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ANTITRUST AND COMPETITION NEWSLETTER

WINTER 2012

Welcome

Dear Friends and Colleagues:

In this issue of our newsletter, we recap important recent developments on the global antitrust and competition landscape and include a regional focus on important competition developments in France.

We hope you find this issue of our newsletter informative and useful. If you have suggestions about topics you would like us to address in the future, please click the "Feedback" link and send us your thoughts.

Best regards,

Bob Rosenfeld
Chair, Antitrust and Competition Group

What's Inside

Developments

Europe

Disclosure of Leniency Documents

An increasing number of private damages claimants in European jurisdictions are requesting access to documents obtained by competition authorities under cartel leniency programs. Following the EU Court of Justice's 2011 judgment in *Pfleiderer* (Case C-360/09), it is for national courts to weigh whether such documents should be disclosed. *Pfleiderer* returned to the German courts, where disclosure was ultimately denied on the basis that it would damage the leniency procedure. It was argued that cartelists would be less likely to "blow the whistle" if there were a risk of incriminating evidence being disclosed in damages actions.

The European Commission ("Commission") has intervened in cases in the United Kingdom, United States, and Canada, arguing against disclosure of leniency documents. It has largely been successful in its interventions. Recently, in an ongoing UK case brought by National Grid against participants in the gas-insulated switchgear cartel, the court decided to review the relevancy of leniency documents to determine whether they should be disclosed (*National Grid Electricity Transmission Plc v ABB Ltd. and others*). In its submission, which has been made public, the Commission articulates the risks of damaging the leniency procedure, arguing that leniency documents should only be sought by claimants as a last resort. The court's decision on disclosure is pending.

European Commission Blocks NYSE Euronext/Deutsche Börse Merger

On February 15, 2011, NYSE Euronext (NYSE) and Deutsche Börse (DB) announced their intent to create the world's largest stock exchange, and notified both U.S. and EU competition authorities of their intent. The U.S. Department of Justice cleared the merger in December 2011 on the condition that DB divest its share in Direct Edge, the fourth-largest U.S. stock exchange.

The European Commission, however, analyzed the effects of the proposed merger on exchange-traded derivatives (ETDs) and found that ETDs constituted a separate market. Specifically, the Commission noted that Eurex (operated by DB) and Liffe (operated by NYSE) were the two largest competitors in facilitating the trade of European ETDs and that the merged entity would hold a 90% share of the global market for European ETDs, thereby significantly restricting competition.

The parties offered commitments, which included the sale of part of Liffe's European single stock derivatives business as well as allowing third parties to access Eurex.

Nevertheless, the Commission decided to prohibit the deal on the basis that only the outright sale of either Eurex or Liffe would alleviate competition concerns.

This is only the fourth time the Commission has prohibited a deal under current merger legislation (although several deals have been abandoned voluntarily in anticipation of a prohibition).

EU Judge Moots Effects-Based Approach for Cartel Fines

An EU General Court judge recently delivered a speech at the European Competition Forum calling for a review of the guidelines used by the Commission to set cartel fines.

Under current Commission penalties guidelines, the Commission looks at the value of sales and the gravity and duration of the cartel to establish the basic level of fine. Speaking on February 2, 2012, Judge van der Woude said he would "invite the review of the guidelines and focus on the effects of the [cartel] infringement." The current guidelines, he said, largely neglect the actual effect of the cartel on the market, specifically the damage done to downstream customers and ultimate consumers. Referring to a recent case that upheld the status quo, he stated that more nuanced rules would help judges review Commission penalties (Case C-272/09P *KM Europe v Commission*). Although the Commission initially sets cartel penalties, the EU courts provide the fora in which parties may challenge Commission decisions.

A departure from the existing penalties system is likely to be contentious, especially if a more effects-based route were pursued, largely because the Commission would run the risk of, at least partly, replacing the role of national courts in determining the scope of damages caused to market participants.

United States

Second Circuit Denies Enforcement of Arbitration Agreement's Antitrust Class Action Waiver

In *In re American Express Merchants' Litigation* (2d Cir. Feb. 1, 2012), a purported Sherman Act Section 1 class action brought by merchants against American Express, the Second Circuit ruled that American Express could not enforce an arbitration agreement containing a class action waiver provision (i.e., a provision which forbids the parties from pursuing anything other than individual claims in the arbitral forum). The Second Circuit distinguished the Supreme Court's recent decisions in *AT&T Mobility LLC v. Concepcion,* 131 S. Ct. 1740 (2011), and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010). *Concepcion*, in particular, had bolstered the enforceability of arbitration provisions, ruling that the Federal Arbitration Act preempts certain state laws. The Second Circuit found that those cases did not address the issue of whether a class action arbitration

waiver clause is enforceable even if the plaintiffs can demonstrate that the practical effect of enforcement would be to preclude their ability to vindicate their federal statutory rights. In so ruling, the Second Circuit relied upon evidence demonstrating that the cost of individually arbitrating the merchants' claims would be prohibitive. (The merchants had alleged that when American Express entered the commodity credit card business, American Express forced merchants to pay "excessive" rates equal to American Express's more attractive business and personal charge cards by tying the credit and charge cards together.)

Congressional Reports on Pharmaceutical Settlements and Authorized Generics

The Congressional Research Service has issued two reports with respect to pending legislation regarding the pharmaceutical industry. One report, "Pharmaceutical Patent Litigation Settlements: Implications for Competition and Innovation," addresses, among other pending legislation, S. 127, the Preserve Access to Affordable Generics Act, which would establish a presumption that payments from a branded manufacturer to a generic manufacturer to delay entry of the generic are unlawful. The report provides background regarding the Hatch-Waxman Act, the applicable antitrust principles, and summaries of the leading decisions from the Second, Sixth, Eleventh, and Federal Circuits. Although it does not advocate specific Congressional action, the report provides Congress with options for regulating Hatch-Waxman Act settlements. The second report, "Authorized Generic Pharmaceuticals: Effect on Innovation," provides background for H.R. 741 and S. 373, which would prohibit the branded manufacturer from manufacturing, marketing, selling, or distributing an authorized generic drug. For more information regarding authorized generics, see the FTC's report on "Authorized Generic Drugs: Short-Term Effects and Long-Term Impact."

FTC and DOJ Review of Mergers and Acquisitions

In the past few months, the Federal Trade Commission and the Department of Justice have taken significant actions with respect to a number of mergers and acquisitions. For example:

- The DOJ forced AT&T to abandon its proposed acquisition of T-Mobile USA after suing to block the transaction in August 2011.
- The DOJ required Exelon Corporation and Constellation Energy Group to divest three electricity generating plants in order to proceed with their $7.9 billion merger.
- The FTC required AmeriGas LP and Energy Transfer Partner L.P., distributors of propane gas, to amend the agreement by which AmeriGas would acquire

ETP's Heritage Propane business. Under the agreement, AmeriGas will not acquire ETP's Heritage Propane Express (HPE). Among other things, (1) ETP is required to maintain HPE as a viable business for two years unless it is sold before then; (2) AmeriGas is required to provide services to HPE; and (3) ETP is prohibited from selling HPE Express without FTC approval.

- An FTC administrative law judge ruled that ProMedica Health Systems, Inc.'s consummated acquisition of St. Luke's Hospital harmed competition and issued an order requiring ProMedica to divest St. Luke's hospital to a buyer approved by the FTC within 180 days after the order becomes final.

- The FTC forced Omnicare to abandon its attempt to take over rival drug-supply company PharMercia after suing to block the transaction in January 2012.

This recent activity, which demonstrates a range of remedies at the agencies' disposal, indicates that the agencies are taking a more aggressive position in challenging some mergers and acquisitions.

Asia

Legislation and Guidelines

MOFCOM Issues Regulations Regarding Failure to Notify Transaction

On January 5, 2012, China's Ministry of Commerce (MOFCOM) issued new regulations regarding the investigation of and sanctions for companies that fail to notify transactions as required by the Anti-monopoly Law (AML). The regulations, which took effect February 1, 2012, provide that companies that fail to notify a transaction in accordance with the AML may be fined up to RMB 500,000 (approximately $80,000) and ordered to take measures deemed necessary to restore pre-concentration conditions. Such measures may include the disposal of shares or assets acquired. Companies under investigation will be ordered to suspend the relevant transaction pending the outcome of MOFCOM's investigation. The extent to which MOFCOM may seek to enforce suspension beyond China is unclear. However, these new regulations demonstrate MOFCOM's determination to see that the AML is properly complied with and enforced.

Korea Introduces Antitrust Guidelines for Patent Licensing

On January 17, 2012, Korea's Fair Trade Commission (KFTC) published new antitrust guidelines on patent licensing that aim to protect the bargaining power of small and medium-sized companies that license the right to use patents owned by large businesses. The guidelines outline 10 potentially abusive practices and explain how they can restrict

competition and how to reduce their anticompetitive effects. Practices covered include charging discriminatory prices, dividing the market by restricting the geographical areas in which licenses are granted, restricting the price or sales of products made using a licensed patent, and prohibiting the buyer of a patent license from buying competing licenses. Although the guidelines are not legally binding, they suggest the KFTC may increase its activity in the field of patent licenses.

Korea Introduces Antitrust Guidelines for Standards-Setting Activities

On February 1, 2012, the KFTC published new guidelines that address competition concerns arising in standards setting. The guidelines suggest how to conduct standards setting in a transparent, inclusive, and fair manner. They ask standards-setting organizations to allow as many interested parties as possible to take part in the process and to keep clear and non-discriminatory restrictions to a minimum. The Commission also instructs companies to avoid exchanging data on prices, production volumes, and condition of sales. To avoid patent ambush, the holders of relevant patents must disclose their patents and accept fair, reasonable, and non-discriminatory (FRAND) commitments for the use of the patents, including disclosing proposed licensing terms. The new guidelines illustrate KFTC's efforts to promote competition in the technology industry and to clarify gray areas in potentially anticompetitive uses of intellectual property rights. The guidelines are not legally binding, and KFTC still will have to prove any breach of competition law.

Investigations

China Telecom and Unicom Pledge to Reduce Broadband Rate and Apply for Suspension of Anti-monopoly Investigation

On December 2, 2011, China Telecom and China Unicom announced that they had applied to the National Development and Reform Commission (NDRC) for suspension of an ongoing anti-monopoly investigation. The NDRC's investigation focused on two areas: (1) whether the two companies had not fully integrated their networks, therefore resulting in increased costs and lower network speeds, and (2) whether they use discriminatory pricing practices against other service providers and customers. Both companies admitted to price discrimination against different broadband access operators. China Unicom pledged to enhance broadband access speeds over the next five years and to further lower broadband access charges to the public. China Telecom pledged that within five years, the unit broadband price for public users would decrease by 35%, and measures would be carried out immediately. It has been disclosed that the Price Supervision Bureau of the NDRC was not satisfied with the proposed measures on the grounds that they were too broad and not verifiable. Although the NDRC has acknowledged receipt of the application, no official decision has been issued regarding acceptance or rejection of the application.

Authorities

Shanxi Price Bureau to Select Key Industries for Anti-Price Monopoly Investigation

On January 10, 2012, the Price Bureau of Shanxi Province ("Price Bureau") held a provincial price supervision and AML working conference. The Deputy Director of the Price Bureau announced that the Price Bureau will focus on AML enforcement and investigating and sanctioning major price fraud cases, and will initiate anti-profiteering and anti-dumping law enforcement. In 2012, the Price Bureau will select some key industries for anti-price monopoly investigations, focusing on pricing in the banking, electricity and coal, medicine, education, tourism, and other sectors. The Price Bureau also announced that it will keep a close watch on collusive price increases between enterprises or organized by industry associations, and will severely punish hoarding of products beyond reasonably required storage levels. The Price Bureau will keep close track of and investigate frequent or significant price manipulations by companies with high market shares and promptly stop the bidding up of prices beyond a reasonable cost growth rate.

Regional Focus: France

The French Competition Authority (the "Authority") has been very active and recently published several sets of important guidelines. On May 16, 2011, it published guidelines on fines and on February 10, 2012, it published guidelines on settlement proceedings and compliance programs. It also has rendered a very important decision in the leniency context, detailing new ways to calculate fines and demonstrating the need for companies to consider applying for leniency in cartel cases. We highlight below these recent developments of interest to companies and competition practitioners in France.

French Competition Authority Fines Four Laundry Detergent Manufacturers for Cartel Activity

On December 8, 2011, the French Competition Authority fined four major laundry detergent manufacturers up to M€ 367.95 (the total amount of fines would have been M€ 713.57 without reductions due to leniency applications) for participating in a cartel through a trade association. This proceeding was initiated through applications for leniency by each party to the cartel before the Authority, as well as before the European Commission ("Commission") in a separate proceeding that resulted in fines against Unilever, Procter & Gamble, and Henkel totaling M€ 315.2. In France, the Authority imposed its fines after finding that Unilever, Procter & Gamble, Henkel, and Colgate Palmolive held regular secret talks on their pricing and promotion policies and imposed a monitoring device of compliance with the cartel rules. Significantly, the Authority held that the benefits of the leniency and settlement procedures can be combined in certain circumstances (*e.g.,* when the objections notified on the concerned company differ in one or more significant aspects from the content of its leniency application) and applied its new methods related to the setting of the financial penalties (*cf.* Notice on the Method Relating to the Setting of Financial Penalties of 16 May 2011).

French Settlement Procedure

On February 10, 2012, the Authority released a framework document concerning its settlement procedure. The settlement procedure enables companies to waive their right to challenge the charges notified by the Authority's investigation services in return for a reduced fine. The notice explains how to implement such a procedure, in particular how a company must waive its right to challenge the charges notified. In the framework of such a procedure, the companies can also change their behavior in the future by making structural (separate accounts, spinning off, etc.) or behavioral (modifications to contractual clauses, general terms of sale, price scales, etc.) commitments or by setting up antitrust compliance programs. Following the decision of the Authority regarding the detergent cartel referenced above, the benefits of the leniency procedure can be combined with the settlement procedure, in particular if the objections notified on the

company in question differ in one or more significant aspects from the content of its leniency application. The settlement procedure grants a 10% reduction in the financial penalty, which may be combined with additional 5 to 15% reductions depending on the commitments made by the companies.

French Antitrust Compliance Programs

On February 10, 2012, the Authority released a framework document aimed at encouraging antitrust compliance programs whereby companies express how they comply with European and French competition rules. Such programs must seek two objectives: (1) prevent the risk of committing infringements and (2) provide the means of detecting and handling misconduct. Therefore, programs should provide informational measures (training, awareness) and operational initiatives (internal and external monitoring, audit, and alert mechanisms). The document does not provide a template compliance program but outlines five key features for establishing credible, efficient, and size-tailored programs. Although the existence of a compliance program is neither a mitigating circumstance nor an aggravating factor, implementing one may help companies to discover infringements and encourage them to submit an application for leniency, which may grant a complete or partial immunity. The commitment to establish or improve an existing compliance program within a settlement procedure may allow a reduction of the financial penalty up to 10%, to which other discounts may be added for a total reduction of up to 25%.

The Authority's new framework will need time to be enforced and adapted and also may be challenged before the Court of Appeals and the Supreme Court. In the context of the European Competition Network and of the International Competition Network, it might be a subject of discussion among competition agencies and authorities. Of course, the new framework should influence companies in their organization, compliance, and defense strategies.

Events, Articles and Honors

Upcoming Antitrust and Competition Events

March 2012

China Legal Executive Council (L-Council) China Anti-Monopoly Forum 2012
Beijing, China
Of Counsel Veronica Lockyer will speak on Merger Control under China's Anti-Monopoly Law (**March 23**).

May 2012

Strafford Publications
Orrick of counsel Howard Ullman will participate in a webinar panel sponsored by Strafford Publications, titled "Tying Arrangements: Avoiding Antitrust Liability: Leveraging Market Power Arguments and Seller Defenses" (**May 1**).

Recent Antitrust and Competition Publications

Orrick partner Russell Cohen co-wrote "From the Experts: Recent Developments in Alien Tort Statute Litigation," which appeared in *Corporate Counsel* magazine and on Law.com on December 23, 2011.

Recent Antitrust and Competition Honors

Benchmark Litigation's 2012 edition recognizes Orrick's Antitrust and Competition Group for the first time and "highly recommends" Orrick's California antitrust litigators.

Top Legal (Italy)'s latest rankings placed Orrick in the top 10 firms in Italy for Competition and EU Law.

Germany's 2012 *JUVE* legal handbook placed Orrick as among the top firms in that country, recognized Orrick's Competition Law practice, and recommended the firm's State Aid work.

Asian-MENA Counsel magazine's latest "Representing Corporate Asia and Middle East" survey gives Orrick's Antitrust and Competition practice in Japan an honorable mention.

PLC: Orrick's Competition/Antitrust practice was "recognized" in PLC's survey for England, France, Germany, and Italy and was "recommended" for USA, California, San Francisco, and Silicon Valley.

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Get to Know

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Mr. Rasmussen, a partner in the Washington, D.C. office, is a member of the Antitrust and Global Competition Group. He specializes in antitrust and consumer protection matters before the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice. His practice also includes counseling and litigation regarding mergers and acquisitions, joint ventures, product distribution and marketing, privacy, telemarketing and advertising issues.

Mr. Rasmussen was featured in a front page story in *The Legal Times*, as well as the book *The Jury* by Stephen J. Adler. He has also been quoted numerous times in the *Wall Street Journal* and *The New York Times*, as well as other national publications.

Prior to joining Orrick, Mr. Rasmussen was a partner for 22 years with Patton Boggs LLP in Washington, D.C. He was also a trial attorney with the FTC's Bureau of Competition, and served as a Lt. J.A.G. in the U.S. Naval Reserve.

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