun jumping. Concerns are likely to arise if the merger agreement allows the buyer to exercise any management control over the target, e.g., by requiring the buyer's consent to execute contracts in the target's ordinary course of business or by granting the buyer review (and/or approval) rights over the target's sale or purchase terms. Such restrictions are particularly likely to come to the authority's attention given the need to disclose transaction documents in many jurisdictions.
- **Information Exchange.** Sharing of competitively sensitive information beyond what is strictly necessary for legitimate purposes (such as due diligence and integration planning) may constitute gun jumping. Appropriate precautions should be put in place, such as the use of "clean teams" for highly sensitive information, a confidentiality agreement limiting the use of shared information to specific purposes, and providing information only in appropriately redacted, aggregated, and/or historical form.
- **Conduct Before Completion.** Integration planning can be acceptable, but actual integration is not. Between filing and completion, the buyer and target must continue to operate as independent competitors: the parties cannot coordinate their prices or strategies, or allocate markets or customers. Joint marketing is also not tolerated. The FTC, however, has indicated that joint marketing of competing products can be distinguished from joint marketing of the transaction—joint advertisements that announce or support the merger are therefore generally permissible.[67] Transferring employees or appointing executives before completion is high risk. While some human resource planning is acceptable (such as considering the post-completion senior team), employees must continue to act only for their own employer prior to completion and the buyer should not take any steps leading to the exit of key employees from the target.

Conclusion

Gun jumping is now an enforcement priority for antitrust authorities across the globe. Looking ahead, the international trend is clear: more cases, stricter approaches, and higher fines than ever before (though it remains to be seen whether this trend continues in the United States under the new administration). While there is broad recognition internationally on what activities will constitute gun jumping, in practice a lot still depends on the facts and circumstances of the case—there are few bright line rules. Counseling clients on acceptable conduct in the pre-completion period remains a key challenge facing antitrust lawyers today. ■

1 Source: Decisions of the FTC, DOJ, European Commission, FCA, Norwegian Competition Authority, CADE, and MOFCOM, as referenced in this article. All US$ currency conversions in this article are approximate and are based on the US$ rate on November 16, 2016.

2 15 U.S.C. § 18a.

3 The HSR Act (and associated rules) do not define "beneficial ownership." Instead, the Statement of Basis and Purpose Implementing Title II of the HSR Act, 43 Fed. Reg. 33,458 (July 31, 1978) states that the "existence of beneficial ownership is to be determined in the context of particular cases with reference to the person or persons that enjoy the indicia of beneficial ownership." These indicia include: (1) the right to gain in the value of the underlying asset or to receive dividends, (2) the risk of loss of value, (3) the right to vote stock or designate management, and (4) discretion over investment decisions. The beneficial ownership analysis under Section 7A is highly fact-specific—the question is whether too many indicia of beneficial ownership (e.g., access to competitively sensitive information and con-

trol over key decisions) have shifted to the buyer prior to the expiration of the HSR waiting period.

4 15 U.S.C. § 18a.

5 15 U.S.C. § 1.

6 Adjustment of Civil Monetary Penalty Amounts, 81 Fed. Reg. 126 (June 30, 2016).

7 15 U.S.C. § 1.

8 15 U.S.C. § 45(m)(1)(C).

9 William Blumenthal, The Rhetoric of Gun-Jumping, Remarks Before the Association of Corporate Counsel at the Annual Antitrust Seminar of Greater New York Chapter (Nov. 10, 2005), https://www.ftc.gov/sites/default/files/documents/public_statements/rhetoric-gun-jumping/20051110gunjumping.pdf.

10 The DOJ alleged that the activist investment firm, ValueAct, violated the HSR Act by failing to report its purchase of over $2.5 billion of Halliburton and Baker Hughes voting shares. According to the complaint, ValueAct purchased the shares with the intention to influence the companies' business decisions and therefore could not rely on the limited "investment-only" exemption to the HSR Act's notification requirements. United States. v. VA Partners I, LLC, Case 16-cv-01672, 2016 U.S. Dist. LEXIS 163605 (N.D. Cal. Apr. 4, 2016).

11 The FTC alleged that the investment firm founder Fayez Sarofim violated the HSR Act by failing to report stock purchases from several issuers between 2001 and 2012. United States v. Fayez Sarofim, FTC File No. 151 0064 (D.D.C. Oct. 27, 2016).

12 The FTC alleged that Caledonia Investments plc violated the HSR Act by failing to report its purchase of voting shares in Bristow Group, Inc. in 2014. United States v. Caledonia Investments plc, 1:16-cv-01620 (D.D.C. Aug. 10, 2016).

13 United States v. Gemstar-TV Guide Int'l, 2003 U.S. Dist. LEXIS 12494 (D.D.C. 2003).

14 United States v. Flakeboard Am. Ltd., 2015 U.S. Dist. LEXIS 33629 (N.D. Cal. 2015).

15 United States v. Duke Energy Corp., 1:17-cv-00116 (D.D.C. Jan. 18, 2017).

16 Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Duke Energy Corporation for Violating Premerger Notification and Waiting Period Requirements (Jan. 18, 2017), https://www.justice.gov/opa/pr/justice-department-reaches-settlement-duke-energy-corporation-violating-premerger.

17 United States v. Smithfield Foods, Inc., 2010 U.S. Dist. LEXIS 13457 (D.D.C. Jan. 22, 2010). In this case, the "ordinary course" contracts concerned the target's purchase of hogs from independent hog suppliers. After executing the merger agreement, the target, a pork packer and processor and hog producer, stopped exercising independent judgement in its hog purchases and instead asked for the buyer's consent for each of the three hog purchase contracts that arose during the HSR waiting period.

18 *Id.*

19 United States v. Qualcomm Inc., No. 1:06CV00672 (PLF) (D.D.C. Apr. 19, 2006). In this case, the parties contractually agreed that the target would carry on its business in the ordinary course, but in practice the buyer's consent was sought for each of the following actions, which the DOJ regarded as ordinary course conduct for the target: (1) licensing IP to a third party, (2) entering into any "material contract" or a new contract valued above certain thresholds, (3) hiring employees, (4) offering discounts or submitting proposals to customers, and (5) providing pricing information to customers. The buyer, therefore, exercised operational control over the target before the HSR waiting period had expired.

20 United States v. Computer Assocs. Int'l, 2002 U.S. Dist. LEXIS 23039 (D.D.C. Nov. 20, 2002).

21 *Gemstar-TV Guide International*, 2003 U.S. Dist. LEXIS 12494, *Flakeboard America Limited*, 2015 U.S. Dist. LEXIS 33629. See the section of this article entitled Key Takeaways—A Practical Approach to Mitigating Risk: Three Key Areas for Clients in relation to addressing concerns about sharing competitively sensitive information.

22 United States v. Input/Output, Inc., 1999 U.S. Dist. LEXIS 10222 (D.D.C. 1999).

23 Council Regulation No. 139/2004, art. 7(1), 2004 O.J. (L 24).

24 Consolidated Version of the Treaty on the Functioning of the European Union art. 101(1), 2012 O.J. (C 326) 47.

25 Council Regulation No. 139/2004, art. 14(2), 2004 O.J. (L 24).

26 In 2007, the Commission conducted a dawn raid at INEOS' offices following a "tip-off" that INEOS was intervening in the management of Kerling prior to that acquisition receiving merger clearance from the Commission. In the end, no evidence of gun jumping was found.

27 Case COMP/M.7184—Marine Harvest/Morpol, Comm'n Decision, 2004 O.J. (L 24). Marine Harvest is currently challenging the Commission's decision in the EU General Court, claiming that the exemption under Article 7(2) EUMR applies because the "economic purpose" of the 2012 purchase of 48.5 percent of Morpol had always been a complete buyout of Morpol. See Case T-704/14—Marine Harvest v. Comm'n, 2014 O.J. (C 409). The hearing took place on September 15, 2016 (report not yet available).

28 Case COMP/M.4994—Electrabel/Compagnie Nationale du Rhône, Comm'n Decision, 2009 O.J. (L 395).

29 In *Marine Harvest*, the Commission considered that Marine Harvest's willingness to promptly inform the Commission of its acquisition of Morpol constituted a mitigating circumstance, resulting in a reduction in the fine. In *Electrabel*, the Commission noted that Electrabel disclosed the matter voluntarily to the Commission and answered the Commission's questions, each of which constituted mitigating circumstances.

30 *Marine Harvest*, 2004 O.J. (L 24), ¶¶ 155–158.

31 *Id.* ¶ 94.

32 Press Release, Eur. Comm'n, Commission Fines Electrabel 20 Million Euros for Acquiring Control of Compagnie Nationale Du Rhône Without Prior Commission Approval (June 10, 2009) (IP/09/895); Press Release, Eur. Comm'n, Mergers: Commission Fines Marine Harvest €20 Million for Taking Control of Morpol Without Prior EU Merger Clearance (July 23, 2014) (IP/14/862).

33 *Electrabel*, Comm'n Decision, 2009 O.J. (L 395).

34 Case COMP/M.969—A.P. Moeller, Comm'n Decision, 1999 O.J. (L 395); Case COMP/M.920—Samsung/AST, Comm'n Decision, 1998 O.J. (L 395).

35 Council Regulation No. 139/2004, art. 7(2), 2004 O.J. (L 24).

36 The trend of higher gun-jumping fines is also evident in countries within Europe, including Norway. In 2014, the Norwegian Competition Authority imposed a 25 million kroner (around $3.6 million) fine on a grocery retailer for failing to file a deal in which it took over a number of empty store leases from a competitor and began operating the new stores. Line Kaspersen & John Thomas Aarø, *Norgesgruppen får bot på 25 millioner for Ica Maxi-oppkjøp*, Dagens Næringsliv (Feb. 20, 2014), http://www.dn.no/nyheter/2014/02/20/norgesgruppen-far-bot-pa-25-millioner-for-ica-maxioppkjop.

37 Press Release, Autorité de la Concurrence, Gun jumping/Rachat de SFR et de Virgin Mobile par Numéricable (Nov. 8, 2016).

38 Press Release, Altice, Decision of the French Competition Authority (Nov. 8, 2016); Press Release, SFR, Decision of the French Competition Authority (Nov. 8, 2016).

39 Press Release, Danish Competition and Consumer Authority, Danish Audit Firms Breached Merger Stand-Still Obligation (Dec. 17, 2014). The decision of the Danish Competition and Consumer Authority is currently on appeal.

40 Enterprise Act 2002, c.40, §§ 72, 80, and 81.

41 Competition & Markets Authority, Mergers: Guidance on the CMA's jurisdiction and procedure, Annex C, § C.9 (Jan. 2014).

42 Lei No. 12.529, de 30 de Novembro de 2011, Artigo 88, Diário Oficial da União [D.O.U.] de 1.12.2011 (Braz.).

43 Conselho Adminsistrativo de Defesa Econômica (CADE), Guia para Análise da Consumação Prévia de Atos de Concentração Econômica, Seção 1 (Braz.) [hereinafter CADE's guidance], http://www.cade.gov.br/acesso-a-informacao/publicacoes-institucionais/guias_do_Cade/guia-gun-jumping-versao-final-3.pdf.

44 *Id.*

[45] CADE's guidance also provides that the following clauses may raise concerns: (1) non-refundable clauses providing for partial or total payment of the deal's consideration (except for break-up fees, down payments commonly used in mergers, or deposits in escrow accounts), and (2) clauses providing for activities that are impossible, or costly, to reverse. See CADE's guidance, *supra* note 43.

[46] CADE's guidance also provides that the following conduct may raise concerns: (1) exercising significant influence on the target's activities, (2) receiving profits from the target, (3) joint product development, (4) exclusive intellectual property licenses between the parties, and (5) ceasing investments. *See* CADE's guidance, *supra* note 43.

[47] Lei No. 12.529, de 30 de Novembro de 2011, Artigo 88, Diário Oficial da União [D.O.U.] de 1.12.2011 (Braz.).

[48] Press Release, CADE, Cisco and Technicolor Admit Practice of Gun Jumping in Global Transaction (Jan. 21, 2016).

[49] Press Release, Technicolor, Technicolor Completes the Acquisition of Cisco Connected Devices (Nov. 20, 2015).

[50] CADE, *supra* note 48.

[51] Flavia Fortes, *JBJ Pays Fine for Jumping the Gun in Its Acquisition of Mataboi*, MLex (Dec. 7, 2016).

[52] CADE also declared the concluded contracts to be null and void. Press Release, CADE, Blue Cycle's Joint Venture Is Considered Gun Jumping (Aug. 31, 2016).

[53] Press Release, CADE, Gás Local and Gasmig to Pay BR$90,000 For Gun Jumping (June 29, 2015).

[54] Press Release, CADE, CADE Signs Reversibility Agreement for the Acquisition of Brasfrigo by Goiás Verde (Feb. 2, 2015).

[55] Press Release, CADE, CADE Imposed a BR$3 Million Fine Against OGX for Gun Jumping (Aug. 28, 2013).

[56] Anti-Monopoly Law of the People's Republic of China (promulgated by The Ministry of Commerce of the People's Republic of China, Aug. 3, 2008), Chapter IV. As of December 12, 2016, the AML turnover thresholds require a transaction to be notified to MOFCOM where either (1) the parties have a combined worldwide turnover of ¥10 billion or more and at least two parties each have turnover in China of ¥400 million, or (2) the parties have a combined turnover of ¥2 billion or more in China and at least two parties each have turnover in China of ¥400 million.

[57] Interim Measures for Investigating and Handling Failures to Legally Declare the Concentration of Business Operators (promulgated by The Ministry of Commerce of the People's Republic of China, Dec. 30 2011, effective Feb. 1 2012), Article 13, MOFCOM Order [2011] No. 6.

[58] Han Chunlin, Deputy Director-General of MOFCOM's Anti-Monopoly Bureau, Statements at the 2016 China Competition Policy Forum (Oct. 27–28, 2016).

[59] MOFCOM Administrative Penalty Decisions, http://tfs.mofcom.gov.cn/article/xzcf/.

[60] Commerce Department Administrative Penalty Decision (Commercial Letter [2016] No. 965) (Jan. 1, 2017).

[61] Commerce Department Administrative Penalty Decision (Commercial Letter [2016] No. 175) (May 3, 2016).

[62] Commerce Department Administrative Penalty Decision (Commercial Letter [2015] No. 671) (Sept. 29, 2015).

[63] MOFCOM, *supra* note 59.

[64] Shang Ming, Former Director-General of MOFCOM's Anti-Monopoly Bureau, Statements at the 2016 China Competition Policy Forum (Oct. 27–28, 2016).

[65] Xu Lefu, Head of the Third Review Division with MOFCOM's Anti-Monopoly Bureau, Statements at the ABA Section of Antitrust Law Spring Meeting (Apr. 7, 2016).

[66] Shayndi Raice et al., *Will the New Year Be Sweet '16 for Deals?*, Wall St. J., Dec. 31, 2015), http://www.wsj.com/articles/will-the-new-year-be-sweet-16-for-deals-1451557804.

[67] Blumenthal, *supra* note 9.

Convergence with Chinese Characteristics? A Cross-Jurisdictional Comparative Study of Recent Merger Enforcement in China

BY CUNZHEN HUANG AND FEI DENG

IN THE EIGHT YEARS SINCE CHINA'S Anti-Monopoly Bureau within the Ministry of Commerce (MOFCOM) started implementing merger reviews under China's Anti-Monopoly Law (AML), MOFCOM has intervened in a total of 30 cases—two blocked deals and 28 conditional approvals.[1] Although these cases represent a very small percentage of the more than 1600 filings reviewed up to the end of 2016, they provide important insights on where and how MOFCOM has chosen to intervene in proposed mergers.[2]

Given the significance of these enforcement actions and the amount of information available, we conduct a cross-jurisdictional comparison between each of MOFCOM's 28 conditional clearances and the corresponding decision of its counterparts in the United States and the European Union. Through a comparison of key characteristics—review time, remedy type, and specific terms imposed—we find that while certain aspects of China's approach are unique (e.g., a preference on the part of MOFCOM for behavioral remedies), there is a general trend toward convergence (e.g., less use of extreme remedies like hold-separates by MOFCOM and more frequent use of behavioral remedies recently in the United States). From this study, we provide some insights into the recent trends in merger enforcement in China and guidance for practitioners engaged in future global deals in preparing and tailoring their merger filings for different jurisdictions.

An Overview of Cases with Enforcement Actions by MOFCOM

Among the 28 cases where MOFCOM imposed restrictive conditions, four appear to be China-specific: at least one of the merging parties was a Chinese firm and the overlap was mainly in China so that the parties did not need to file in any other jurisdictions.[3] Of the remaining 24 cases, both the U.S. and EU antitrust agencies took enforcement actions in nine; the EU alone took action in three; the U.S. alone took action in one; and there was no enforcement action in either jurisdiction in 11 cases. (See Table 1).[4] The fact that in nearly half of the global deals where MOFCOM took an enforcement action it was not joined by either the U.S. or the EU indicates that MOFCOM does not shy away from making a different decision than the other two major jurisdictions.

Was China Always the Last Jurisdiction to Conclude Its Review When It Imposed Conditions?

Conventional wisdom holds that MOFCOM tends to be the last antitrust agency to conclude its review, often holding up the deal.[5] Among the 28 cases where MOFCOM imposed restrictive conditions, there are eight cases that appear to be not notifiable in the other two jurisdictions.[6] Thus there are 20 global deals (shown in Table 2 below) with closing dates available to conduct this comparison.[7]

Among the 13 cases where at least one of the two other jurisdictions also intervened, MOFCOM was not the last agency to conclude its review in six of them. In all six of these mergers, the U.S. agency required structural remedies. The later U.S. closing time in these cases is probably due to the requirement of finding an acceptable upfront buyer. However, in those seven cases where only MOFCOM intervened it was always the last agency to complete its review.

In some cases, the delay can be negligible—for example, MOFCOM approved the Seagate/Samsung merger with a behavioral remedy a few days after the U.S. agency cleared the merger and two months after the EC cleared the merger. In other cases, the time between MOFCOM's decision and the decisions of the other major jurisdictions can be quite significant—eight months for Marubeni/Gavilon, five months for Glencore/Xstrata, four months for Microsoft/Nokia, and three months for Google/Motorola Mobility and Nokia/Alcatel-Lucent.

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Table 1. Cross-Jurisdiction Comparison of Conditional Approval Decisions

China-Specific Filing	Conditions Imposed by Both U.S. and EU	Conditions Imposed by EU but Not U.S.	Conditions Imposed by U.S. but Not EU	No Conditions Imposed by U.S. or EU
GE/Shenhua (JV) (2011)	Pfizer/Wyeth (2009)	ARM/G&D/Gemalto (JV) (2012)	InBev/AB (2008)	Mitsubishi Rayon/Lucite (2008)
Henkel HK/Tiande (JV) (2012)	Panasonic/Sanyo (2009)	Glencore/Xstrata (2013)		GM/Delphi (2009)
Wal-Mart/Yihaodian (2012)	Novartis/Alcon (2010)	Baxter/Gambro (2013)		Uralkali/Silvinit (2011)
Hunan Corun New Energy/Toyota (JV) (2014)	Western Digital/Hitachi (2012)			Alpha V/Savio (2011)
	UTC/Goodrich (2012)			Seagate/Samsung (2011)
	Thermo Fisher/Life Tech (2014)			Google/Motorola Mobility (2012)
	NXP/Freescale (2015)			Marubeni/Gavilon (2013)
	InBev AB/SAB Miller (2016)			MediaTek/Mstar (2013)
	Abbott/St. Jude Medical (2016)			Microsoft/Nokia (2014)
				Merck/AZ Electronic (2014)
				Nokia/Alcatel-Lucent (2015)

Notes: InBev/AB was reviewed by UK Office of Fair Trading (OFT) instead of the EC.
Cases within each category are sorted chronologically from earliest to the latest by their clearance dates by MOFCOM.

Did China Always Impose a Stricter Remedy than the U.S. and the EU?

Among the 28 conditional clearances MOFCOM has issued so far, there are eight transactions that appear not to be notifiable in the U.S. and the EU For the rest of the 20 cases, as illustrated in Table 3, seven were cleared by the U.S. and the EU without any remedies. Among the rest of the 13 cases where at least one of the other jurisdictions also imposed remedies, MOFCOM imposed stricter (or broader) remedies in four transactions; less strict (or narrower) remedies in three transactions; similar remedies in three transactions (involving divesting local businesses to different buyers in different jurisdictions[8]); and remedies of a different nature in three transactions.

Table 2. Cross-Jurisdiction Comparison of Approval Dates

Cases in Which MOFCOM Approved the Deal Later than U.S. and EU Counterparts	Cases in Which MOFCOM Approved the Deal Earlier than U.S. or EU Counterparts
InBev/AB (2008)	Pfizer/Wyeth (2009)
GM/Delphi* (2009)	Panasonic/Sanyo (2009)
Seagate/Samsung* (2011)	Novartis/Alcon (2010)
Google/Motorola Mobility* # (2012)	Western Digital/Hitachi (2012)
ARM/G&D/Gemalto (JV) (2012)	UTC/Goodrich (2012)
Glencore/Xstrata # (2013)	Thermo Fisher/Life Tech (2014)
Marubeni/Gavilon* # (2013)	
Baxter/Gambro (2013)	
Microsoft/Nokia* # (2014)	
Merck/AZ Electronic* (2014)	
Nokia/Alcatel-Lucent* # (2015)	
NXP/Freescale (2015)	
InBev AB/SAB Miller (2016)	
Abbott/St.Jude Medical (2016)	

Note: Cases within each category are sorted chronologically from earliest to the latest by their clearance dates by MOFCOM.
* indicates cases cleared in both the EU and the U.S. while enforced in China.
\# indicates cases where MOFCOM completed its review more than 2 months later than the U.S. and the EU.

It is interesting to note that in the seven transactions where neither the U.S. nor the EU imposed any remedies, MOFCOM's remedies were all behavioral remedies. These remedies included commitments on supply terms with Chinese customers (e.g., in GM/Delphi, Merck/AZ Electronics), long-term hold-separate commitments (e.g., in Seagate/Samsung and Marubeni/Gavilon), and SEP related commitments (e.g., in Google/Motorola, Microsoft/Nokia, and Nokia/Alcatel-Lucent). This indicates that MOFCOM favors behavioral remedies when it has a concern over certain aspects of the merger but has no reference point as to how to resolve the concern.

When MOFCOM decided to impose stricter (or broader) remedies than those required by either the U.S. or the EU, the extra remedies fell into a few distinct categories. In some cases, the additional remedies were structural and required a broader scope of divestiture, including divestment or reduction of shareholding in joint ventures (e.g., in Panasonic/Sanyo and Thermo Fisher/Life Tech). In other cases, MOFCOM required

Table 3. Cross-Jurisdiction Comparison of Remedies

Case	Merger Type	Overlapping Industry	Remedy Type China	Remedy Type U.S.	Remedy Type EU	Remedy Comparison: China vs. U.S. & EU
InBev/AB (2008)	Horizontal	Beverages	Behavioral	Structural	Cleared	Different
GM/Delphi (2009)	Vertical	Automobile	Behavioral	Cleared	Cleared	Stricter
Pfizer/Wyeth (2009)	Horizontal	Pharmaceutical	Structural	Structural	Structural	Less strict
Panasonic/Sanyo (2009)	Horizontal	Chemical	Hybrid	Structural	Structural	Stricter
Novartis/Alcon (2010)	Horizontal	Pharmaceutical	Behavioral	Structural	Structural	Different
Seagate/Samsung (2011)	Horizontal	Electronics	Behavioral	Cleared	Cleared	Stricter
Western Digital/Hitachi (2011)	Horizontal	Electronics	Hybrid	Structural	Structural	Stricter
Google/Motorola Mobility (2011)	Vertical	Consumer Technology	Behavioral	Cleared	Cleared	Stricter
UTC/Goodrich (2012)	Horizontal	Aviation	Structural	Behavioral and Structural	Structural	Less strict
ARM/G&D/Gemalto (JV) (2012)	Vertical	Electronics	Behavioral	–	Behavioral	Same
Glencore/Xstrata (2012)	Horizontal and Vertical	Mining	Hybrid	Cleared	Hybrid	Different
Marubeni/Gavilon (2012)	Horizontal	Agriculture	Behavioral	Cleared	Cleared	Stricter
Baxter/Gambro (2012)	Horizontal	Healthcare	Hybrid	–	Structural	Stricter
Thermo Fisher/Life Tech (2013)	Horizontal	Life Sciences	Hybrid	Structural	Structural	Stricter
Microsoft/Nokia (2013)	Vertical	Electronics	Behavioral	Cleared	Cleared	Stricter
Merck/AZ Electronic (2014)	Conglomerate	Electronics	Behavioral	Cleared	–	Stricter
Nokia/Alcatel-Lucent (2015)	Horizontal	Consumer Technology	Behavioral	Cleared	Cleared	Stricter
NXP/Freescale (2015)	Horizontal	Electronics	Structural	Structural	Structural	Same
InBev AB/SAB Miller (2016)	Horizontal	Beverages	Structural	Hybrid	Structural	Same
Abbott/St. Jude Medical (2016)	Horizontal	Healthcare	Structural	Structural	Structural	Less strict

Note: Cases are sorted chronologically from earliest to the latest by their clearance dates by MOFCOM.

additional behavioral remedies, such as long-term hold-separate commitments, OEM agreement terminations in China, and price commitments (e.g., in Western Digital/Hitachi, Baxter/Gambro, and Thermo Fisher/Life Tech).[9]

MOFCOM imposed substantially different remedies than its U.S. and EU counterparts in three transactions. In InBev/AB, MOFCOM imposed behavioral remedies, including requiring the combined entity to freeze its current ownership levels in certain Chinese breweries; and the DOJ requested a divestiture of its subsidiary Labatt USA along with a license to brew, market, promote, and sell Labatt brand beer for consumption in the U.S. In Novartis/Alcon, the FTC and the EC asked for divestitures, whereas MOFCOM requested that Novartis stop selling an eye care product and not re-launch or import the same type of product in China in the next five years. MOFCOM also required Novartis to terminate a sale/distribution agreement with a competitor within 12 months. In Glencore/Xstrata, the EC asked for a divestiture of Glencore's 7.8 percent shareholding in Nyrstar and a few behavioral remedies with regard to zinc metal, whereas MOFCOM requested a divestiture of Xstrata's Las Bambas copper mine in Peru to a group of Chinese companies and a few behavioral remedies, such as commitments on supply terms to Chinese customers.

Such differences may not be completely explained by different competition landscapes in different jurisdictions: MOFCOM did not publish market share information in InBev/AB, imposed remedies in Novartis/Alcon where the incremental increase in Novartis's market share was less than 1 percent, and requested a divestiture and behavioral remedies in Glencore/Xstrata when the products at issue had combined shares ranging from 6.8 percent to 17.9 percent with changes in market share as low as 0.2 percent.

Finally, the three cases where MOFCOM imposed less severe remedies all involved structural remedies. The scope of divestiture was narrower than in the U.S. and/or the EU, and in one case, UTC/Goodrich, MOFCOM did not impose any behavioral remedies while the DOJ did.

Some of the stricter/broader or different conditions imposed by MOFCOM included unconventional remedies. For example, in some cases (e.g., MediaTek/MStar and Thermo Fisher/Life Tech), the remedies contained commitment of price levels. This remedy appears to be similar to a planned economy approach, which holds that the government can and should regulate the market price. In some other cases, the price commitment took the form of non-discriminatory pricing. For example, in ARM/G&D/Gemalto (Joint Venture), the post-transaction firm was required to license technology to downstream customers on non-discriminatory terms, and not to use restrictions on input supply to disadvantage its competitors. Other unconventional remedies included long-term hold-separate orders, patent licensing commitments, and specific supply terms with Chinese customers, each of which is discussed below.

Hold-Separate Orders. Long-term hold-separate orders have perhaps been the most unique remedy imposed by MOFCOM. Unlike temporary hold-separate orders intended to preserve the competitiveness and marketability of the to-be-divested business, long-term hold-separate orders have been used by MOFCOM to tackle alleged horizontal concerns. Such orders were issued in MediaTek/MStar, Marubeni/Gavilon, and Seagate/Samsung, each of which was either not notifiable to or unconditionally cleared by the U.S. and the EU. MOFCOM also issued a long-term hold-separate order in Western Digital/Hitachi, where a global divestiture of 3.5 inch HDD business was required by all three jurisdictions.

The long-term hold-separate orders have been heavily criticized for their unintended consequences, including disrupting the companies' daily business and long-term growth without achieving procompetitive goals.[10] Although MOFCOM has publicly defended this controversial remedy, it has not publicly imposed a long-term hold-separate order since 2013, and it substantially released the hold-separate orders in Seagate/Samsung and Western Digital/Hitachi at the end of 2015.[11]

Patent Licensing Commitments. MOFCOM frequently imposed restrictions on licensing terms for patents "essential" to a standard (standard essential patents, or SEPs). MOFCOM first imposed SEP- and FRAND-related conditions in the Google/Motorola Mobility transaction approved in 2012. As a condition for clearance, MOFCOM required Google to commit to continuing to honor Motorola Mobility's FRAND commitments in existence at the time of its decision, without identifying a merger-specific theory of harm that would be corrected by the remedy. Both the DOJ and the EC unconditionally cleared the transaction months before MOFCOM issued its decision.

MOFCOM imposed similar conditions regarding SEPs and FRAND terms in the Nokia/Alcatel-Lucent and Microsoft/Nokia mergers. More than three months after the DOJ and the EC cleared Nokia/Alcatel-Lucent, MOFCOM cleared this transaction with conditions that allegedly addressed the "concentration in the market for communications related SEPs." Specifically, the conditions required that Nokia not seek an injunction against infringement unless with an unwilling licensee, and that Nokia inform Chinese licensees of any transfer of Nokia's SEPs so that the Chinese licensees' can take such transfer into consideration during their new negotiations with Nokia on the royalty rate of Nokia's SEP portfolio. Furthermore, Nokia could transfer its SEPs to other entities only if that entity agreed to abide by Nokia's FRAND commitments. Nokia also had to comply with various reporting obligations. The MOFCOM decision did not justify how all communications-related SEPs constituted one market, nor how these commitments addressed plausible antitrust concerns arising from a horizontal merger.

MOFCOM has imposed restrictions not only on licensing terms for SEPs but also on terms used to license non-SEPs. In Microsoft/Nokia, in addition to the commitments specific to SEPs, for certain non-SEPs Microsoft was required to (1) continue to offer non-exclusive licenses to smartphone manufacturers; (2) offer these licenses at rates and terms similar to those previously offered by Microsoft; (3) not transfer these patents for five years and only transfer these patents to a buyer that agrees to all prior licensing commitments made by Microsoft; and (4) only seek injunctions against infringement of these patents after a potential licensee fails to negotiate in good faith.

Overall, the frequent use of licensing behavioral commitments reflects that MOFCOM has taken a more proactive stance than its U.S. and EU counterparts on potential anticompetitive effects on patent licensing even if such effects are not merger-specific. This is especially true for commitments related to non-SEPs, since SEPs are presumably already bound by the FRAND obligations set at the standard-setting stage.

Specific Supply Terms with Chinese Customers. Another type of unique remedy that MOFCOM has often requested is specific supply terms with Chinese customers. Such remedies were required when MOFCOM identified "disadvantaged negotiation position of Chinese customers" as a potential harm of the merger.

As early as GM/Delphi in 2009, which was granted early termination by the FTC and unconditionally approved by the EC, MOFCOM required the merged entity to maintain non-discriminatory, timely, and reliable supply to Chinese customers on pre-transaction terms and market terms. A similar remedy was imposed in Uralkali/Silvinit and Glencore/Xstrata.

Remedies regarding supply terms with Chinese customers have become more detailed and specific over time. In MediaTek/MStar, a transaction not reviewed in the U.S. or the EU, the parties were required by MOFCOM to (1) maintain the same cycle and scope of price cuts in China as prior to the acquisition; (2) make sure that the quarterly price cut of LCD TV chips was not, on average, smaller than an undisclosed amount agreed to by the parties and MOFCOM and that the price for these products never increased; and (3) maintain that the prices of new products at product launch in China are not higher than the prices of the same products offered outside China. In Thermo Fisher/Life Tech, in addition to global divestiture of the cell culture and gene modulation businesses, the merged entity also had to commit to lowering catalog prices in China for two products by 1 percent per year while not reducing any other discounts offered to Chinese distributors.

Did MOFCOM Tend to Impose Behavioral Remedies Rather than Structural Remedies?

There have been 22 cases—a majority of cases enforced by MOFCOM so far—where MOFCOM imposed behavioral remedies.[12] Among them, there are only two cases where the U.S. or the EU also imposed behavioral remedies. As for the rest, the U.S. or the EU imposed structural remedies in six cases and neither the U.S. nor the EU imposed any condition in 14 cases.[13]

In addition, MOFCOM tended to impose behavioral remedies in cases where it alone had concerns, since the other two jurisdictions did not impose any conditions on the transaction. Among the 15 transactions where MOFCOM was the only agency to impose restrictive conditions, it imposed behavioral remedies in 14 of these,[14] even though about half of them were horizontal mergers.

However, there are also examples where MOFCOM imposed only structural remedies, while the EU or the U.S. antitrust agencies imposed behavioral remedies in addition to structural remedies. For example, in UTC/Goodrich, both MOFCOM and the EU imposed structural remedies, while the U.S. imposed structural plus behavioral remedies. Similarly, in InBev AB/SAB Miller, both MOFCOM and the EU imposed structural remedies, while the U.S. imposed both structural and behavioral remedies.

For Structural Remedies, What Characteristics Can Be Summarized from MOFCOM's Decisions?

Structural remedies are generally regarded as the most effective type of remedy, since they can durably address competition concerns without any need for medium-to-long term monitoring by regulators or their designated trustees. Nevertheless, as shown in Table 4, only 12 of the 28 conditional approvals issued by MOFCOM so far involved structural remedies: six involved pure structural remedies where-

Table 4. MOFCOM's Structural Remedies

	Merger Type	Remedy Type	Upfront Buyer/ Fix-it-First—China	Upfront Buyer/ Fix-it-First—U.S.	Upfront Buyer/ Fix-it-First—EU
Mitsubishi Rayon/Lucite (2009)	Horizontal & Vertical	Hybrid	N	N/A	N/A
Pfizer/Wyeth (2009)	Horizontal	Structural	N	Upfront buyer (Boehringer Ingelheim)	N
Panasonic/Sanyo (2009)	Horizontal	Hybrid	N	Upfront buyer	N
Alpha V/Savio (2011)	Horizontal	Structural	N	N/A	N/A
Western Digital/Hitachi (2012)	Horizontal	Hybrid	N	Upfront buyer (Toshiba)	Upfront buyer (Toshiba)
UTC/Goodrich (2012)	Horizontal	Structural	N	N	N
Glencore/Xstrata (2013)	Horizontal & Vertical	Hybrid	N	N/A	N
Baxter/Gambro (2013)	Horizontal	Hybrid	N	N/A	Upfront buyer (Nikkiso Co. Ltd.)
Thermo Fisher/Life Tech (2014)	Horizontal	Hybrid	N	Upfront buyer (GE Healthcare)	N
NXP/Freescale (2015)	Horizontal	Structural	Fix-it-First (Beijing Jianguang, a state-controlled Chinese investment company)	Upfront buyer (Beijing Jianguang)	Proposed as a fix-it-first remedy but ended up with an upfront buyer remedy (Beijing Jianguang)
InBev AB/SAB Miller (2016)	Horizontal	Structural	Fix-it-First (SAB Miller's JV partner Huarun)	Upfront buyer (Molson Coors, SAB Miller's U.S. JV partner)	Upfront buyer (Japanese brewer Asahi to purchase SAB Miller's business in France, Italy, the Netherlands, and the UK)
Abbott/ St. Jude Medical (2016)	Horizontal	Structural	Fix-it-First (Terumo)	Upfront buyer (Terumo)	N

as the other six involved hybrid remedies.

MOFCOM has only on three occasions (i.e., Abbott/St. Jude Medical, InBev AB/SAB Miller, and NXP/Freescale) requested that the agreement for the sale of the divested business be executed and approved before MOFCOM approved the main transaction. The other nine transactions where a structural remedy was imposed only involved post-closing divestures.

MOFCOM has indicated that its categorization of the structural remedy type is more aligned with the EU approach.[15] MOFCOM imposed a fix-it-first divestiture in its three most recent decisions and has so far not imposed an upfront-buyer remedy.

Table 5: MOFCOM's Three Types of Divestiture by Order of Event

Post-Closing Divestiture	Fix-it-First Divestiture	Upfront-Buyer Divestiture
MOFCOM Decision	Divestment Agreement Executed	MOFCOM Decision
Closing of Main Transaction	MOFCOM Decision	Divestment Agreement Executed
Divestment Agreement Executed	Closing of Main Transaction or Closing of Divestment	Closing of Main Transaction
Closing of Divestment	Closing of Divestment or Closing of Main Transaction	Closing of Divestment

Interestingly, in MOFCOM's first fix-it-first divestiture (NXP/Freescale), the buyer was the state-controlled Chinese investment company Beijing Jianguang. Although the divestiture plan was likely submitted to MOFCOM at an early stage, when the same remedy was offered to the FTC and the EC, it was ultimately approved by MOFCOM during Phase I of its review after the transaction was withdrawn and refiled. The EC approved the transaction in 2015 and only imposed an upfront buyer divestiture (as opposed to a fix-it-first divestiture as the parties proposed) due to the pending review by the U.S. Committee on Foreign Investment of Beijing Jianguang's purchase. The FTC approved the transaction subject to divestiture of NXP's radio frequency power amplifiers business to Beijing Jianguang.

In InBev AB/SAB Miller, the EC required SAB Miller's entire European business to be divested, and its business in France, Italy, the Netherlands, and the UK was sold to the Japanese brewer Asahi. Almost two months after the EC's decision, the DOJ approved the transaction on the condition that SAB Miller's entire U.S. business be sold to SAB Miller's U.S. joint venture partner Molson Coors (as well as a few behavioral remedies limiting InBev AB's distribution practices). Nine days after the U.S. decision, during the Phase III review (despite discussing the divestiture plan with MOFCOM before the case opened), MOFCOM also approved the transaction, subject to the condition that SAB Miller sell its 49 percent shareholding in Snow Beer (i.e., the vast majority of SAB Miller's Chinese business) to its Chinese joint venture partner Huarun.

In Abbott/St. Jude Medical, St. Jude Medical's global small vessel closure devices business was divested to Terumo, a Japanese company.[16] The EC cleared the transaction on November 23, 2016, and later approved Terumo as the buyer of the divestment business. The FTC approved the transaction and the divestment to Terumo on December 27, 2016. Three days later, MOFCOM approved both the transaction and the divestment to Terumo.

In all three of these transactions, MOFCOM's review process was completed not long after the U.S. and the EU. As acknowledged in statements issued by the FTC and the DOJ, MOFCOM had been in close contact and cooperation with its counterparts in the U.S. throughout its review process, apparently including the remedy design process.[17] This is encouraging for the business and antitrust communities, which have been concerned about the prolonged MOFCOM review process and have advocated for more international cooperation, including during the remedy design process.

It is, nevertheless, worth noting that in NXP/Freescale, the buyer for the global divested business was a Chinese company. Similarly, in InBev AB/SAB Miller, three different buyers were approved in three different jurisdictions and in China the buyer was a Chinese brewer. Although MOFCOM approved a Japanese buyer in Abbott/St. Jude Medical, it remains to be seen in the case of a non-Chinese buyer for a global divested business whether it is beneficial to encourage MOFCOM to approve a fix-it-first or up-front buyer divestiture. Doing so may slightly delay the approval time or closing time of the main transaction but may lead to quicker approval and closing of the divestiture. Parties may prefer this given that the FTC often requires a relatively short interval between the closing of the main transaction and of the divestiture. Moreover, MOFCOM's incentive not to lag behind other major jurisdictions in terms of approving the main transaction may encourage MOFCOM to directly assess the proposed single buyer in the U.S. and/or the EU instead of requesting three buyer candidates, as MOFCOM would otherwise do.

Until recently, MOFCOM did not engage in active cooperation with other agencies during the remedy design phase. The norm had been to obtain MOFCOM's approval to close the main transaction first and leave the potential buyer discussion with MOFCOM until after the closing of the main transaction. Among the nine transactions where only a post-closing divestiture was ordered by MOFCOM, five involved an up-front buyer in the U.S., the EU, or both.

In these five transactions, MOFCOM's conditional decision did not come significantly later than the decisions of the U.S. and the EU MOFCOM may have just decided to accept the up-front buyer for the divested global business that was approved by the antitrust agencies in the U.S. and the EU (but typically only after reviewing three buyer candidates). MOFCOM, however, did express frustration about not being involved in determining the buyer at the same time as other agencies and feeling pressured to concur.

Unlike in the U.S. and the EU, where the closing of the divesture transaction normally takes place after the closing of the main transaction, MOFCOM requested that the divestiture in NXP/Freescale take place before the closing of the main transaction and that the divesture in InBev AB/SAM Miller take place within 24 hours after the closing of the main transaction. In MOFCOM's most recent decision, Abbott/St. Jude Medical, MOFCOM allowed Abbott to close the divestiture 20 days after the closing of the main transaction.

Another interesting and noteworthy aspect of MOFCOM-designed structural remedies is the inclusion of a "crown jewel" provision in Glencore/Xstrata. The "crown jewel" provision requires the divestiture of an alternative package of assets to what the party was originally required to divest, and the alternative assets are typically to be divested by a trustee. In this case, MOFCOM ordered that Xstrata divest its Las Bambas copper mine in Peru, but, if Xstrata could not execute the divestiture agreement with a MOFCOM-approved buyer or close the divestiture transaction within the time limit that MOFCOM set, Xstrata would have had to divest through a divestiture trustee one of four projects (Tampakan, Frieda River, El Pachón, and Alumbrera) selected by MOFCOM.

What Can We Conclude So Far?

Based on a comprehensive review of the cases to date in which MOFCOM imposed restrictive conditions and a cross-jurisdictional comparison to the U.S. and EU decisions on the same cases, we conclude that there has been a general trend toward convergence. Controversial remedies such as hold-separates have not been used by MOFCOM in recent years, and the U.S. antitrust agencies have recently shown more interest in using behavioral remedies. At the same time, MOFCOM's merger reviews have some distinct characteristics that practitioners should be aware of, including its frequent use of behavioral remedies, even for horizontal mergers and especially in cases where the other jurisdictions are unlikely to impose any conditions; unconventional remedies such price restrictions and commitments on licensing terms; and a longer review time. ■

1 All statistics collected in this article reflect reviews MOFCOM completed up to December 31, 2016.

2 MOFCOM releases quarterly counts of unconditional approvals at http://fldj.mofcom.gov.cn/article/zcfb/, and publishes the individual enforcement decisions at: http://fldj.mofcom.gov.cn/article/ztxx/.

3 GE/Shenhua (Joint Venture), Henkel HK/Tiande (Joint Venture), Wal-Mart/Yihaodian, and Hunan Corun New Energy/Toyota (Joint Venture).

4 Among the 11 cases where neither the U.S. nor EU agencies took an enforcement action, we found evidence of unconditional clearance for seven cases from publicly available information. For four cases, we found no public information regarding clearance of enforcement from the U.S. and the EU, most likely because the parties did not have to file in these jurisdictions.

5 *See, e.g.*, U.S. Chamber of Commerce, Competing Interests in China's Competition Law Enforcement: China's Anti-Monopoly Law Application and the Role of Industrial Policy 50 (Sept. 8, 2014), https://www.uschamber.com/sites/default/files/aml_final_090814_final_locked.pdf; U.S.-China Business Council, Competition Policy and Enforcement in China 16 (Sept. 2014), https://www.uschina.org/sites/default/files/AML%202014%20Report%20FINAL_0.pdf.

6 This includes four China-specific deals and four global deals that appear to be not notifiable in the other two jurisdictions.

7 MOFCOM does not release specific information on review time on cases where it does not impose any conditions (except for cases under the simplified procedure), thus we can only compare cases where remedies were required for clearance.

8 In InBev AB/SAB Miller, apart from similar structural remedy across all three jurisdictions, additional behavioral remedies were also imposed in the U.S.

9 In Panasonic/Sanyo, MOFCOM requested the merged entity to divest Panasonic's HEV NiMH facility in Chigasaki, Japan, reduce Panasonic's shareholding in its joint venture PPEV, and eliminate some of Panasonic's rights in PPEV. In Thermo Fisher/Life Tech, on top of the divestiture ordered by the EU and U.S., the merged entity was ordered to divest a 51% stake in a Chinese joint venture and to provide price commitments on certain products. In Baxter/Gambro, the merged entity had to terminate an OEM agreement with Nirop in China for the production of hemodialyzers (where the combined share was only 22%), in addition to the global divestiture of continuous renal replacement therapy products. These conditions were in addition to the same divestiture of assets that was offered to the FTC and the EC.

10 *See, e.g.*, *WD and HGST: We Tried to Merge Our Two Drive Makers, MOFCOM Said NO, NO, NO*, Register, Dec. 10, 2014, https://www.theregister.co.uk/2014/12/10/wd_mofcom_and_hgst_drive_manufacture_merger/; *Recent Enforcement Decisions Involving Technology Mergers and Acquisitions at MOFCOM*, Competition Pol'y Int'l (Oct. 2014), at https://www.wsgr.com/publications/PDFSearch/sher-1014.pdf.

11 The hold-separate condition imposed on Seagate/Samsung's Hard Disk Drive Business was subject to review after one year, and it was substantially released after more than three years and ten months. Western Digital was allowed to apply for relief from the hold-separate order after two years. The condition was imposed for more than three years and seven months until MOFCOM substantially released it in October 2015.

12 In six of these cases MOFCOM also imposed structural remedies at the same time. See Table 3.

13 This includes both cleared and not notifiable transactions.

14 The only exception is Alpha V/Savio, where MOFCOM imposed structural remedies.

15 *See, e.g.*, MOFCOM's interpretation of the Provisional Rules on Divestiture, http://fldj.mofcom.gov.cn/article/j/201412/20141200835988.shtml. As shown in Table 5, MOFCOM's fix-it-first divestiture requires the divestment agreement to be executed before MOFCOM's approval of the main transaction, which is the same as the EU's fix-it-first divestiture and similar to U.S.'s upfront buyer divestiture. MOFCOM's upfront buyer divestiture requires divestment agreement executed before the closing of the main transaction but after MOFCOM's approval of the main transaction, which is the same as EU's upfront buyer divestiture.

16 The EU and the U.S. also required a divestiture to Terumo of Kalila Medical, Inc., a company acquired by Abbott in 2016 that has developed a transseptal introducer sheath sold under the Vado® trademark.

17 Press Release, U.S. Dep't of Justice, Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition (July 20, 2016), https://www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer; Press Release, Fed. Trade Comm'n, FTC Puts Conditions on Abbott Laboratories' Proposed $25 billion Acquisition of Rival Medical Device Maker St. Jude Medical, Inc. (Dec. 27, 2016), https://www.ftc.gov/news-events/press-releases/2016/12/ftc-puts-conditions-abbott-laboratories-proposed-25-billion.

Recent Developments in the European Commission's Anti-Cartel Enforcement

BY MARIA JASPERS AND GERALD MIERSCH

THE FIGHT AGAINST CARTELS HAS been a priority for the European Commission's antitrust enforcement throughout the last two decades. Last year marked the 20th anniversary of the EU leniency system, the 10th anniversary of the current Fining Guidelines, and a record year of cartel fines, which exceeded €3.7 billion. The 2016 enforcement agenda of the Commission also reflected its positive experience with the cartel settlement procedure, which is now a firmly established case-resolution tool at the EU level. All decisions adopted by the Commission in 2016 were either settlements or decisions resulting from investigations under the standard procedure against parties that had opted out of earlier settlement discussions (so-called Staggered Hybrid Settlement cases). Nevertheless, this outcome should not be perceived as an indication of any reluctance on the side of the Commission to pursue cases under the standard procedure, as is clear from its enforcement record in earlier years.

Public enforcement is occurring in a changing landscape in which private damages claims before European national courts are becoming a reality. Proposals are also underway to further strengthen the role of the national competition authorities in the enforcement of the EU antitrust rules.

This article examines certain recent developments and trends in the decisions adopted by the Commission and the case law of the European court, focusing on areas of particular importance for practitioners, including leniency and the EU cartel settlement procedure.

The Commission itself has the power to adopt cease and desist decisions and impose (administrative) fines on companies that have participated in a cartel. The legislative framework does not provide for criminal sanctions or sanctions on individuals. Parties can bring an action against the Commission decision to the Court of Justice of the European Union (the EU Court), which is composed of the General Court (GC) and the appeal body, the Court of Justice (CJEU).[1] The GC will do a full assessment of the facts and the law and has unlimited jurisdiction on issues relating to the fine; meaning that it can cancel, reduce or increase the fine imposed by the Commission, even if there is no mistake in the fining methodology.[2] In the ten years following the adoption of the current Fining Guidelines, the EU Court has examined practically all aspects of the fining methodology and largely endorsed the Commission's fining policy. The vast body of jurisprudence also demonstrates that the GC does not hesitate to use its unlimited jurisdiction to cancel, reduce or increase the fine.

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Cartel Conduct

Article 101 of the Treaty on the Functioning of the European Union (TFEU) does not only prohibit agreements, but also concerted practices that have the object or effect of restricting competition.[3] This includes any form of coordination by which the parties replace the risks of competition with practical cooperation. As the parties do not have to agree on the anticompetitive outcome, exchanges of information can raise concerns if they prevent the parties from determining their market conduct independently. One of the most debated issues in EU antitrust enforcement in recent years has been how to draw the line between legal and illegal information exchanges.[4]

In the context of anti-cartel enforcement, the starting point is straightforward: information exchanges amongst competitors with the object of fixing prices or sharing markets amount to cartel behavior.[5] This was the situation in the *Bananas* case,[6] where the parties, before setting their quotation prices, disclosed to each other the prices they intended to quote and discussed price trends. After having set the quotation prices, the parties also exchanged these prices, which allowed them to monitor their individual pricing decisions.

The CJEU agreed with the Commission that the parties' communications before setting the quotation prices reduced uncertainty as to the future conduct of their competitors and had the objective of creating competitive conditions that do not correspond to the normal conditions on the market.[7] Before coming to this conclusion, the CJEU confirmed two principle findings: First, if a company takes part in the information exchange and remains active on the market, it can be presumed that it takes the information obtained into account when it determines its own conduct on the market.[8] Second, the concerted practice can have an anticompetitive object even if it has no direct connection to consumer prices. The reason is that Article 101 of the TFEU not only protects the interests of individual competitors or consumers, but also the structure of the market and, therefore, competition as such.[9]

The protection of competition was also an important consideration when the CJEU assessed the role of a cartel facilitator that was not active in the cartelized market. In the *Heat Stabilisers* case,[10] the consultancy firm AC Treuhand played an essential role in the cartel by organizing a number of meetings in which it actively participated, collecting and providing sales data to the producers, offering to act as a moderator in the event of tensions between those producers, and encouraging them to find compromises.[11] The CJEU confirmed the Commission's decision to hold AC Treuhand liable as cartel facilitator under Article 101 of the TFEU and found that this provision refers to all agreements and concerted practices that distort competition, irrespective of the markets on which the parties operate.[12]

Anticompetitive behavior is often composed of a number of individual acts, such as specific meetings and contacts occurring over an extended time period. Each of these acts can, on their own, be an infringement of Article 101 of the TFEU. The series of acts can also be considered as a whole and combined in a single and continuous infringement if they form part of an "overall plan."[13] The finding of a single and continuous infringement has an impact on a number of elements that are relevant for the investigation of a case, such as the leniency ranking (which is determined per infringement), the limitation periods (which start running when the entire infringement is terminated), and the calculation of the 10 percent-legal fining limit (which applies per infringement).

A company can be held liable for the whole infringement, even if it did not directly participate in all aspects of the cartel, as long as it "was aware of the offending conduct planned or put into effect by other undertakings in pursuit of the same objectives, or could reasonably have foreseen it and was prepared to take the risk."[14] Companies that do not even produce some of the products covered by the single and continuous infringement can, therefore, nevertheless also be held liable for those aspects of the infringement if the awareness condition is met.[15] A lack of awareness of certain elements of a cartel does not alter the finding of a single and continuous infringement as such, but might prevent the Commission from holding that party liable for all aspects of the infringement.[16]

The increased level of private enforcement in Europe, including the possibility of claiming damages from any of the liable cartelists, has put the single and continuous infringement concept (and its application in individual cases) in the spotlight. The EU Court usually agrees with the Commission's finding of a single and continuous infringement,[17] but carefully scrutinizes the parties' individual liability, including both the level of involvement and awareness of notably fringe players in all aspects of a wider infringement.

In the *Car Glass* case,[18] the GC found, following a detailed analysis of all pieces of evidence, that the Commission did not err in finding that a fringe player had bilateral contacts of an anticompetitive nature with two other parties. However, although there were indications within the evidence that the fringe player was aware of the collusion between the three biggest car glass producers (members of "*the club*"), the GC found that this was not sufficient to prove awareness of the overall objective and essential characteristics of the cartel. The GC therefore concluded that the fringe player could not be held liable for having participated in the single and continuous infringement.[19]

Leniency

Inspired by the success of the U.S. Department of Justice's Corporate Leniency Policy of 1993 as well as its own earlier case practice, the European Commission adopted its first leniency program in 1996. Twenty years and two revisions later,[20] the leniency program continues to be the Commission's key investigative tool to detect and sanction secret cartels. Several of the more recent cases that were triggered by immunity applications concern collusion in the automotive or the financial services sectors. This demonstrates that a cartel investigation in one sector, whether initiated on the basis of an immunity application or market information, often results in a wave of further leniency applications in the same sector.[21]

Recent developments and debates in the leniency area have focused on the protection of leniency information in the wake of increased private damages litigation and the interplay between the Commission's leniency programs and the programs operated by European national competition authorities for cases where the authorities have shared jurisdiction.

The Commission's Leniency Program. Immunity can be granted to the first applicant that discloses its participation in a secret cartel and provides evidence that enables the Commission to carry out a targeted inspection or to find an infringement. Subsequent applicants can receive a reduction of any fine if they submit evidence that constitutes significant added value compared to the evidence in the Commission's possession at the time of the application. The Court of Justice has confirmed that a reduction of the fine is justified only where an applicant voluntarily provides information to the Commission without being asked to do so.[22] The General Court has also confirmed that leniency can only be granted to the corporate group[23] as it exists at the time of the application and may not extend to previous parents, although such parents may be held liable for the cooperating ex-subsidiary's cartel conduct during the period for which they exercised a decisive influence over that subsidiary.[24]

The actual reduction of the fine depends on the timing of the cooperation and the evidentiary value of it. The Commis-

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sion operates a band-based system that determines the minimum and maximum reduction that an applicant can receive, depending on its ranking in the leniency race.[25] The Commission's practice shows that it generally rewards genuine cooperation with significant reductions within the applicable bands. Low or no fine reductions are only granted in those exceptional cases where applications are made at a late stage of the procedure, when an applicant chooses to downplay the evidentiary value of its own statements or does not genuinely cooperate with the authority.[26]

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The obligation of all applicants genuinely to cooperate with the Commission until the end of the Commission procedure is an important feature of the success and efficiency of the leniency program. The Court of Justice has also confirmed that the Commission is entitled to withdraw conditional immunity in a situation in which it becomes evident that the applicant had disclosed its immunity application to other cartel participants without informing the Commission.[28]

The leniency program requires applicants to provide a corporate statement detailing the applicant's knowledge of the cartel and its own role in it. Unlike the U.S. Corporate Leniency Program, these statements are used as evidence in the Commission's proceedings and the statements must, therefore, be made accessible to all parties during the administrative proceedings. The Commission has a long tradition of limiting access to corporate statements to any other company as well as the use of such statements[29] in private litigation. It has on numerous occasions intervened in non-EU courts when there was a risk that leniency applicants would be more exposed to damage actions than non-cooperating parties.[30]

With the imminent implementation of the EU Directive on Antitrust Damage Actions, there is now an explicit reference to leniency in EU legislation and a solid legal basis to ensure absolute and indefinite protection of corporate statements throughout the EU.[31] In 2015, similar protections were integrated into EU procedural law through the revision of Commission legislation and notices (that are binding on the Commission).[32] Within the EU there is, therefore, no longer a need for national judges to balance the interest of disclosure in individual cases against the effectiveness of the leniency program, which was, *inter alia*, the scenario in the *Pfleiderer* judgment.[33] However, special protection for written or oral corporate statements does not extend to any pre-existing information that leniency applicants are required to submit as part of their cooperation.[34] This reflects the position that the Commission has constantly defended in discovery matters in civil proceedings within and outside the EU. Given such different levels of protection, the content of corporate statements should be limited to the information that has to be recorded in such statements and not used to shield other evidence from discovery.

The Interplay Between European Leniency Programs. Twenty-seven out of the 28 EU Member States now operate their own leniency programs, which are applied when their national competition authorities act under national or EU law. Most of them are modeled on the ECN Model Leniency program, agreed within the European Competition Network in 2006 as a soft law measure to ensure more convergence between the individual programs, both on substance and procedure.[35] The ECN Model Leniency program also introduced a summary application system meant to alleviate the burden associated with (precautionary) parallel filings at the national level. The summary application system works as an indefinite marker. By making a short form summary application to a national competition authority simultaneously with a full application with the Commission, an applicant can protect its place in the leniency race if (parts of) a case are eventually allocated to that national authority rather than pursued by the Commission. This ensures that an applicant can obtain the same protection at the national level as it would have received had it submitted a full application and cooperated with all authorities that could eventually pursue the case.

The summary application system, and in particular the relationship between a summary application and the complete leniency application filed with the Commission was reviewed by the Court of Justice in the *DHL* case, following a preliminary request from an Italian national court. In this particular case, there was a discrepancy in the scope, rather than simply the level of details, between the summary application filed in Italy and the immunity application filed with the Commission. The immunity application covered freight forwarding services in maritime, air, and road transports while the Italian summary application did not explicitly refer to road transport. Before the applicant had aligned the scope of the latter to include road freight forwarding services, another company filed a summary application for those services. Moreover, the Commission decided to only pursue parts of the reported conduct (not including road transport), which meant that the Italian authority could adopt a decision concerning road freight forwarding services to and from Italy, based on the summary application received from the second company. As a result, DHL did not receive immunity in Italy, despite the fact that it had been the first to blow the whistle at the Commission level.[36]

The Court of Justice found in the *DHL* case that there are no legal links between the summary application and the full immunity application and that an authority is not required to assess and interpret the summary application in light of the full immunity application. That ruling follows the logic of the ECN Model Leniency Program, which underlines the independent nature of each program and puts the burden on the applicant to ensure that the scope of its summary application is always identical to that of the full application.

The interplay between the European leniency programs, as well as the interaction between individual sanctions and corporate leniency programs, are two of the areas that the Commission has identified in its ongoing policy reflections aimed at achieving more convergence on procedures and a strengthened role of the national competition authorities within the ECN. Following a public consultation ending in February 2016, Commissioner Margrete Vestager revealed that the Commission is working on a legislative proposal that it expects to adopt in 2017.[37]

The EU Cartel Settlement Procedure

The Commission's cartel settlement procedure was introduced in 2008 as a case-resolution tool that allows the Commission to more expeditiously handle certain cartel cases so that resources can be used to prosecute and sanction other cartel cases. Under the settlement procedure, the parties acknowledge their participation in and liability for the cartel. The parties also waive certain procedural rights in exchange for a 10 percent reduction of the fine and a more streamlined procedure (including a less detailed decision).[38]

The Commission has, since its first case in 2010, adopted 22 decisions under the cartel settlement procedure, covering more than 90 corporate groups and over 220 individual companies in a variety of different sectors. This means that the settlement procedure represents slightly more than half of the cartel decisions adopted between 2010 and 2016 (22 out of 41) and more than half of the fines imposed in that same period. On average, the procedure has reduced the duration of proceedings by at least two years compared to a standard case.

The parties do not have a right to settle a case. The General Court has, in some of the *Freight Forwarding Services* judgments, recently confirmed the Commission's discretion to start settlement discussions only in those cases that it deems suitable, without having to solicit the parties' views and interest in a settlement.[39]

In contrast to the U.S. plea bargaining system, the EU cartel settlement procedure is designed to conclude a settlement with all settling parties at the same time. Discussions are, therefore, held in parallel with all parties that have expressed an interest in settlement and the Commission adopts one (set of) decisions against all parties at the same time. The Commission can, however, choose to either revert to the normal standard procedure for all parties or to pursue the case as a "hybrid" case if a party subsequently decides to forgo a settlement.[40] In the latter scenario, the Commission adopts a decision under the settlement procedure against the settling parties and concludes the investigation against the non-settling party under the standard procedure. The Commission can either adopt the two decisions in parallel (de facto putting the settlement decision on hold until the decision under the standard procedure is ready) or adopt the settlement decision while the standard procedure is still pending against the party that opted-out (Staggered Hybrid Settlement). The choice will be made on a case-by-case basis taking into account its specific circumstances.

If a case reverts to the normal procedure for all or some of the parties, the Commission often has to continue its investigation in light of arguments advanced by the parties that opted out. This can result in a delay in the procedure greater than that already inherent in the length of the standard procedure. The impact that such delays might have on the settling parties' ability to turn the page and ensure a speedy resolution within a streamlined procedure is one of the reasons why the Commission has opted for a Staggered Hybrid Settlement in five out of the six hybrid cases pursued so far.[41] The Euro interest rate derivative case is the only hybrid case involving more than one non-settling party.[42]

The EU court has in the Timab judgment endorsed the lawfulness of the settlement procedure and clarified the relationship between the two procedures in a (parallel) hybrid scenario.[43] Timab was the first party to opt out of a settlement (Animal Feed phosphate cartel), and the case is a particularly striking example of how new information received after settlement discussions have begun to change the Commission's findings and fine level for a non-settling party. In this case, the result was a considerably higher fine compared to the fine range disclosed to Timab during the settlement discussions.[44]

Both the General Court and the Court of Justice upheld the Commission's decision and found that there are no legitimate expectations that the scope of the case or the contemplated fine would remain the same as discussed and disclosed during the settlement discussions. Equal treatment principles, however, apply to all addressees of the same cartel case. This notably means that the Commission has to ensure that it uses the same methodology for the fine calculation, unless there are objective justifications, against the parties that are pursued under the settlement and the normal procedure. The December 7, 2016 decision adopted against the three financial institutions that opted out of the settlement in the *Euro Interest Rates Derivatives* benchmark manipulation case is the most recent example of how a hybrid case can evolve during the subsequent standard procedure.

The Court has not yet had the opportunity to review Staggered Hybrid Settlement cases. Several parties have, however, appealed to the EU Court, arguing in particular that the Staggered Hybrid Settlement procedure violates the effective exercise of their rights of defense as well as the presumption of innocence because of the prior settlement decision concerning the same infringement. This has not prevented the Commission from continuing to adopt Staggered Hybrid Settlement decisions, while making an individual assessment of the merits of its case against each specific party based on the relevant evidence.

Unlike in some other jurisdictions, parties that agree to settle a case under the EU cartel settlement procedure do not waive their rights to appeal that decision. Such appeals are nevertheless rare, which is not surprising in view of the acknowledgments and acceptance that the parties make within the procedure. There have only been two appeals by settling parties, and both concerned the results of the fining methodology on the claimant's fine compared to the fine imposed on other parties.[45] The first appeal was withdrawn after the party realized at the appeal stage that it had provided incorrect value of sales figures to the Commission during the settlement procedure (which had resulted in a significantly inflated fine compared to those of the other parties) and the Commission, after the party admitted its mistake to both the Commission and the General Court, agreed to readopt the decision using the same calculation methodology but the corrected figures.[46] On December 13, 2016, the General Court annulled the fines imposed on Printeos in the Envelopes case on grounds that were unrelated to the settlement procedure.[47]

The settlement decision adopted in July 2016 against five European truck manufacturers is undoubtedly the cartel case that has received the most attention in the legal and business community.[48] Besides imposing a record fine of €2.9 billion, including the highest individual cartel fine ever imposed on one company (€1 billion imposed on Daimler), it was the first time that the Commission decided to settle a case after having issued a detailed charge sheet (Statement of Objections or SO) in the normal procedure. The case is still ongoing, as one company decided at a late stage not to settle the case. Consequently, details concerning how the procedure was conducted or the particular circumstances that caused the Commission to open the settlement route at such a late stage may not be disclosed at this time. The case does show that settlements are not per se excluded in such situations if the Commission thinks that they could result in sufficient efficiencies, despite the fact that a detailed SO had already been prepared. That it is an exceptional scenario is already apparent from the fact that the Commission has adopted 21 pre-SO settlement decisions and only one post-SO, although the legal framework has been the same since 2008.

Contrary to the practice in some other jurisdictions, the cartel settlement system does not enable variations in the level of the settlement reward depending on whether a settlement submission is introduced at an early or late stage of the procedure. Although it is difficult to predict the type of situations where the Commission might be willing to explore a settlement in a post-SO scenario, it is clear that the Commission has no interest to incentivize a system where parties would only consider settlement after having received a detailed SO in the normal procedure.

Conclusion

The Commission has maintained a robust and deterrent public enforcement response despite a changing landscape. The record fines imposed during 2016 clearly show that the Commission is both willing and able to impose severe and deterrent sanctions in its fight against cartels. Article 101 TFEU enables the Commission to pursue less traditional forms of cartel collusion and the power to sanction cartel facilitators sends an important deterrent message. It is, nevertheless, clear that the proliferation of private damage claims in Europe has had an impact on the public enforcement. This is mainly visible in the diligence by which the Commission now defines and the court scrutinizes the (liability for a) single and continuous infringement as well as in the increased number of requests to redact data from the published versions of Commission decisions.[49] To date, private damage claims are nearly always follow-on claims, based on an earlier finding of an infringement by the Commission or national competition authorities. The Commission has endeavoured to create a framework which supports private damage proceedings but also ensures that leniency applicants or settling parties are not worse off in such proceedings than non-cooperating cartelists. ■

1 All judgments referred to in this article are available on the website of the EU Court, www.curia.europa.eu, under the identified case number. Judgments starting with a "T" are from the GC and judgments starting with a "C" are from the CJEU.

2 *See* Article 31, Council Regulation (EC) No. 1/2003, 2003 O.J. (L 1) 1–25 (on the implementation of the rules on competition laid down in Article 81 and 82 of the Treaty) [hereinafter Regulation 1/2003]. The CJEU has in a number of rulings confirmed that the administrative decision-making system complies with the requirements of Article 6 of the European Convention for Human Rights (ECHR) protecting the right to a fair trial and that the Commission's fining powers do not breach the principle of legality of penalties as laid down in Article 7 ECHR given that the amount of the fines and the method of calculating them are sufficiently foreseeable for a company. *See* C-501/11, Schindler Holding Ltd. v Comm'n, ECLI:EU:C:2013:522 (July 18, 2013), ¶ 58.

3 Consolidated version of the Treaty on the Functioning of the European Union, 2008 O.J. (C 115) 47 [hereinafter TFEU]. Article 101 TFEU is otherwise roughly equivalent to Section 1 of the Sherman Act in the United States.

[4] In July 2016, the Commission closed its case against 14 container liner companies that were suspected of having coordinated their price increases by signaling their intended general rate increases through press releases and press articles. The case was not a secret cartel and the companies offered commitments that were sufficient to remove the competition concerns. Press Release, Eur. Comm'n, Antitrust: Commission Accepts Commitments by Container Liner Shipping Companies on Price Transparency (July 7, 2016) (IP/16/2446).

[5] *See* point 59 of the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements, 2011 O.J. (C11) 1 [hereinafter Horizontal Guidelines].

[6] Case COMP/39.188—Bananas, Comm'n Decision, 2009 O.J. (C 189) 12. The complete non-confidential versions of all Commission decisions are available at http://ec.europa.eu/competition/cartels/cases/cases.html.

[7] C-286/13, Dole Food Co. v. Comm'n, ECLI:EU:C:2015:184 (Mar. 19, 2015), ¶¶ 119–135.

[8] *Id.* ¶ 127; *see also* C-8/08, T-Mobile Netherlands, 2009 E.C.R. I-04529, ¶ 51.

[9] Dole Food Co. v. Comm'n, *supra* note 7, ¶¶ 123–125; T-Mobile Netherlands, *supra* note 8, ¶¶ 36–39.

[10] Case COMP/38.589—Heat Stabilisers, Comm'n Decision, 2010 O.J. (C 307) 9.

[11] C194/14, AC Treuhand v. Comm'n, ECLI:EU:C:2015:717 (Oct. 22, 2015), ¶ 37. AC Treuhand received remuneration from the other parties for these services.

[12] *Id.* ¶¶ 33–36.

[13] *See, e.g.*, Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P, Aalborg Portland et al., 2004 E.C.R. I-00123, ¶ 258.

[14] C-441/11P, Comm'n v. Verhuizingen Coppens, ECLI:EU:C:2012:778 (Dec. 6, 2012), ¶ 41.

[15] *See, e.g.*, T-378/10, Masco Corp. v. Comm'n, ECLI:EU:T:2013:469 (Sept. 16, 2012), ¶¶ 22, 70; Joined Cases T-379/10 and T-381/10, Keramag Keramische Werke v. Comm'n, ECLI:EU:T:2013:457 (Sept. 16, 2013), ¶ 73.

[16] C-293/13, Fresh Del Monte Produce v. Comm'n, ECLI:EU:C:2015:416 (June 24, 2015), ¶ 160.

[17] *See, e.g.*, the judgments of the GC in the Pre-stressing steel case upholding entirely the Commission's finding that the cartel involving 17 undertakings and lasting for more than 18 years constituted a single and continuous infringement, e.g., T-393/10, Westfälische Drahtindustrie v. Comm'n, ECLI:EU:T:2015:515 (July 15, 2015), ¶¶ 150–202.

[18] Case COMP/39.125—Car Glass, Comm'n Decision, 2009 O.J. (C 173) 13.

[19] T-68/09, Soliver NV v. Comm'n, ECLI:EU:T:2014:867 (Oct. 10, 2014), ¶ 114. Since the decision had not qualified the anticompetitive bilateral contacts as an infringement (rather than a part of a wider infringement), the GC annulled the decision as far as Soliver was concerned.

[20] The current program was introduced in 2006 (Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2006 O.J. (C 298) 17 [hereinafter Leniency Notice] and follows an earlier revision in 2002 (Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, 2002 O.J. (C 45) 3). In 2015, the Commission for the first time introduced the key pillars of its leniency policy into a legislative act (Article 4(a) of Commission Regulation (EC) 773/2004, as amended by Commission Regulation (EU) 2015/1348, 2015 O.J. (L 208) 3 [hereinafter Regulation 773/2004].

[21] The Commission has so far adopted five cartel decisions concerning the automotive sector (covering five cases and totaling nine different cartels) and six relating to the financial services sector (covering four cases and totaling ten different cartels).

[22] See, notably, Joined Cases C-293/13 & C-294/13, Fresh Del Monte Produce v. Comm'n & Comm'n v. Fresh Del Monte Produce, ECLI:EU:C:2015:416 (June 24, 2015), ¶¶ 167–189.

[23] The relevant corporate group is, under EU law, called "undertaking," which refers to the economic entity composed of the parent and the subsidiaries over which it exercises decisive influence.

[24] T-406/10, Emesa-Trefileria v. Comm'n, ECLI:EU:T:2015:499 (July 15, 2015), ¶¶ 152–171.

[25] The second applicant can receive a reduction between 30–50%, the third between 20–30%, and subsequent applicants up to 20% (Leniency Notice point 26).

[26] The Commission has granted leniency reductions (not including immunity) to almost 80 applicants under the current leniency notice and have only rejected five such applications.

[27] See, especially, T-154/09, MRI v. Comm'n, ECLI:EU:T:2013:260 (May 17, 2013), ¶¶ 212–214, 355; T-408/10, Roca Sanitario v. Comm 'n, ECLI:EU:T:2013:440 (Sept. 16, 2013), ¶¶ 190–200; T-406/09, Donau Chemie v. Comm'n, ECLI:EU:T:2014:254 (May 14, 2014), ¶¶ 225–231; and T-391/09 Evonik Degussa v. Comm'n, ECLI:EU:T:2014:22 (Jan 23, 2014), ¶¶ 209–211.

[28] C-578/11 P, Deltafina v. Comm'n, ECLI:EU:C:2014:1742 (June 12, 2014), ¶¶ 46, 53–54.

[29] Access to such corporate statements is granted only to the parties to the Commission's proceedings for the purposes of their rights of defense and only at the Commission's premises. The parties are allowed to listen to the oral statement or read the transcript but cannot make a mechanical copy of the statements. *See* Articles 15 1(b) and 16(a) of Commission Regulation 773/2004 and point 33 of the Leniency Notice. Article 16(a) of Regulation 773/2004 regulates the use of information taken from such statements in review proceedings before the EU courts or before national courts.

[30] This includes numerous amicus briefs filed with U.S. courts. *See, e.g.*, Air Cargo Shipping Services Antitrust Litig., M.D.L. No. 1775 (E.D.N.Y.), and TFT-LCD (Flat Panel) Antitrust Litig., No. M: 07-1827 (N.D. Cal. 2011), and observations to national courts pursuant to Article 15(3) of Council Regulation 1/2003 (e.g., to the UK High Court of Justice in the *National Grid Electricity Transmission Plc v. ABB Ltd.*, Claim No. HC08C03243; http://ec.europa.eu/competition/court/amicus_curiae_2011_national_grid_en.pdf.

[31] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union, 2014 O.J. (L 349). The directive foresees that the rules are implemented in national law by December 27, 2016. Some Member States are, however, experiencing delays.

[32] See, notably, Article 4(a) and 16 (a) of Regulation 773/2004 and corresponding changes in the Leniency Notice, the Settlement Notice, the Commission Notice on rules for access to the Commission file, and the Notice on cooperation between the Commission and national courts. All adopted amendments as well as the consolidated versions of the legislative acts and notices can be found at http://ec.europa.eu/competition/antitrust/actions damages/evidence_en.html.

[33] C-360/09, Pfleiderer AG v. Bundeskartellamt, 2011 E.C.R. I-05161, ¶ 31. In this case, the Court of Justice held that (the current state of) EU law did not per se prevent plaintiffs from getting access to corporate statements when seeking damages before national courts. It was, therefore, the responsibility of the national court to balance the interests in each case.

[34] *See* Art. 4(a)(3) of Regulation 773/2004.

[35] The European Competition Network (ECN) is the cooperation between the Commission and the national competition authorities that have been empowered to apply the EU competition rules in parallel to the Commission. The ECN Model Leniency Program can be found at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf. It is not legally binding, but national competition authorities have committed to use their best efforts to align their respective programs based on the principles set out in that model.

[36] C-428/14, DHL Express (Italy), ECLI:EU:C:2016:27 (Jan. 20, 2016), ¶¶ 24, 67.

[37] The results of the public consultation and all underlying documents are available at http://ec.europa.eu/competition/ecn/index_en.html.

[38] Commission Notice on the Conduct of Settlement Procedures in View of the Adoption of Decisions Pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in Cartel Cases (Settlement Notice), http://eur-

lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008XC0702(01)&from=EN).

[39] *See* T-267/12, Deutsche Bahn v. Comm'n, ECLI:EU:T:2016:110 (Feb. 29, 2016), ¶¶ 416–443. This also follows from Article 10(a) of Regulation 773/2004 and points 5–7 of the Settlement Notice.

[40] There has been only one case to date where the Commission decided to revert to the standard procedure for all parties after having found that the settlement discussions did not progress with the expected speed and efficiency. Press Release, Eur. Comm'n, Antitrust: Commission Sends Statement of Objections to Suspected Participants in Smart Card Chips Cartel (Apr. 22, 2013).

[41] Animal Feed Phosphates (AT.38866), decisions adopted on July 20, 2010; Yen Libor (AT.39861), decisions adopted on Dec. 4, 2013 and Feb. 4, 2015; Euro Interest Rate Derivatives (AT.39914), decisions adopted on Dec. 4, 2013 and Dec. 7, 2016; Steel Abrasives (AT. 39792), decisions adopted on Apr. 2, 2014 and May 25, 2016, Canned Mushrooms (AT.39965), decisions adopted on June 26, 2014 and 6 Apr. 6, 2016, and Trucks (AT.39825), settlement decision adopted July 19, 2016. Further information on these cases can be found on the Commission website, http://ec.europa.eu/competition/cartels/cases/cases.html.

[42] On December 7, 2016, the Commission adopted its second decision in the Euro Interest Rate Derivatives case (AT.39914) against three parties that had opted-out of the settlement reached in December 2013.

[43] T-456/10, Timab Indus. v. Comm'n, ECLI:EU:T:2015:296 (May 20, 2015); C-411/15 P, Timab Indus. v. Comm'n, ECLI:EU:C:2017:11 (Jan. 12, 2017).

[44] After the settlement discussions, Timab provided clarifications on its earlier leniency statements that significantly reduced the evidentiary value of those statements. As a result, the Commission reduced the duration of Timab's involvement and reassessed the value attributed to the self-incriminating information that had been given for the retained period. The combination of the adjustments under the leniency notice and the changed parameters in the fining calculations resulted in a considerably higher fine (€60 million) than the one disclosed during the settlement discussions €41 to 44 million), minus the 10% settlement discount. The General Court reviewed the calculations in detail and fully upheld the Commission's decision.

[45] During the settlement discussions, the Commission discloses the fining methodology and the resulting fine (in the form of a range) that it intends to impose on that party. In its settlement submission, the party indicates the maximum amount of the fine that it accepts in the framework of the settlement procedure. The Commission does not, however, disclose the fine that it intends to impose on the other parties in that case.

[46] *See* T-98/14, Société Générale v. Comm'n, ECLI:EU:T:2016:131 (Mar. 2, 2016) Société Générale had provided the value of sales figures to the Commission in reply to a detailed Commission request and the figures had (at the Commission's insistence) been certified by an external auditor. It is, therefore, clear that the Commission could not have detected the error during the administrative procedure.

[47] T-95/15, Printeos v. Comm'n, ECLI:EU:T:2016:722 (Dec. 13, 2016). The General Court found that the recitals dealing with one element of the fine calculations were not sufficiently reasoned.

[48] Press Release, Eur. Comm'n, Antitrust: Commission Fines Truck Producers €2.93 Billion for Participating in a Cartel (July 19, 2016) (IP/16/2582).

[49] This development is slowing down the speed with which the Commission is able to publish a full (non-confidential) version of its decisions, and the Commission's reluctance to accept certain claims is now often challenged in court.

The Era of "Big Data" and EU/U.S. Divergence for Refusals to Deal

BY PAUL LUGARD AND LEE ROACH

As the Federal Trade Commission recently observed, "We are in the era of big data."[1] Thanks to the proliferation of smartphones, computers, and Internet connectivity, "the amount of consumer data flowing throughout the economy continues to increase rapidly."[2] What is known as "big data" could be described as "the growing technological ability to capture, aggregate, and process an ever-greater volume, velocity, and variety of data."[3] This data involves "large, diverse, complex, longitudinal, and/or distributed datasets generated from instruments, sensors, Internet transactions, email, video, click streams [and other sources]."[4]

Undoubtedly, big data may have big economic value. "[I]t can guide the development of new products and services, predict the preferences of individuals, help tailor services and opportunities, and guide individualized marketing."[5] Not surprisingly, the big data concept as a value-laden commodity has piqued the interest of antitrust authorities in both Europe and the United States. European authorities have publicly contemplated the notion that big data ought to be subject to EU abuse of dominance law. On the other hand, U.S. authorities have resisted the idea of big data as anything like an "essential facility" triggering a "duty to deal" concepts and have instead suggested consideration of big data only as an asset within the existing merger review context. All signs now point in the direction of major cross-Atlantic divergence of thinking on this subject, divergence that should be concerning to affected parties on both continents.

Last September, European Commissioner for Competition Margrethe Vestager strongly implied on several occasions that big data ought to fall within the scope of the EU's abuse of dominance law. According to Vestager, "If data can help you compete, by improving your services and cutting costs, then having the right set of data could make it almost impossible for anyone else to keep up."[6] For this reason, in her view, the EU "need[s] to be sure that companies which control that sort of data don't use it to stop others from competing."[7]

Less than a week after those remarks, Vestager commented on a German investigation into whether Facebook's terms of service amounted to an abuse of its market power as a social network by forcing customers to agree to unfair conditions on the use of their data.[8] According to Vestager, this investigation fell into a "gray zone between competition and privacy," as the social networking site has "a very dominant position."[9] She added that "[d]ata as such is . . . the new line of business" because "[b]oth knowledge and data are another kind of currency, another asset than just the [revenues] of the company."[10]

Meanwhile, in spring 2016, French and German antitrust authorities published a joint study on the interaction between competition law and big data. It concluded that big data could qualify as an essential facility and that the failure to share it with a competitor could therefore be an abusive practice.[11] This French-German collaboration was preceded by a report of the UK Competition and Market Authority on the commercial use of consumer data, discussing the possibility that firms may leverage their market power into related markets by conditioning the purchase of their datasets on use with their own data analytics services.[12] Finally, this past January, the European Commission's initiative to establish the European single digital market has led the Commission to propose a FRAND licensing regime to facilitate greater access to the ever-growing volumes of machine-generated data.[13]

Antitrust authorities in the United States have also commented that the emergence of big data has implications for antitrust law. For example, in December 2015, during remarks analyzing the FTC's merger review process, FTC Commissioner Terrell McSweeney asked rhetorically whether one company "controlling vast amounts of data" might "possess[] a kind of market power that creates a barrier to entry."[14] According to Commissioner McSweeney, "It may be that an incumbent has significant advantages over new entrants when a firm has a database that would be difficult, costly, or time

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consuming for a new firm to match or replicate."[15] The Council of Economic Advisers to the President later cited these comments in suggesting that the antitrust agencies may want to consider whether big data "is a critical resource, without which new entrants might have a difficult time marketing to or otherwise attracting customers."[16]

Nevertheless, as indicated above, U.S. antitrust officials have generally limited their thinking about big data to the merger enforcement context.[17] They have not taken the aggressive position that Commissioner Vestager staked out when she implied that big data might constitute an essential facility and businesses that aggregate big data may thereby have an obligation to share it with their competitors. Their silence likely reflects an important difference of opinion on duty to deal claims and the essential facilities doctrine. In short, it portends strikingly different treatment of big data between the two jurisdictions. Given that the largest aggregators of big data carry on business operations on both continents, these differences are important to consider and could have significant ramifications for how such companies interact with both consumers and competitors.

Background on the Essential Facilities Doctrine in the U.S. and EU

In the United States, exclusionary conduct is governed by Section 2 of the Sherman Act. According to the Supreme Court's longstanding Section 2 case law, companies—even dominant firms—have no general duty to deal with or aid competitors. As the Court wrote in *Colgate* almost a century ago, the Sherman Act "does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business freely to exercise his own independent discretion as to parties with whom he will deal."[18]

As in the United States, a firm's refusal to deal with a competitor is not necessarily illegal under the European competition rules. However, when compared to the United States, the EU is far more open to imposing duties to deal with competitors and to the essential facilities doctrine as a basis for liability under European abuse of dominance law. Article 102 of the Treaty on the Functioning of the European Union (TFEU) provides that "any abuse by one or more undertakings of a dominant position within the common market . . . shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States." Establishing a violation of this prohibition involves three elements: the existence of a dominant position in a properly identified relevant market; the abuse of that position; and the possibility that, through the abusive conduct, trade between EU Member States may be affected.[19]

Ultimately, although the American and European competition law regimes share much common ground, they operate from a different set of underlying principles, objectives, and priorities when it comes to taking steps that might require a dominant firm to engage with competitors. Why that is so requires a closer look at case law in the two jurisdictions.

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The Essential Facilities Doctrine in U.S. Antitrust Law

After percolating in lower courts for a long time, the essential facilities doctrine seemed to find some support in the Supreme Court's 1985 decision in *Aspen Skiing*.[20] In that case, the defendant owned three of the four ski resorts in Aspen, Colorado, and had a joint lift-ticket package with its smaller rival, which owned the fourth resort and was the only other competitor in the market. The defendant discontinued the multi-resort package and then refused to sell any lift tickets to its rival, effectively preventing the rival from creating its own bundles. The Supreme Court affirmed a jury verdict for the plaintiff, finding that the defendant lacked any legitimate business reason for its refusal to sell to the rival and had thereby violated Section 2 of the Sherman Act. Writing for the Court, Justice Stevens observed that "[t]he jury may well have concluded that [the defendant] elected to forgo these short-run benefits because it was more interested in reducing competition . . . over the long run by harming its smaller competitor."[21]

Nevertheless, almost two decades later the Supreme Court in *Trinko* virtually eliminated the essential facilities doctrine as a meaningful basis for liability under American antitrust law.[22] There, Verizon, an incumbent local telephone monopolist, faced a private class action brought by a customer alleging that the company had violated Section 2 of the Sherman Act by discriminating against a competing local exchange carrier. According to the plaintiff, Verizon failed to provide its competitor with adequate access to its facilities, resulting in poor quality and overpriced telephone service for the plaintiff. The plaintiff sought to ground this Sherman Act claim in provisions within the 1996 Telecom Act that required incumbent local carriers like Verizon to share certain portions of their networks with competitors. The plaintiff argued that these access provisions implied a cause of action under the Sherman Act.

Writing for the Court, Justice Scalia distinguished *Aspen Skiing* as limited to its facts and cautioned that it represented only a "limited exception" to the general rule against duty to deal claims.[23] The defendant in *Aspen Skiing* decided to cease participating in a profitable venture, suggesting "a willingness to forsake short-term profits to achieve an anticompetitive end."[24] Thus, *Aspen Skiing* exists "at or near the outer boundary of § 2 liability."[25] The Court had "never recognized" the essential facilities doctrine, but likewise found "no need either to recognize it or to repudiate it" in *Trinko*.[26]

Still, Justice Scalia identified three critical harms that the essential facilities doctrine could create. First, compelling parties with a competitive advantage to share resources undermines the purpose of antitrust law by reducing incentives to invest in those resources. Indeed, the Court's opinion in *Trinko* explicitly described the Sherman Act as "the Magna Carta of free enterprise."[27] Second, compelled sharing would require federal courts to act as central economic planners, a role they are ill-equipped to play.[28] Third, compelled sharing might actually create opportunities for collusion, which the Court characterized as the "supreme evil of antitrust."[29]

Subsequent court decisions appear to confirm that *Trinko* amounted to something of a death knell for the essential facilities doctrine in the United States. In *Pacific Bell*, for example, the Supreme Court addressed a claim from Linkline Communications, an independent retail DSL Internet service provider, alleging that Pacific Bell had unlawfully monopolized the market for DSL services by imposing a "price squeeze."[30] Much like in *Trinko*, Pacific Bell faced substantive obligations under telecom law and regulations to provide wholesale access to its network to competitors like Linkline that also sold DSL services to retail customers. Linkline essentially claimed that Pacific Bell had raised the wholesale prices by which Linkline gained access to the network but then cut retail DSL prices, such that Linkline could not simultaneously market to retail customers without losing money. The Court held that this price-squeeze claim had no basis because Pacific Bell had no antitrust obligation to sell its inputs to Linkline in the first place. The Court reasoned that "*Trinko* . . . makes clear that if a firm has no antitrust duty to deal with its competitors at wholesale, it certainly has no duty to deal under terms and conditions that the rivals find commercially advantageous."[31]

While the Supreme Court has "never recognized" the essential facilities doctrine,[32] some lower courts do. The Ninth Circuit's recent decision in *Honeywell*, however, indicates that as a practical matter the circumstances under which such a claim may be found are exceedingly rare.[33] In that case, Aerotec International, which services Auxiliary Power Units (APU) used in commercial aircraft, sued Honeywell, an APU manufacturer that also sells APU parts and service. Aerotec sought to halt some of Honeywell's policies, including its policy to afford best pricing for parts only to "affiliates" and thus to charge higher rates to independent servicers like Aerotec. Among its claims, Aerotec alleged that Honeywell's proprietary APU parts were essential facilities, and that Honeywell's pricing policies amounted to a refusal to deal that violated the essential facilities doctrine.

The Ninth Circuit rejected that claim. It observed that the Sherman Act does not restrict the right of a business to freely determine with whom it will deal, quoted *Trinko*, and reiterated the harms that can flow from imposing a duty to deal. It then stated that *Aspen Skiing* offered "no relief" to Aerotec because that case did not even recognize a duty to deal, but only a duty to refrain from practices the purpose of which are "to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition."[34] The court went on to hold that, even under Ninth Circuit precedent that recognized the essential facilities doctrine, "a facility is only essential where it is otherwise unavailable."[35]

The Essential Facilities Doctrine Under Abuse of Dominance Law in the European Union

In the EU, a unilateral refusal to grant access to an essential facility is just one example of a potentially unlawful refusal to deal. The essential facilities doctrine has been applied for over 40 years by the European Commission, the General Court, the Court of Justice, and increasingly competition agencies and courts of the 27 Member States.

Something resembling the essential facilities doctrine first provided a basis for EU abuse of dominance liability in *Commercial Solvents v. Commission*.[36] There the European Court of Justice determined that a dominant supplier abused its position when it declined to supply a customer who was simultaneously a competitor in a downstream market for a derivative product. Perhaps not surprising in light of the fact that in Europe many essential infrastructures are the legacy of past state ownership and exclusive privileges granted by the Member States, the European Commission subsequently applied the doctrine to a number of situations where owners of ports, harbors, tunnels, and related facilities prevented access to their infrastructure to block the emergence of downstream competition.[37]

Later, in *Oscar Bronner*, the European Court of Justice set forth more clearly the necessary elements for successfully advancing such a claim, including indispensability, i.e., the "essential" character of the product or facility that a dominant firm refuses to share.[38] The case involved a regional newspaper demanding access to a national newspaper's distribution network. According to the Court, such a claim required showing that (1) the refusal to deal was likely to eliminate all competition in the downstream market; (2) the refusal was not capable of being justified; and (3) access to the facility was indispensable to the competitor's business, there being no actual or potential substitutes.[39] The Court established in this respect that the indispensability test has an objective character; the fact that it may not be economically viable for the firm requesting access to replicate the facility because of its smaller size is not enough to support the conclusion that the refusal to give access is illegal under Article 102 TFEU.

Subsequent cases have applied a "duty to deal" to intellectual property.[40] For an American audience, the *Microsoft* case is perhaps the most well-known European decision to apply a duty to deal or essential facilities basis for liability in a case involving intellectual property as the facility at issue. There, the Commission determined that Microsoft had abused its dominant position in the market for computer operating systems by refusing to share information necessary for competitors in the server operating system market to interoperate with its Windows operating system. The Commission determined that this information was essential for other firms to compete with Microsoft. The Commission expanded on prior rulings in other cases, imposed unbundling obligations and established monitoring requirements on Microsoft. The EU Community Courts upheld the Commission's decision.[41]

The Commission's 2008 Guidance on its enforcement priorities in applying Article 102 TFEU to dominant firms' abusive conduct makes clear that the concept of anticompetitive refusal to deal is broad.[42] It covers a variety of practices, including the refusal to supply products to existing or new customers, refusal to license intellectual property rights, and refusal to grant access to an essential facility or a network. For an anticompetitive refusal to deal to exist, the Commission does not regard it as necessary for the refused product to have been already traded—it is sufficient that there is demand from potential purchasers and that a potential market for the input at stake can be identified. Likewise, it is not necessary for there to be actual refusal on the part of a dominant undertaking—"constructive" refusal is sufficient. In its Guidance Paper the Commission identifies three criteria to be considered: (1) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market; (2) the refusal is likely to lead to the elimination of effective competition on the downstream market; and (3) the refusal is likely to lead to consumer harm.

Why More Divergence?

As identified above, there is substantial existing divergence between U.S. and EU law on the extent to which each imposes antitrust obligations to deal with competitors. There are at least three reasons why this divergence is unlikely to narrow and is more likely to grow in the years ahead. The first reason relates to the strength of existing U.S. precedent on this doctrine. The case law leaves little room to accommodate forced sharing by competitors.

The second reason concerns the EU's increased use of the commitment procedure in Article 9 of Regulation 1/2003. The Article 9 procedure provides the European Commission with a powerful enforcement tool by enabling it to accept commitments by the parties involved in a possible violation of the European competition rules in exchange for termination of the investigation. As has been observed elsewhere, the Article 9 procedure provided the Commission with more discretion to tailor the remedies offered to the perceived competitive problem than it enjoys under the conventional procedure governing prohibition decisions, while the intensity and scope of judicial review is minimal.[43] As a result, the Commission's leverage to structure (or "engineer") and impose tailor-made remedies is significant.

A review of Article 9 commitment decisions confirms the Commission's willingness to accept commitments involving inputs important for downstream competitors and, more importantly, whether intentionally or unintentionally, tends to extend the scope of a duty to deal under the European competition rules. For instance, in 2009 the Commission adopted a commitment decision involving ENI to open up access to Italy's natural gas market.[44] The Commission found that ENI did not invest in additional capacity because third-party access to increased capacity would have boosted competition on the downstream gas supply market to the detriment of ENI's own downstream business. This decision may be seen as an attempt to extend the indispensability requirement of *Bronner* to "potential" inputs that would be profitable to develop if the market power rents of the downstream division of the dominant firm are not considered.

Another more recent illustration is the Commission's 2016 commitment decision involving credit default swaps (CDS).[45] While mainly based on the presumed existence of an anticompetitive agreement within the meaning of Article 101 TFEU (not on an Article 102 TFEU anticompetitive refusal to deal theory), it raised important issues regarding access to data necessary to offer credit default trading services. In an attempt to facilitate the transition from over-the-counter trading of CDS to exchange trading platforms, the Commission held that investment banks breached EU rules by, inter alia, refusing to license "Final Price" information and various indices necessary for exchange trading. To alleviate these concerns, the parties offered—and the Commission accepted—access to the data by licensing the rights on FRAND terms. Again, the decision may be seen as broadening refusal to deal/essential facilities obligations of dominant companies and illustrating that mandating access may in some cases also be based on Article 101 TFEU.

The third reason for greater divergence within this area of competition law relates to actions by individual countries within the EU. Individual countries are not bound by case law under Article 102 TFEU and are thus entitled to impose stricter rules on abusive conduct by dominant companies. Individual countries have, in fact, required or sought to require dominant firms to share customer data with their competitors. In September 2014, France's antitrust authority, Autorité de la Concurrence, ordered the former incumbent French energy utility monopolist, GDF Suez, to provide competitors access to parts of its customer database and asserted that GDF Suez might have violated abuse of dominance laws.[46] A rival energy company, Direct Energie, complained in April 2014 that GDF Suez was offering its regulated gas customers both gas and electricity at market prices, which allowed it to leverage its dominant position in gas to win new customers in the electricity market. Another example is the AC's challenge in 2014 of Cegedim, a French company, for refusing to sell information from a medical database over which it had exclusive control to any customers that use software from one of its main competitors.[47]

Will Big Data Become Subject to an Antitrust Duty to Deal with Competitors?

The emergence of big data is likely to bring to a head the divergent treatment of essential facilities in the United States and EU. This is due to big data's inherent characteristics—i.e., that it arises precisely at the confluence of various business-to-business and business-to-consumer relationships and that it can rapidly establish and reinforce mutually dependent relationships, often through direct or indirect network effects.

As antitrust enforcement agencies race to understand big data and try to develop tools and a coherent analytical framework to identify and balance its benefits and costs, there is a growing focus on whether and how it may present legitimate antitrust concerns. But this journey is not without obstacles. To start, one problem is that the whole notion of big data "seems to mean different things to different people."[48] Second, and as suggested above, big data displays a number of unique features—volume, variety, velocity, and value—the importance of which must be clearly identified and then must inform the antitrust analysis in each case at hand. Yet volume, variety, and velocity would be of little consequence without the ability to extract information and thereby derive value from it. Thus, a critical component of big data is the use of sophisticated analytics (including deep learning) to extract information "by revealing the context in which the data is embedded and its organisation and structure," separating the "signal from the noise," and identifying "hidden relations (patterns), e.g., correlations among facts, interactions among entities, [and] relations among concepts."[49]

It is clear that in some exceptional cases big data and, more precisely, the knowledge extracted from it may constitute a source of significant competitive advantage.[50] But this observation in and of itself does not warrant a broad application of the essential facilities doctrine. In fact, the application of the doctrine in this context has received strong opposition from incumbents[51] but also from antitrust practitioners[52] and academics.[53] Those espousing this view typically argue that data is not a crucial input for the success of any company, as innovative entrants have been able to establish themselves without it. Facebook, Snapchat, and Tinder are just a few examples where a simple insight into customer needs enabled entry and rapid success, disrupting established network effects and related advantages held by incumbents.[54]

Critics of the application of the essential facilities doctrine to big data argue that data is cheap, ubiquitous, and easy to obtain, with near-zero marginal costs of production and distribution.[55] The cost of collecting, storing, and analyzing big data is low and declining.[56] Users are constantly leaving digital footprints, while companies generate massive quantities of "exhaust" as a byproduct of customer interactions.[57] Data can be readily purchased from a range of third parties, including large data brokers, and firms can access a variety of off-the-shelf software tools for analytics.[58] In addition, data is non-rivalrous in that the collection of user data by one firm

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does not occur at the expense of other firms and their access to the same or similar data.[59] The non-rivalrous quality of data is reinforced by the common practice of "multi-homing," in which consumers use (and share data with) multiple different providers for the same service.[60] Finally, they argue that the value of data is ephemeral,[61] such that any competitive advantage gained through its acquisition is fleeting.

The harms from forced sharing outlined in *Trinko* provide a helpful framework for evaluating whether or when big data ought to be deemed an essential facility that a dominant firm must share with competitors. The requirement may discourage the sort of innovation that is the hallmark of developing technologies. This could in turn lead to firms devoting fewer resources to developing ways of acquiring and using big data.

The comparison between *Trinko* and *GDF Suez* may illustrate this point. Both cases involved dominant incumbent public utilities. In both instances, procompetitive reforms had pulled these former monopolists into the era of open competition. These companies then faced criticism for not sufficiently cooperating with their new competitors in further hastening competition.

The precise legal ground for requiring these two incumbents to share assets with competitors is quite telling. In *Trinko*, the obligation to share assets arose as a requirement under the 1996 Telecom Act. It did not, in other words, arise as an obligation under the Sherman Act—it was not an *antitrust* violation for Verizon to refuse competitors access to its facilities. In contrast, in *GDF Suez*, abuse of dominance law was the precise vehicle for requiring a former incumbent monopolist to provide competitors access to its facilities. To the degree that big data implicates data privacy issues, for example, it is more appropriate to develop regulatory tools geared towards those concerns within the context of consumer protection laws, and not in the context of competition law.

Requiring companies to share big data also places courts in the position of determining whether and to what extent rivals should share complicated sets of data with one another, and at what price and other terms. This implicates not only difficult economic questions but also fundamentally vexing technological problems.

The third possible harm identified in *Trinko* is probably the most cogent: the forced sharing of big data could create opportunities for collusion. The role of big data in online shopping presents a common-sense example. An individual who uses Google to search for items to purchase online equips Google—knowingly or unknowingly—to collect, aggregate, analyze, and use data associated with that search. This can lead to further services that the consumer may then find appealing, or annoying, such as targeted online advertising. But that data also plays an increasingly critical role in price setting. In short, whether a consumer is willing to pay an advertised price for an item for which she is actively searching is a relatively rich source of information about how that same good ought to be priced going forward. Forced sharing of such data or analytics raises the possibility of price collusion.[62] It establishes direct communication among rivals regarding price-setting processes and the research that informs how prices are set. Such communications are rife with incentives to collude on prices themselves by enabling competitors to know whether their customers are price sensitive.

Conclusion

The risks identified in *Trinko* warrant thoughtful study. Application of the essential facilities doctrine or abuse of dominance standards to an asset like big data—one which appears to be driving significant activity in various fields—could have far-reaching consequences, not all of which are now fully understood or realized. In the meantime, companies will continue amassing such data and, along with it, some of them will amass a significant amount of leverage over consumers and their rivals. So competition law will continue to grapple with big data both in the United States and in the EU. Consistency would benefit both consumers and businesses in both jurisdictions. As we discuss above, however, there is greater likelihood of increasing divergence on this issue. The complexity of these issues calls for competition authorities in both jurisdictions to collaborate in a search for modes of analysis that make forced sharing of big data assets a rare occurrence. ■

1 U.S. Federal Trade Commission Report, Big Data: A Tool for Inclusion or Exclusion? at i (2016) [hereinafter FTC Big Data Report], https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf.

2 *Id.*

3 U.S. Exec. Office of the President, Big Data: Seizing Opportunities, Preserving Values 2 (2014) [hereinafter White House May 2014 Report], https://obamawhitehouse.archives.gov/sites/default/files/docs/big_data_privacy_report_may_1_2014.pdf.

4 Core Techniques and Technologies for Advancing Big Data Science & Engineering (BIGDATA), National Science Foundation, Program Solicitation NSF 12-499 (2012), https://www.nsf.gov/pubs/2012/nsf12499/nsf12499.htm.

5 FTC Big Data Report, *supra* note 1.

6 Margrethe Vestager, Making Data Work for Us—Data Ethics Event on Data as Power (Sept. 9, 2016), https://ec.europa.eu/commission/2014-2019/vestager/announcements/making-data-work-us_en.

7 *Id.*

8 Aoife White & Francine Lacqua, *Facebook Probe Is in Antitrust, Privacy Gray Zone, EU Says*, Bloomberg Tech. (Sept. 14, 2016), https://www.bloomberg.com/news/articles/2016-09-14/facebook-probe-in-antitrust-and-privacy-gray-zone-vestager-says.

9 *Id.*

10 *Id.*

11 Autorité de la Concurrence and Bundeskartellamt, Big Data: French and German Authorities Explore Antitrust Issues (2016) [hereinafter French and German Big Data Report], http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf;jsessionid=0D702D369EA11A51984A7B91489F2CA9.1_cid387?__blob=publicationFile&v=2 .

12 DotEcon with Analysys Mason, The Commercial Use of Consumer Data, Research Report for the Competition Markets Authorities (June 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/435777/The_Commercial_Use_of_Consumer_Data_-_DotEcon_and_Analysys_Mason.pdf.

13 *See* https://ec.europa.eu/digital-single-market/en/news/communication-building-european-data-economy.

14 Terrell McSweeny, Comm'r, Fed. Trade Comm'n, Panel Discussion: Why Regulate Online Platforms: Transparency, Fairness, Competition, or Innovation—Opening Remarks at CRA Conference (Dec. 9, 2015), https://www.ftc.gov/system/files/documents/public_statements/903953/mcsweeny_-_cra_conference_remarks_9-12-15.pdf.

15 *Id.*

16 U.S. White House Council of Economic Advisers, Issue Brief: Benefits of Competition and Indicators of Market Power 13 (Apr. 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

17 Indeed, AT&T's proposed $85.4 billion takeover of Time Warner will present U.S. antitrust regulators with an opportunity to clarify what role big data ought to play in merger enforcement review. *See, e.g.*, Eric Kroh, *AT&T-Time Warner Deal to Test Big Data Antitrust Theories*, Law360 (Oct. 28, 2016).

18 United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

19 *See, e.g.*, Rene Barents, Directory of EC Case Law on Competition, ch. 23 at 309 (2007).

20 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985).

21 *Id.* at 680.

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

23 *Id.* at 409.

24 *Id.*

25 *Id.*

26 *Id.* at 410.

27 *Id.* at 415.

28 *Id.*

29 *Id.*

30 Pac. Bell Tel. v. Linkline Commc'ns, 555 U.S. 438 (2009).

31 *Id.* at 150.

32 *Trinko*, 540 U.S. at 410.

33 Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171 (9th Cir. 2016).

34 *Id.* at 1184 (internal quotes omitted).

35 *Id.* at 1185.

36 Joined Cases 6 & 7/73, Istituto Chemioterapico Italiano S.p.A & Commercial Solvents v. Comm'n, 1974 E.C.R. 223.

[37] Case COMP/IV/34.174—Sealink/B&I—Holyhead: Interim measures, Comm'n Decision (June 11, 1992), http://ec.europa.eu/competition/antitrust/cases/dec_docs/34174/34174_2_2.pdf; Case COMP/IV/34.689—Sea Containers v. Stena Sealink—Interim measures, Comm'n Decision, 1993 O.J. (L 15) 9; Case COMP/IV/32.490—Eurotunnel, Comm'n Decision, 1994 O.J. (L 354) 66.

[38] Case C-7/97, Oscar Bronner GmbH v. Media Print Zesting's und Zeitschriftenverlag GmbH, 1998 E.C.R. I-7791.

[39] Oscar Bronner ¶¶ 41–46. *See also* Erika Szyszczak, *Controlling Dominance in European Markets*, 33 Fordham Int'l L.J. 1738 (2010).

[40] *See, e.g.*, Joined Cases C-241 & 242/91P, Radio Telefis Eireann (RTE) & Indep. Television Pubs. Ltd (ITP) v. Comm'n (*Magill*), 1995 E.C.R. I-743, ¶¶ 10–11, 49-57; Case C-418/01, IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co. KG, 2004 E.C.R. I-5039, ¶¶ 31–52; Case T-201/04, Microsoft v. Comm'n, 2007 E.C.R. II-3601, ¶¶ 284–288, ¶¶1329-1330; Szyszczak, *supra* note 39, at 1762.

[41] Case T-201/04, Microsoft v. Comm'n, 2007 E.C.R. II-3601.

[42] Eur. Comm'n, Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings, 2009 O.J. (C 45) 7–20.

[43] Paul Lugard & Martin Mollman, *A Commitment a Day Keeps the Court Away*, CPI Antitrust Chron. (Mar. 2013).

[44] Case COMP/39.315—ENI, Comm'n Decision (Sept. 29, 2009), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39315/39315_3019_9.pdf.

[45] Case COMP/39745—CDS Information Market, Comm'n Decision (July 7, 2016), http://ec.europa.eu/competition/antitrust/cases/dec_docs/39745/39745_14238_7.pdf and http://ec.europa.eu/competition/antitrust/cases/dec_docs/39745/39745_14237_7.pdf.

[46] Geert De Clercq & Benjamin Mallet, *French Competition Watchdog to Investigate GDF Suez*, Daily Mail, Sept. 9, 2014, http://www.dailymail.co.uk/wires/reuters/article-2749349/French-competition-watchdog-investigate-GDF-Suez.html.

[47] *See* Press Release, Autorité de la Concurrence (July 8, 2014), http://www.autoritedelaconcurrence.fr/user/standard.php?id_rub=592&id_article=2403.

[48] Robert Mahnke, *Big Data as a Barrier to Entry*, CPI Antitrust Chron. (May 2015).

[49] OECD, Hearing on Big Data—Note By BIAC, DAF/COMP/WD(2016)77, ¶ 7 (Nov. 17, 2016) [hereinafter OECD HEARING ON BIG DATA], https://one.oecd.org/document/DAF/COMP/WD(2016)77/en/pdf.

[50] Mahnke, *supra* note 48.

[51] Andres V. Lerner, The Role of "Big Data" in Online Platform Competition (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2482780.

[52] David A. Balto & Matthew C. Lane, Monopolizing Water in a Tsunami: Finding Sensible Antitrust Rules for Big Data (Mar. 22, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2753249.

[53] D. Daniel Sokol & Roisin E. Comerford, *Antitrust and Regulating Big Data*, 23 Geo. Mason L. Rev. 1129 (2016).

[54] OECD Hearing on Big Data, *supra* note 49, ¶ 15.

[55] *See* Sokol & Comerford, *supra* note 53, at 1137 (citing Carl Shapiro & Hal R. Varian, Information Rules: A Strategic Guide to the Network Economy 24 (1999)).

[56] White House Report, *supra* note 3, at 1 (noting that the growth of big data is fueled by "the cratering costs of computation and storage"); Edith Ramirez, Chairwoman, Fed. Trade Comm'n, The Privacy Challenges of Big Data: A View from the Lifeguard's Chair, Remarks Before the Technology Policy Institute Aspen Forum 3 (Aug. 19, 2013), www.ftc.gov/sites/default/files/documents/public_statements/privacy-challenges-big-data-view-lifeguard%E2%80%99s-chair/130819bigdataaspen.pdf ([T]he "phenomenal growth in storage and analytic power" has been accompanied by a decline in cost.); McKinsey Global Institute, *Big Data: The Next Frontier for Innovation, Competition, and Productivity* 2 (2011 file:///C:/Users/rtonneli/Downloads/MGI_big_data_full_report%20(1).pdf ("The ability to store, aggregate, and combine data and then use the results to perform deep analyses has become ever more accessible as trends such as Moore's Law in computing, its equivalent in digital storage, and cloud computing continue to lower costs and other technology barriers.").

[57] Darren S. Tucker & Hill B. Wellford, *Big Mistakes Regarding Big Data* 3, Antitrust Source (Dec. 2014), http://www.americanbar.org/content/dam/aba/publishing/antitrust_source/dec14_full_source.authcheckdam.pdf.

[58] *Id.*

[59] *Id.*; *see also* Sokol & Comerford, *supra* note 53, at 1137.

[60] Tucker & Wellford, *supra* note 57, at 3.

[61] Sokol & Comerford, *supra* note 53, at 1138; *see also* Tucker & Wellford, *supra* note 57, at 4 ("90% of the data in the world today has been created in the last two years . . . . 70% of unstructured data is stale after only 90 days.").

[62] At the same time, the risk of collusion may cut the other way. The French and German study published in 2016 identified ways in which the *failure* to require sharing could also lead to collusion because it could lead to market transparency. That transparency could then result in tacit or explicit collusion. The study also explored the possibility that the use of algorithms in analyzing big data could also facilitate collusion by reducing market uncertainty. *See, e.g.*, French and German Big Data Report, *supra* note 11.

Student Writing Competition Winner

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A Hitchhiker's Guide to Antitrust and Intellectual Property Guidelines

BY HARTMUT SCHNEIDER, SARAH LICHT, AND NICOLE CALLAN

ALMOST 22 YEARS AGO, THE U.S. antitrust enforcement agencies issued their Antitrust Guidelines for the Licensing of Intellectual Property (IPG).[1] Styled as an effort to "assist those who need to predict whether the Agencies will challenge a practice as anticompetitive,"[2] the decision to memorialize basic enforcement principles for the application of U.S. antitrust law to the licensing of IP has proven to be hugely influential throughout the world. Many jurisdictions have followed the United States in developing guidance for the business community on questions regarding IP rights and antitrust law. Prominent examples include the European Union,[3] Canada,[4] Korea,[5] and Japan.[6]

In addition, several countries have recently updated their IP/antitrust guidelines to account for conduct that attracted little attention, or was not well understood, when their respective guidelines were first issued. Fair, reasonable, and non-discriminatory (FRAND) licensing of standard-essential patents (SEPs) is one example of a topic addressed in updates. Indeed, the last two years saw a flurry of revisions to account for this and other topics in countries such as Canada, Korea, and Japan, in addition to efforts by China to unify its IP/antitrust guidance.[7] India, too, entered the debate, publishing its first contribution to the discussion about SEPs and FRAND licensing terms in March 2016.[8]

Not to be outdone, the U.S. agencies proposed their first update to the U.S. IPG in August 2016 and then issued revised guidelines on January 12, 2017.[9] The updates are modest, however, and could leave the impression that leadership on IP/antitrust guidance has shifted from the U.S. to other jurisdictions.

The revised IPG reaffirm basic principles that have governed the antitrust analysis of licensing agreements for many years, but offer only minor substantive modifications, primarily to account for changes in law and enforcement practices since 1995. For example, the new guidelines incorporate Supreme Court rulings acknowledging the longstanding agency view that a patent does not necessarily confer market power on the patentee; clarifying that a unilateral refusal to assist competitors generally does not result in antitrust liability; and holding that resale price maintenance agreements are not per se illegal and are evaluated under the rule of reason.[10] The revised IPG also refer to "innovation markets," a concept introduced in 1995, as "research and development markets" going forward.[11] The revised guidelines do not, however, address more controversial current topics at the intersection of antitrust and IP law, such as the antitrust treatment of SEPs or of patent settlements.

Some observers have expressed concern that the U.S. agencies' reserved approach to guideline revisions may "delay or forestall the issuance of a much-needed major update, and that it might be misinterpreted as a departure from guidance that the Agencies have previously offered."[12] As these critics also have noted, however, the U.S. agencies have addressed many of the more cutting-edge IP/antitrust topics through mechanisms other than guidelines, including various forms of "secondary guidance," such as reports,[13] workshops,[14] and published letters detailing enforcement intentions in specific matters.[15] Accordingly, the concerns appear to be more about U.S. officials' decision not to integrate previous policy statements into one reference document, than about the U.S. agencies' substantive leadership on controversial IP/antitrust issues in general.[16] The practical implication is that businesses will continue to consult a range of sources when encountering problems at the intersection of U.S. antitrust and IP law.

While agencies around the world have taken different approaches to providing guidance on IP/antitrust issues to the business community, their efforts nevertheless have created a "common core" of antitrust and IP doctrinal and economic principles about which there is substantial consensus. Outside of this common core, guidance on conduct that implicates both antitrust and IP law varies, both substantively and in terms of whether the guidance is contained in a single source or a patchwork of source materials. This article provides an

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overview of the issues that comprise the common core, the topics about which there is still considerable debate, and the different source materials that competition agencies use to provide guidance.

The Basics: An Emerging "Common Core" of Antitrust and IP Guidance

Most jurisdictions that have issued guidance on the IP and antitrust interface agree on a "common core" of three basic analytical principles.[17]

Normal Antitrust Analysis Applies to IP Rights. IP guidelines in most jurisdictions affirm that IP rights are subject to antitrust scrutiny, and that the antitrust analysis of the exercise of IP rights generally follows the analytical approach applicable to other property rights. For example, the U.S. guidelines state that the agencies "apply the same analysis to conduct involving intellectual property as to conduct involving other forms of property, taking into account the specific characteristics of a particular property right."[18] U.S. courts have endorsed this approach.[19]

The EU Technology Transfer Guidelines explain that "[t]he fact that intellectual property laws grant exclusive rights of exploitation does not imply that intellectual property rights are immune from competition law intervention."[20] Accordingly, the factors set forth in the EU TTG for assessing technology transfer agreements closely resemble the factors used to evaluate other types of conduct.[21] In assessing the competitive effects of restrictive license agreements, the European Commission will consider "(a) the nature of the agreement; (b) the market position of the parties; (c) the market position of competitors; (d) the market position of buyers on the relevant markets; (e) entry barriers; and (f) maturity of the market."[22]

Similarly, guidelines issued by the Canadian Competition Bureau state that "the [Competition] Act generally applies to conduct involving IP as it applies to conduct involving other forms of property."[23] These principles also are reflected in draft guidance published by the NDRC in China. The first "law enforcement principle" of the draft is that "[i]n the anti-monopoly regulation on the behavior of exercising IPR, the IPR shall be subject to the same regulatory framework as other property rights, and the basic analytical framework of the [Anti-Monopoly Law] shall be followed."[24]

Ownership of IP Rights Does Not, on Its Own, Convey Market Power. In their 1995 guidelines, the U.S. agencies observed that while it was unclear whether IP rights confer market power, they would not "presume that a patent, copyright, or trade secret necessarily confers market power upon its owner."[25] Eleven years later, the Supreme Court adopted this approach, stating that "Congress, the antitrust enforcement agencies, and most economists have all reached the conclusion that a patent does not necessarily confer market power upon the patentee."[26]

Other jurisdictions have adopted the U.S. position, expressly or by implication providing that the ownership of

Other topics at the antitrust and IP intersection—often, but not always involving more recent developments—are less universally covered by major guidelines, and jurisdictions have differed in how they have incorporated these topics into primary or secondary guidance. Prominent unsettled issues today are the innovation market concept, settlements involving IP, standard setting, and conduct of non-practicing entities.

IP rights, and the corresponding rights to exclude, do not, standing alone, convey market power. For example, the EU Technology Transfer Guidelines' detailed discussion regarding the definition of relevant markets and the calculation of market shares presupposes that patent owners are not presumed to have market power.[27] The Korean guidelines concur, stating that "[a]n IPR owner is not immediately deemed to have market dominance simply because an exclusive or monopolistic right to use is granted for the IPR."[28] More recently, draft guidelines issued by China's NDRC state that an "undertaking shall not be directly presumed to hold a dominant market position in the relevant market only based on the fact that it owns the IPR."[29]

Licensing Is Generally Procompetitive and Subject to the Rule of Reason. Many guidelines also affirm the principle that licensing is typically procompetitive and, therefore, subject to a rule of reason or similar balancing analysis. The U.S. IPG have long endorsed this principle, devoting an entire section to the "procompetitive benefits of licensing."[30] The IPG explain that the "Agencies' general approach in analyzing a licensing restraint under the rule of reason is to inquire whether the restraint is likely to have anticompetitive effects and, if so, whether the restraint is reasonably necessary to achieve procompetitive benefits that outweigh those anticompetitive effects."[31]

Similarly, the EU Technology Transfer Guidelines state that even license agreements that restrict competition in some way often produce procompetitive effects that may outweigh the harm to competition.[32] The Korean guidelines, too, apply a rule of reason standard in balancing the "effectiveness" of the exercise of an IP right, stating that "[i]f, the effect of increasing efficiency exceeds the anti-competitive effect as the result of the exercise of the IPR, it may be judged that such exercise of IPR is not in violation of the FTL."[33]

The Japanese guidelines emphasize the potential procompetitive benefits of the IP laws, discussing them in the very first section of the guidelines. The IP laws

> may encourage entrepreneurs to conduct research and development and may serve as a driving force for creating new

technologies and products based on the technologies. . . . In addition, technology transactions assist in promoting competition by enabling increased efficiency in the use of technology through combinations of different technologies, the formation of new markets for technologies and their associated products, as well as an increase of competing parties.[34]

Finally, in China, the NDRC draft guidance states that "[w]hen conducting analysis on the behavior of exercising IPR that may eliminate or restrict competition, the enforcement agencies shall give full consideration of the positive effects of exercising IPR on competition and innovation on an ad hoc basis."[35]

The Finer Points: Use of "Secondary Guidance" for Developing and Frequently Encountered Questions

Antitrust and IP guidelines are not the only source of guidance about a competition agency's approach to issues at the intersection of antitrust and IP law. That is especially true in the United States, where multiple sources contain and reflect the agencies' enforcement perspectives on conduct implicating both antitrust and IP.

First, there is case law.[36] The business community and agencies follow and consider relevant judicial precedent, and agencies may adjust their enforcement intentions to account for changes in the case law. The changes to the U.S. IPG provide recent examples. In accord with the Supreme Court's 2004 decision in *Trinko*, the revisions would make it explicit that "[t]he antitrust laws generally do not impose liability upon a firm for a unilateral refusal to assist its competitors."[37] The revisions also state that "the Agencies will apply a rule of reason analysis to price maintenance in intellectual property licensing agreements," a reflection on the Supreme Court's 2007 decision in *Leegin*.[38] Finally, the revised guidelines recognize that *Illinois Tool Works* made clear that a patent does not necessarily confer market power on its owner.[39]

Secondary Guidance in the U.S. and Abroad. Another mechanism agencies use to convey developing analytical and enforcement principles is to provide "secondary guidance" through reports, speeches, press releases, workshops, and other public documents. These materials often are less formal than guidelines, but nevertheless offer insight into the approach of at least current agency leadership and are important sources for practitioners seeking to predict enforcement intentions. Especially in the United States, where the IPG are more than 20 years old and the recent revisions are modest, this secondary guidance is an important tool for businesses to evaluate questions related to antitrust and IP.

The U.S. agencies generally provide more frequent secondary guidance than other competition agencies. As three former senior agency economists have noted, "The DOJ and FTC have done much to chart the IP Licensing shoals over the past 20 years" by issuing policy statements and similar publicly available materials.[40]

In contrast to the U.S.'s heavy reliance on secondary guidance, other jurisdictions are more likely to update their guidelines on a more or less regular basis. For example, the European Union issued its updated technology transfer guidelines in 2010, only six years after they were first issued. Similarly, Canada, Japan, and Korea have all recently updated their guidelines, all of which are much younger than the U.S. IPG.

Why Secondary Instead of "Primary" Guidance? Agencies have used secondary guidance for multiple purposes. First, they can stimulate debate and develop approaches to new or unsettled questions at the intersection of antitrust and IP law. For example, the FTC's study on Patent Assertion Entity (PAE) activity[41] does not offer definitive conclusions on all antitrust questions surrounding PAE conduct. To the contrary, the FTC expressly cautioned that the lack of comprehensive PAE data restricted its ability to generalize study findings to the PAE population as a whole but nonetheless proceeded with the study in order to gain a better understanding of how PAEs function and their impact on patent litigation.[42]

Another purpose of secondary guidance is to provide more specific guidance on questions that are addressed in guidelines at a higher level. One example is the treatment of patent pools. The 1995 U.S. IPG addressed pooling arrangements in general terms,[43] but more detailed guidance later became available in DOJ Business Review Letters[44] and in the 2007 joint DOJ and FTC IP Report.[45] Taken collectively, these sources of secondary guidance provide a blueprint for the antitrust analysis of patent pools that is now so universally recognized that the revised IPG incorporate by reference this body of secondary guidance in a new footnote of the IPG.[46]

Meanwhile, other jurisdictions have addressed and updated patent pool guidance directly in guidelines. The EU is a prominent example. Patent pools (known as technology pools in EU parlance) were covered in the 2004 Technology Transfer Guidelines.[47] The 2004 guidelines focused on the nature of the pooled technologies, emphasizing that pools "composed only of technologies that are essential and therefore by necessity also complements" generally did not violate competition law unless "the conditions on which licenses are granted" independently raised competitive concerns.[48] A separate section of the guidelines discussed the analytical principles applicable to these conditions.[49]

The 2014 EU TTG reorganized and modified EU guidance on patent pools. The substantive rules did not change fundamentally, but the new guidance is noteworthy for the introduction of an antitrust "safe harbor" for patent pools.[50] Although the EU appears to be the only jurisdiction to have included a safe harbor for patent pools meeting certain criteria, other guidelines contain similar substantive guidance.[51]

The Next Frontier: IP and Antitrust Developments Outside the "Common Core"

Much of the guidance discussed in the previous sections covers well-established general principles regarding the antitrust analysis of conduct involving IP rights and addresses circumstances with which enforcers and the business community are familiar. Other topics at the antitrust and IP intersection—often, but not always involving more recent developments—are less universally covered by major guidelines, and jurisdictions have differed in how they have incorporated these topics into primary or secondary guidance. Prominent unsettled issues today are the innovation market concept, settlements involving IP, standard setting, and conduct of non-practicing entities.

Innovation Markets. The innovation market concept is addressed by most major guidelines, but its treatment varies and continues to evolve.

The 1995 IPG explained that U.S. agencies may analyze the competitive effects of a licensing arrangement "either as a separate competitive effect in relevant goods or technology markets, or as a competitive effect in a separate innovation market."[52] The update to the IPG replaced the term "innovation market" with "research and development market," and defined such a market as "the assets comprising research and development related to the identification of a commercializable product, or directed to particular new or improved goods or processes, and the close substitutes for that research and development."[53] The treatment of research and development markets in the revised IPG is similar to the treatment of innovation markets in the 1995 guidelines. For example, the IPG continue to note that the agencies will "delineate a research and development market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms."[54]

Guidelines in other jurisdictions vary in their treatment of the issue. Some, such as Canada, appear to reject the concept of separate innovation markets. Canada's guidelines state that "[t]he Bureau does not define markets based on research and development activity or innovation efforts alone."[55] Other countries, such as Japan, appear implicitly to reject innovation markets.[56] Guidelines from a third group of jurisdictions do not reject the innovation market concept but indicate skepticism about its utility or uncertainty about how to evaluate effects on innovation markets. For example, the EU TTG acknowledge that some license agreements "may affect competition in innovation," but state that there will be a "limited number of cases" where it is "useful and necessary to also analyze the effects on competition in innovation separately."[57] Korea's guidelines, for their part, state that innovation markets may be considered separately from product or technology markets, but do not specify how the innovation market analysis would proceed.[58]

Settlements. Few guidelines expressly touch on issues surrounding settlements involving IP, such as "reverse payment" settlements between branded and generic drug manufacturers.[59] Indeed, among guidelines reviewed for this analysis, only the EU TTG and the Korean guidelines appear to address settlements at all, and only the EU guidelines address reverse payment settlements. U.S. guidelines remain largely silent on the topic,[60] although the FTC in particular has been a vocal participant in the debate about the proper antitrust analysis of brand/generic patent settlements both before and since the Supreme Court's decision in *Actavis*.[61]

Europe's TTG address settlement agreements in Section 4.3, observing that licensing of technology rights "may serve as a means of settling disputes or avoiding that one party exercises its intellectual property rights to prevent the other party from exploiting its own technology rights."[62] However, settlement terms may be subject to antitrust scrutiny "in the same way as other license agreements."[63] The EU TTG discuss "reverse payment" settlements which, as the guidelines note, "often do not involve the transfer of technology rights, but are based on a value transfer from one party in return for a limitation on the entry and/or expansion on the market of the other party."[64] However, the practical value of the guidance is limited by its general nature: the EU TTG merely state that the Commission will be "particularly attentive" to anticompetitive risks where the parties are actual or potential competitors "and there was a significant value transfer from the licensor to the licensee."[65]

Korea's guidelines address settlements briefly, acknowledging that while they can be "an effective means of dispute resolution for guaranteeing patent holders' rights," certain unfair agreements "may interfere with the welfare of the consumers by sustaining the exclusive authority of the invalid patent and by preventing the entry of competing enterprisers into the market."[66]

Standards Development. The development of standards is discussed in guidance issued by most major jurisdictions, but the level of specificity and depth of discussion varies significantly. The following examples illustrate the evolution of the treatment of standards development in guidance documents over time.

In 2005, Japan issued its Guidelines on Standardization and Patent Pool Arrangements (JSPG), devoting an entire section to standardization activities. Like most guidelines, the JSPG acknowledge the procompetitive benefits of standardization, including consumer convenience and interoperability.[67] The guidelines go on to enumerate specific conduct that may threaten fair competition, including restricting prices of new products with specifications, restricting development of alternative specifications, unreasonably extending the scope of specifications, unreasonably excluding technical proposals from competitors, and excluding competitors from standardization activities.[68] The guidelines also discuss the enforcement of patent rights in the context of standard setting, noting that "if a patent holder has taken part in the activities and is endeavoring to have its patented technologies adopted by the specifications, refusing to grant a license will pose a legal problem with the AMA."[69]

In the United States, neither the 1995 IPG nor the 2017 revisions discuss how the antitrust laws apply to standard setting. The 2007 IP Report, however, dedicates a chapter to collaborative standards development.[70] Like the 2005 Japanese guidelines, the report recognizes the potential for competitive harm when an agreement regarding standards "replaces consumer choice and the competition that otherwise would have occurred."[71] The remainder of the chapter discusses aspects of "holdup"—i.e., circumstances where a holder of an essential patent attempts to extract high royalties based on the mere fact that its technology has been standardized—in the context of joint standard setting and steps that standard-setting organizations can take to avoid or mitigate holdup, such as disclosure rules, FRAND licensing obligations, or ex ante licensing negotiations.[72]

The EU's 2010 Horizontal Cooperation Guidelines[73] discuss standardization agreements in Section 7. Echoing the approach of other jurisdictions, the guidelines explain that standardization agreements "generally have a positive economic effect," but can give rise to competitive concerns.[74] The guidelines then set out specific circumstances that may be anticompetitive.[75] The EU guidelines also discuss at some length commitments to license on FRAND terms.[76]

Korea's 2014 guidelines describe conduct which, in the eyes of the Korea Fair Trade Commission (KFTC), might restrict competition.[77] Examples of such conduct include "avoiding or circumventing licensing on FRAND terms to strengthen market dominance or to exclude competitors" and "unfairly imposing discriminatory conditions when licensing standard essential patents or imposing an unreasonable level of royalty."[78] Korea's revised guidelines (which became effective on March 23, 2016) focus specifically on the exercise of SEPs, distinguishing between SEPs that are incorporated into standards by standards- development organizations while requiring the SEP holder to license such patents on FRAND terms, and so-called de facto SEPs that have become standard through competition in the relevant market.[79] The KFTC has eliminated provisions that previously applied identical criteria for evaluating SEPs and de facto SEPs, explaining that because SEP holders affirmatively make FRAND commitments but holders of de facto SEPs often do not, it would not be appropriate to treat the two in the same manner.[80]

In its Rules on the Prohibition of Abuses of Intellectual Property Rights, China's SAIC lists practices that the SAIC believes could raise concerns, including refusing to disclose information on patent rights to the standards development organization and "violating the fair, reasonable and non-discriminatory principle."[81] Meanwhile, NDRC's draft guidelines address standard setting in a number of places and include a section on injunctive relief for infringement of SEPs, which states that "if a SEP holder with a dominant position makes use of injunctive relief to force the licensee to accept unfairly high royalties or other unreasonable conditions raised by the SEP holder, it may eliminate or restrict competition."[82]

Canada's original guidelines, issued in 2000, explored standards development only in passing, in the context of an example involving a refusal to license. When the Canadian Competition Bureau updated its guidelines in 2016, however, it included a new section on SEPs "designed to illustrate the analytical framework that would be applied by the Bureau in conducting its review of business conduct involving patents that are essential to . . . industry standards."[83] The draft guidelines specifically address patent holdup as one competition concern resulting from the incorporation of patented technologies into a standard.[84]

Non-Practicing Entities/Patent Assertion Entities. The antitrust analysis of the conduct of non-practicing entities (NPEs), especially of the PAE variety (i.e., NPEs that acquire patents from third parties and seek to generate revenue by asserting them against alleged infringers),[85] continues to be a hotly disputed topic. Given the relative lack of consensus on analytical principles, it is no surprise that NPEs and PAEs are largely absent from the major guidelines. Only the two most recent guideline revisions—from Korea and Canada—expressly address NPE/PAE conduct.

The Korean guidelines assert that, despite some procompetitive benefits, "NPEs are more likely to abuse patent rights than usual patent holders as they do not manufacture goods so they do not need to have cross licensing with counterparts and do not bear risks of being counter-sued."[86] The KFTC Review Guidelines provide examples of NPE conduct that—in the eyes of the KFTC—could restrict competition, including attempts to impose excessive royalties, "unfair" refusals to license, or deception in the "act of filing a patent suit or sending a notice of infringement."[87]

The Canadian guidelines similarly note that PAEs face different incentives and are not open to infringement counterclaims.[88] The guidelines express concern that PAEs may use false or misleading claims to extract license fees.[89] In a hypothetical example involving allegations that a PAE sent false or misleading demand letters, the guidelines explain that the Canadian Competition Bureau would examine whether the letters included representations that were false or misleading in a material respect, whether the representations were made to members of the public, and whether the representations were made to promote a business interest.[90] To determine whether the representation was false or misleading, the Bureau would examine "both the general impression created by the notice, as well as its literal meaning."[91]

In the United States, the FTC has studied PAEs pursuant to its authority under Section 6(b) of the FTC Act. The FTC's PAE Activity Study was released in October 2016.[92] One of its stated goals was to overcome the relative lack of empirical information about PAEs and to "provide a better understanding of the organizational structure and economic relationships of PAEs, as well as their activity and associated costs and benefits."[93] The PAE Activity Study distinguishes Portfolio PAEs from Litigation PAEs, concluding that the former often negotiate broad licenses covering large patent portfolios, while the latter often file infringement lawsuits before securing licenses, which generally are less valuable than the portfolios of Portfolio PAEs.[94] The PAE Activity

Study makes several recommendations for legislative and judicial reform intended to curb nuisance litigation while "recogniz[ing] that infringement litigation plays an important role in protecting patent rights, and that a robust judicial system promotes respect for the patent laws."[95] The study does not translate into immediate public guidance on PAE conduct beyond these recommendations. With more work, however, this could be an area where updates to existing formal guidelines or secondary guidance may become available in the future.

Conclusion

The last two years have been a period of intense activity in the development and revision of guidelines regarding the antitrust treatment of conduct involving IP rights. The available guidelines are important tools for practitioners seeking to analyze potentially restrictive conduct involving IP under the relevant antitrust laws. Knowing the guidelines, however, does not always equate to knowing an agency's likely enforcement posture, especially in the United States. The reliance that the United States places on "secondary guidance," such as reports and business review letters, emphasizes the importance of those types of less formal guidance as added resources for navigating the intersection of antitrust and IP law.

As jurisdictions around the world continue to consider new guidance, it remains to be seen whether they will follow the approach taken by the United States, which has paired high-level guidelines with extensive secondary policy statements, or will attempt to address more controversial topics directly through formal guidance. At a minimum, members of the IP and antitrust community can expect to see a "common core" of principles in guidelines around the world, and continued dialogue on emerging topics. ■

1 U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (1995) [hereinafter 1995 IPG], https://www.justice.gov/atr/archived-1995-antitrust-guidelines-licensing-intellectual-property.

2 *Id.* § 1.0.

3 European Comm'n, Guidelines on the Application of Article 101 of the Treaty on the Functioning of the European Union to Technology Transfer Agreements (2014) [hereinafter EU TTG], http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52014XC0328(01); *see also* European Comm'n, Guidelines on the Applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements (2010) [hereinafter HG], http://ec.europa.eu/competition/consultations/2010_horizontals/guidelines_en.pdf.

4 Canadian Competition Bureau, Intellectual Property Enforcement Guidelines (2016) [hereinafter CIPG], www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/vwapj/cb-IPEG-e.pdf/$file/cb-IPEG-e.pdf.

5 Korea Fair Trade Comm'n, Review Guidelines on Unfair Exercise of Intellectual Property Rights (2010) [hereinafter KRG]. Recent revisions to Korea's guidelines entered into force in March 2016. At the time of writing, only a draft of the updated guidelines was available online. *See* http://eng.ftc.go.kr/bbs.do?command=getList&type_cd=62&pageId=0401.

6 Japan Fair Trade Comm'n, Guidelines for the Use of Intellectual Property Under the Antimonopoly Act (2016) [hereinafter JIPG], www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/IPGL_Frand.pdf.

7 In December 2016, a former senior official of China's MOFCOM said that the introduction of uniform guidelines was an urgent task for Chinese antitrust regulators. *See* MLEX, *Unified IP Antitrust Guidelines a Top Priority for China, Ex-MOFCOM Competition Chief Says* (Dec. 12, 2016). China's National Development and Reform Commission (NDRC), the Ministry of Commerce (MOFCOM), the State Administration for Industry and Commerce (SAIC), and the State Intellectual Property Office (SIPO) has each developed draft guidelines. The SAIC released Rules on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition in Spring 2015, with an effective date of August 1, 2015. In addition, the Anti-Monopoly Commission under the State Council (AMC) is developing IP guidelines by integrating drafts from four government agencies. SAIC has contributed draft Guidelines on Antitrust Enforcement Against IP Abuse. *See* CHINAIPR, *SAIC Announces Its Latest Draft of IP Abuse Guidelines*, (Feb. 8, 2016), http://chinaipr.com/2016/02/07/saic-announces-its-latest-draft-of-ip-abuse-guidelines. The NDRC issued a draft of its Anti-Monopoly Guideline on Abuse of Intellectual Property Rights on October 22, 2015, and a subsequent draft on December 31, 2015. Drafts from MOFCOM and SIPO are not publicly available. For an overview of recent developments involving IP and antitrust guidelines in China see Koren W. Wong-Ervin, *An Update on China's Anti-Monopoly Law Guidelines on IP*, LAW360 (Dec. 15, 2015).

8 Government of India, Dep't of Indus. Policy and Promotion, Ministry of Commerce & Industry, D*iscussion Paper on Standard Essential Patents and Their Availability on FRAND Terms* (2016), http://dipp.nic.in/English/Discuss_paper/standardEssentialPaper_01March2016.pdf.

9 *See* U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property (2017) [hereinafter IPG], https://www.ftc.gov/system/files/documents/public_statements/1049793/ip_guidelines_2017.pdf.

10 *See infra* note 36 et seq.

11 The agencies believe that the new terminology would "more accurately reflect how these markets have been defined in enforcement actions." *See* Press Release, U.S. Dep't of Justice & Fed. Trade Comm'n, DOJ and FTC Seek Views on Proposed Update of the Antitrust Guidelines for Licensing of Intellectual Property (Aug. 12, 2016), www.justice.gov/opa/pr/doj-and-ftc-seek-views-proposed-update-antitrust-guidelines-licensing-intellectual-property.

12 Letter from Joseph Farrell, Richard Gilbert, and Carl Shapiro, University of California, to Fed. Trade Comm'n and Antitrust Division, U.S. Dep't of Justice (Sept. 7, 2016), https://www.justice.gov/atr/file/890491/download.

13 *E.g.*, U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, ANTITRUST ENFORCEMENT AND INTELLECTUAL PROPERTY RIGHTS: PROMOTING INNOVATION AND COMPETITION (2007) [hereinafter IPR], www.ftc.gov/sites/default/files/documents/reports/antitrust-enforcement-and-intellectual-property-rights-promoting-innovation-and-competition-report.s.department-justice-and-federal-trade-commission/p040101promotinginnovationandcompetitionrpt0704.pdf; EUROPEAN COMM'N, *Competition, Assessment of Potential Anticompetitive Conduct in the Field of Intellectual Property Rights and Assessment of the Interplay Between Competition Policy and IPR Protection* (2011), http://ec.europa.eu/competition/consultations/2012_technology_transfer/study_ipr_en.pdf.

14 *E.g.*, U.S. Dep't of Justice & Fed. Trade Comm'n, Patent Assertion Entity Activities Workshop (2012), www.ftc.gov/news-events/events-calendar/2012/12/patent-assertion-entity-activities-workshop.

15 E.g., Letter from Renata B. Hesse, Acting Assistant Att'y Gen., to Michael A. Lindsay, Dorsey & Whitney LLP (Feb. 2, 2015) [hereinafter IEEE], https://www.justice.gov/file/338591/download. The Antitrust Division's Business Review Letters are available at https://www.justice.gov/atr/business-reviews.

16 In the press release accompanying the revised IPG, the U.S. agencies acknowledged the "desire of some commenters for the guidelines to more specifically address additional IP licensing activities" and noted that "the business community may consult the wide body of DOJ and FTC guidance available to the public—in the form of published agency reports, state-

ments, speeches and enforcement decisions—which rely on [the IPG's] analytical framework and further illuminate each agency's analysis of a variety of conduct involving intellectual property." Press Release, U.S. Dep't of Justice & Fed. Trade Comm'n, DOJ and FTC Issue Updated Antitrust Guidelines for the Licensing of Intellectual Property (2017), https://www.justice.gov/opa/pr/doj-and-ftc-issue-updated-antitrust-guidelines-licensing-intellectual-property.

[17] *See also* Press Release, U.S. Dep't of Justice & Fed. Trade Comm'n, *supra* note 11.

[18] IPG, *supra* note 9, § 2.0.

[19] *See, e.g.*, Atari Games Corp. v. Nintendo of Am., Inc., 897 F.2d 1572, 1576 (Fed. Cir. 1990) ("[T]he aims and objectives of patent and antitrust laws may seem, at first glance, wholly at odds. However, the two bodies of law are actually complementary, as both are aimed at encouraging innovation, industry and competition."); *see also In re* Papst Licensing, GmbH Patent Litig., No. CIV.A.99-3118, 2000 WL 1145725, at *6 (E.D. La. Aug. 11, 2000) (citing U.S. IPG's guidance on market definition).

[20] EU TTG, *supra* note 3, ¶ 7.

[21] *Id.* ¶ 159.

[22] *Id.*

[23] CIPG, *supra* note 4, at 6.

[24] NDRC, Anti-Monopoly Guideline on Abuse of Intellectual Property Rights, Exposure Draft (2015), § I(I)1 [hereinafter NDRC Dec. 2015], http://www.aipla.org/committees/committee_pages/Standards_and_Open_Source/Committee%20Documents/IPR%20Guideline%20(draft)%2020151231-EN.PDF.

[25] 1995 IPG, *supra* note 1, § 2.2.

[26] Illinois Tool Works Inc. v. Indep. Ink, Inc., 547 U.S. 28, 45 (2006). The amendments to the IPG removed the 1995 expression of uncertainty and replace it with a citation to *Illinois Tool Works*. *See* IPG, *supra* note 9, § 2.2 n.16.

[27] *See, e.g.*, EU TTG, *supra* note 3, ¶ 79 et seq.

[28] KRG, *supra* note 5, § 2.C.

[29] NDRC Dec. 2015, *supra* note 24, § I(I)2.

[30] IPG, *supra* note 9, § 2.3.

[31] *Id.* § 3.4; *see also, e.g.*, Schlafly v. Pub. Key Partners, No. 94-20512, 1997 WL 564073, at *4 (N.D. Cal. Aug. 29, 1997) (citing the U.S. guidelines and noting that "licensing arrangements are generally considered to be procompetitive").

[32] EU TTG, *supra* note 3, ¶ 174. The EU TTG recognize that while licensing agreements often will be subject to an effects-based analysis, some restrict competition "by their very object" and, therefore, are unlikely to be justified. *See id.* ¶ 14. The EU TTG note that the "hardcore restrictions of competition" set forth in Art. 4 of the Technology Transfer Block Exemption will typically fall into the category of restrictions by object. *See* Comm'n Regulation (EU) No. 316/2014 of 21 March 2014, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Technology Transfer Agreements, Art. 4, http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014R0316&from=EN.

[33] KRG, *supra* note 5, § 2.D.

[34] JIPG, *supra* note 6, at 2.

[35] NDRC Dec. 2015, *supra* note 24, § I(I)3.

[36] Most jurisdictions issue public decisions in cases of antitrust and intellectual property significance, and those decisions often reveal important refinements of the law. *See, e.g.*, Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 914 (N.D. Ill. 2012) (Posner, J., sitting by designation) (explaining that an injunction will rarely be appropriate where a patent holder has made a FRAND commitment, because the commitment "implicitly acknowledged that a royalty is adequate compensation for a license to use that patent" and the patentee therefore cannot establish irreparable harm), *aff'd in part, rev'd in part and remanded*, 757 F.3d 1286 (Fed. Cir. 2014); Case C-170/13, Huawei Techs. Co. v. ZTE Corp., ECLI:EU:C:2014:2391 (ECJ July 16, 2015) (finding that the owner of a FRAND-encumbered standard essential patent can only seek an injunction in certain circumstances); *In re* Orange Book Standard, KZR 39/06, (Bundesgerichtshof—BGH, May 6, 2009) (requiring a defendant to make a licensing offer to the patent holder in order to raise the so-called Orange Book defense of anticompetitive conduct by the patent holder); *see also* Press Release, European Comm'n, Antitrust: Commission Finds that Motorola Mobility infringed EU competition Rules by Misusing Standard Essential Patents (Apr. 29, 2014), http://europa.eu/rapid/press-release_IP-14-489_en.htm; Press Release, European Comm'n, Antitrust: Commission Accepts Legally Binding Commitments by Samsung Electronics on Standard Essential Patent Injunctions (Apr. 29, 2014), http://europa.eu/rapid/press-release_IP-14-490_en.htm.

[37] *See* IPG, *supra* note 9, § 2.1 (citing Verizon Commc'ns v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407–08 (2004)).

[38] *See* IPG, *supra* note 9, § 5.2 (citing Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007)).

[39] *See supra* note 25.

[40] *See* Letter from Farrell, Gilbert, and Shapiro, *supra* note 12.

[41] Fed. Trade Comm'n, Patent Assertion Entity Activity: An FTC Study (2016) [hereinafter PAE Activity Study], https://www.ftc.gov/system/files/documents/reports/patent-assertion-entity-activity-ftc-study/p131203_patent_assertion_entity_activity_an_ftc_study_0.pdf.

[42] Fed. Trade Comm'n, Patent Assertion Entities (PAE) Study Participant Materials Part B—Collection of Information Methodology (2013), https://www.reginfo.gov/public/do/DownloadDocument?objectID=47563401. Other examples of secondary guidance mainly intended to stimulate and advance debate are the various workshops on intellectual property and antitrust questions that the agencies have conducted over the years. *See supra* note 14.

[43] *See* 1995 IPG, *supra* note 1, ¶ 5.5.

[44] *See* Letter from Thomas O. Barnett, Assistant Att'y Gen., to William F. Dolan and Geoffrey Oliver, Jones Day (Oct. 21, 2008), https://www.justice.gov/atr/response-rfid-consortium-llcs-request-business-review-letter; Letter from Charles A. James, Assistant Att'y Gen., to Ky P. Ewing, Vinson & Elkins (Nov. 12, 2002), https://www.justice.gov/atr/response-3g-patent-platform-partnerships-request-business-review-letter; Letter from Joel I. Klein, Assistant Att'y Gen., to Carey R. Ramos, Paul, Weiss, Rifkind, Wharton & Garrison (June 10, 1999), https://www.justice.gov/atr/response-hitachi-ltds-matsushita-electric-industrial-co-ltds-mitsubishi-electric-corporations; Letter from Joel I. Klein, Assistant Att'y Gen., to Garrard R. Beeney, Sullivan & Cromwell (Dec. 16, 1998), https://www.justice.gov/archive/atr/public/busreview/2121.pdf; Letter from Joel I. Klein, Assistant Att'y Gen., to Gerrard R. Beeney, Sullivan & Cromwell (June 26, 1997), https://www.justice.gov/atr/response-trustees-columbia-university-fujitsu-limited-general-instrument-corp-lucent.

[45] *Supra* note 13.

[46] IPG, *supra* note 9, § 5.5, n.81.

[47] European Comm'n, Guidelines on the Application of Article 81 of the EC Treaty to Technology Transfer Agreements (2004), http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52004XC0427(01)&from=EN.

[48] *Id.* ¶ 220.

[49] EU TTG, *supra* note 3, ¶ 223 et seq.

[50] *Id.* ¶ 261. Under the 2014 Guidelines, the creation and operation of patent pools generally does not raise competition concerns if several listed conditions are met. These conditions include well-established principles of patent pooling, such as that pool participation must be open to "all interested technology rights owners;" the pooled IP is licensed into and out of the pool on a non-exclusive basis; or that pool participants "remain free to develop competing products and technology." *Id.*

[51] *See* KRG, *supra* note 5, § III.4; JIPG, *supra* note 6, at 9, 13; Japan Fair Trade Comm'n, Guidelines on Standardization and Patent Pool Arrangements § 2 (2005) [hereinafter JSPG], http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/Patent_Pool.pdf ; CIPG, *supra* note 4, § 7, Example 6.

[52] 1995 IPG, *supra* note 1, § 3.2.3. The 1995 IPG defined an innovation market as consisting of "the research and development directed to particular new or improved goods or processes, and the close substitutes for that research and development." *Id.*

[53] IPG, *supra* note 9, § 3.2.3.

[54] *See id.*; *see also* DOJ Press Release, *supra* note 11 ("The proposed update

retains the concept of 'innovation markets,' but refers to them as 'Research and Development Markets' to more accurately reflect how these markets have been defined in enforcement actions.") The addition of pharmaceutical cases in note 40 of the updated IPG may signal that the agencies see the development of new drugs as the main area of application of the innovation market concept.

[55] CIPG, *supra* note 4, at 19.

[56] Japan's guidelines indicate that "the effect on competition in developing technologies should be evaluated by the effect on competition in the trade of future technologies resulting from such activities or products incorporating the technology." JIPG, *supra* note 6, at 6.

[57] EU TTG, *supra* note 3, ¶ 26.

[58] KRG, *supra* note 5, § II.3(A)(3).

[59] The relative lack of guidance may be due to the fact that the regulatory environment of some jurisdictions encourages "reverse payment" settlements more than others.

[60] The IPG devote one paragraph to settlements, noting that settlements involving cross-licenses "can be an efficient means to avoid litigation" but may raise competition concerns when the cross-licensing involves horizontal competitors. IPG, *supra* note 9, § 5.5.

[61] FTC v. Actavis, Inc., 570 U.S. 756 (2013). For example, in 2010, the FTC released a staff report on the impact of brand/generic patent settlements. Fed. Trade Comm'n, Pay-For-Delay: How Drug Company Pay-Offs Cost Consumers Billions: A Fed. Trade Comm'n Staff Study (2010), https://www.ftc.gov/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff.

[62] EU TTG, *supra* note 3, ¶ 234.

[63] *Id.* ¶ 237.

[64] *Id.* ¶ 238.

[65] *Id.* ¶ 239. Accordingly, practitioners have to rely on precedent, notably the decisions by the European Commission and the General Court in the Lundbeck case. *See* Case AT.39226—Lundbeck (June 19, 2013); Case T-472/13, Lundbeck v. Comm'n (Sept. 8, 2016), ECLI:EU:T:2016:449.

[66] KRG, *supra* note 5, § III.6.

[67] JSPG, *supra* note 50, § 2(2).

[68] *Id.*

[69] *Id.* § 2(3).

[70] IPR, *supra* note 13, at 33–53.

[71] *Id.* at 34.

[72] *Id.* at 42–52. For other secondary guidance on SEPs and FRAND commitments, see, e.g., U.S. Dep't of Justice & Patent & Trademark Office, Policy Statement on Remedies for Standard-Essential Patents Subject to Voluntary F/RAND Commitments (2013), https://www.justice.gov/sites/default/files/atr/legacy/2014/09/18/290994.pdf.

[73] HG, *supra* note 3.

[74] *Id.* ¶ 258.

[75] *Id.* ¶¶ 276–281.

[76] *Id.* ¶¶ 282–283, 286–287.

[77] KRG, *supra* note 5, § III.5(A) ("[C]onsultation for the standard setting and the exercise of standard essential patents related to standard technologies can generate pro-competition effects by promoting the use of related technology and enhancing efficiency, thus contributing to the welfare of consumers.").

[78] KRG, *supra* note 5, § III.5(A)(3), (4).

[79] *See supra* note 5. Several sections of the ABA have commented on the proposed revisions to Korea's guidelines. *See* Am. Bar Ass'n, Joint Comments of the American Bar Association Sections of Antitrust Law, Intellectual Property Law, International Law, and Science & Technology Law on to the Korea Fair Trade Commission's Review Guidelines on Unfair Exercise of Intellectual Property Rights, (2015) [hereinafter ABA KFTC Comments], http://www.americanbar.org/content/dam/aba/administrative/intellectual_property_law/advocacy/advocacy-20151030-joint-comments.authcheckdam.pdf.

[80] *Id.*

[81] China State Admin. for Indus. and Comm., Rules of the Administration for Industry and Commerce on the Prohibition of Abuses of Intellectual Property Rights for the Purposes of Eliminating or Restricting Competition, China State Administration for Industry and Commerce § 13 (2015).

[82] NDRC Dec. 2015, *supra* note 24, § IIII(II)(6). Several sections of the ABA have commented on NDRC's draft guidelines. *See* Am. Bar Ass'n, Joint Comments of the American Bar Association's Sections of Antitrust Law, Intellectual Property Law, and International Law on the Anti-Monopoly Guideline on Intellectual Property Abuse (Draft for Comments) (2016), www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs/2016_comments.html.

[83] CIPG, *supra* note 4, at 52.

[84] *Id.*

[85] PAE Activity Study, *supra* note 41, at 1.

[86] KRG, *supra* note 5, § III.7.

[87] *Id.* In view of these broad principles, commentators have urged the Korea Fair Trade Commission to tread carefully in analyzing cases involving NPEs/PAEs, to ensure that actual enforcement is based on solid evidence of harm. *See* ABA KFTC Comments, *supra* note 79.

[88] CIPG, *supra* note 4, at 39.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] PAE Activity Study, *supra* note 41.

[93] Agency Information Collection Activities; Submission for OMB Review; Comment Request, 79 Fed. Reg. 28,715, 28,716 (May 19, 2014).

[94] PAE Activity Study, *supra* note 41, at 3–4.

[95] *Id.* at 9.

IPRs and China's Anti-Monopoly Law: Friends or Foes?

BY CHARLES POMMIÈS, PETER MCDONALD, AND DAVID SHEN

THE INTERPLAY BETWEEN intellectual property rights (IPRs) and antitrust has been recognized as an important issue from the very beginning of the antitrust enforcement history in China. As in many other jurisdictions, the exercise of IPRs in China is not immune to the application of antitrust rules. The 2007 Anti-Monopoly Law (AML) aims to strike the right balance between, on the one hand, legitimate use and, on the other hand, abuse of IPRs: the AML "shall not apply to the exercise of intellectual property by business operators pursuant to the relevant laws and administrative regulations on intellectual property; however, this law shall apply to the conduct of a business operator which eliminates or restricts competition by abusing intellectual property rights.

China's evolving economy is increasingly relying on the creation and the exploitation of IPRs. The upgrading of China's industrial capabilities, the shift from "made in China" to "made by China," and the emphasis on growing a consumer-oriented, technology-led economy put IPRs at the core of multiple policy initiatives. As part of that national effort to foster innovation, China's antitrust enforcement agencies have taken a leading role in defining the boundaries between antitrust and IP law, albeit in an uncoordinated manner to date. While the State Administration of Industry and Commerce (SAIC) published guidance in the form of IPR Abuse Rules in April 2015 (the SAIC Rules),[2] the Ministry of Commerce (MOFCOM) and the National Development and Reform Commission (NDRC) issued decisions interpreting and applying the AML to regulate the use of IPRs.

The State Council, China's highest government body, has now mandated its Anti-Monopoly Committee to prepare a single, coordinated set of guidelines dealing with the interface between IPRs and the AML (the IPR Guidelines). As part of this exercise, both the NDRC and the SAIC have issued draft guidelines on the same issues to be incorporated in the Anti-Monopoly Committee's final package. The NDRC Draft Guidelines[3] and the SAIC Draft Guidelines[4] converge in many respects but remain different in important aspects, and the final position that will be adopted by the Anti-Monopoly Committee is still unclear.

In this complex and fast-moving environment, IPR holders active in China often struggle to keep track of the current trends and probable evolutions of the law and practice of Chinese antitrust enforcers to minimize the risk that their IPR portfolio is impacted.

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The Institutional Puzzle and Key Issues

One of the striking features of the antitrust enforcement landscape in China is how fragmented it is. This is a source of complexity—and, at times, perplexity—for IPR holders operating in China. In addition to judicial courts, three administrative agencies are tasked with enforcing the AML.

MOFCOM is in charge of enforcing the merger review provisions of the AML. MOFCOM has no mandate, and no active role, in policing corporate behavior, but it does exercise considerable influence through the remedies it imposes in problematic concentrations, including upon the uses of IPRs.[5] This is made possible by MOFCOM's extensive reliance on behavioral remedies rather than structural fixes in merger cases. For instance, in its decision clearing the acquisition of Alcatel-Lucent by Nokia, MOFCOM imposed a series of obligations on Nokia to effectively ensure that the portfolio of Alcatel's 2G, 3G, and 4G cellular communication standard-essential patents (SEPs) would be made available on fair, reasonable, and non-discriminatory (FRAND) terms to potential bona fide licensees on a long-term basis.[6]

The **NDRC** is responsible for regulating price-related infringements of the AML. It is also responsible for the enforcement of China's Price Law. The NDRC's foray into the field of IPRs is best illustrated by the historic RMB6.088 billion (approximately US$975 million) fine imposed on Qualcomm for abusing its dominant position in the wireless SEP licensing market and the baseband chip market.[7]

The **SAIC** is in charge of enforcing many laws, including the AML with respect to anticompetitive non-price conduct. The SAIC had kept a relatively low profile on the enforcement front, until its decision to impose a RMB677.7 million (approximately US$97 million) fine on Tetra Pak for abusing its dominant position through tie-in sales, exclusivity obligations and—although these related directly to prices—exclusionary rebate schemes.[8]

Tetra Pak illustrates the difficult delineation between the NDRC and the SAIC's respective remit.[9] Competition between the regulators is an important element in the dynamics of antitrust enforcement in China and explains why the SAIC and the NDRC have submitted numerous draft guidelines on the abusive exercise of IPRs. The lack of a unified approach increases difficulties for IPR holders operating in China.

This article will examine three major areas of concerns faced by IPR-rich companies doing business in China in light of the IPR Guidelines currently in preparation: the limits to the right to refuse to license; the safe harbors for licensing agreements; and the issue of unfairly high royalty rates.[10]

Right to Refuse to License, or a Duty to Deal with Prospective Licensees?

One of the most controversial issues that the Chinese antitrust agencies aim to tackle relates to the refusal by a dominant company to license IPRs. This should not come as a surprise. Whether denying a license could harm competition—and under which conditions—has been a hotly debated topic in recent years in the antitrust community on a global basis, including in China. Moreover, the AML itself, contrary to the laws in other jurisdictions (e.g., Article 102 of the Treaty on the Functioning of the European Union), provides in general terms that a refusal to deal by a company holding a dominant position without a valid justification will constitute an abuse.[11]

The debate initially crystallized around the SAIC Rules because they include a provision on abusive refusals to license, which attracted strong criticism for applying the "essential facility" doctrine. The SAIC's position appears to have evolved on that point, though, since the subsequent SAIC Draft Guidelines only contain a passing reference to essential facility. Setting itself apart from the SAIC, the NDRC does not mention the notion of essential facility in its Draft Guidelines at all. That should, however, do very little to alleviate the concerns of IPR holders because the NDRC is arguably pushing for stringent conditions on legitimate refusals to license.

The SAIC Rules. Article 7 of the Rules provides that a dominant undertaking shall not, without justification, refuse to license to other undertakings under reasonable conditions an IPR that constitutes an essential facility for manufacturing and operating activities, thus eliminating or restricting competition.

Article 7 adds that, when examining a case of refusal, the SAIC will assess whether the following cumulative factors are present:

1. The fact that there is no reasonable substitute for the IPR concerned such that the IPR is essential for other undertakings to participate in [a or the] relevant market;
2. The fact that the refusal to license the IPR concerned will negatively affect competition or innovation in [a or the] relevant market, harming the consumer interests or public interests;
3. The fact that the licensing of the IPR concerned would not cause unreasonable harm to the IPR owner.

Because it relies on the notion of essential facility, Article 7 raises a lot of questions and leaves many—if not most of them—unsolved. The doctrine of essential facility is unprecedented in China, contentious in many jurisdictions, and not well suited for IPRs. In particular, it has been argued that it has never been applied to patents (while it may have been applied to other types of IPRs). In the absence of a proper definition—in China or any other jurisdiction—of what constitutes an essential facility in the context of IPRs, the application of Article 7 will inevitably be hotly disputed.

The concept of essential facility as outlined in Article 7 is relatively broad: it appears to apply to production technologies as well as technologies (or other IPRs, such as know-how, design rights, etc.) that are used in marketing and commercialization. There is nonetheless a lack of clarity in what could be covered: for instance, Article 7 is silent on whether it is limited to the production of goods or could also apply to the provision of services.

Perhaps a more important question is whether the concept of essential facility under the Rules is limited to technology required to effectively compete in a separate market (as was the case in international precedents, such as in the EU *Magill*[12] or *Microsoft*[13] cases), or could it also be relied upon by companies wanting to compete in the same market as the holder of the IPRs? Under the first factor that the SAIC has to examine, it is not clear if the two relevant markets are the same or not (thanks in part to the Chinese language that does need to use the definite or indefinite article). The potential scope of application of Article 7 appears to be broad and may give rise to innovative and unexpected claims by competitors.

There is also no definition or guidelines on what can constitute a "justification" to refuse to grant a license. Will it have to be an objective justification or will the holder of the IPR be able to put forward more subjective factors to justify its refusal? Article 7 of the Rules indicates that there should be a balance of interests between, on the one hand, the adverse impact on innovation and competition harming consumers or the public interest and, on the other hand, the fact that the licensor's interests should not be unreasonably damaged. The proposition that "licensing the intellectual property right would not cause unreasonable damage to the licensor," however, leaves the door open to multiple interpretations—although it plainly and dangerously suggests that inflicting some degree of damage to the licensor will be acceptable. Also left open is the notion of "reasonable compensation" that the licensees should offer as a condition to be granted a license.

Relying on broad, barely defined concepts, Article 7 leaves a wide margin of discretion to the SAIC—particularly as the prospect of judicial oversight over SAIC decisions is minimal. According to public reports, the SAIC is conscious that Article 7 is controversial. SAIC officials emphasized that they would apply caution in enforcing the Rules. There will undoubtedly be much scrutiny by the international antitrust community of the way the duty to deal outlined in Article 7 will be implemented by the SAIC. Until there is more certainty, there is a real risk that the threat of forced licensing could reduce multinational companies' incentives to innovate in China—or, at least, to offer their most innovative products to Chinese customers.

The SAIC Draft Guidelines. The latest version of the SAIC Draft Guidelines mark a noteworthy evolution because the provision on refusals to license[14] no longer relies on the condition that the IPR concerned constitutes an essential facility. Article 24 of the SAIC Draft Guidelines is applicable to any IPR, yet adds as a nod to the SAIC Rules that an unjustified refusal would be abusive "in particular if the IPR concerned constitutes an essential facility for production and operation activities."

Article 24 also clarifies that the refusal to license IPRs is one legitimate form of exercise of IPRs by their holders, which under normal circumstances, should not be objectionable.

The SAIC Draft Guidelines, however, just like the SAIC Rules, cover the possibility that a refusal by a dominant company to license on reasonable terms may be abusive. Unless it is justified, such refusal could exclude or restrain competition and be found to be in breach of the AML.

Likewise, Article 24 lists the same three factors as the SAIC Rules as a guide to assess whether a refusal is abusive, namely: whether the IPR is necessary to compete on the relevant market or can be substituted; whether the refusal could have a detrimental effect on competition, innovation, consumers, or other public interests; and whether the license could cause unreasonable harm to the IPR holder.

The NDRC Draft Guidelines. The provision on abusive refusals to license in the NDRC Draft Guidelines[15] is worded in a way very similar to the SAIC Draft Guidelines (which have obviously been influenced by the NDRC formulation) although it makes no reference to the notion of essential facility. The main difference between the NDRC Draft Guidelines and the SAIC Draft Guidelines is that the two Draft Guidelines provide disparate elements. The NDRC indicates that, depending on the particular circumstances of each specific case, it will consider:

1. Whether the holder has undertaken any commitment to license the IPR concerned;
2. Whether the IPR concerned is essential to enter [a or the] relevant market, or whether alternative IPRs are reasonably available;
3. Whether the prospective licensee is able and willing to pay a reasonable licensing fee;
4. What will be the impact on innovation by the holder if the IPR concerned were to be licensed;
5. Whether the prospective licensee will lack the necessary quality and technical ability to ensure the proper implementation of the IPR concerned or the safety and performance of the products implementing that IPR; and
6. Whether the use by the prospective licensee can have a negative impact on energy conservation, the environment, or other social and public interests.

The first three factors put forward by the NDRC are unsurprising because they are in line—if not completely with international standards (insofar as the NDRC Draft Guidelines also cover the possibility that a refusal to grant a license to a third party wanting to compete on the same relevant market can be abusive)—at least with the SAIC Rules and Draft Guidelines.

The other three factors, however, depart from the SAIC's position. While each is in some respects favorable to the holder of IPRs, depending on how broadly they may be interpreted and how systematically they may be applied by the NDRC, they could also increase the burden on IPR holders refusing to grant a license. Effectively, IPR holders confronted with a request for license will need to complete a due diligence analysis on two key aspects.

First, IPR holders will need to assess whether their own prospects for pursuing innovative efforts will decrease if the IPR concerned were licensed. This is obviously a powerful tool in the hands of the NDRC to effectively conclude that non-practicing entities should not be able to refuse a license. For practicing entities, however, doing a fair analysis could be extremely complex and will, in any event, lead to much doubt and uncertainty. In practice, it is questionable whether an IPR holder can properly measure how its incentive and ability to innovate could be impacted by the granting of a license. One could argue that the risk that the most valuable innovations systematically give rise to a duty to license, allowing rivals to free-ride on others' innovative efforts, is a powerful disincentive to invest in R&D. This would lead to the logical conclusion that the most valuable technologies—which likely include those that are deemed essential—should not be subject to a duty to license according to the NDRC. This appears to be at odds with the objectives pursued by the NDRC and hard to reconcile with the SAIC's position. In any event, the NDRC Draft Guidelines do not provide any guidance on this point and do not indicate to what degree innovation must be impacted in order to justify a refusal.

Second, IPR holders will have to make inquiries about the exact uses of the IPR concerned anticipated by the prospective licensee and to evaluate whether that prospective licensee is committed to high standards of safety, quality, and compliance with energy conservation and environmental standards. Knowing your counterparty is obviously a key element of any license agreement. It is typically in the best interests of an IPR holder—at least from a financial and reputational perspective—to get an understanding of who their licensees are and how they intend to, and actually do, implement the IPR concerned. The NDRC Draft Guidelines, however, appear to extend the category of potential licensees by effectively reversing the burden of proof: they suggest that an IPR holder could refuse a license only to those prospective licensees that are not "fit enough." This again would leave a considerable margin of discretion to the NDRC to decide whether a refusal to license is legitimate and supported by sufficient evidence of the risk (on the environment, safety, or other public interests) that a license would have carried.

If the NDRC proposal is eventually the one adopted in the final version of the Guidelines, IPR holders should be prepared to face persistent requests for licenses coming from China and to spend time to carefully respond to these requests. While both the NDRC and the SAIC acknowledge at the outset that a refusal to license is a legitimate form of exercise of IPRs, demanding conditions attached to a refusal could, in practice, negate that premise.

Finally, it is worth noting that the SAIC and NDRC provisions on refusals to license are not about compulsory patent licensing. Rather, IP owners within the purview of these provisions do not have unfettered rights to refuse licensing, resulting in the potential for forced dealing between an unwilling licensor and an arguably willing licensee. Under China's compulsory licensing regime, a violation of these provisions would be a basis for compulsory licensing. Therefore, compulsory licensing can be the outcome; but the State Intellectual Property Office of China, not the SAIC or NDRC, is the competent agency to grant compulsory licensing of patents.

Safe, but Very Narrow, Harbors

Following the approach of other regulators around the world, including in the United States and the European Union, both the SAIC and the NDRC are keen to provide safe harbors for agreements that raise no competition concerns in order to improve the efficiency of competition law enforcement efforts as well as to increase legal certainty for the benefit of IPR holders. They do so in a relatively uniform way (except for the critical market share threshold), but IPR holders should be aware that the scope of application of the safe harbors is in practice extremely narrow.

The SAIC defines the harbors in similar terms in the Rules and the Draft Guidelines:

- For horizontal agreements between competitors, the exercise of IPRs may be found not to constitute an anticompetitive agreement if either (1) the combined share of the parties on the relevant market affected by the parties' behavior is no more than 20 percent, or (2) there are at least four substitutable technologies that are controlled by independent third parties and can be obtained at reasonable cost in the market.
- For vertical agreements, the exercise of IPRs may be found not to constitute an anticompetitive agreement if either (1) the combined share of the parties on the relevant market affected by the parties' behavior is no more than 30 percent, or (2) there are at least two substitutable technologies that are controlled by independent third parties and can be obtained at reasonable cost in the market.

The different thresholds depending on whether the agreements are horizontal or vertical reflect the fact that vertical relationships are generally considered less harmful to competition than agreements between competitors. The market share thresholds retained by the SAIC are comparable to those defined in the European Technology Transfer Block Exemption Regulation (the TTBER).[16] Interestingly, however, the SAIC goes further than the TTBER in that it also considers the number of alternative technologies, and not merely the market shares of the parties. This means that even competitors with a combined market share in excess of 20 percent could fall within the safe harbor if there are four or more alternative technologies controlled by independent entities. The proper definition of the relevant affected market and the identification of all alternative technologies (i.e., the ones that are controlled by independent entities and are readily available on the market for a reasonable cost, but not those proprietary technologies that are not licensed out) will be key in that context.

The NDRC's approach is stricter than the SAIC. First, the market share thresholds are lower: 15 percent for horizontal agreements and 25 percent for vertical agreements. Second, the NDRC does not adopt the criterion of the number of available alternative technologies.

The most important point to bear in mind, however, is that both the SAIC and the NDRC hold that the safe harbors are not automatic and do not confer an absolute protection:

First, the safe harbors only cover agreements that do not fall within one of the categories of anticompetitive agreements defined in Article 13(1) to (5) and Article 14(1) and (2) of the AML prohibiting, *inter alia*, agreements between competitors relating to price fixing, quotas, or market allocation, and agreements with non-competing licensees containing "resale-price maintenance" provisions. In other words, an agreement can benefit from the safe harbor only to the extent that it could otherwise have fallen in one of the "catch-all" categories of Article 13(6) and Article 14(3). This limitation is substantial as many licensing agreements will include price, use, or territorial restrictions. In particular, Article 13(4) of the AML specifically prohibits agreements between competitors in relation to "restricting the purchase of new technologies or equipment, or the development of new technologies or products." As many of the IP-related restrictive agreements between competitors could fall within the scope of Article 13(4), it remains to be seen whether the condition for applying the safe harbor to licensing agreements between competitors will eventually be very limited or extremely difficult to prove.

Second, the SAIC and the NDRC make clear that safe harbors are not available where there is evidence that an agreement has the effect of eliminating or restricting competition. In other words, the safe harbor remains available until the SAIC or the NDRC can prove that an agreement can generate anticompetitive effects.

In practice, IPR holders should be cautious when availing themselves of the safe harbors, even in cases where they are below the market share thresholds or there are multiple alternative technologies readily available. An assessment of the actual or potential effects of licensing agreements on competition should be conducted in order to mitigate risk.

Excessive Royalties

The NDRC—which is a price regulator as well as an antitrust enforcer—is known for paying particular attention to pricing issues when assessing vertical agreements under the AML. Resale price maintenance has long been a focus of the NDRC's enforcement priorities.[17] In the field of IPRs, the main ground of the NDRC's decision against Qualcomm was that Chinese mobile device manufacturers had been charged unreasonable royalties for Qualcomm's IPRs.[18] The NDRC continues in the same vein with an important provision in the chapter on abuses of dominance targeting the practice of licensing IPRs at unfairly high prices.

More surprisingly in light of the fact that it is generally not responsible for price-related infringements of the AML, the SAIC Draft Guidelines also contain a provision on excessive royalties. This is an addition compared to the SAIC Rules, whose Article 10 covers unreasonable restrictive conditions in licensing agreements, but does not mention royalty rates specifically.

The ability to regulate royalty rates under the NDRC and SAIC Draft Guidelines derives from the law itself. Article 17(1) of the AML provides that excessive pricing shall be an abuse of dominance. Moreover, the AML's purposes are not limited to preventing anticompetitive conduct. The AML is also meant to increase economic efficiency, safeguard the public interest, and promote the development of a socialist market economy.[19] This forms the foundation for Chinese antitrust agencies to take into account broader industrial policy considerations when applying the AML and explains why these agencies are generally more willing to tackle pricing issues than their counterparts in other jurisdictions.

The NDRC and SAIC approaches are in broad terms similar.[20] Both acknowledge that, in order to continue to incentivize innovation, IPR holders are entitled to recoup R&D investments. They should decide freely on royalty rates, subject to one limitation: the rates should be reasonable. Unfairly high rates would have a negative impact on competition and constitute an abuse if the IPR holder concerned is in a dominant position. Importantly, the Draft Guidelines clarify that the mere holding of IPRs does not equate to being in a dominant position.[21] There is no such presumption, even for SEPs.

There is no definition of what a fair or reasonable royalty rate ought to be. Each of the NDRC and SAIC Draft Guidelines instead set out a list of factors that may be considered before a finding of abuse is made. These factors include considering:

- The licensing history for the IPRs concerned;
- Commitments to license made by the IPR holders;
- The geographic or product scope covered by the licensing agreement;
- In case of a package licensing, whether some of the IPRs included in the package could be expired, invalid, or not required by the licensee;
- Obligations imposed on the licensee not taken into account when setting the royalty (e.g., cross-licensing or grant-back obligations); and
- The circumstances under which a licensing agreement is entered into (e.g., if it follows threats of or actual proceedings for injunctive relief).

The main factor to be considered, however, is obviously the royalty rate itself. There is in that respect a disturbing divergence between the SAIC and the NDRC. The SAIC proposes to look at whether the licensing fee claimed by the holder is consistent with the value of the IPR concerned. The NDRC, on the other hand, is concerned about the contribution of the IPRs concerned to the value of the goods that implement them and the issue of royalty stacking in the case of SEPs. In both cases, there is no more precise guidance at this point on how these factors ought to operate.

Despite multiple critics both in China and abroad against any provision on excessive licensing fees, IPR holders should not expect that the final IPR Guidelines will remove such a provision. It will be up to the Anti-Monopoly Committee to increase legal certainty by shedding more light on the practical and objective methodology that dominant IPR holders should follow when setting licensing fees to avoid the risk of abuse.

Conclusion

The Chinese antitrust agencies should be praised for proposing to adopt a unified approach to the application of the AML to the exercise of IPRs. Irrespective of the merits of their provisions, the numerous drafts published by the NDRC and the SAIC help to shape the debate and alert IPR holders on areas of possible concern.

The process of adoption of the final IPR Guidelines, however, has taken much longer than was originally planned. The uncertainty around the IPR Guidelines is problematic both for licensees and licensors at a time when the Chinese economy's transformation relies on a compelling push to innovate. Although one can only speculate on the reasons for this delay, it is understood that Chinese IP-rich companies are actively participating in the process. This involvement may result in a slight reshifting of the balance between licensors and licensees, in particular in the three areas discussed in this article.

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[1] Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), art. 55, http://www.npc.gov.cn/englishnpc/Law/2009-02/20/content_1471587.htm.

[2] Provisions on Prohibition of Abuse of Intellectual Property Rights to Exclude or Restrain Competition (Order No. 74 promulgated by the State Admin. of Indus. & Commerce, Apr. 7, 2015).

[3] Nat'l Dev. & Reform Comm'n, Anti-Monopoly Guidelines for the Abuse of Intellectual Property Rights (Draft for Comments Dec. 31, 2015), http://jjs.ndrc.gov.cn/fjgld/201512/t20151231_770233.html [hereinafter NDRC Draft Guidelines].

[4] State Admin. of Indus. & Commerce, Announcement on Soliciting Public Opinions on the Guidelines for Anti-Monopoly Law Enforcement Against the Abuse of Intellectual Property Rights (7th Draft of the State Administration of Industry and Commerce) (Feb. 4, 2016), http://www.saic.gov.cn/zwgk/zyfb/qt/fld/201602/t20160204_166506.html [hereinafter SAIC Draft Guidelines].

[5] MOFCOM's role is also important in the drafting of the final version of the guidelines to be issued by the Anti-Monopoly Committee because the Anti-Monopoly Committee has no permanent staff. MOFCOM acts as its secretariat and MOFCOM officials will therefore effectively be in charge of reconciling the different drafts proposed by the NDRC and the SAIC as well as coordinating with China's State Intellectual Property Office.

[6] Press Release, Ministry of Commerce, MOFCOM Approves Nokia's Acquisition of Equity of Alcatel-Lucent Conditionally (Oct. 21, 2015), http://english.mofcom.gov.cn/article/newsrelease/significantnews/201510/20151001151049.shtml.

[7] Qualcomm, National Development and Reform Commission Penalty Decision [2015] No. 1 (Feb. 9, 2015).

[8] Tetra Pak, State Administration of Industry and Commerce Penalty Decision [2016] No. 1 (Nov. 9, 2016).

[9] For another illustration of how tenuous the distinction between price and non-price conduct can be, see the decisions issued by the SAIC and the NDRC against Chongqing Qingyang Pharmaceuticals, a manufacturer of active pharmaceutical ingredients which was determined to manipulate the market for allopurinol for its own benefit in two steps: first by organizing shortage of supply and second by increasing retail prices through increasing its rivals' costs as well as direct price-fixing and market-allocation mechanisms. The local branch of the SAIC issued a fine of RMB439,308.53 (approximately US$66,500) in relation to the refusal to supply. Chongqing Qingyang Pharmaceuticals, State Administration of Industry and Commerce Penalty Decision [2015] No. 15 (Oct. 28, 2015). Less than three months later, the NDRC imposed fines totaling RMB1.8 million (approximately US$272,000) on Chongqing Qingyang Pharmaceuticals and its distributor Chongqing Datong because they played a leading role in the formation of the anticompetitive agreements. (Chongqing Qingyang Pharmaceuticals, National Development and Reform Commission Penalty Decision [2016] No. 1 (Jan. 15, 2016).

[10] For the sake of clarity, it is noted that the IPR Guidelines should cover multiple other important areas, including all aspects of IPR licensing but also standard setting, patent pools, as well as the assessment of IPRs in merger control proceedings.

[11] *See* Anti-Monopoly Law of the People's Republic of China, art. 17(3).

[12] Joined Cases C-241/91 P & C-242/91 P, Radio Telefis Eireann & Independent Television Publications Ltd v. Comm'n, 1995 E.C.R. I-808.

[13] Case T-201/04, Microsoft Corp. v. Comm'n, 2007 E.C.R. II-3601.

[14] SAIC Draft Guidelines, *supra* note 4, art. 24.

[15] NDRC Draft Guidelines, *supra* note 3, sec. III(ii)(2).

[16] Commission Regulation No. 316/2014, 2014 O.J. (L 93) 17 (explaining the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements).

[17] *See, e.g.*, the RMB118.5 million (approximately US$17.2 million) fine imposed on Medtronic for imposing the price of its medical equipment supplies to distributors. Medtronic, National Development and Reform Commission Penalty Decision [2016] No. 8 (Dec. 5, 2016).

[18] *See* Press Release, *supra* note 6.

[19] Anti-Monopoly Law of the People's Republic of China, art. 1.

[20] SAIC Draft Guidelines, *supra* note 4, art. 23; NDRC Draft Guidelines, *supra* note 3, sec. III(ii)(2).

[21] SAIC Draft Guidelines, *supra* note 4, art. 22; NDRC Draft Guidelines, *supra* note 3, sec. III(i).

Navigating the Unique Features of China's Competition Landscape

BY ANDREW L. FOSTER

NEARLY NINE YEARS AGO, CHINA enacted its first comprehensive competition regulation, the Anti-Monopoly Law (AML).[1] Since then, the rapid growth of the Chinese economy, as well as the quickly developing maturity and confidence of its competition regulators, have quickly elevated China into one of the world's most critical jurisdictions for antitrust practitioners and their clients. From merger control, to cartels, to enforcement against dominant firms and monopolists, the actions of China's regulators now impact business in the United States and Europe on a daily basis.

For many practitioners, relying on mistaken assumptions regarding the goals of China's competition policy and related procedures can lead to significant surprises, even for experienced lawyers. For example, the AML owes a significant debt to the competition laws of the European Union, which were often tracked closely in the original drafting of the AML, and it would be reasonable to assume that the similarities in language should lead to similarities in substantive approach. Moreover, the comparative youth of the regime might appear to suggest that it would take its cues primarily from more experienced regulators, such as those of the United States and European regimes. These mistaken assumptions sometimes give rise to practitioners' often incorrect expectations that Chinese regulators can and will seek to converge both their procedures and their substantive assessments with those of other mature competition regulators.

The evidence of the past several years has shown, however, that the Chinese antitrust enforcement agencies are charting their own path forward. Moreover, this is a path that has been shown not to be bound by global standards or practices, but instead driven to satisfy the unique concerns of the Chinese markets, and the unique role that the AML is designed to play in regulating those markets. Practitioners with clients who operate in or make sales into China must learn not only to recognize these China-specific goals and guidelines of the AML, but also to understand the important ways in which these sometimes differ from established practices in the United States or European Union.

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Examining recent merger control activity and conduct investigations demonstrates these concerns acutely. On the merger control side, there has been particular divergence from Western practice with regard to: (1) the role and procedures of the review process generally; (2) the negotiation and implementation of remedies for conditional approval; and (3) the assessment of notifiability for joint ventures and minority investments. As to conduct investigations, there has been divergence from Western practices relating to due process and, from a substantive standpoint, with regard to how unilateral conduct by firms (for example, with regard to pricing, rebates/discounts, or minimum resale guidance) may nevertheless expose such firms to investigations and penalties for allegedly anticompetitive behavior.

Background on Competition Law Enforcement Under The AML

Three Anti-Monopoly Enforcement Agencies (AMEAs) enforce the antitrust laws in China: the Ministry of Commerce (MOFCOM);[2] the National Development and Reform Commission (NDRC),[3] and the State Administration for Industry and Commerce (SAIC).[4] Each has responsibility for a separate area of enforcement.

Responsibility for merger control lies in the Anti-Monopoly Bureau (AMB) of MOFCOM. MOFCOM also has other responsibilities with regard to review of mergers and acquisitions (such as being responsible for national security review and foreign investment review, among others), but the AMB's merger control review process has quickly risen to rival those of the U.S. agencies and European Commission in terms of its ability to affect materially the outcome of a proposed multinational transaction. All merger control activities take place centrally within MOFCOM's national-level Beijing offices.

The NDRC and SAIC form China's two other enforcement agencies. The NDRC is primarily responsible for enforcing the AML's provisions addressing price-related anticompetitive conduct, such as price fixing and retail price maintenance, while the SAIC enforces the AML's provisions on non-price-related conduct, such as tying and bundling. Neither the AML nor public guidance clarifies exactly how this distinction between price- and non-price-related conduct should be applied in practice. Given that all antitrust violations at least arguably boil down to price, it is unsurprising that there remains a certain amount of overlap in the two agencies' activities. This is all the more important given the different cultures and procedural approaches taken by the NDRC and SAIC respectively, as well, as will be discussed in more detail below. Unlike MOFCOM, the NDRC and SAIC often delegate enforcement responsibilities from their central offices to regional or provincial offices around the country as appropriate.

China's Own Path with Regard to Merger Control

The Importance of Industrial Policy. In most jurisdictions, the overriding objective of merger control is to protect consumers by prohibiting mergers, acquisitions, and other concentrations (such as joint ventures) that will or are likely to create or enhance market power.[5] Notwithstanding ongoing debate as to whether consumer welfare or total welfare should form the benchmark for the relevant economic welfare standard, most competition regulators accept that the basic goals of antitrust law are to enhance economic efficiency and safeguard consumer welfare.[6] As a result, in recent decades, there has been a commensurate shift away from using antitrust law to serve broader policy goals, such as industrial policy[7] or public interest,[8] as a consensus has emerged among developed countries that such use undermines economic efficiency.[9]

In drafting the AML, China explicitly preserved its ability to consider industrial policy concerns in evaluating transactions (and on some readings has even mandated such consideration). MOFCOM reviews mergers and acquisitions to determine whether they "lead or may lead to elimination or restriction of competition" (Article 28), primarily considering whether a concentration would "generate or reinforce a single undertaking's ability, motive or possibility to eliminate or restrict competition by itself."[10] In addition to evaluating factors, such as market shares, market power, and the degree of concentration in the relevant market, MOFCOM is also instructed to consider explicitly the impact of the concentration "on the development of the national economy" (Article 27).

Thus, in parallel with its "pure" competition policy assessment, MOFCOM will, under its ordinary procedure,[11] engage with other important Chinese stakeholders in a substantive assessment of the impact of a proposed transaction on China's national economic development and industrial policy. This industrial policy review involves the solicitation of the views not only of key Chinese customers, but also of other important State ministries (such as the NDRC, the Ministry of Industry and Information Technology, the Ministry of Agriculture, and others, as relevant) as well as Chinese trade associations and competitors (including in particular the large State-Owned Enterprises).[12]

While Western practitioners are often generally aware that the Chinese merger review process encompasses such industrial policy considerations, it is important to recognize that these are not the sorts of sub rosa concerns and conspiracy theories that have been thought to affect trans-Atlantic competition practice.[13] Instead, these are patent, explicit concerns that are an integral feature of the Chinese law itself, and can (and should be) dealt with through patient advance planning and proactive outreach, rather than treated as fodder for post hoc grumbling about fairness concerns. Indeed, where it considers such action justified by China's unique market characteristics or industrial policy concerns, MOFCOM has demonstrated a robust track record of its willingness to impose conditions on (or even prohibit) transactions that have been cleared unconditionally in other jurisdictions, including, e.g., Seagate/Samsung (2011),[14] Google/Motorola (2012),[15] Marubeni/Gavilon (2013),[16] Glencore/Xstrata (2013),[17] Nokia/Alcatel-Lucent (2015),[18] and others. As a result, there is no longer any excuse for Western practitioners failing to recognize, and prepare for, the sovereign difference in approach enshrined in the AML.

Remedies in China. Given that MOFCOM's reviews are motivated by both competition concerns and industrial policy concerns, it should be unsurprising that it must be somewhat more open to a wider range of remedy proposals to fix those concerns than would be a jurisdiction focused on competition concerns alone. Thus, while MOFCOM shares the same preference for structural-type remedies to fix competition concerns, just as do the U.S. agencies and the European Commission, it is far more willing to consider behavioral or hybrid remedies to address considerations,[19] such as: (1) guaranteed supply for key Chinese customers (Uralkali/Silvinit (2011),[20] Glencore/Xstrata (2013));[21] (2) price guarantees or price reductions for Chinese customers (ThermoFisher/Life Technologies (2014));[22] (3) maintenance or increase of R&D spending (Seagate/Samsung (2011),[23] Western Digital/Hitachi (2012));[24] (4) renewed commitments to license Standard Essential Patents on fair, reasonable, and non-discriminatory terms (Google/Motorola (2012),[25] Microsoft/Nokia (2014),[26] Nokia/Alcatel-Lucent (2015));[27] and even (5) commitments that if technology were ever to be licensed in the future, it would be made available to Chinese licensees on fair, reasonable, and non-discriminatory terms (Merck/AZ Electronic Materials (2014)).[28]

With regard to structural remedies, these tend to parallel or mirror the same remedies required in other jurisdictions (e.g., NXP/Freescale (2015),[29] UTC/Goodrich (2012)).[30] MOFCOM is increasingly using "fix-it-first" remedies, as its last two conditional decisions have involved such a strategy (NXP/Freescale (2015)[31] and SAB Miller/AB InBev (2016)),[32] although there does not appear to be any indication that MOFCOM is moving towards making such a strategy a requirement.

Moreover, MOFCOM also appears to use structural remedies as a means of at least partially satisfying potential industrial policy concerns. This may take the form of requiring a divestiture of equity in an existing Chinese joint venture (which may benefit the Chinese joint venture partner, the Chinese market structure, Chinese customers, or all of the above). It may also take the form of MOFCOM steering a divestiture of key assets to an important Chinese player. While MOFCOM tends to deny publicly that industrial policy considerations play any material role in its remedy requirements, it has at least been speculated that this may have been the case in its review of Glencore/Xstrata (2013), which resulted inter alia in the sale of a Peruvian copper mine to a consortium of Chinese State-Owned companies, led by China MinMetals Corporation.[33] Here, after a review process that lasted well over a year, MOFCOM only permitted the transaction to close after extracting divestiture remedies from natural resource commodities producer and trader Glencore. Like other agencies, MOFCOM can not only require divestitures but can also exert significant influence over the identity of potential buyers. That the sale of the asset was eventually confirmed to a Chinese-led consortium may have invited some to speculate whether industrial policy concerns played any role in the review and ultimate disposition of the transaction.

China's Unique "Hold Separates." It has now been several years since MOFCOM last formally imposed its unique "hold- separate" remedy, which was used in four cases between 2011 and 2013. However, there are indications that MOFCOM still sometimes informally requires these kinds of commitments, and it is important for Western practitioners to understand the differences and potential implications of such a requirement.

Sometimes referred to as "temporary divestitures" by senior leadership within MOFCOM, the hold-separate remedy permits the transaction in question to close, but prevents meaningful integration of the acquired business (either a portion or the entire concern) until a specified period of time had passed and MOFCOM can undertake a new review to understand whether the competitive landscape had changed sufficiently to permit full integration. The two earliest hold separates occurred in the hard-disk drive cases driven by consolidation in that industry in 2011 and 2012, Seagate/Samsung (2011),[34] cleared unconditionally elsewhere, and Western Digital/Hitachi (2012), in which other competition regulators (as well as MOFCOM) required structural divestitures before providing approval. These were followed by similar decisions in Marubeni/Gavilon (2013)[35] and MediaTek/MStar (2013),[36] both cleared unconditionally everywhere else.

The hold separate generally requires the merging firms to maintain separate assets or business operations for a minimum review period (ostensibly between one and three years) before an application for "reconsideration" can be made to have the remedy lifted. During this review period, the acquirer and target operations operate separately (usually on a global basis), while an appointed trustee monitors contracts, pricing, customer relations, and other business practices. The parties are required to report to MOFCOM on a semi-annual or quarterly basis, and are usually also required to impose information firewalls and strict limitations on the exercise of shareholder rights by the acquirers.

Once the review period has expired, the parties may apply for reconsideration, but experience has shown that this can be a long and difficult road. As of the beginning of 2017, while all four cases would nominally be eligible to have the remedy lifted, only one (Seagate/Samsung) has succeeded in achieving a full removal.

Seagate delayed submission of its application to remove the hold-separate condition until May 2013, five months longer than the one-year waiting period it was required to observe, while Western Digital submitted its application promptly in March 2014, exactly two years after the decision. However, the reconsideration processes for both of those cases took substantially longer than generally anticipated (more than two years in Seagate's case). While no public information is available for the current status for Marubeni/Gavilon or MediaTek/MStar, both are long eligible for removal (Marubeni in April 2013 and MediaTek in August 2016). MOFCOM has given no indication that those remedies have been lifted.

More information exists for the Samsung and Western Digital applications for reconsideration. It has been reported that, during each respective evaluation process, MOFCOM met with the applicants multiple times to discuss removal and required the applicants to submit additional detailed evidence showing changed market conditions.[37] MOFCOM also consulted with other Chinese government agencies, industrial associations and customers, and even engaged independent third-party economic experts. Finally, on October 19, 2015, MOFCOM announced the partial removal of the conditions in Western Digital/Hitachi (leaving intact the requirement to continue to hold separate the respective sales and marketing teams), and on October 22, 2015, nearly four years after imposition of the initial, one-year remedy, MOFCOM announced the complete removal of the conditions in Seagate/Samsung.

The concept of this kind of hold separate is one that is wholly foreign to non-Chinese practitioners. Thus, experience with the U.S. or European regimes does not provide much guidance on how to deal with these cases—however, neither will reliance on the bare text of the MOFCOM decisions imposing these remedies. In all four cases, MOFCOM's decisions run only to a few pages, with the operative remedy requiring the hold separate sometimes being summarized in a mere sentence or two. Only after issuance of the public decision will detailed negotiations between the parties and MOFCOM commence, hammering out the working-level operational details of what can be an enormously complicated undertaking in seeking to manage independently two separate

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businesses while understanding the contours of where integration may be permitted, how information flows will operate, and how competitively sensitive information will be managed and who can access that information. These negotiated, detailed implementation plans can sometimes run into the hundreds of pages, belying the apparent simplicity of a commitment made in a sentence or two in a decision.

Because MOFCOM may sometimes also consider an "informal" hold-separate remedy (that is, one that does not result in an official, published conditional decision but instead results in an unconditional approval, at least on the books), practitioners may see these hold separates as a deceptively simple means of untying whatever knot may be obstructing the path to clearance. Practitioners considering such an "informal" hold-separate remedy should give careful thought to just how such implementation will be accomplished (and memorialized) in the absence of an official process, overseen by a monitoring trustee, where the rules of the game will be made clear to all parties in advance and cannot be unilaterally changed or altered "informally" afterwards.

The Notifiability and Review of Joint Ventures and Minority Investments

Another striking area of divergence for Western practitioners within the field of merger control comes in MOFCOM's treatment of joint ventures and minority investments, especially in the requirement to notify such transactions for review prior to implementation, and in MOFCOM's aggressive pursuit of companies for failing to notify.

In order for a transaction to be notifiable to MOFCOM, it must satisfy two separate and independent requirements: (1) the transaction must itself qualify as a "concentration" (Articles 20–21); and (2) the participating parties must meet the relevant revenue thresholds.[38] Once these two prongs have been met, notification to and approval from MOFCOM will be required before the joint venture or minority investment can be made—there are no exceptions for lack of local effects or for a joint venture lacking the character of a fully-functioning, autonomous, independent business (a "non-full function" joint venture). As a result, many joint ventures which would not be notifiable in the United States or the European Union—indeed, even those joint ventures which may have no operations in or sales to China—could nevertheless be notifiable to MOFCOM.

The first step in this notifiability assessment is to examine whether the transaction or investment in question constitutes a "concentration," that is, a merger or acquisition of control over another undertaking (Article 20). Acquisitions of sole control and joint control would each qualify as a "concentration," although the AML does not itself define control. Thus, while it is generally accepted that acquisitions of 50 percent or more of the voting rights or economic interest in an entity would qualify as a change of control, the guidance for acquisitions of less than 50 percent—say, a 49/51 joint venture or a 35 percent minority investment—could nevertheless result in a finding of joint control, but do not have obvious bright line rules and thus could lead to traps for unwary practitioners.

Western practitioners are generally familiar with the tests for joint control set forth in European Union's Consolidated Jurisdictional Notice, and the rules in China were inspired by this language.[39] In the EU, as a general rule, unilateral veto rights at the board level that would allow a minority investor to veto decisions which "are essential for the strategic commercial behavior of the joint venture" and include one or more of the ability to control or block either (1) the appointment or removal of senior management; (2) the approval of the annual budget; (3) the approval of the annual business plan; and/or (4) decisions on major investments or transactions to be undertaken, establish control.

The rules in China tend to be interpreted more broadly, with the key difference lying in the fact that MOFCOM reserves maximum discretion to itself in making the ultimate determination on control. Adding another layer of complexity, there are effectively two sets of guidelines in use by MOFCOM discussing this aspect of control. The guidelines officially in force set out a "decisive influence" test for control which takes into account "composition of the board of directors or the board of supervisors . . . and the voting mechanisms thereof," and had generally been understood to include the constellation of veto rights discussed in the Consolidated Jurisdictional Notice.[40] However, draft revisions to MOFCOM's guidelines on Measures for Notification of Concentrations Between Undertakings have also been proposed which, while not officially in force, likely reflect current practice within the AMB. Under these draft revisions, entities may potentially be considered to have control if they have any one of veto rights set forth above, or "other rights which may affect the operating strategy of an undertaking."[41]

Moreover, experience shows that MOFCOM's primary focus lies in the parties' ability to appoint or remove senior management, above all other factors. Thus, even a minority investor or a minority joint venture partner might easily find itself in a joint control situation simply by insisting on the right to, for example, appoint the chief executive or chief financial officer, or on the right to veto any expenditures in excess of an annual budget. Such control could be found notwithstanding the fact that only one party may in all other regards effectively be responsible for running the day-to-day operations of the target venture.

Once the possibility for a change in control is established, thus satisfying the first requirement for notifiability, the second step is to test whether the joint venture or minority investment also satisfies the revenues thresholds.[42] But here, too, are traps for the unwary. First, in the context of a joint venture under joint control or a minority investment leading to joint control, the relevant parties to count for threshold purposes will be the ultimate parent entities on both sides, including their entire groups, and not the revenues of the target. This calculation must include not only the parent entities themselves, but also all entities in which they directly or indirectly own 50 percent or more of the voting interests or economic interest or otherwise have control; this greatly increases the likelihood that the thresholds will be triggered. Similarly, this approach nullifies any hoped-for arguments to excuse filings based on the small size of the target or its confinement to activities outside of China—because it is the revenues of the parents that count, and not those of the target, MOFCOM will not find such arguments convincing.

Many Western practitioners miss the potential for a required China filing for joint ventures or minority investments leading to joint control due to these differences from the U.S. and European practice. In addition, many parties may simply be unwilling to notify MOFCOM of these transactions due to the added time required to navigate the review process, as well as potential fears regarding the interplay of industrial policy concerns. Nevertheless, in recent years MOFCOM has cracked down strictly on such failures to notify.

For example, in September 2015, MOFCOM published four decisions penalizing companies for failing to notify qualifying transactions.[43] Two of these decisions involved the failure to notify establishment of a joint venture between a multinational (Microsoft and Bombardier, respectively) and its Chinese partner. The other two decisions involved minority investments made as part of multistep acquisitions and levied penalties for premature or partial implementation of an acquisition prior to MOFCOM's approval of the transaction as a whole. In May 2016, MOFCOM published an additional three decisions penalizing companies for failures to notify,[44] two of which again involved the failure to notify establishment of a joint venture between a multinational (Hitachi and, again, Bombardier) and its Chinese partner. These seven decisions (four of which involve failure to notify joint ventures), resulted in individual fines ranging between RMB 150,000 (US$ 23,000) and RMB 400,000 (US$ 62,000), and are part of a larger campaign by MOFCOM to curb failures to file. MOFCOM has stated that it has opened more than 50 such investigations in its enforcement history and has thus made it plain that it will not excuse failures to file, either for negligence or for willful strategic or timing decisions. Western practitioners must adjust their advice to clients appropriately.

Anticompetitive Conduct Enforcement

Western practitioners will also find significant divergence with regard to Chinese investigations regarding anticompetitive conduct by parties. Some of these stem from fundamental differences between the legal regimes themselves, rather than being tied to particular competition policy or antitrust law issues. Others appear to reflect decisions by the Chinese enforcement agencies with respect to their priorities and competitive theories of harm that show marked divergence from those of their Western counterparts. Both are worthy of exploration.

Differences in the Legal Regime. Western practitioners are sometimes surprised to learn that the concept of legal privilege does not exist in China vis-à-vis the government. While the NDRC and SAIC are obligated to keep confidential any business secrets obtained in the course of enforcement (Article 41), no doctrine similar to that of legal professional privilege in Europe or attorney-client privilege in United States permits undertakings to withhold evidence on the basis that it constitutes legal advice or confidential communications between counsel and client.[45]

By the same token, Western ideals of due process do not have the same resonance within the halls of the Chinese antitrust enforcers. In particular, the NDRC has drawn sharp criticism for its perceived bias against multinationals and its alleged disdain for due process. For example, in 2013 NDRC officials reportedly suggested at a closed-door meeting with senior in-house counsel for about 30 international companies that providing admissions of guilt and "self-criticisms" rather than hiring experienced outside defense counsel could result in more favorable treatment during the course of an investigation.[46]

Similarly, the NDRC in particular is known to prefer to initiate, execute, and close its investigations in a matter of weeks or months, rather than the years that such investigations often take in the United States or Europe. With pressure to close investigations as quickly as possible, the NDRC reportedly relies more on leniency and settlement discussions, while soliciting investigation targets to provide both self-reports as well as evidence on the misconduct of third parties. Moreover, despite steadily increasing the scope of its operations and the number of its investigations (as well as the size of its fines), no penalized company has ever appealed a decision of the NDRC, despite the fact that the AML does at least provide for a theoretical appeal mechanism. This de facto absence of any judicial review over the process and substance of the NDRC's investigations will be very striking to any U.S. practitioner, and raise questions regarding the inherent fairness and checks and balances on the NDRC's investigative process.

By contrast, the SAIC's investigations (especially of multinationals) tend to be have a much longer duration and have largely been devoid of any reported due process concerns. For example, the SAIC opened its investigation into the rebating and discounting practices of Tetra Pak in July 2013, spending more than three years collecting data and engaging in hearings and bilateral meetings before fining the company nearly RMB 668 million (US$ 97 million) in a decision that Tetra Pak says it will not appeal. Similarly, the SAIC's investigation of Microsoft, first opened in 2014, is still ongoing today, signaling the SAIC's decision to proceed with thoroughness and caution in its high-profile investigations.

Given these differences, it can be seen that the decision as to whether potentially offending conduct falls into the "price-related" scope of the NDRC's remit or the "non-price-related" scope of that of the SAIC may make a material difference, at least in perception, as to a company's ability to ensure its due process is respected during an investigation. While Western practitioners may have some trepidation in the merger context, for example, as to whether the Federal Trade Commission or Department of Justice will take responsibility for review of a transaction, or as to whether a transaction notifiable to several individual EU Member States may be referred up to the European Commission, the implications of these alternatives may seem minor compared to a choice between the investigative methods of the NDRC and the SAIC in China.

Theories of Harm. Another potential area of divergence with regard to conduct investigations lies in the theories of harm. Historically, in the context of China's planned economy, the NDRC was responsible for regulating pricing of commodities and goods in China. While China has moved much more in the direction of a market economy, the NDRC does still seem to intervene more aggressively with regard to its perceptions of "unfair" pricing than would competition regulators in the United States, European Union, and other jurisdictions. For example, in May 2011, the NDRC fined Unilever RMB 2 million (US$300,000) for unilateral pricing conduct on the grounds that it "disturbed market order" by spreading news of a coming price increase for its own household products ahead of time.[47] Similarly, when foreign infant formula producers such as Danone and Mead Johnson raised prices following the melamine scandal of domestic Chinese producers (which resulted in the deaths of several infants), the NDRC punished these firms with a combined fine of RMB 669 million (US$96 million) alleging that they had committed minimum resale price maintenance by restricting supplies or fining retailers that did not follow suggested pricing practices. The NDRC did not, however, develop evidence of these alleged practices in its decision and, perhaps tellingly, almost as soon as the investigation had been announced (it took about a month from initial announcement to decision), several producers cut their prices for key products in China by as much as 15 percent or 20 percent.

This willingness to target what may be largely unilateral pricing conduct has been recently reaffirmed in the SAIC's decision to fine Tetra Pak nearly RMB 668 million (US$97 million) for practices which included inter alia taking advantage of its dominant market position to implement retroactive sales discounts and purchase target discounts.[48] While U.S. regulators would be hard pressed to find support for a Sherman Act Section 2 claim for such discounts in the absence of evidence of actual predatory pricing, such claims would sound very familiar to European practitioners, as they closely track the European Commission's very conservative approach taken to discounting articulated in its Intel investigation.[49]

Conclusion

These areas of divergence are just a few of the more important ones between Chinese antitrust practice and that of the United States and Europe, but they serve to highlight the important fact that MOFCOM, the NDRC, and the SAIC are all interested in developing a national competition policy that fits China's unique market and antitrust laws rather than slavishly adhering to practices elsewhere. Rather than bemoaning these differences, Western practitioners must raise their awareness of the aims and procedures of Chinese antitrust law to ensure that they are not unintentionally misleading clients due to their own training and antitrust "autopilot." Whether these differences will persist in the future remains to be seen, but for now it seems prudent to prepare for a regime that remains discerning and selective in choosing which parts of traditional global practice to adopt wholesale and which to adapt to the unique characteristics of China. ■

1 Anti-Monopoly Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 30, 2007, effective Aug. 1, 2008), 2007 Standing Comm. Nat'l People's Cong. Gaz. 517. While the AML was China's first comprehensive law dedicated to the protection of competition, it was not the first Chinese law to deal with competition-related matters. For example, Anti-Unfair Competition Law (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993, effective Dec. 1, 1993) CLI.1.6359(EN) (Chinalawinfo), Price Law (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 29, 1997, effective May 1, 1998), 1997 Standing Comm. Nat'l People's Cong. Gaz. 783, and other civil and criminal statutes have long included piecemeal strictures against common anticompetitive offenses such as price-fixing, predatory pricing, and the like.

2 The MOFCOM Anti-Monopoly Bureau: http://fldj.mofcom.gov.cn/.

3 The NDRC Price Supervision and Anti-Monopoly Bureau: http://jjs.ndrc.gov.cn/.

4 The SAIC Anti-Monopoly and Anti-Unfair Competition Enforcement Bureau: http://www.saic.gov.cn/fldyfbzdjz/.

5 ICN, ICN Recommended Practices for Merger Analysis (June 2009), http://www.internationalcompetitionnetwork.org/uploads/library/doc316.pdf. *See also* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines (2010), http://www.justice.gov/atr/public/guidelines/hmg-2010.htm, Eur. Comm'n, Guidelines on the Assessment of Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings, 2004 O.J. (C 31).

6 OECD, *The Objective of Competition Law and Policy and the Optimal*

Design of a Competition Agency, OECD J. Competition L. & Pol'y (May 26, 2003) [hereinafter OECD, *Optimal Design*], http://www.oecd-ilibrary.org/governance/the-objectives-of-competition-law-and-policy-and-the-optimal-design-of-a-competition-agency_clp-v5-art2-en.

7 Industrial policies, such as inter alia creation of national champions, correction of market failures, preservation or creation of access to critical infrastructure or markets, transfer of key technology or intellectual property, and execution of economic development, do not inherently clash with a primary goal of enhancing consumer welfare and economic efficiency, but are often in tension or outright conflict. *See* OECD, *Competition Policy, Industrial Policy and National Champions* (2009), http://www.oecd.org/daf/competition/44548025.pdf.

8 In most cases, public interest factors, such as consideration of employment effects or distribution of income or restrictions on foreign ownership and investment, exceed (or ignore) generally accepted competition policy objectives of promoting competition and efficiency. Thus, the inclusion of public interest considerations in merger control assessments materially increases the risk of inconsistent implementation of competition policy.

9 Still-developing countries tend to preserve more widely their ability to introduce industrial policy and public interest objectives in merger control. See OECD, *Optimal Design*, *supra* note 6.

10 Interim Provisions for the Assessment of the Effect of the Concentration of Business Operators on Competition (promulgated by the Ministry of Commerce, Aug. 29, 2011, effective Sept. 5, 2011), at 4, CLI.4.157952 (Lawinfochina).

11 Provisions for the Review of Concentration of Undertakings (promulgated by the Ministry of Commerce, Nov. 24, 2009, effective Jan. 1, 2010), at 6, CLI.4.123907 (Lawinfochina). Under the Simplified Procedure, introduced by MOFCOM in 2014, this second, industrial policy review is replaced by a ten-day public comment period.

12 *See* Susan Ning et al., *Review of Merger Control and Merger Remedies Regime in China: From 2008–2013*, King & Wood Mallesons Antitrust & Competition (Aug. 23, 2013), http://www.chinalawinsight.com/2013/08/articles/corporate/antitrust-competition/review-of-merger-control-and-merger-remedies-regime-in-china-from-2008-2013/; *see generally* Competition Law in the Asia-Pacific: A Practical Guide (Katrina Groshinski et al. eds., 2014).

13 *See, e.g.*, the fallout from the European Commission's prohibition of the GE/Honeywell merger in 2001, *EU Officially Blocks GE-Honeywell Deal*, Wall St. J., July 5, 2001, http://www.wsj.com/articles/SB994164822646614367; *Europe Ends Bid by G.E. for Honeywell*, N.Y. Times, July 4, 2001, http://www.nytimes.com/2001/07/04/business/europe-ends-bid-by-ge-for-honeywell.html); or more recently, the accusations of anti-American bias in the European Commission's investigations of Google, *Behind Google's Europe woes, American Accents*, Reuters (Nov. 26, 2014), http://www.reuters.com/article/us-google-eu-insight-idUSKCN0JA1X120141126).

14 Seagate/Samsung (2011), http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml. One of the well-publicized mergers in the hard disk drive industry announced in 2011 (along with that of Western Digital and Hitachi), the Seagate/Samsung transaction benefited from a priority rule in the EU and other jurisdictions under which, by virtue of being the first to file, it was evaluated under a "snapshot" freezing the competition landscape at the time of filing (i.e., under the legal fiction that the second transaction was not taking place). While that allowed Seagate/Samsung to be cleared unconditionally in nearly every jurisdiction around the world, China declined to consider any kind of priority rule and, as a result, Seagate/Samsung became the first recipient of China's unique "hold separate" remedy, discussed in more detail *infra*.

15 Google/Motorola (2012), http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml. Cleared unconditionally in other jurisdictions, Google's acquisition of Motorola Mobility nevertheless received close scrutiny from antitrust agencies due to the potential impact of the acquisition of Motorola Mobility's intellectual property portfolio. In China, however, Google's Android mobile telephone operating system platform boasts a far higher regional share than it does globally, and MOFCOM conditioned its approval upon an explicit agreement by Google to continue observing Motorola Mobility's fair, reasonable, and non-discriminatory licensing obligations, particularly for its standard essential patents.

16 Marubeni/Gavilon (2013), http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml. The acquisition of Gavilon (formerly a commodity trading arm of ConAgra) by Japanese trading house Marubeni was cleared unconditionally in all jurisdictions around the globe except China. Apparently concerned by Marubeni's domestic market position with regard to the import of soybeans (implicating potential national food security issues), MOFCOM imposed a "hold-separate" remedy on the transaction, notwithstanding a combined market share of less than 20%, with an increment of less than 1%.

17 Glencore/Xstrata (2013), http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml. Receiving conditional approval from MOFCOM after one of the longest reviews on record (lasting more than a year), natural resource commodities trader Glencore was finally allowed to purchase mining concern Xstrata. MOFCOM notably required the divestiture of a copper mine located in Peru, which was subsequently purchased by a consortium of State-Owned Chinese entities.

18 Nokia/Alcatel-Lucent (2015), http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml. After receiving unconditional antitrust approvals in jurisdictions around the world, Nokia's acquisition of Alcatel-Lucent was approved in China only after acceptance of licensing remedies and commitments relating to standard essential patents that closely tracked similar requirements placed on Nokia, as seller, in its sale of its handset business to Microsoft the previous year.

19 Elizabeth Xiao-Ru Wang et al., *Merger Remedies with Chinese Characteristics*, CPI Antitrust Chron. (Aug. 2013).

20 Uralkali/Silvinit (2011), http://fldj.mofcom.gov.cn/article/ztxx/201106/20110607583288.shtml.

21 Glencore/Xstrata (2013), http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400091222.shtml.

22 ThermoFisher/Life Technologies (2014), http://fldj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml.

23 Seagate/Samsung (2011), http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml.

24 Western Digital/Hitachi (2012), http://fldj.mofcom.gov.cn/article/ztxx/201203/20120307993758.shtml.

25 Google/Motorola (2012), http://fldj.mofcom.gov.cn/article/ztxx/201205/20120508134324.shtml.

26 Microsoft/Nokia (2014), http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400542415.shtml.

27 Nokia/Alcatel-Lucent (2015), http://fldj.mofcom.gov.cn/article/ztxx/201510/20151001139743.shtml.

28 Merck/AZ Electronic Materials (2014), http://fldj.mofcom.gov.cn/article/ztxx/201404/20140400569060.shtml.

29 NXP/Freescale (2015), http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml.

30 UTC/Goodrich (2012), http://fldj.mofcom.gov.cn/article/ztxx/201206/20120608181083.shtml.

31 NXP/Freescale (2015), http://fldj.mofcom.gov.cn/article/ztxx/201511/20151101196182.shtml.

32 SAB Miller/AB InBev (2016)), http://fldj.mofcom.gov.cn/article/ztxx/201607/20160701369044.shtml

33 *See Glencore to Sell Peruvian Mine to Chinese Group for $6 Billion*, N.Y. Times, Apr. 14, 2014, http://dealbook.nytimes.com/2014/04/14/chinese-consortium-buys-peru-mine-for-6-billion/.

34 Seagate/Samsung (2011), http://fldj.mofcom.gov.cn/article/ztxx/201112/20111207874274.shtml.

35 Marubeni/Gavilon (2013), http://fldj.mofcom.gov.cn/article/ztxx/201304/20130400100376.shtml.

36 MediaTek/MStar (2013), http://fldj.mofcom.gov.cn/article/ztxx/201308/20130800269821.shtml.

37 MOFCOM has published draft remedy guidelines that indicate that, in considering whether to remove restrictive conditions, MOFCOM will evaluate

whether: (1) the parties have undergone any significant change; (2) market conditions have undergone any significant change; and (3) it has become unnecessary or impossible to implement the conditions. Provisions on Imposing Restrictive Conditions on Concentration of Undertakings (for Trial Implementation) (promulgated by the Ministry of Commerce, Dec. 4, 2014, effective Jan. 5, 2015), at 27, CLI.4.239782 (Lawinfochina).

38 The revenue thresholds require satisfaction of both of the following requirements: (1) the combined annual revenues of the parties must exceed RMB 10 billion on a global basis or RMB 2 billion in mainland China; and (2) each of at least two individual undertakings must have annual revenues of RMB 400 million in mainland China.

39 Commission Consolidated Jurisdictional Notice Under Council Regulation (EC) No. 139/2004 on the Control of Concentrations Between Undertakings, 2008 O.J. (C 95) 1.

40 Guiding Opinions on Declaring the Concentration of Undertakings (Revised in 2014), Art. 3 (promulgated by the Ministry of Commerce on June 6, 2014, effective June 6, 2014), CLI.4.227221 (Chinalawinfo).

41 Comparison Table for the Revised Draft of Measures for Notification of Concentrations Between Undertakings (on file with the author).

42 Provisions on the Notification Thresholds for Concentration of Undertakings, Art. 3 (promulgated by the Standing Comm. State Council on Aug. 3, 2008, effective Aug. 3, 2008), CLI.2.107178 (Chinalawinfo).

43 Simon Baxter et. al, *MOFCOM Cracking Down on Failures to Notify Qualifying Mergers, Acquisitions and Joint Ventures* (Oct. 12, 2015), https://www.skadden.com/insights/mofcom-cracking-down-failures-notify-qualifying-mergers-acquisitions-and-joint-ventures.

44 Allen & Overy, *China Merger Control: MOFCOM Mounting Pressure on Failure to Notify Reportable Transactions* (May 18, 2016), http://www.allenovery.com/publications/en-gb/Pages/China-merger-control-MOFCOM-mounting-pressure-on-failure-to-notify-reportable-transactions.aspx.

45 Article 38 of the Law of the People's Republic of China on Lawyers (promulgated by the Standing Comm. Nat'l People's Cong., May 15, 1996, effective Jan. 1, 1997, amended Oct. 28, 2007, CLI.1.188538 (Chinalawinfo)), does stipulate that "A lawyer shall keep the national secrets and trade secrets known in practicing law, and shall not divulge any private information of a client." However, this law deals with lawyers and not their clients—who can nevertheless be compelled to provide such information to the State.

46 Michael Martina, *Tough-talking China Pricing Regulator Sought Confessions from Foreign Firms*, Reuters (Aug. 21, 2013), http://www.reuters.com/article/us-china-antitrust-idUSBRE97K05020130821.

47 *Unilever Fined for China Price Rise Talk*, Fin. Times (May 7, 2011), https://www.ft.com/content/f5d62146-77e5-11e0-ab46-00144feabdc0.

48 *SAIC Fines Tetra Pak Record $97 million for Antitrust Violations*, China L. & Prac. (Nov. 17, 2016).

49 *See, e.g.*, Case COMP/C-3/37.990—Intel, Comm'n Decision (Summary at O.J. (C 227) 13–17 (2009)).

International Comity in the Enforcement of U.S. Antitrust Law in the Wake of *In Re Vitamin C*

BY BENJAMIN G. BRADSHAW, JULIA A. SCHILLER, AND REMI MONCEL

NEARLY FIVE YEARS AGO IN ANTITRUST, we analyzed price-fixing allegations against Chinese manufacturers of Vitamin C, observing that, of the various judicial doctrines applicable to U.S. antitrust actions against companies owned or directed by a foreign state, international comity may be "best suited to balancing the competing demands of respect for the sovereignty of foreign nations and the need to enforce U.S. antitrust laws."[1] With its 2016 decision in *In re Vitamin C Antitrust Litigation*, the Second Circuit agreed.[2] In this important decision, the court vacated a $147 million judgment against Chinese Vitamin C manufacturers that had admitted to conspiring to fix prices and output in violation of the Sherman Act. The Second Circuit held that the principle of international comity weighed against exercising jurisdiction over the defendants in that case. Although the price fixing harmed American importers and consumers, the court found the foreign conduct to be outside its reach because the defendants' actions were compelled by Chinese law.[3]

In its decision, the Second Circuit recognized (as had the district court before it) that international comity is "'neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.'"[4] The Second Circuit declared that international comity "'is not just a vague political concern favoring international cooperation when it is in our interest to do so [but r]ather it is a principle under which judicial decisions reflect the systemic value of reciprocal tolerance and goodwill.'"[5] Central to the Second Circuit's reasoning was the concept of reciprocity, which weighs heavily in favor of extending deference to a foreign nation even where U.S. and foreign national interests significantly diverge. U.S. and Chinese antitrust policy objectives were at odds in important respects at the time of the dispute. But as the I*n re Vitamin C* court observed, "Not extending deference in these circumstances disregards and unravels the tradition of according respect to a foreign government's explication of its own laws, the same respect and treatment that we would expect our government to receive in comparable matters before a foreign court."[6]

One may question whether we see analogs to the *Vitamin C* litigation in the future. Indeed, the Chinese regulatory regime in place when the case was initiated no longer exists. Eight years ago, i.e., six years after the conduct in the Vitamin C litigation took place, China's Anti-Monopoly Law (AML) went into effect. The new AML may be less susceptible to a "true conflict"[7] with the Sherman Act than was China's previous regulatory regime, as the AML's enactment was widely viewed as bringing Chinese antitrust law closer to that of the United States. The AML carves out some exceptions for state-owned businesses, and the law leaves room for coordinated actions to keep Chinese enterprises competitive in the global economy. Thus, at the Chinese state's direction, companies might still pursue conduct that violates the Sherman Act, and private plaintiffs may have a limited ability to recover damages caused by such conduct in federal court under the Second Circuit's *Vitamin C* precedent.

Below, we revisit the judicial doctrine of international comity. Fundamentally, comity calls on courts to navigate the complexity that arises when nations' legal regimes are in tension and a judicial decision may have potential ripple effects on U.S. foreign relations. Multiple factors affect courts' comity analyses, including their sense of the judiciary's particular role in the political order, longstanding U.S. and international jurisprudence, the positioning of the U.S. federal government, and broader geopolitical events. We examine each of these factors.

First, we take a closer look at the evolution of international comity, culminating in the Second Circuit's opinion in *In re Vitamin C*. In particular, we analyze the independent role the judiciary plays in balancing the competing concerns of respect for foreign sovereigns and enforcement of the U.S. antitrust laws.

Second, we examine the 2017 update to the Department of Justice and Federal Trade Commission's (the Agencies)

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Antitrust Guidelines for International Enforcement and Cooperation to assess how the Agencies view the role of comity in the extraterritorial application of U.S. law.[8]

Third, we consider the broader economic and political environment in which U.S. courts may be asked to resolve conflicts between U.S. laws and those of other nations. Specifically, the Brexit vote and the 2016 U.S. presidential election arguably reflect a growing sentiment against the status quo in international economic cooperation and trade. Whether this sentiment will result in increased regulatory and legal conflicts among nations remains to be seen. At least as significant is the United States' decades-long efforts to work closely with other nations bilaterally and through multilateral institutions to harmonize countries' antitrust regimes, which implies a reduced likelihood of true conflicts of laws in the long term. In this environment, the doctrine of international comity and its multi-factor balancing test provide a flexible framework that is well suited not only to resolving current conflicts between U.S. and foreign law but also those that may arise in the future.

International Comity and the Sherman Act's Reach

Extraterritorial Application of the Sherman Act. The extent to which U.S. courts should apply U.S. antitrust laws extraterritorially has long been the subject of debate. The Sherman Act applies to "[e]very contract, combination . . . or conspiracy, in restraint of trade" and to every person who shall "monopolize, or attempt to monopolize, or combine or conspire . . . to monopolize" trade or commerce "among the several States, or with foreign nations."[9] When the issue of applying the Sherman Act to conduct in foreign countries first came before the Supreme Court in *American Banana Co. v. United Fruit Co.*, the Court adopted a strict territorial interpretation.[10] Specifically, in holding that foreign conduct was outside the scope of the Sherman Act, Justice Holmes declared that "the general and almost universal rule is that the character of an act as lawful or unlawful must be determined *wholly by the law of the country where the act is done*."[11]

Over time, courts moved away from this strict territorial interpretation to an "effects"-based approach that focused on the economic effects of the foreign conduct on U.S. markets. In the seminal *Alcoa* case, the Second Circuit held that the Sherman Act applied to agreements entered into and consummated outside of the United States by foreign companies "if they were intended to affect [U.S.] imports and did affect them."[12] The court found it to be "settled law" that "any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders."[13]

Alcoa's application of the Sherman Act to foreign conduct left ill-defined the geographical limits of the Sherman Act beyond the United States' borders.[14] After *Alcoa*, courts developed various standards to determine the magnitude and type of domestic effect necessary to establish a claim under the Sherman Act.[15] In an effort to reconcile these different standards, in 1982 Congress passed the Foreign Trade Antitrust Improvements Act (FTAIA), which sought to establish an objective standard to guide the courts. Under the FTAIA, Congress eliminated U.S. antitrust jurisdiction over conduct involving trade or commerce with foreign nations (other than import trade or import commerce) unless such conduct has a "direct, substantial, and reasonably foreseeable effect" on the United States.[16] More recently, the U.S. Supreme Court, citing back to *Alcoa* but not the FTAIA, explained in *Hartford Fire* that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[17]

Unfortunately, these cases and statutes provide no definitive answer for how comity affects a U.S. court's ability to hear a Sherman Act claim against a foreign defendant. To some, courts should look to comity to determine whether the Sherman Act grants a cause of action or jurisdiction.[18] Under this view, a claim, when properly before the court, requires no comity analysis because Congress, in enacting the statute that conferred the court jurisdiction and the plaintiff its claim, already made the inherently political determinations about the effects of U.S. laws on foreign relations.

To others, including the Second Circuit in *In re Vitamin C*, even where a plaintiff's cause of action and the court's jurisdiction are undisputed, a comity analysis remains proper. This view empowers U.S. courts under certain circumstances to relinquish jurisdiction over foreign defendants whose conduct violates U.S. antitrust laws and unquestionably affects U.S. commerce.

International Comity. To determine whether to abstain from asserting jurisdiction on comity grounds, courts developed a multi-factor balancing test first set out by the Ninth and Third Circuits in *Timberlane Lumber Co. v. Bank of America, N.T. & S.A.*[19] and *Mannington Mills, Inc. v. Congoleum Corp.*[20] Factors in this balancing test include:

> (1) Degree of conflict with foreign law or policy; (2) Nationality of the parties, locations or principal places of business of corporations; (3) Relative importance of the alleged violation of conduct here as compared with conduct abroad; (4) The extent to which enforcement by either state can be expected to achieve compliance, the availability of a remedy abroad and the pendency of litigation there; (5) Existence of intent to harm or affect American commerce and its foreseeability; (6) Possible effect upon foreign relations if the court exercises jurisdiction and grants relief; (7) If relief is granted, whether a party will be placed in the position of being forced to perform an act illegal in either country or be under conflicting requirements by both countries; (8) Whether the court can make its order effective; (9) Whether an order for relief would be acceptable in this country if made by the foreign nation under similar circumstances; and (10) Whether a treaty with the affected nations has addressed the issue.[21]

Then, in *Hartford Fire*, the U.S. Supreme Court refused to abstain from exercising jurisdiction in a case where U.S. and British law were seemingly at odds. Relying solely upon the first factor—the degree of conflict between U.S. and foreign law—the Court looked not just for apparent conflicts in legal regimes or discordant policy preferences but a "true conflict" between U.S. and foreign law.[22] In *Hartford Fire*, the Court explained that a "true conflict" exists only where a defendant is incapable of complying with both U.S. and foreign law.[23] That is, comity applies only where one sovereign compels conduct prohibited by another sovereign. After determining that there was no true conflict, the Court found "no need in this litigation to address other considerations that might inform a decision to refrain from the exercise of jurisdiction on the ground of international comity."[24] Courts are split over whether *Hartford Fire*'s focus on the existence of a "true conflict" clarified or displaced the factors articulated in *Mannington Mills* and *Timberlane Lumber*.

The *Vitamin C* opinion strengthens the view that a court should refrain from exercising jurisdiction over challenged conduct where a "true conflict" exists between U.S. and foreign laws. The Second Circuit looked for a "true conflict" between U.S. and Chinese law, and based on the presence of such a conflict, reversed the district court's exercise of jurisdiction. Nearly all of the court's analysis was focused on the true-conflict factor, which suggests that the court considered this factor to be the most significant one. This factor is likely to be particularly significant in conflicts with sovereigns, such as China, with significant economic and political influence. Unlike the Court in *Hartford Fire*, the Second Circuit recognized that the remaining factors are "still relevant to an abstention analysis."

Prior to the *Vitamin C* opinion, in *Mujica v. AirScan Inc.*, the Ninth Circuit had taken an even more expansive view of comity, holding that the presence of a true conflict is not a prerequisite for reaching the remaining factors in the comity analysis, at least in cases involving "adjudicatory comity."[25] Because it found that a true conflict did exist, the Second Circuit declined to reach the question of whether, in a case involving "prescriptive comity," the court could have reached the remaining factors in the comity analysis even in the absence of a true conflict.[26]

The* Vitamin C *Case. Plaintiff importers of Vitamin C filed a complaint in January 2005 alleging that four Chinese manufacturers of Vitamin C, who collectively controlled more than 60 percent of the global market, conspired to fix prices and volumes in violation of Sherman Act Section 1 and Clayton Act Sections 4 and 6. In subsequent motion practice, the defendants did not dispute the conduct allegations. Instead, they raised three defenses: (1) foreign sovereign compulsion, (2) the act of state doctrine, and (3) the principle of international comity.[27]

For the first time in any U.S. court, the Ministry of Commerce of the People's Republic of China (MOFCOM) filed a sworn statement and amicus brief in support of the defendants' motions to dismiss. According to this brief, the defendants' price fixing was compelled by Chinese law. But the district court found the amicus brief insufficiently credible and denied the defendants' motions. According to the court, "[MOFCOM's] assertion of compulsion is a post-hoc attempt to shield defendants' conduct from antitrust scrutiny rather than a complete and straightforward explanation of Chinese law during the relevant time period in question."[28] Several defendants then settled; the remaining defendants went to trial, and the jury returned a $147 million award.

The Second Circuit reversed, finding the district court had abused its discretion by not abstaining from exercising jurisdiction "on international comity grounds."[29] The district court had given MOFCOM insufficient deference, the Second Circuit held, adding that a U.S. court is "bound to defer" to a foreign government's statements concerning its laws and regulations when that government directly participates in a U.S. court proceeding.[30] Based on MOFCOM's statement, the Second Circuit concluded that the Chinese government compelled the defendants to fix prices, thus creating the kind of "true conflict" hypothesized by the U.S. Supreme Court in *Hartford Fire*.[31]

Having found that Chinese law required defendants to violate U.S. antitrust law, the Second Circuit went on to consider whether the remaining factors in the *Timberlane/Mannington Mills* balancing test weighed in favor of dismissal. The court concluded that they did.[32] Of particular note, the court found that while the plaintiffs may have been unable to obtain a Sherman Act remedy in another forum, complaints as to China's export policies could be adequately addressed through diplomatic channels and the World Trade Organization, of which both the United States and China are members.[33] The court found it significant that there was no evidence that the defendants acted with the express purpose or intent to affect U.S. commerce or harm businesses in particular. Moreover, the regulations at issue were intended to assist China in its transition from a state-run economy and to remain a competitive participant in the global Vitamin C market.[34] Finally, the court recognized that according to MOFCOM the exercise of jurisdiction had already negatively affected U.S.-China relations, and it would be unlikely that the injunctive relief obtained by the plaintiffs in the district court would be enforceable in China, just as a similar injunction issued in China against a U.S. company would be difficult to enforce in the United States.[35] Upon consideration of all of these factors, the court concluded that exercising jurisdiction was inappropriate and dismissed the case.

2017 Updates to the Antitrust Guidelines for International Enforcement

The doctrinal evolution of comity described above coincides with the issuance on January 13, 2017, of the DOJ and FTC's Antitrust Guidelines for International Enforcement and Cooperation (Guidelines).[36] These Guidelines update and replace those issued in 1995.[37] Their purpose is to provide "guidance to businesses engaged in international activities on questions that concern the Agencies' international enforcement policy as well as the Agencies' related investigative tools and cooperation with foreign authorities."[38] The Guidelines are a useful tool for the regulated community to gain insights into the executive branch's interpretation of the nation's antitrust laws and the meaning of recent court decisions interpreting them. With comity calling for the balancing of different sovereigns' interests, the Guidelines provide one sovereign's view of the proper way to conduct this balancing.

The Guidelines primarily provide a faithful summary of cases interpreting the U.S. antitrust laws over the past 20 years. In particular, the Guidelines discuss the major judicial opinions interpreting the FTAIA.[39] They also contain a new section dedicated to international cooperation, where the government outlines its efforts to collaborate with foreign nations in the enforcement of antitrust laws and the management of related issues, including confidentiality.[40]

At the same time, the Guidelines reflect an effort by the U.S. government to maximize the extraterritorial application of U.S. antitrust laws and reserve to the executive branch discretion over when to defer to foreign nations' interests when they diverge from the those of the United States. For example, the Guidelines adopt an interpretation of the FTAIA's "direct" prong that stretches the statute's reach.[41] According to the Guidelines, wholly foreign conduct can be subject to the Sherman Act so long as it has "proximately caused" the effects on the U.S. market.[42] But the courts disagree on this question, with the Ninth Circuit taking a narrower view that applies the Sherman Act only where the effect on the U.S. market follows as "an immediate consequence" of the defendant's activity.[43]

Similarly, the Guidelines recognize that comity puts certain foreign conduct that has effects in the United States beyond the reach of U.S. courts, but the Agencies take a narrow view of the scope of the doctrine in three ways. First, the Guidelines argue that conflicts of laws are "rare."[44] While the U.S. Supreme Court has narrowed the scope of what constitutes a "true conflict,"[45] courts nonetheless have found true conflicts in some cases. The *Vitamin C* decision is perhaps the most prominent example in recent years. At the same time, the Guidelines correctly observe that the increasing harmonization of countries' antitrust regimes reduces the likelihood that a true conflict of law will occur.[46]

Second, the Guidelines assert that the Agencies' "determination that the importance of antitrust enforcement outweighs any relevant foreign policy concerns . . . is entitled to deference."[47] The American Bar Association, in its comments on a draft of the Guidelines, noted that this approach does not recognize the dual duties of the executive and judicial branches to consider comity in applying U.S. laws to foreign conduct, and relied on separation-of-powers principles and U.S. Supreme Court precedent to criticize this stance.[48] The Agencies' position also contrasts with the *Vitamin C* decision, in which the Second Circuit held that a foreign government's interpretation of its own laws deserves deference in the course of evaluating the presence of a true conflict.[49] Finally, the examples in the Guidelines, which are meant to help readers understand the Agencies' perspectives through hypotheticals, also reflect the government's intent to retain wide discretion in enforcing the Sherman Act abroad.

The Agencies appear to be interpreting the antitrust laws in a way that preserves maximum flexibility in exercising their enforcement abilities.[50] But this discretion is in tension with promoting predictability, which is a stated purpose of the Guidelines. On the surface, comity's future may be uncertain to the extent that the government pursues international enforcement and enjoys judicial deference. More likely, it is increased harmonization of U.S. antitrust laws with those of other nations, not the degree of government enforcement, which will reduce "true conflicts" and thus courts' decisions to relinquish jurisdiction in the name of comity.

International Comity in Today's Economic and Political Environment

The Second Circuit's decision in *In re Vitamin C* brings some clarity to a notoriously muddled area of law. There remain unanswered questions, such as whether a true conflict is a prerequisite for invoking the doctrine of comity and whether the presence of a conflict alone is sufficient to require dismissal. But where a conflict has been established and the other factors counsel against exercising jurisdiction, dismissal under the doctrine of international comity would appear appropriate.

Even as the doctrine of international comity has become clearer, a trend of political and regulatory convergence appears likely to reduce the occurrence of true conflicts of law like the one seen in the *In re Vitamin C* case. As of 2017, according to the DOJ and FTC, over 130 jurisdictions around the world have enacted antitrust laws as a means to promote open and free markets and prevent anticompetitive conduct.[51] In this environment, the United States has been very active in building strong relationships with foreign authorities to promote greater policy engagement and to achieve convergence on substantive and procedural standards.[52]

At the same time, it remains to be seen how recent events will affect the economic and political environment in which disputes involving the application of the doctrine of international comity might arise. Brexit, for example, presents many unanswered questions, including the extent to which the United Kingdom will incorporate or depart from the European Union's antitrust framework. In addition, during his 2016 presidential bid, U.S. President Donald Trump questioned several prevailing policies in areas of international trade and economic cooperation, including by calling for renegotiation or withdrawal from existing trade agreements, such as NAFTA, the imposition of taxes on U.S. companies investing overseas, and addressing trade imbalances with China.

It is too early to tell what changes ultimately will be implemented under President Trump, and how such changes might affect regulatory and legal conflicts between U.S. laws and those of other nations or the extent to which the United States will continue to work to harmonize different countries' antitrust laws. A broader application of U.S. antitrust law (and greater international harmonization) could be viewed as a means to protect U.S. competition. Yet more aggressive national policies and government enforcement may lead to more true conflicts, which would limit courts' ability to redress harms to U.S. importers and consumers.

Conclusion

Regardless of how the harmonization of antitrust laws between the United States and other nations may change in the future, the doctrine of international comity is, on the whole, well-suited to resolving conflicts that may arise. Comity can apply when the strict tests of other doctrines, such as the foreign sovereign compulsion and act of state doctrines,[53] have not been met. And the flexibility of the comity analysis allows courts to take into account the legal, political, and economic conditions that shape foreign defendants' actions.

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[1] *See* Benjamin Bradshaw, Julia Schiller, & Ramesh Nagarajan, *Foreign Sovereignty and U.S. Antitrust Enforcement: Is "The State Made Me Do It" a Viable Defense?*, Antitrust, Summer 2012, at 20; *id.* at 24 ("Perhaps the doctrine best suited for the fast-changing global economy is one of the oldest and most flexible—the approach of international comity, which allows courts to balance the competing concerns of respect for foreign sovereigns and enforcing the U.S. antitrust laws.").

[2] *In re* Vitamin C Antitrust Litig., 837 F.3d 175 (2d Cir. 2016).

[3] *Id.* at 179.

[4] *Id.* at 183 (quoting Hilton v. Guyot, 159 U.S. 113, 163–64 (1895)).

[5] *Id.* (quoting Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct.of S. Dist. of Iowa, 482 U.S. 522, 555 (1987)) (alteration in original).

[6] *Id.* at 189.

[7] Hartford Fire Ins. Co. v. California, 509 U.S. 764, 798–99 (1993).

[8] U.S. Dep't of Justice & Fed. Trade Comm'n, Antitrust Guidelines for International Enforcement and Cooperation (Jan. 13, 2017) [hereinafter Guideines], https://www.justice.gov/atr/internationalguidelines/download.

[9] 15 U.S.C. §§ 1, 2.

[10] 213 U.S. 347 (1909).

[11] *Id.* at 356 (emphasis added).

[12] United States v. Aluminum Co. of Am., 148 F.2d 416, 444 (2d Cir. 1945).

[13] *Id.* at 443.

[14] ABA Section of Antitrust Law, Antitrust Law Developments 1152–53 (7th ed. 2012).

[15] *Id.*

[16] 15 U.S.C. § 6a.

[17] *Hartford Fire*, 509 U.S. at 796.

[18] *Id.* at 798 (acknowledging divergence of views on this question).

[19] 549 F.2d 597 (9th Cir. 1976).

[20] 595 F.2d 1287 (3d Cir. 1979).

[21] *In re Vitamin C*, 837 F.3d at 184–85 (citing *Mannington Mills*, 595 F.2d at 1297–98; *Timberlane Lumber*, 549 F.2d at 614).

[22] *Hartford Fire*, 509 U.S. at 798 ("The only substantial question in this litigation is whether there is in fact a true conflict between domestic and foreign law.'") (quoting Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 552, 555 (1987)).

[23] *Id.* at 799.

[24] *Id.*

[25] *See* 771 F.3d 580, 600 (9th Cir. 2014). Adjudicatory comity refers to "comity among courts," and it "may be viewed as a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state." *Id.* at 599 (internal quotation marks omitted).

[26] *In re Vitamin C*, 837 F.3d 185–86. Prescriptive comity involves "the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures when they enact laws, and courts assume it has been exercised when they come to interpreting the scope of laws their legislatures have enacted." *Hartford Fire*, 509 U.S. at 817 (Scalia, J., dissenting).

[27] For discussion of these defenses and the Foreign Sovereign Immunities Act, see Bradshaw et al., *supra* note 2.

[28] *In re* Vitamin C Antitrust Litig., 810 F. Supp. 2d 522, 552 (E.D.N.Y. 2011). To support his finding that MOFCOM encouraged but did not require the defendants to price fix, Judge Cogan noted statements by Chinese officials to the World Trade Organization, the defendants' self-interest in price fixing, and the Chinese government's failure to punish companies that violated the price and output restrictions. *See id.*

[29] *In re Vitamin C*, 837 F.3d at 182.

[30] *Id.* at 189.

[31] *Hartford Fire*, 509 U.S. at 798.

[32] *In re Vitamin C*, 837 F.3d at 193–94.

[33] *Id.* at 193.

[34] *Id.*

[35] *Id.* at 194.

[36] *See generally* Guidelines, *supra* note 8.

[37] U.S. Dep't Justice & Fed. Trade Comm'n, Antitrust Enforcement Guidelines for International Operations (Apr. 1995), https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations.

[38] Guidelines, *supra* note 8, at 1.

[39] *Id.* at 16–26.

[40] *Id.* at 37–51.

[41] As discussed above, the FTAIA subjects to the Sherman Act import commerce and foreign commerce with a "direct, substantial, and reasonably foreseeable effect" on the United States. 15 U.S.C. § 6a.

[42] Guidelines, *supra* note 8, at 21.

[43] *Compare* Lotes Co. v. Hon Kai Precision Indus., 753 F.3d 395, 398 (2d Cir. 2014) (adopting proximate cause test), *and* Minn-Chem, Inc. v. Agrium Inc., 683 F.3d 845, 856–57 (7th Cir. 2012) (en banc) (same), *with* United States v. LSL Biotechnologies, 379 F.3d 672, 680 (9th Cir. 2004) (defining a direct effect as one that "follows as an immediate consequence of the defendant's activity").

[44] Guidelines, *supra* note 8, at 28.

[45] *Hartford Fire*, 509 U.S. at 798.

[46] Guidelines, *supra* note 8, at 28–29.

[47] *Id.* at 28.

[48] Joint Comments of the American Bar Association Section of Antitrust Law and Section of International Law on the Proposed Update to the U.S. Department of Justice and Federal Trade Commission Antitrust Guidelines for International Enforcement and Cooperation 11–12 (Dec. 1, 2016), https://www.justice.gov/atr/page/file/915786/download.

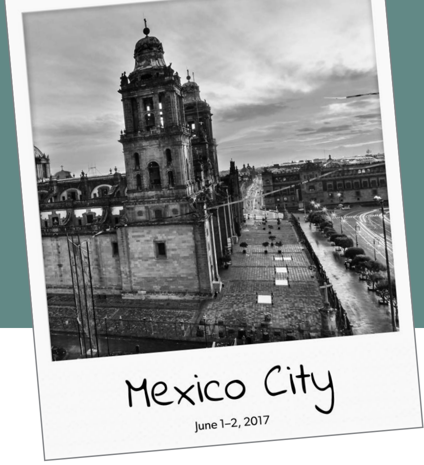
[49] *In re Vitamin C*, 837 F.3d at 190.

[50] *Guidelines*, *supra* note 8, at 2.

[51] *Id.*

[52] *Id.* at 1–2.

[53] *See* Bradshaw et al., *supra* note 2, at 20 (discussing these doctrines).



ANTITRUST IN THE AMERICAS

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Jaime BARAHONA URZÚA, Guerrero Olivos, Santiago

Omar GUERRERO RODRIGUEZ, Hogan Lovells BSTL, S.C., Mexico City

Scott D. HAMMOND, Gibson Dunn & Crutcher LLP, Washington, DC

Mariana TAVARES DE ARAUJO, Levy & Salomão Advogados, Rio de Janeiro

10:15 – 11:30

SLEEPING WITH THE ENEMY: COMPLIANCE ISSUES WHEN DOING A DEAL WITH THE COMPETITION.
Many deals involve working together with competitors, whether it's a joint venture, participating in trade association activities, or licensing agreements. Often these involve exchanges of information. Sometimes there's no problem, but sometimes it can facilitate collusion. This panel will focus on compliance issues that will help clients distinguish one from the other.

Moderators:

Alfonso MIRANDA LONDOÑO, Esguerra Asesores Jurídicos, Bogotá

Allan VAN FLEET, McDermott Will & Emery, Houston, TX

Speakers:

Valeria CHAPA GARZA, Vice President and General Counsel, Honeywell International Inc, Mexico City

Alejandro FAYA RODRIGUEZ, Head of Planning, Institutional Relations and International Affairs Unit, Comisión Federal de Competencia Económica (COFECE), Mexico City

Stacy FRAZIER, Executive Counsel, General Electric Company, Washington, DC

Cristiane SILVESTRE, Legal Manager, Braskem, São Paulo

11:30 – 11:45 **BREAK**

11:45 – 13:00

ANTITRUST AND TELECOMMUNICATIONS
In the information economy, perhaps no sector is as important as telecommunications. Going from a landline-based regulated utility to a rapidly evolving landscape with multiple platforms, the sector's interaction with competition law is changing quickly. Mexico's constitutional reform empowered a new telecom regulator to enforce competition law in the sector, and other nations in the region have seen similar changes.

Moderators:

Hal J. SINGER, Economists Incorporated, Washington, DC

Rafael VALDES ABASCAL, Valdés Abascal Abogados S.C., Mexico City

Speakers:

Alejandro CANTÚ JIMÉNEZ, Co-Secretary & General Counsel, America Movil SAB de CV, Mexico City

Maria Elena ESTAVILLO FLORES, Commissioner, Instituto Federal de Telecomunicaciones (IFT), Mexico City

Pablo MARQUEZ, Márquez Barrera Castañeda Ramirez (MBCR), Bogotá

Guilherme RIBAS, Mundie e Advogados, São Paulo

13:00 – 13:45 **LUNCH**

13:45 – 14:15

KEYNOTE SPEAKER

Questioner:

Michael G. EGGE, Latham & Watkins LLP, Washington, DC

Speaker:

Deborah P. MAJORAS, Chief Legal Officer & Secretary, Procter & Gamble, Cincinnati, OH

14:15 – 15:30

IT'S JUST A DISTRIBUTION AGREEMENT: WHAT COULD GO WRONG?
Distribution agreements often come with provisions that may have antitrust implications, such as exclusivity, RPM, discounts, rebates, MFNs etc. The implications are not always easy to detect, and sometimes don't get all the attention they deserve. This panel will focus on how antitrust authorities across the Americas address antitrust issues in distribution agreements and what practitioners may do to prevent headaches.

Moderators:

Brian R. HENRY, Vice President & Senior Managing Counsel, The Coca-Cola Company, Atlanta, GA

Julián PEÑA, Allende & Brea, Buenos Aires

Speakers:

Monica BICHARA, Legal and Corporate Security, The Home Depot, Monterrey

Fernando CARREÑO, Von Wobeser y Sierra SC, Mexico City

Jorge DE LOS RÍOS, General Counsel and Business Integrity Officer, Unilever, Bogotá

Paulo MONTT, Gandarillas Montt Del Río & Krause, Santiago

15:30 – 15:45 **BREAK**

15:45 – 17:00

LEVELING THE PLAYING FIELD

Mexico's constitutional reform included provisions that allow COFECE to take action involving essential inputs and barriers to competition, even in the absence of proof of violation of the competition law. Are these necessary tools to remedy the effects of decades of state-sponsored monopolies? Do they threaten firms that have invested in infrastructure and intellectual property? Is this an idea that will catch on elsewhere in the hemisphere?

Moderators:

Terry CALVANI, Freshfields Bruckhaus Deringer, Washington, DC

Luis MONTERRUBIO, Noriega y Escobedo Abogados A.C., Mexico City

Speakers:

Miguel FLORES BERNÉS, Greenberg Traurig SC, Mexico City

Elisa MARISCAL, Director, Global Economics Group LLC, Mexico City

Carlos MENA LABARTHE, Chief Prosecutor, Comisión Federal de Competencia Económica (COFECE), Mexico City

Anita M. MOSNER, Holland & Knight LLP, Washington, DC

17:00 **COCKTAIL RECEPTION**

FRIDAY, JUNE 2, 2017

08:00 – 12:30 **REGISTRATION**

08:30 – 08:45 **WELCOMING REMARKS**

08:45 – 10:00

THE LAST WORD: JUDGES AND COMPETITION LAW

There are as many systems for enforcing antitrust law as there are countries in the region. Some agencies prosecute cases before the regular judiciary, some have internal adjudicative systems, and others bring cases before specialized tribunals. But one thing is common to all: the judiciary has the final say. Judges from across the region will discuss the advantages of their various systems and what kinds of arguments are likely to find traction.

Moderators:

Russell DAMTOFT, Associate Director, Office of International Affairs, Federal Trade Commission, Washington, DC

Cristianne SACCAB ZARZUR, Pinheiro Neto Advogados, São Paulo

Speakers:

Jean Claude TRON PETIT, Magistrate, Fourth Administrative Court of the First Circuit, Mexico City

Enrique VERGARA VIAL, President, Tribunal de Defensa de la Libre Competencia (TDLC), Santiago

The Honorable Diane P. WOOD, Chief Judge, U.S. Court of Appeals for the Seventh Circuit, Chicago, IL

Ellen Gracie NORTHFLEET, Retired Chief Justice, Supreme Court of Brazil, Rio

10:00 – 11:15

MERGER ENFORCEMENT

Merger enforcement is becoming more sophisticated throughout the region, and the role of economic tools and economists has become increasingly important. Enforcers' ideas are increasingly informed by *ex post* analysis of mergers. Cooperation among the authorities is increasing.

Moderators:

Luis SANTOS COY GARCIA, Creel García-Cuéllar Aiza Y Enríquez SC, Mexico City

Fiona A. SCHAEFER, Milbank Tweed Hadley & McCloy LLP, New York, NY

Speakers:

John BODRUG, Davies Ward Phillips & Vineberg LLP, Toronto

John M. MAJORAS, Jones Day, Washington, DC

Amadeu RIBEIRO, Mattos Filho Veiga Filho Marrey Jr e Quiroga Advogados, New York, NY

Darrell L. WILLIAMS, Charles River Associates, Los Angeles, CA

11:15 – 11:30 **BREAK**

11:30 – 12:15 **KEYNOTE SPEAKER**

12:15 – 13:45

ENFORCER'S PANEL

Political change across the region is changing the shape of antitrust. New leadership has recently arrived or is coming soon in Argentina, Brazil, and the United States. Major reforms are under way in Mexico and Chile. Hear from enforcement leaders from around the hemisphere and gauge for yourself which way the winds are likely to blow.

Moderators:

William C. MACLEOD, Kelley Drye & Warren LLP, Washington, DC

Eduardo PEREZ MOTTA, Agon, Mexico City

Speakers:

Esteban GRECO, President, National Commission for the Defense of Competition, Buenos Aires

Felipe IRARRAZABAL, National Economic Prosecutor, Fiscalía Nacional Económica, Santiago

Alejandra PALACIOS PRIETO, Chairwoman, Comisión Federal de Competencia Económica (COFECE), Mexico City

Criminal Antitrust Fines and Penalties: Reductions Based on Ability to Pay

BY SETH C. FARBER, JEFF LITVAK, LAUREN E. DUXSTAD, AND GEOFFREY IHNOW

CRIMINAL ANTITRUST FINES AND penalties obtained by the Department of Justice have risen substantially in recent years, from $338M in 2005 to over $3.6B in 2015.[1] One of the reasons for this increase in fines is the focus on investigating and prosecuting international cartels. The largest such investigation involves the automotive part manufacturing industry. Through November 2016, that investigation alone has resulted in over $2.9 billion in fines from 47 companies that have pleaded guilty or agreed to plead guilty.[2]

As large criminal antitrust fines have become common, more companies are finding themselves facing potential penalties that exceed their available resources. The U.S. Sentencing Guidelines allow for reduction of a fine under certain circumstances, one of which involves the company's ability to pay the fine imposed. In plea negotiations, the Antitrust Division traditionally follows the Guidelines and, accordingly, has recognized the legitimacy of ability to pay considerations in negotiated pleas.

This article describes a methodology that can be used to support an argument for reducing a proposed fine through an evaluation of the company's ability to pay, explains how such an argument is raised during the course of a company's plea negotiations with the Division, and identifies cases where the argument has resulted in a fine reduction. A hypothetical case example is also provided to show how the methodology may be used in practice.

Seth C. Farber is a Partner at Winston & Strawn LLP; Jeff Litvak is a Senior Managing Director at FTI Consulting, Inc.; Lauren E. Duxstad is an Associate at Winston & Strawn LLP; and Geoffrey Ihnow is a Senior Director at FTI Consulting, Inc. Winston & Strawn LLP represented Nishikawa Rubber Co., Ltd. in connection with the DOJ investigation of Nishikawa discussed in this article. FTI Consulting, Inc. served as Nishikawa's financial analyst in that matter. *The authors gratefully acknowledge the assistance of Basil Imburgia, a Senior Managing Director at FTI Consulting, Inc., in the preparation of this article.*

Background

According to Section 8C3.3(a) of the Guidelines ("Reduction of Fine Based on Inability to Pay"), the court shall reduce the fine below what is imposed "to the extent that imposition of such a fine would impair [a company's] ability to make restitution to victims." (emphasis added). Furthermore, Section 8C3.3(b) enables the court to impose a fine below what is otherwise required if

> the court finds that the organization is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay the minimum fine required. . . . *Provided*, that the reduction under this subsection shall not be more than necessary to avoid substantially jeopardizing the continued viability of the organization. (emphasis added).

On its face, this standard appears quite stringent and, in a contested sentencing, may prove quite difficult for a company to satisfy. However, in the context of negotiated plea agreements, the Division has generally taken a more lenient approach. Consistent with its mission of promoting competition, the Division may agree to limit a proposed fine to an amount that will not be so great as to endanger the company's ability to continue as a viable competitor. To date, in the auto parts investigation alone, the Division has agreed to a reduction of the Guidelines fine for at least five companies based on inability to pay.[3]

For example, Mitsuba Corporation was able to persuade the DOJ to agree to a recommended sentence that included a reduction of more than $500 million in the fine amount based on Mitsuba's inability to pay. Neither the DOJ nor the court accepted Mitsuba's representations about its limited resources at face value. Rather, as explained at sentencing, the DOJ retained an economic expert who offered an opinion that a guideline sentence (which would have started at $672 million) would force Mitsuba out of business and result in the loss of thousands of jobs, and, on that basis, the DOJ argued that a substantial variance from the Guidelines was warranted.[4] The court accepted that recommendation because it was satisfied that the DOJ "adequately and fairly made its assessment with respect to the fine that could be made by the corporation without sacrificing its existence."[5] Mitsuba was sentenced to a fine of $135 million, with $10 million to be paid within 30 days of the sentence, and $25 million installments each of the five years thereafter.[6]

Description of the Process

At or around the time the DOJ proposes a fine amount under the Guidelines, counsel should carefully consider whether the company may have an ability-to-pay issue. It is the defendant's burden to produce relevant materials demonstrating its inability to pay the suggested fine under the Guidelines.[7] To satisfy that burden, an ability-to-pay analysis should include careful review of the company's financial statements and recent financial performance, as well as forecasts of expected performance for both the company and the industry in general.

The Division and ultimately the court may find an analysis prepared by an independent financial analyst to be more persuasive and reliable, in particular if the outside expert has experience with ability-to-pay analyses in criminal sentencing matters for antitrust and related offenses, knowledge of the industry in question, and, for cases involving foreign corporations, knowledge and experience with financial accounting and performance metrics in that foreign jurisdiction.

When the question of a corporate defendant's ability to pay the Guidelines fine is raised, the Division consults with its Corporate Finance Unit to determine the maximum amount the corporation can afford to pay in installments without substantially jeopardizing its continued viability. The DOJ will consider all current and projected financial information offered by the defendant.[8] In addition, the DOJ will likely request that the company produce relevant financial documents so that the DOJ can make an independent determination of the company's financial condition and ability to pay. Such documents typically include the company's audited and unaudited financial statements (balance sheet, income statement, statement of cash flows), annual Securities Reports, tax returns, strategic business plan and operating plan, related projections, budgets, borrowing and repayment schedules, and organization charts.[9]

The DOJ will also retain its own analyst to independently evaluate the company's ability to pay and support the DOJ in determining the appropriate fine amount. The DOJ will typically retain an expert with experience in complex accounting matters. It is helpful for the company's financial analyst to have a working knowledge of, and an established relationship with, the DOJ's expert in order to anticipate potential arguments and analyses the DOJ may employ.

Because it is the company's burden to show inability to pay, counsel will need to prepare a presentation for the DOJ demonstrating that inability. Counsel should work closely with the company's independent financial analyst and the company's internal financial team to prepare that presentation. The financial analyst should take the lead in making the presentation to the DOJ and the DOJ's expert and, in doing so, will need to explain the company's financial condition and expected ability to pay, including potential changes in its financial condition over the next five years. The company's financial analyst must also be prepared to explain how the assumptions underlying the projections were determined. At the same time that the company's financial analyst is preparing its presentation, the DOJ's expert will be reviewing the company's financial documents and preparing the DOJ's own calculation of the amount the company is able to pay. During the company's presentation, there will be an opportunity for the two analysts to discuss their models and assumptions used to project future financial performance. Frequently, the DOJ's expert will have follow-up questions, and there may be additional meetings, in person or by telephone, to discuss open issues. The DOJ will consider additional arguments by company counsel and its analyst to determine a final amount that the company is able to pay. In total, a company can expect the process to last six months or more.

Projected Free Cash Flow

While the Guidelines offer no prescribed methodology for analyzing a company's ability to pay a fine, that analysis is typically performed by analyzing the company's projected free cash flow and assessing the strength of its balance sheet.

As the Mitsuba case illustrates, the Guidelines allow for a reasonable installment schedule to pay the fine. Therefore, free cash flow should be projected over the period during which a fine will be paid. The free cash flow available for payment of a fine is best measured by the free cash flows available to the equity holders of the company. Free cash flow to equity holders (FCFe), is calculated in the following manner:

	Net Income
Add	Non-cash items *(e.g., depreciation)*
Subtract	Capital expenditures
Add or Subtract	Net borrowings *(difference between debt issued and repaid)*
Add or Subtract	Incremental non-cash working capital needs

If debt issued exceeds repayments of principal, then the net borrowings would be an addition to the free cash flow. If the amount of non-cash working capital is lower than the prior year, the changes in non-cash working capital would be an addition to the free cash flow.

The first step in analyzing free cash flow is to prepare projected financial statements over the installment period for the fine (typically up to five years). These projections should be prepared by the company's management and, if they are not pre-existing documents, should be prepared with the assistance of the company's financial analyst. Along with the projections, additional documentation should be obtained from the company that will help in assessing the reasonableness of the projections and help in preparing the ability-to-pay analysis.

Once FCFe has been determined, the analyst must consider whether any traditional dividend should be provided to the equity holders.[10] The dividend can be based on historical amounts or projections from management. The amount after payment of a dividend would result in the free cash flow available to pay a fine. The DOJ will consider accepting continued payment of dividends (although perhaps at reduced levels) if the company can demonstrate that such continued payments are necessary to the company's continued ability to retain the support of key constituencies.

Once the initial analysis of free cash flow is completed, the calculation should be reviewed for reasonableness and for areas where the DOJ may have questions. Issues that should be considered in reviewing the free cash flow analysis include:

- How do the projected sales and operating margins compare with historical trends?
- How reasonable are the projected sales and operating margins given the anticipated economic and industry environment?
- How do projected capital expenditures compare with historical activity?
- If the projected capital expenditures are higher than what they were historically, why is this additional spend necessary (e.g., were there legally required investments)?
- Are the working capital needs appropriate given the level of projected sales?
- What effect will additional debt needed to pay a fine have on the free cash flow?

Strength of the Balance Sheet

Besides the additional cash flow generated during the installment period, the DOJ often considers additional sources available to pay a fine, such as non-essential assets, all sources of borrowing capacity, and additional equity raises. In order to quantify these sources, the strength of the company's balance sheet must be analyzed in conjunction with projected operational performance. Assets that could potentially be available for payment of a fine include cash and cash equivalents, marketable securities, and non-operating assets. The amount of cash available to pay a fine is the difference between the ending cash balance reflected on the projected balance sheet and the cash needed to support operations. Determining what cash and cash equivalents are needed to support operations can be accomplished by calculating certain liquidity ratios and comparing them to a peer group of similarly situated companies. Ratios typically used for this analysis include:

- Current and quick ratios;
- Cash as a percentage of total assets;
- Net working capital as a percentage of sales; and
- Cash in Days in Sales.[11]

In determining the peer group against which the company should be compared, the analyst must identify rivals that are the greatest competitive threats to the company's survival, and show that insufficient cash reserves to compete against these threats could jeopardize the company's continued viability. In developing the peer group, the analyst must further consider a comparable company's customer base, sales volume, liquidity, and input from management.

In addition to cash, the analyst should also look at the balance sheet to identify any marketable securities, other investments, or non-operating assets that could potentially be liquidated in order to pay a fine. The analyst should discuss these items with the company to understand whether and how readily the items can be liquidated and the value that would be generated from sale.[12]

In addition to reviewing the assets, the company's ability to raise additional debt or equity capital in order to pay a fine must be considered. While the announcement of criminal antitrust charges, a plea agreement, and a fine may negatively impact a company's ability to raise equity capital, the analyst can aid in determining what the company's borrowing capabilities are to finance payment of a fine. Because pre-plea negotiations with the DOJ are confidential, the analyst will experience some limitations in not having the ability to interview the company's lenders. Nevertheless, the analyst can still provide some insight as to what borrowing capabilities the company may have when facing a fine.

A review of information on the company's peer group may also inform the analyst about the company's borrowing capabilities. A company's debt-to-equity and debt-to-capital ratios as compared to the industry or peer group can provide an indication of whether a company has the ability to take on additional debt. The analyst must keep the peer group in mind when performing these analyses so as to not have the company over-leveraged on a relative basis. A company may also have unused lines of credit, but the terms of these contracts, including any financial/operating covenants, require a thorough analysis to determine how much of the line of credit would be available. Since the ability to raise additional debt may involve a variety of factors, such as what assets are available to collateralize the debt and what risk profile lenders may accept in lending additional funds, an analyst should work with the company to understand what additional capital can be raised and risk factors associated with these projections.

Other Legal Contingencies

As discussed above, free cash flow, assets, and any additional equity or debt that can be raised are all sources of funds to pay a fine to the DOJ. However, the analyst must also estimate how much of these available funds will be needed to satisfy the company's exposure to other legal contingencies. In an international cartel case, one such contingency is the potential for substantial fines from other jurisdictions. Some jurisdictions may coordinate closely with the DOJ.[13] If those jurisdictions negotiate their penalties at the same time as the DOJ, the analyst will be able to incorporate those additional penalties into the ability-to-pay analysis. However, many jurisdictions may proceed on different timetables and, in those instances, the analyst, with the assistance of company counsel, will need to estimate future penalties and incorporate that estimate into the analysis.

In addition, after the company enters a plea agreement with the DOJ and the misconduct is publicized, victims may seek damages, restitution, and other remedies either through class action litigation, individual actions, or requests for voluntary compensation. As described above, Section 8C3.3(a) of the Guidelines expressly recognizes that a fine should not be set at an amount that would impair a company's ability to pay restitution to its victims. The company and counsel can aid the analyst in developing estimates of exposure from other legal contingencies. These contingencies could be material to the company's survival and, if quantifiable, should be reserved for on the projected balance sheet on an after-tax basis.

The Company's Ability to Pay

The company's ability to pay includes the aggregate amount available from (1) projected free cash flow over the installment period, (2) excess cash, and (3) additional capital that can be raised. From this sum, the amount necessary for other legal contingencies should be subtracted, resulting in the amount available to pay a fine. As part of the analysis, any key items or assumptions should be noted, including any contingencies which cannot be quantified but might have a material effect on the projections of a company's ability to pay.

Hypothetical Case Example

Airline Co. faced a substantial fine (up to $250 million under the Guidelines) for price fixing with competitors on fuel surcharges for its cargo and passenger transport business segments. An analysis of Airline Co.'s ability to pay a fine was performed by projecting its free cash flows to equity holders and analyzing the strength of its balance sheet.

At the time of the analysis, the economy was in a severe downturn where the credit markets were frozen and there was a dramatic decline in oil prices. In addition, the market for the company's services was in decline. Historically, the company's Earnings before Interest and Taxes (EBIT) ranged between 2 percent and 5 percent of sales, and its net income ranged between -2 percent and 9 percent of sales. The trailing 12 months showed an EBIT margin of 2 percent and a net loss of 1 percent. Free cash flow was projected as follows:

USD millions	Year 1	Year 2	Year 3	Year 4	Year 5
Revenue	$4,069	$3,327	$3,901	$4,335	$4,754
EBIT	(43)	(209)	(165)	(95)	(92)
NOPAT*	(186)	(311)	(302)	(242)	(246)
FCFe	(175)	(321)	(231)	(149)	(167)

**NOPAT = Net Operating Profit After Taxes*

This negative cash flow preceded any consideration of other legal contingencies.

The projection was assessed for reasonableness by performing a sensitivity analysis based on industry forecasts of oil prices per barrel and various exchange rates between the company's local currency and the U.S. dollar. The sum of free cash flows in the sensitivity analysis ranged from positive $260 million to over negative $2 billion with an average of negative $990 million. Because the projected sum of free cash flow to equity holders fell within this range, the sensitivity analysis supported the conclusion that the projections utilized were reasonable.

The projected balance sheet presented a similarly bleak scenario for Airline Co. Historically, Airline Co. had a working capital deficiency of $1.2 billion and a debt-to-equity ratio that increased from 3:1 to 5:1 in the current year. Due to the tight credit markets at this time, Airline Co. was not able to refinance its outstanding debentures. The debenture market had been one of Airline Co.'s primary sources of financing. A soaring debt ratio would cause Airline Co. to breach various covenants in its debt agreements. Given the credit environment at the time, Airline Co. also failed to secure additional financing collateralized by its receivables.

Based on projected free cash flow losses and challenges obtaining additional financing, Airline Co. had limited to no ability to pay a fine. Through the ability-to-pay analysis, Airline Co. demonstrates the challenges of its financial situation and ultimately agrees with the DOJ to a reduced fine of $50 million payable over five years.

Cooperation Discount

As demonstrated above, the ability-to-pay analysis may lead to a proposed fine amount that is less than would otherwise be required, even taking into account whatever fine discount the DOJ may have agreed to in recognition of the company's cooperation. By definition, however, that fine amount is the maximum amount that the company can afford to pay, and, at least in theory,[14] the same amount that the company would have been required to pay had it contested the case and been uncooperative. Because the DOJ has a longstanding policy of encouraging and rewarding cooperation, counsel representing companies that have provided cooperation to the DOJ should consider advocating that the cooperation discount be applied to the fine amount determined by the ability-to-pay analysis as opposed to the original fine determined under the Guidelines. In particular, counsel may argue that it is essential to the DOJ's leniency policy for the DOJ to provide a cooperating company with a discount to the fine that would otherwise result under the Guidelines. Indeed, in the case of a company that is unable to pay the Guidelines fine, the DOJ can fulfill this policy imperative only by providing a discount from the maximum fine that the company can pay. As such, the DOJ has recently agreed to offer such a discount to companies that cooperate under the Division's leniency pro-

[C]ounsel may argue that it is essential to the DOJ's leniency policy for the DOJ to provide a cooperating company with a discount to the fine that would otherwise result under the Guidelines. Indeed, in the case of a company that is unable to pay the Guidelines fine, the DOJ can fulfill this policy imperative only by providing a discount from the maximum fine that the company can pay.

gram, in addition to a fine reduction based on the company's inability to pay.[15]

The DOJ's recent policy shift is consistent with its long-touted principle that the prospect of a significant fine discount is a central benefit of its leniency program. Ten years ago, in a widely cited paper that retains a prominent position on the DOJ's website, then-Deputy Assistant Attorney General Scott D. Hammond described the Division's leniency policy for cooperating companies generally and explained the fine discount in particular.[16] Under that policy, "[S]econd-in companies that provide cooperation that substantially advances an investigation can expect to receive a plea agreement that recommends a substantial assistance departure pursuant to U.S.S.G. Section 8C4.1 and a fine below the minimum Guidelines range."[17] For both the DOJ and the cooperating company, the "rewards are significant when the defendant decides to break ranks with the other cartel members and becomes a cooperating witness for the government."[18] And, indeed, the DOJ's second-in leniency policy has been exceedingly successful, as dozens of companies have cooperated, received fine discounts, and pled guilty, pursuant to the policy's terms.

However, where a company lacks the ability to pay even the discounted fine accounting for the benefit of cooperation, if the fine amount determined by the ability-to-pay analysis were not then discounted for cooperation, there would be no fine reduction benefit as a reward for its cooperation. Because the Guidelines themselves take inability to pay into account and authorize a fine reduction based on that inability to pay, a cooperating company would receive exactly the same fine after a conviction at trial, even if it had never cooperated and fought the DOJ from the inception.

Counsel should therefore argue that the failure to reward an "inability to pay" company with a fine discount would significantly undermine the leniency program. If companies believe that the substantial burdens of cooperation may not be rewarded, their incentive to cooperate will be substantially reduced. Accordingly, counsel should advocate that the DOJ apply its fine discount to the maximum amount that the company can pay to ensure the continued vitality of the leniency program and to ensure "inability to pay" companies enjoy an expected fine discount benefit for their cooperation. Application of a cooperation discount in this manner would allow the leniency program to continue to differentiate meaningfully between companies that cooperate and companies that resist and, thus, would properly incentivize cooperation.

Conclusion

The DOJ seeks to fine the violator without jeopardizing the continued viability of the company to operate as a going concern. Furthermore, the Guidelines contemplate reducing the size of the fine if the fine amount would be so great that it would impair the company's ability to make restitution to its victims, or if payment of the fine would risk the solvency of the company. Demonstrating that a fine imposed by the DOJ is beyond a company's ability to pay involves an analysis of the free cash flows over the period of payment, an analysis of what cash or other assets would be available to pay a fine, and an analysis of what capital can be raised to support a fine. The ability-to-pay analysis should also consider the cost of other potential fines and damages/restitution via lawsuits brought by harmed parties as a result of the conduct at issue in the criminal investigation.

The role of counsel and the financial analyst is not only to assist the company in preparing a persuasive and objective analysis of its ability to pay, but also to assist the company in assessing the reasonableness of the proposed fine and answering questions from the DOJ about the analysis performed. As the case study shows, presenting an ability-to-pay analysis can be a powerful tool for seeking a reduced fine amount, preserving the company's ability to pay victims of the challenged conduct, and assuring that the company will continue as a viable competitor. ■

1 *See DOJ Criminal Enforcement Trends Chart* (Dec. 2015), https://www.justice.gov/atr/criminal-enforcement-fine-and-jail-charts.

2 *See* U.S. Dep't of Justice, Japanese Auto Parts Company Agrees to Plead Guilty to Antitrust Conspiracy Involving Steel Tubes (Nov. 8, 2016), http://www.justice.gov/opa/pr/japanese-auto-parts-company-agrees-plead-guilty-antitrust-conspiracy-involving-steel-tubes. The violation of the Sherman Act is a felony punishable by a fine of up to $100 million for corporations. Under the Alternative Fines Statute, the fine may be increased to twice the gain or loss involved from the conspiracy. 18 U.S.C. § 3571. Since 2012, there have been nine fines greater than $100 million. Companies that paid fines under the Alternative Fines Statute include Bridgestone Corp. ($425M); Furukawa Electric Co., Ltd. ($200M); Hitachi Automotive Systems, Ltd. ($195M); JTEKT Corp. ($103.7M); Mitsuba Corp. ($135M); Mitsubishi Electric Corp. ($190M); Nishikawa Rubber Co., Ltd. ($130M); Toyo Tire & Rubber Co., Ltd. ($120M); and Yazaki Corp. ($470M).

3 These companies include Maxzone Vehicle Lighting Corp.; Mitsuba Corp.; Rubycon Corp; and Nishikawa Rubber Co., Ltd. *See* Sentencing Hr'g Tr., United States v. Maxzone Vehicle Lighting Corp., No. 11-cr-00654 (Dkt. 13) (N.D. Cal. Nov. 11, 2011); Sentencing Hr'g Tr., United States v. Mitsuba Corp., No. 12-20712 (Dkt. 12) (E.D. Mich. Dec. 9, 2013); United States' Sentencing Memorandum, Motion for Departure, and Request for Expedited Sentencing, United States v. Rubycon Corp., No. 16-cv-00367-JD (Dkt. No. 5) (N.D. Cal. Sept. 7, 2016); Joshua Sisco, *Comment: DOJ Boosts Co-operation Incentives for Financially Distressed Companies*, MLEX (Nov. 11, 2016). The fifth company has not yet been publicly disclosed by the DOJ. *See* Sisco, *supra*. FTI Consulting, Inc. served as the financial analyst of this fifth company.

4 *See* Sentencing Hr'g Tr. at 23, United States v. Mitsuba Corp., No. 12-20712 (Dkt. 12) (E.D. Mich. Dec. 9, 2013).

5 *Id.*

6 *Id.* at 24.

7 *See* United States v. Nathan, 188 F.3d 190, 212 (3d Cir. 1999).

8 *See* Decl. of Dale Zuehls ISO Reply to Defs' Sent. Memo. at 3, United States v. AU Optronics, No. 09-00110 (Dkt. 961-2) (filed Sept. 20, 2012).

9 *See* Example of Document Request List in Appendix, *available at* http://americanbar.org/groups/antitrust_law/publications/antitrust_magazine.html (Supplementary Materials).

10 Although funds available for return to equity holders may be available to instead pay a fine, the DOJ has recognized the legitimacy of some contin-

ued dividend payments in negotiated pleas. The principal rationale for doing so is that a total elimination of the dividend could excessively erode the company's shareholder base and endanger its shareholder support, thereby potentially threatening the company's viability and competitive standing.

11 The amount of cash necessary for operational needs can be calculated as a percentage of sales and translated to the Cash in Days in Sales metric (i.e., divide Cash by Sales and multiply by 365 days).

12 Some reasons for retaining these assets include that they could serve as collateral on existing or future debt or are needed to foster and strengthen critical business relationships as is common in Japanese business, custom, and practice.

13 Canada is the jurisdiction which has historically coordinated most closely with the DOJ on antitrust investigations. Press Release, U.S. Dep't of Justice, Nishikawa Agrees to Plead Guilty and Pay $130 Million Criminal Fine for Fixing Prices of Automotive Parts (July 20, 2016), http://www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive.

14 Although in theory the result of a negotiated inability-to-pay analysis should be the same as a litigated result, the DOJ may take a harsher approach in litigation than in negotiation. Because the company has the burden of demonstrating inability to pay, in practice, companies can expect a markedly less favorable result from a judge than they would receive from the DOJ in a negotiated plea agreement. For example, as noted above, the DOJ has, in negotiated resolutions, respected companies' assertions of their need to maintain certain levels of dividend payments and to refrain from liquidating marketable securities.

15 United States' Sentencing Memorandum, Motion for Departure, and Request for Expedited Sentencing, United States v. Rubycon Corp., No. 16-cv-00367-JD (Dkt. No. 5) at 14–15 (N.D. Cal. Spet. 7, 2016).

16 Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All 14, Address to OECD Competition Committee Working Party No. 3 (Oct. 17, 2006) ("Early cooperation from cartel members is absolutely critical to the detection and prosecution of cartel conduct, and the Division seeks to favorably reward and thus encourage such cooperation. Where the ultimate prize of full immunity is no longer available, second-in or early cooperators can still obtain substantial discounts below their Guidelines fine and incarceration ranges."), https://www.justice.gov/atr/speech/us-model-negotiated-plea-agreements-good-deal-benefits-all.

17 Scott D. Hammond, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Measuring the Value of Second-In Cooperation in Corporate Plea Negotiations 5, Address to the 54th Annual Am. Bar Ass'n Section of Antitrust Law Spring Meeting (Mar. 29, 2006), https://www.justice.gov/atr/speech/measuring-value-second-cooperation-corporate-plea-negotiations.

18 Hammond, *supra* note 16, at 20.

Individual Accountability Under The Sherman Act: The Early Years

BY GREGORY J. WERDEN

THE JUSTICE DEPARTMENT'S RECENT success in ensuring individual accountability for Sherman Act violations is well known, but its early success has been forgotten. I document individual accountability over the first six decades of Sherman Act enforcement through historical vignettes and statistics not previously compiled.

The Beginnings of Individual Accountability

When Congress began considering trust legislation, a penal law was the main impulse. Fifteen of the 19 trust bills introduced in the 50th Congress were penal; indeed, 13 had mandatory minimum prison terms.[1] S.1 of the 51st Congress, which became the Sherman Act, authorized fines and prison sentences for individuals when introduced by Senator Sherman.[2] In debate on his bill, however, he—and he alone—spoke against sanctioning individuals.[3] He was trying to fend off attacks on the bill's constitutionality[4] and keep it out of the Judiciary Committee, but the bill was sent to that Committee.[5] The Committee's version of the bill, which was enacted, retained its penal provisions but reduced the maximum fine from $10,000 to $5,000, and reduced the maximum jail term from five years to one year.[6] These maximums remained unchanged for the entire six decades I examine.

Sherman Act enforcement was minimal before Congress first earmarked funds for antitrust in 1903.[7] During the 19th century, a single individual was convicted of a Sherman Act violation: James M. Moore was indicted for fixing the price of coal in the Utah Territory on November 4, 1895 (BB12).[8] Exactly two months later, Utah became the 45th state. A jury found Moore guilty on November 12, 1896, in the newly created U.S. District Court for the District of Utah. His conviction was set aside on the grounds that this court had no power to adjudicate a Sherman Act charge arising in the Utah Territory.[9]

The first small wave of success with individual accountability came in 1907 when five sentences were imposed on individuals.[10] On January 9, S.J. Tribolet was fined $1000 for actions that pushed up the price of meat in Phoenix (BB40). The following year, he became the first individual sentenced under the Sherman Act to have his conviction upheld on appeal.[11] On February 18, the first Sherman Act custodial sentences, three months in county jail, were imposed on Spencer P. Shotter and J.F. Cooper Myers when they entered guilty pleas to a Sherman Act indictment (BB43).

On May 20, Frederick A. Holbrook became the first person twice convicted under the Sherman Act, when his guilty pleas to two indictments were accepted by Judge Kenesaw Mountain Landis. Both indictments charged price fixing in the sale of school furniture (BB44). Holbrook was the manager of the School Furnishings Manufacturers' Association, and he was fined $5000 for each offense. On February 16, he likely became the first person arrested for violating the Sherman Act.

A remarkable example of individual accountability was the 1911 prosecution of nine cartels controlling the production of different types of wire (BB88–88f). All told, 189 fines were imposed on individuals in these cases, in which many individuals were fined multiple times, but none imprisoned. Brooklyn attorney Edwin E. Jackson, Jr. managed all nine cartels. He entered nine pleas of nolo contendere, all of which were accepted on August 4, 1911, and he was fined $5000 in each case. He will forever remain the only person convicted of nine Sherman Act offenses in a single day.

Prosecution of German Saboteurs

During World War I, German saboteurs were prosecuted in two Sherman Act cases. The principal defendant in the New York case was Franz von Rintelen (BB170), who significantly furthered Germany's war efforts during the four months he spent in the United States in 1915. On December 28 of that year, he and others were indicted for violating the Sherman Act by conspiring to restrain export trade in munitions destined for Germany's foes, specifically, "Great Britain, France, Russia, Italy and other foreign nations." He orchestrated a successful campaign of sabotage, but the alleged means and methods of accomplishing the Sherman Act conspiracy were inducements of work stoppages.

By the time of his indictment, von Rintelen was an inmate of Donington Hall, a Leicestershire estate in which the British government housed German officers taken prisoner of war. Without extradition proceedings, he was returned to the United States to stand trial when the U.S. entered the war, arriving April 25, 1917. Late in the evening of May 20, the jury returned a verdict of guilty, and the next day he and two co-conspirators were sentenced to a year in prison.[12] He was later convicted of additional federal offenses, but released from U.S. Penitentiary, Atlanta on November 26, 1920, when

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pardoned by President Wilson.[13]

Another German sabotage ring was organized in the German Consulate in San Francisco. The Consul General (Franz Bopp), Vice General Consul, and three consulate employees were indicted on February 11, 1916, and re-indicted on March 3, 1916, for conspiring to bomb manufacturing plants, railroads, and ships with the object of impeding munitions shipments to Germany's foes (BB171). On January 10, 1917, all were found guilty of violating the Sherman Act and the Neutrality Act.[14] On January 25, each was sentenced to a year in prison for the Sherman Act violation, with the sentence to run concurrently with a prison sentence for the Neutrality Act violation.

Annette Abbott Adams, the first woman federal prosecutor, tried the case, and defendant Margaret W. Cornell became the first woman convicted of a Sherman Act violation and the first woman imprisoned as a result. With time off for good behavior, she was released from San Quentin State Prison (then housing both men and women) on November 28, 1917.

Prosecution of Racketeers

During 1933–1934, five Sherman Act indictments were handed down in the Southern District of New York alleging cartels enforced by violence. The indictments were signed, and cases prosecuted, by Antitrust Division attorneys John Harlan Amen and Albert J. Law. By the end of 1940, 25 prison sentences had been imposed in these five cases.[15] Twice convicted in these cases were Louis "Lepke" Buchalter and Jacob "Gurrah" Shapiro, who had worked their way up from street crime, to labor union violence, to racketeering. By some accounts, Lepke was the most powerful, most financially successful, and most targeted mobster of his day.[16]

The fur business in New York City was hit hard by the Great Depression, and cartelization was the response. Conditions could not have been less conducive to success, but, for a large fee, Lepke and Gurrah could make it work. Two separate cartels were formed in 1932: The Protective Fur Dressers Association cartelized rabbit dressers, and the Fur Dressers Factor Corporation cartelized the dressers of other furs. Cheating on the cartels resulted in threats, and if not heeded, personal assaults and destruction of goods. Rather than bring cheaters into the fold, Lepke and Gurrah forced them out of the market.

On November 6, 1933, numerous companies and individuals, including Lepke and Gurrah, were named in separate four-count indictments of the two cartels. In addition to a price-fixing count, each defendant was charged with actual monopolization, attempted monopolization, and conspiracy to monopolize. The Protective Fur Dressers case came to trial first, and Lepke and Gurrah were convicted on November 8, 1936. Both were fined and sentenced to a year in prison on each of the four Sherman Act counts, with the three Section 2 sentences to run concurrently with each other but consecutively with the Section 1 sentence.[17]

Lepke and Gurrah were released on bail pending appeal, and neither appeared on July 6, 1937 for trial in the Fur Dressers Factor case. They were declared fugitives, and on November 8, 1937, a $5000 reward was posted for information leading to the apprehension of either of them. They appear to be the only antitrust violators ever to have been the subjects of FBI wanted posters. Gurrah surrendered on April 24, 1938, and he was convicted in the second Sherman Act case on June 18. He was again sentenced to a year in jail on each count, but this time the court made three of the sentences consecutive, leaving him with a total of five years to serve from the two Sherman Act convictions. He was never again a free man. He subsequently was sentenced to a longer prison term for conspiracy and extortion, and in 1947 he died in prison.

Lepke remained a fugitive while Gurrah was tried. His 1939 wanted poster read:

WANTED

FOR: VIOLATIONS OF FEDERAL ANTITRUST LAWS

Lepke surrendered to J. Edgar Hoover on August 24, 1939, after associates led him to believe he would be offered a deal. But there was no deal. On January 2, 1940, he pleaded guilty in the Fur Dressers Factor case and was sentenced to four, concurrent, one-year prison terms. In 1939 and 1940, he was convicted of other federal crimes for which he could have served the rest of his life in Leavenworth Penitentiary. But he was allowed to stand trial in Brooklyn on a murder charge, and on December 2, 1941, he was sentenced to death. Lepke was held in Leavenworth until he exhausted all appeals, then delivered to New York authorities. He contested the transfer, but to no avail,[18] and was executed in Sing Sing Prison on March 4, 1944.[19]

Statistics on Individual Accountability, 1890–1950

A full picture of individual accountability requires comprehensive statistics, which I present for the first six decades of Sherman Act enforcement. I omit suspended sentences, as well as any portion of a sentence that was suspended. If a sentence was reduced while the case was still in the trial court, I recorded the reduced sentence. The data are presented by decade. Because the Sherman Act became law on July 2, 1890, the 1890s end on July 1, 1900, and so forth. The tables below indicate that 2441 individuals were fined and 179 were sentenced to prison. Without double counting individuals sanctioned both ways, the total number of individuals sentenced was 2528. That reduces to 2434 when sentences set aside on appeal are subtracted.

Sherman Act Fines Imposed on Individuals

Decade	1890s	1900s	1910s	1920s	1930s	1940s	Total
Individuals Fined	1	23	478	270	178	1491	2441
Average Fine	$200	$2261	$736	$1835	$3909	$1548	$1599
Adjusted Average	$55,800	$427,300	$85,000	$136,000	$373,300	$64,200	$102,200

Sherman Act Prison Sentences

Decade	1890s	1900s	1910s	1920s	1930s	1940s	Total
Individuals Sentenced	0	2	54	22	92	10	180
Average Term (months)	–	3.0	10.3	4.9	14.2	6.0	10.4
Sentences Not Set Aside	0	2	27	22	62	8	121
Average Term (months)	–	3.0	5.2	4.9	18.1	6.0	11.9

The Average Fines in the table below might seem inconsequential, but the Adjusted Averages offer useful perspective. The latter are the product of multiplying the Average Fines by the ratio of the GDP per capita for the third quarter of 2016 to that in the decade the fines were imposed. Over the entire six decades, the Adjusted Average fine was over $100,000, even though the average is brought down by trivial fines in some cases. A fine of less than $100 was imposed 284 times. In 186 instances, the fine was $1, and in two, it was $.01.

Rows two and three in the table above present data on prison sentences imposed, and rows four and five present data on just those sentences imposed that were not set aside on appeal.[20] In the wake of *Apex Hosiery*,[21] 30 of the 1930s sentences imposed in cases involving labor union violence were overturned on the basis that only labor-market effects had been proved.[22] Additionally, 27 of the 1910s prison sentences for exclusionary conduct by National Cash Register Co. were overturned due to trial errors.[23] Omitting these cases and two reversed 1940s convictions of single individuals leaves 121 individual sentences with an average prison term of just under a year.[24]

The most striking entry in either table is the number of individuals fined in the 1940s. Due in large part to the massive growth in the Antitrust Division during the 1938–1943 tenure of Thurman Arnold,[25] most of the individuals fined in the first six decades of Sherman Act enforcement were fined in the 1940s. Arnold strongly advocated the use of criminal prosecution in Sherman Act cases,[26] and he was responsible for the criminal conviction and fining of many notables of the day. In the *ASCAP* case,[27] those fined included Oscar Hammerstein II, Jerome Kern, and Johnny Mercer, who collectively won 13 Tonys and 8 Oscars. Captains of industry also were fined, including Alcoa Chairman, Arthur V. Davis; Alcoa President, Roy A. Hunt (son of the founder); American Tobacco President, George Washington Hill; Dow Chemical President, Willard H. Dow (son of the founder); Eli Lilly President, Eli Lilly, Jr. (grandson of the founder); Procter & Gamble President, Richard R. Dupree; Standard Oil of New Jersey Chairman, Walter C. Teagle; Standard Oil of New Jersey President, William S. Farish II.[28]

The number of individuals sanctioned in the 1940s is breathtaking, but the severity of the sanctions is comparatively low. During the 1930s, 25.8 percent of the individual sentences not set aside on appeal were custodial, but that number dropped to 0.5 percent in the 1940s. A major reason likely was Thurman Arnold's view that "the violation of antitrust laws by great industrial leaders does not usually fall in that class of offenses which involve moral turpitude. It is more like passing through a traffic light at high speed without the intention of harming anyone."[29]

From 1911 on, pleas of nolo contendere were entered by a large fraction of the individuals who were fined but not imprisoned. Guilty pleas, which now are common in Sherman Act cases, were uncommon during the first six decades, and the individuals imprisoned nearly always were convicted at trial. Although the available information did not state whether any sort of sentencing deal was stuck prior to charges being filed, the time between charges and the entry of pleas rarely was so short as to make a plea deal seem likely.

Conclusion

Making individual accountability a priority in Sherman Act enforcement is not a new idea; indeed, it also was a priority in the early days, and the Justice Department had great success. Statistics for the first six decades of enforcement are closer than might be supposed to those for the most recent decade.[30] During the past decade, individual fines in Antitrust Division criminal cases averaged $146,100, which is not far below the adjusted average fine of $102,200 during the first six decades, especially considering that the recent data include sentences for non-Sherman Act offenses prosecuted by the Antitrust Division. During the most recent decade, the average prison sentence in the Antitrust Division's cases was 23.6 months, which is double the average of 11.9 months for the first six decades, but the recent average includes non-Sherman Act counts, and the recent sentences were imposed when the maximum Sherman Act prison term was ten years.

In one critical respect, the statistics of the first six decades stand in stark contrast with those of the past decade: The frequency with which individuals sentenced were given jail time is now dramatically greater that in the early years. In the first six decades, that rate was just 5.2 percent, and mere price fixing rarely produced a custodial sentence.[31] In contrast, 72.7 percent of the individuals sentenced in Antitrust Division cases over the past decade were given a term of incarceration.

Price fixing, no less than armed robbery, is now viewed as a crime of moral turpitude. Still, what the early days lacked in punishment for price fixing, they made up for in the colorfulness of the offenses and offenders. The Department no longer prosecutes mobsters or enemy agents under the Sherman Act.

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1 *See* S. Doc. No. 57-147, 1 Bills and Debates in Congress Relating to Trusts 3–68 (1903).

2 *See id.* at 69–70.

3 *See* 21 Cong. Rec. 2563, 2569 (1890) (remarks of senator John Sherman).

4 The Senate debate on the S.1 began with an attack on its constitutionality, premised on the fact that it was a penal statute that would be construed in favor of the accused. *See id.* at 1765, 1767, 1771 (remarks of Senator James Z. George).

5 A motion to commit S.1 to the Judiciary Committee was rejected once but later agreed to. *Id.* at 2610–11, 2731.

6 *Compare* S.1, § 3, S. Doc. No. 57-147, at 70, *with* S.1, §§ 1–2, 21 Cong. Rec. 3145 (1890).

7 Act of Feb. 25, 1903, ch. 755, 32 Stat. 854, 903–04.

8 Justice Department antitrust cases were numbered by the Commerce Clearing House (CCH) "Blue Book": The Federal Antitrust Laws with Summary of Cases Instituted by the United States 1890–1951 (1952). I denote the Blue Book numbers: "BBxx." The Blue Book summarizes all the cases considered here, but most of my information was gleaned from court docket sheets, newspapers, and books.

9 Moore v. United States, 85 Fed. 465 (8th Cir. 1898). Moore was convicted of another coal-related Sherman Act violation. This conviction was reversed for insufficient evidence. Union Pac. Coal Co. v. United States, 173 F. 737 (8th Cir. 1909) (BB54).

10 For judgments in the earliest government Sherman Act cases, see Roger Shale, Decrees and Judgments in Federal Anti-Trust Cases July 2, 1890–January 1, 1918 (1918).

11 Tribolet v. United States, 95 Pac. 85 (S. Ct. Ariz. 1908).

12 The government's lead trial counsel was John C. Knox. He later served as a judge in the Southern District of New York and tried the two fur cases discussed in the next section. The government's opening statement was delivered by John Lord O'Brien, who later was in charge of antitrust enforcement at the Justice Department.

13 For a first-person account, see Captain Von Rintelen, The Dark Invader: Wartime Reminiscences of a German Naval Intelligence Officer (1933). For the most detailed account, see Howard Blum, Dark Invasion: 1915—Germany's Secret War and the Hunt for the First Terrorist Cell in America (2014). And for a brief summary by a leading World War I historian, see Barbara W. Tuchman, The Zimmerman Telegram 66–87 (1958).

14 Act of March 4, 1909, ch. 321, § 13, 35 Stat. 1090 (originally enacted as the Neutrality Act of April 20, 1818, ch. 88, § 6, 3 Stat. 447), current version at 18 U.S.C. § 960.

15 Three cases not discussed in the text involved fresh food: United States v. United Sea Food Workers Union (S.D.N.Y. Feb. 5, 1934) (saltwater fish) (BB397); United States v. Fish Credit Ass'n (S.D.N.Y. June 5, 1933) (fresh water fish) (BB389); United States v. United Pac. Produce Co. (S.D.N.Y. Apr. 7, 1933) (artichokes) (BB387).

16 *See* Albert Fried, The Rise and Fall of the Jewish Gangster in America (Rev. Ed. 1980); Paul R. Kaviell, The Life and Times of Lepke Buchalter: America's Most Ruthless Racketeer (2006); Burton B. Turkus & Sid Feder, Murder, Inc. 331–62 (1951). In the 1975 Golan-Globus film *Lepke*, released through Warner Bros., Tony Curtis plays Lepke, and Warren Berlinger plays Gurrah.

17 Lepke's sentence was reduced to a total of one year when retried after an appellate reversal of his conviction. United States v. Buchalter, 88 F.2d 625 (2d Cir. 1937). Martin Thomas Manton, who sat on the panel, was the first federal judge convicted of taking bribes. Apocryphal tales tie the bribes to the reversal of Lepke's conviction and to Lepke getting bail pending appeal.

18 Application of Buchalter, 54 F. Supp. 444 (S.D.N.Y. Mar. 1, 1944), *aff'd*, 141 F.2d 259 (2d Cir. Mar. 2, 1944), *cert. denied*, 321 U.S. 780 (Mar. 4, 1944).

19 While the Justice Department was prosecuting Lepke, it also prosecuted Jimmy Hoffa. He was indicted along with three corporations, seven of their executives, and the Teamsters Local for which Hoffa was business agent. The corporations were wholesalers of waste paper, and the indictment charged a conspiracy to eliminate competition from other wholesalers by means including refusal of the union to deliver to or for them. United States v. Wholesale Waste Paper Co. (E.D. Mich. Dec. 13, 1940) (BB570). On February 20, 1942, all those charged entered pleas of nolo contendere. Hoffa was fined $1000.

20 The latter rows do include the eight prison sentences, averaging 6.5 months, that were not served because the district court suspended them after the convictions were upheld in *United States v. Trenton Potteries*, 273 U.S. 392 (1927) (BB259).

21 Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940).

22 United States v. Local 807 of Int'l Bhd. of Teamsters, 118 F.2d 684 (2d Cir. 1941) (BB433) (11 prison sentences averaging 8.2 months); United States v. Gold, 115 F.2d 236 (2d Cir. 1940) (BB395) (19 prison sentences averaging 4.8 months).

23 Patterson v. United States, 222 F. 599 (6th Cir. 1915) (BB112) (sentences averaging 11.7 months).

24 Raising the average were the 36 sentences of two years (and Gurrah's sentence of three years), resulting from consecutive sentences imposed on individuals convicted of multiple counts.

25 From FY 1938 to FY 1942, the Antitrust Division grew from 111 employees to 583 and its budget increased from $473,000 to $2,325,000. Corwin D. Edwards, *Thurman Arnold and the Antitrust Laws*, 58 Pol. Sci. Q. 338, 339 & n.1 (1943).

26 *See* Thurman W. Arnold, Bottlenecks of Business 139–52 (1940); Thurman W. Arnold, *Antitrust Law Enforcement, Past and Future*, 7 J. L. & Contemp. Probs. 5, 16 (1940).

27 United States v. Am. Soc'y of Composers, Authors and Publishers (E.D. Wisc. Feb. 5, 1941) (BB585).

28 United States v. Aluminum Co. of Am. (S.D.N.Y. Jan. 30, 1941) (BB580); United States v. Dow Chem. (S.D.N.Y. Jan. 30, 1941) (BB582); United States v. Am. Tobacco Co. (E.D. Ky. July 24, 1940) (BB547); United States v. Eli Lilly & Co. (Mar. 31, 1941) (BB598); United States v. Procter & Gamble (D.N.J. Dec. 17, 1942) (BB748); United States v. Standard Oil of N.J. (D.N.J. Mar. 25, 1942) (BB695).

29 Arnold, *Past and Future*, *supra* note 26, at 11.

30 Fiscal year 2006–2015 data are available at https://www.justice.gov/atr/file/788426/download.

31 I uncovered little on the extent to which custodial sentences were sought for price fixing, but the prosecutor did seek a prison sentence for Edwin E. Jackson, Jr., the nine-time offender from 1911. *See Three Miscarriages of Justice*, 2 J. Am. Inst. Crim L. & Criminology 624, 625–26 (1911).

GLOBAL PRIVATE LITIGATION

May 7–8, 2017

Conference Chair: **Scott A. Martin**

Conference Vice-Chairs: **Kristina Nordlander & Bruce L. Simon**

www.ambar.org/atplaintiffs

SUNDAY, MAY 7, 2017

08:00 – 16:00

HOLLAND DAY TOUR:
THE KEUKENHOF, THE HAGUE, AND MADURODAM
First stop will be Keukenhof Park filled with blooming tulips, hyacinths, daffodils and other spring bulbs. Continue to The Hague and the to Madurodam, the miniature city with a model of several typical Dutch landmarks on a 1:25 scale. Additional fee, includes lunch.

18:30 – 20:30

EVENING BOAT CRUISE WELCOME/NETWORKING EVENT
Join us for a unique welcoming reception utilizing the famous Amsterdam canals. The group will depart one of several salon boats each different in style and size. The boats will set off on a two-hour tour of the city. The boats will depart from the landing stage St. Nicolaaskerk, which is located opposite the conference hotel, NH Barbizon Palace.

MONDAY, MAY 8, 2017

08:0– 08:30 BREAKFAST AND REGISTRATION OPENS

08:30 – 08:45

OPENING REMARKS

Speaker:

William C. MACLEOD, Kelley Drye and Warren LLP, Washington, DC

08:45 – 09:30

PANEL I: THE ROLE OF PRIVATE ENFORCEMENT
We start our exploration with the fundamental question, "Why private enforcement?" and focus on how best to achieve goals of compensation and deterrence, analyzing perceived abuses in the U.S. system and proposed solutions, including the approach of the EU Directive.

Moderator:

Frederieke LEEFLANG, Boekel de Neree, Amsterdam

Panelists:

Kris DEKEYSER, Acting Director, Policy and Strategy Directorate, European Commission Directorate General for Competition, Brussels

Brent SNYDER, Acting Assistant Attorney General, US Department of Justice, Antitrust Division, Washington, DC

09:30 – 10:15

PANEL II: COLLECTIVE ACTIONS ACROSS THE GLOBE
The experts provide a nuts-and-bolts examination of developing approaches to collective actions, including a review of implementing statutes in EU member states during 2016 and discussion of significant opt-out or opt-in actions.

Moderator:

Anna MORFEY, Hausfeld, London

Panelists:

Ellen BRAUN, Allen & Overy LLP, Hamburg

Nicholas HEATON, Hogan Lovells International LLP, London

Maarten SCHINKEL, University of Amsterdam, Amsterdam

10:15 – 10:30 BREAK

10:30 – 11:15

PANEL III: FUNDING ISSUES & CLAIMS AGGREGATION
Private competition litigation involves substantial resources and requires balancing risks and rewards. Among the issues—legal, financial, and ethical—that litigants must assess are the vehicles available pre-filing, including for large or aggregated claims; whether contingent fees and success fees can be deployed; potential sources of private or public funding generally; whether preexisting trade associations can fund or play a more integral role; and the impact if "loser pays."

Moderator:

Till SCHREIBER, Managing Director, Cartel Damages Claims Consulting, Brussels

Speakers:

Craig ARNOTT, Managing Director, Burford Capital, London

Jurriaan BRAAT, Omni Bridgeway, Geneva

Susan DUNN, Head of Litigation Funding, Harbour Litigation Funding, London

11:15 – 12:00

PANEL IV: PUBLIC AND PRIVATE INTERFACE
Potentially game-changing questions: What is the potential for discovery of government files under the EU directive, what stay issues may arise, what collateral estoppel effect arises from Commission findings?

Moderator:

Fiona SCHAEFFER, Milbank Tweed Hadley & McCloy LLP, New York, New York

Speakers:

Albrecht BACH, Oppenländer Rechtsanwälte, Stuttgart

Jay HIMES, Labaton Sucharow LLP, New York, NY

Belinda HOLLWAY, Scott + Scott LLP, London

Lisa PHELAN, Chief, Washington Criminal I Section. US Department of Justice, Antitrust Division, Washington, DC

12:00 – 13:30 **LUNCH & SPEAKER**

13:30 – 14:15

PANEL V: CONSOLIDATING PROCEEDINGS

The US has its federal "multijurisdictional litigation" (MDL) procedure, but managing multiple proceedings on a global scale is a new frontier. What will be the "magnet" jurisdictions for litigation (collective actions or even discovery) and settlement—and what impact will Brexit have? What about vertical consolidations of redress (direct and indirect claims, and others in the distribution chain)?

Moderator:

Jon LAWRENCE, Freshfields Bruckhaus Deringer LLP, London

Speakers:

Thomas FUNKE, Osborne Clarke Rechtsanwälte Steuerberater, Köln

Nadine HERMANN, Quinn Emanuel Urquhart & Sullivan LLP, Hamburg

14:15 – 15:00

PANEL VI: THE ROLE OF EXPERTS

Reflecting on the increasingly critical role of experts in U.S. antitrust cases post-*Tyson Foods*, and their potential use in nearly every phase of litigation, what are the expectations for them in the EU and in global litigation and how might their roles differ (e.g., use of the "expert determinator")?

Moderator:

Kristina NORDLANDER, Sidley Austin LLP, Brussels

Speakers:

Thilo KLEIN, Compass Lexecon, London

Gunnar NIELS, Oxera Consulting LLP, Oxford

Darrell WILLIAMS, Charles River Associates, Los Angeles, CA

15:00 – 15:15 **BREAK**

15:15 – 16:00

PANEL VII: PASS-ON AND CONTRIBUTION ISSUES

The panelists compare the effects of indirect purchaser regimes in the US (*Illinois Brick/ARC America*) and the EU (*Crehan/Manfredi*) and relevant law on pass-on, contribution and joint and several liability, cy pres recovery, and related damages assessments.

Moderator:

Kathrin WESTERMANN, Noerr LLP, Berlin

Speakers:

Frédéric JENNY, ESSEC Business School, Paris

Toni KALLIOKOSKI, Dittmar & Indrenius LTD, Helsinki

Martijn Van MAANEN, BarentsKrans, The Hague

16:00 – 16:45

PANEL VIII: GLOBAL RESOLUTIONS

The last stop on our journey, appropriately in Amsterdam: Can the resolution in *Parker* (Marine Hose) be replicated for future settlements, and if so, by what mechanism(s) and in what jurisdiction(s)? What is the risk calculus for a settling defendant? And is "global peace" for competition litigation still a pipe dream?

Moderator:

Jolling de PREE, De Brauw Blackstone Westbroek, Amsterdam

Speakers:

Jereon KORTMANN, Stibbe NV, Amsterdam

Elizabeth MORONY, Clifford Chance LLP, London

16:45 – 17:00

CONCLUDING REMARKS ROUNDTABLE:
"A NEW WORLD: THE IN-HOUSE PERSPECTIVE"

Perspectives from the "principals": Potential worldwide corporate litigants offer their thoughts on global recovery and highlight a key point of interest that they've learned.

Moderator:

Bruce L. SIMON, Pearson Simon Warshaw LLP, San Francisco, CA

Speakers:

Brian R. HENRY, Vice President & Senior Managing Counsel, The Coca-Cola Company, Atlanta, GA

Melissa L. ZUJKOWSKI, Vice President of Litigation and Disputes, Flextronics, San Jose, CA

17:00 **COCKTAIL EVENT**

18:00 **DINE-AROUND**

American Bar Association
321 North Clark Street
Chicago, IL 60654

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