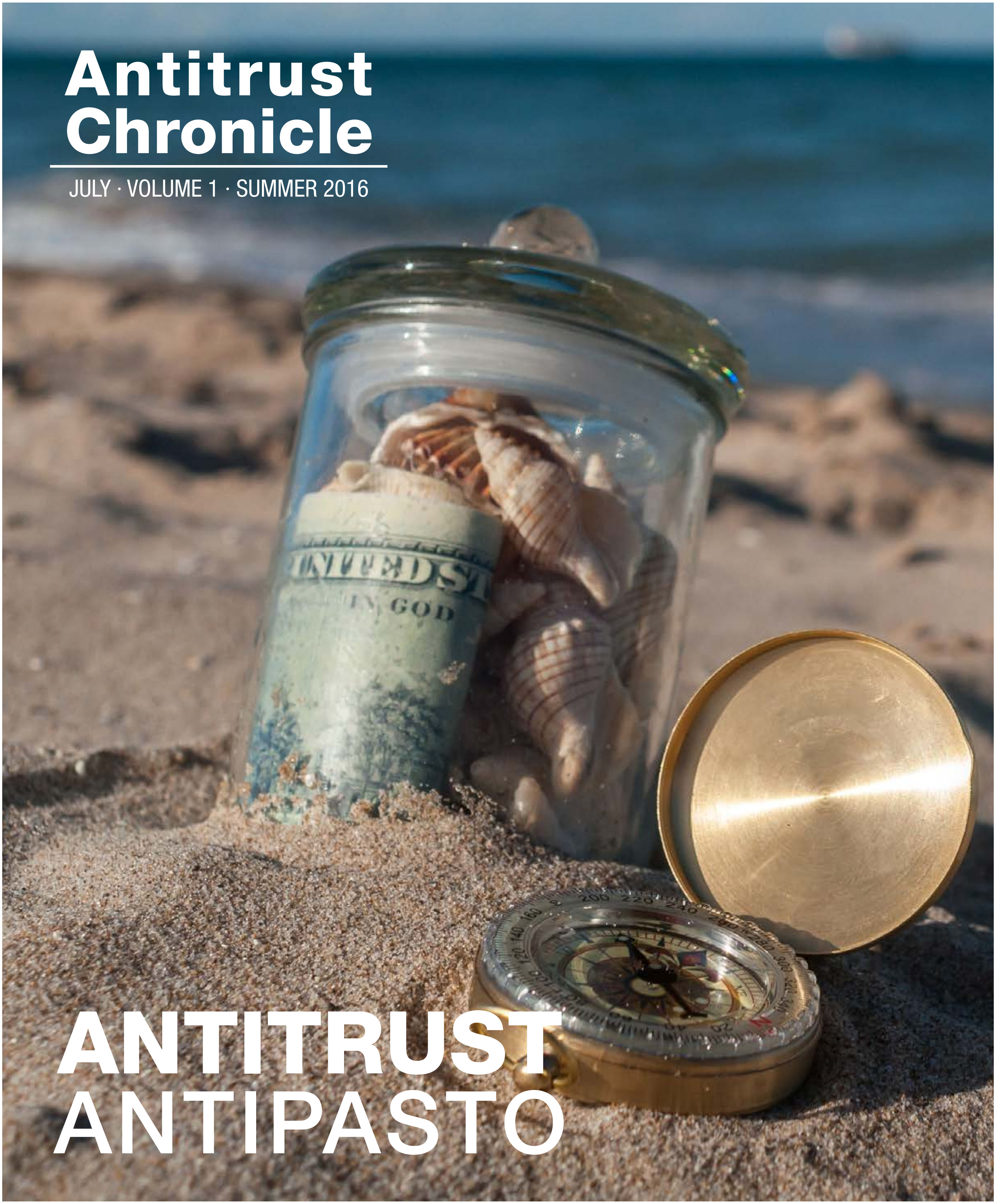
Antitrust Chronicle

JULY · VOLUME 1 · SUMMER 2016



ANTITRUST ANTIPASTO

CPI COMPETITION POLICY INTERNATIONAL

TABLE OF CONTENT

LETTER FROM THE EDITOR

Dear Readers,

This month, the Antitrust Chronicle (AC) brings you our traditional summer edition "Antirust Antipasto."This compilation of articles from our Advisory Board and other special guests covers a venerable cornucopia of antitrust topics such as the role of innovation in merger control, the protection of confidential information in cartel decision, enforcement in China's pharmaceutical sector and…a potential new love story.

In addition, issues related to the territorial scope of competition law, collective actions and pre-trial discovery are addressed as well as the role the late Justice Scalia played in the U.S. Supreme Court's antitrust decisions during his tenure on the Court.

Do not miss our interview with Andreas Mundt, President of Bundeskartellemt, who talked to us about the recent reports on Big Data and Digital Markets and the ongoing Facebook investigation.

We look forward to seeing many of you later this month on July 28, 2016 at George Washington University in Washington D.C. for the CPI debate focusing on the role of Antitrust and Regulation in the new Matchmaker Economy.

In the meantime, we sincerely hope you enjoy reading this summer "Antitrust Antipasto" issue of our AC magazine.

Thank you, Sincerely,
CPI Team

SUMMARIES

All Eyes On Antitrust Enforcement In China's Pharmaceutical Industry

By Adrian Emch & Jiaming Zhang

August 1, 2016 marks the eighth anniversary of the entry into effect of China's Anti-Monopoly Law ("AML"). Enforcement of the law has gone through various phases, with the peak – at least in terms of press coverage – during 2014, culminating in the Qualcomm decision by the National Development and Reform Commission in February 2015.

Since the 2015 Qualcomm decision, Chinese antitrust enforcement has been less headline-grabbing and, generally speaking, lower profile. However, in the past months, press reports have picked up again, as some sectors have been publicly identified as targets for antitrust enforcement action. One of these sectors is life sciences, in particular pharmaceuticals. This article examines recent pharmaceuticals antitrust cases in China.

Antitrust In The EU Digital Markets: A Case Study

By Timothy Cowen & Stephen Dnes

This article will place EU competition law policy in a comparative perspective, drawing comparisons with U.S. federal antitrust law, which differs on a number of key points relating to innovation. As a starting point, both EU and U.S. policy and law both seek to foster innovation. However, they can be argued to do this in slightly different ways.

This article highlights a number of important precedents, such as the Microsoft decision, to show how EU competition policy fosters a competitive marketplace, before applying these points to the ongoing investigation into Google, whose resolution may yet prove to be the most important restatement of EU competition policy towards on digital markets.

A Reluctant Standard-Bearer For Chicago School Antitrust

By Max Huffman

This article addressed the role the late Justice Scalia played in the U.S. Supreme Court's antitrust decisions during his tenure on the Court. Was Justice Scalia rightly considered a prominent member of the Chicago School of antitrust thought and policy? Leading proponents are – or were – Robert Bork, Justice Scalia's colleague on the D.C. Circuit; and Richard Posner and Frank Easterbrook, both also Chicago Law School professors turned judges. What was Justice Scalia's impact on the antitrust body of law?

The Role Of Innovation In Merger Control – A Hot Topic

By Rachel Brandenburger, Logan Breed & Falk Schöning

This article considers how the U.S. and EU antitrust agencies assess the impact of a merger on innovation. Merging parties may argue that their merger will improve the merged company's ability to innovate, and innovation-based arguments may also be used to demonstrate that current market shares are not indicative of the parties' potential future market power.

Merging parties should consider the potential procompetitive and anticompetitive effects of their merger on innovation from the outset and be prepared for discussions about this hot topic with the agencies reviewing their merger.

Focus On Innovation: A Review Of The Taiwan Fair Trade Commission's Investigation On Google Maps

By Su-Wan Wang & Elizabeth Xiao-Ru Wang

The Taiwanese Competition Authority has recently confronted issues surrounding Google's search practices. A number of independent providers of digital map programs complained to the Taiwan Fair Trade Commission ("TFTC") about Google's search result algorithms. These firms alleged that Google's search results gave Google Maps favorable placement on its search results pages, reflecting an unfair competitive practice. The map providers also claimed that Google's conduct deprived them of business opportunities, resulting in a loss of revenue, and violating Taiwan's competition statutes. In responding to these concerns, the TFTC conducted a multi-year investigation and closed the probe in the summer of 2015 with a finding of no violations.

This article explains how the TFTC examined whether Google had market dominance, and whether Google's conduct constituted an abuse of dominance. The authors go on to describe the two primary economic tests employed by the TFTC for the agency's refusal to deal analysis, the essential facility test and the profit sacrifice test.

A Turning Of The Tide: Victim Redress Through Private Antitrust Litigation

By Karin E. Garvey

Access to the courts is necessary to seek redress for anticompetitive activity, but the costs of litigation can deter victims of anticompetitive conduct from filing suits, particularly where individual claims are small and the procedural tool of collective actions is not available.

Additionally, access to evidence is necessary to prove an antitrust violation, but pre-trial disclosure is not available everywhere. In the United States, there is a robust class action procedure, just as there is wide-ranging pre-trial discovery. In the European Union, on the other hand, until recently there has been little of either. This paper explores the differences between the U.S. and EU regimes and the fact that the tide is turning in the European Union with the issuance of recent legislation.

Territoriality Isn't Over

By Robert O'Donoghue

This article examines territoriality through the lens of the Iiyama case, the High Court's main findings, and where the judgment leaves us on the question of territorial application of competition law. In light of the recent "Brexit" vote, the issues of territoriality would actually assume greater, not lesser, importance if the UK leaves the European Union since it would become all the more important to understand the demarcation between UK competition and EU competition laws, including when agreements or practices that facially have a UK dimension might remain subject to EU competition law due to their territorial effects.

Interim Relief And Protection Of Confidential Information In EU Cartel Decisions: A New Love Story

By Kyriakos Fountoukakos & Camille Puech-Baron

Imagine you are the lawyer advising a multinational company that was sanctioned by the European Commission for participating in a cartel. The Commission has prepared a lengthy decision with detailed information about the cartel, including your client's business secrets. You identify the information as confidential and the Commission provisionally accepts your claims. Some years later, private damages claimants put pressure on the Commission to disclose documents relating to the cartel including the full, confidential version of the decision. Following a debate with the Commission services and an "appeal" to the Hearing Officer, the Commission rejects your confidentiality claims and decides to publish a non-confidential, version of the decision that discloses the information that your client considers to be confidential.

This paper looks at the test recently established by the EU Courts that companies have to meet to secure interim relief in such situations.

CPI TALKS

Interview with Andreas Mundt, President of the Bundeskartellamt.

In this issue CPI interviews Andreas Mundt about the recent report on Market Power in the Digital Markets, the joint report with the French Competition Authority on Big Data, the ongoing Facebook investigation and more.

CPI SPOTLIGHT

CPI is proud to announce our new Africa Column. This month CPI releases its first column devoted to emerging antitrust developments in Africa. We open our series of articles with a submission from the Competition Commission of South Africa outlining the rationale, scope and procedural aspects of their grocery retail sector market inquiry.

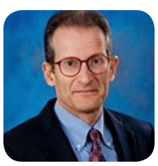
With this new column, CPI is able to offer up to date articles covering all the regions in the world: North America, South America, Europe, Asia-Pacific and Africa. Check them out!

ANNOUNCEMENTS

Save the Date!

On July 28, 2016, CPI, with the support of George Washington University (GWU), will hold a conference in Washington D.C. at GWU to debate the role of Antitrust and Regulation in the new Matchmaker Economy.

Moderated by
William Kovacic



Jon Sallet
(FCC)

Ed Black
(CCIA)

Scott Sher
(WSGR)

David Evans
(Global Econ.)

Terrell McSweeny
(FTC)

Our experts will have a substantive discussion, inter alia, about the challenges and opportunities that online platforms and the new Matchmaker Economy are presenting to regulators.

Click here to sign up!

WHAT IS NEXT?

This section is dedicated to those who want to know what CPI is preparing for the next month. Spoiler alert!

The August edition of the AC will be our yearly international judicial recap. Another judicial year has come and gone in most jurisdictions and we take this opportunity to review some of the most important antitrust rulings in the United States, Europe and other countries. As the saying goes, if you want to know about the future, you need to learn about the past.

INTERVIEW WITH ANDREAS MUNDT PRESIDENT OF THE BUNDESKARTELLAMT

In recent months, the Bundeskartellamt (BKartA) has been very active in antitrust advocacy and enforcement. Good examples of this are the Joint Report with the French Competition Authority regarding Big Data, the opening of an investigation against Facebook and the most recent report on Market Power of Platforms and Networks. It seems that a new era where competition, consumer protection and digital markets go hand in hand has begun, and your office is leading this effort in Europe and, to some extent, in the world.

1. Please, could you tell us why this is the right moment to address these issues and these markets?

Digitalization and the internet economy are increasingly affecting more and more of the economy. This is certainly a demanding development not only for the business community but also for competition agencies.

The internet economy raises new questions regarding competition law enforcement. The conduct and strategies of large internet companies are provoking intense discussion about the competitive harm these strategies cause, whether they are legal and to what extent they should be subject to control. Against this background the Bundeskartellamt launched an "Internet Think Tank" in early 2015.

The Think Tank has three main tasks: first, to conduct in-depth research on existing literature and – national and international – case law, second, to develop concepts on how to assess cases in the digital economy. Third, the Think Tank supports case teams by offering a platform to discuss their ongoing cases in digital markets and help to apply new concepts in practice.

2. The Big Data report and the Market Power on Platforms report were released almost at the same time. Does this mean that it is necessary to really understand both subjects to adequately face the upcoming challenges for competition and regulation?

In many cases the implications of big data and of the network effects and other specifics of platforms often go hand in hand.

Today many firms achieve high turnover based on business models which involve the use of data. For us as a competition authority it is important to understand and determine whether, how and to what extent data can become a factor contributing to market power.

Companies in digital markets often also benefit from network effects. Consider real estate platforms as an example: A large platform is often more attractive to new users looking for real estate as it can offer a larger number of real estate offerings. At the same time, a large number of users makes the platforms more attractive to real estate offerings. Because of this effect, many digital markets show a certain tendency towards concentration.

All in all, we can see two somehow opposing trends in the internet: On the one hand, the digital economy is very dynamic and new ideas and business models can grow fast. On the other hand, the heavyweights can make use of big data and network effects to gain a competitive lead which might make it difficult for newcomers to keep up with them.

Therefore, protecting competition in the Internet means above all keeping markets open for competitors, newcomers and new business models, especially by controlling abusive practices. Enforcing competition law in a consistent manner greatly contributes to maintaining the dynamics of the web.

3. These two reports came soon after the BKartA opened the Facebook investigation, which may address consumer protection and competition concerns. There has been a long debate whether these two areas of law should be dealt with together or separately. What is your view on this?

It is a pending case, so I cannot talk about any details. In general, I can say that we are not a data protection authority. However, if our investigation shows that Facebook is a dominant company and if it uses unlawful terms of service on the use of user data, then this is maybe something not only for data protection officers. There could also be a link to competition law. Dominant companies are subject to special obligations. They are not allowed to abuse their market power. They are also obliged to use adequate terms of service as far as these are relevant to the market. For advertising-financed internet services such as Facebook, user data are hugely important. For this reason it is necessary to examine whether the terms and conditions could represent an abusive imposition of unfair conditions on users.The Bundeskartellamt is conducting the Facebook proceeding in close contact with the competent data protection officers and consumer protection associations.

There have always been many connections between competition law and consumer protection. As I mentioned, in the digital economy there can be a tendency towards concentration. Therefore, we might see more abuse of dominance cases in the future than before. I have always said that the protection of fair competition is also the best protection for consumers. In the digital economy this statement is more fitting than ever before.

4. After reading both reports, it is clear that the BKartA shares the view that data could constitute a market itself and accumulation of data could result in market power. The BKartA also suggests, referring to Evans & Schmalensee, that new elements (such as the relevance of direct and indirect network effects, the access to data or the innovation potential in digital markets) need to be considered in the analysis of market definition and market power. Are competition authorities ready to move away from traditional analysis and adopt a more innovative approach in these new markets?

First, let me stress that we did not take a position on whether data constitutes a market in itself. We see, however, that in digital markets services are often offered free of charge. These free-of-charge services are often financed by targeted advertising that is based on data that a provider collects from the user. In that respect you could consider that a user "pays" for the service by providing personal data in response to targeted ads.

Second, recent case practice shows that the classical tools of competition law are generally sufficient to deal with most of the new issues arising in the context of digitalization. Competition law is a lively and breathing law, designed to cope with all kinds of economic developments and disruptions.

Nevertheless, the Bundeskartellamt is in regular contact with lawmakers to discuss how the legal framework could be adjusted and fine-tuned to tackle the issues in this area appropriately. In 2016 we will see the introduction of an Amendment of the German Competition Act. In this amendment it should be considered whether to expand the criteria for dominance. Network effects and the access to data can be important factors for the market position of any company, they can be a potential source of market power. Other competition parameters such as price competition or market shares as an indicator of market power tend to be less important for some cases in the internet economy than for more traditional markets.

5. The publication of these reports has raised (even more) interest in big data, online platforms and the matchmaker economy. Many people are waiting for the BKartA´s next steps. What could you tell us about the advocacy and enforcement priorities for this year and the next? Does the BKartA plan on collaborating with other competition authorities in the near future?

I think that with the reports on Big Data and on the market power of platforms and networks we have now built a theoretical fundament to cope with the new challenges in the digital economy. Now it is crucial to use this knowledge for conducting cases. As you know, we have several proceedings, for example Facebook and CTS Eventim. Especially in our online cases we are always in close contact with the European Commission and the competition authorities of the other EU Member States.

In addition to the internet economy, the Bundeskartellamt will be working on numerous other proceedings and projects across all sectors. Of course, in the coming years we will also still give high priority to the prosecution and punishment of cartels.

ALL EYES ON ANTITRUST ENFORCEMENT IN CHINA'S PHARMACEUTICAL INDUSTRY

BY ADRIAN EMCH & JIAMING ZHANG

I. INTRODUCTION

August 1, 2016 marks the eighth anniversary of the entry into effect of China's Anti-Monopoly Law ("AML"). Enforcement of the law has gone through various phases, with the peak – at least in terms of press coverage – during 2014, culminating in the Qualcomm decision by the National Development and Reform Commission ("NDRC") in February 2015.[1]

Since the Qualcomm decision Chinese antitrust enforcement has been less headline-grabbing and, generally speaking, lower profile. However, in the past months, press reports have picked up again, as some sectors have been publicly identified as targets for antitrust enforcement action. One of these sectors is life sciences, in particular pharmaceuticals.

The main driver behind the intensified antitrust scrutiny in the pharmaceutical sector was, likely, the liberalization of drug pricing in June 2015.[2] Before that, it was the government thatdecided the prices – or at least price ranges – of most of the commonly used drugs in China, especially those covered by the national health insurance scheme. This often meant price caps (ex-factory and retail) for the drugs. However, the far-reaching policy reform in June 2015 abolished the old pricing system, allowing most drug prices to be decided by the market.

Already when announcing the drug price reform in June 2015, NDRC – which, apart from antitrust enforcement powers, was also in charge of setting drug prices or price ranges – announced that it would use antitrust as a tool to prevent price collusion and manipulation, abuses of dominance to impose excessive prices and other negative outcomes following the reform: "enhancing the supervision of market prices for drugs is a key measure to maintain the price order in the drug market and to ensure a smooth drug price reform."[3]

But beyond this particular announcement, NDRC and the two other authorities empowered to enforce the AML – the Ministry of Commerce ("MOFCOM") and the State Administration for Industry and Commerce ("SAIC") – have made clear through case practice that pharmaceuticals are a key target for antitrust enforcement action. Indeed, the recent enforcement cases in China's pharmaceutical sector cover all three antitrust authorities, and all types of anti-competitive conduct.

The AML targets three types of conduct which most other antitrust regimes in the world also sanction: restrictive agreements, abuse of dominance and anti-competitive mergers. Unlike many other regimes, the AML also prohibits so-called "administrative monopolies," a term used to describe government conduct with anti-competitive effects. Below, we

1 National Development and Reform Commission, [2015] Administrative Penalty Decision No. 1, February 9, 2015, see: http://jjs.ndrc.gov.cn/fjgld/201503/t20150302_666170.html.

2 Opinions on Pushing Forward the Pharmaceutical Pricing Reform, Fa Gai-Jia Ge [2015] No. 904, May 4, 2015, see: http://www.sdpc.gov.cn/zcfb/zcfbtz/201505/t20150505_690664.html.

3 NDRC Notice on Strengthening the Supervision of Pricing Conduct in the Pharmaceutical Market, Fa GaiJia Jian [2015] No. 930, May 4, 2015,see: http://www.sdpc.gov.cn/gzdt/201505/t20150505_690683.html.

will look at pharmaceuticals antitrust cases for each of these four types.

II. RESTRICTIVE AGREEMENTS AND ABUSE OF DOMINANCE – THE QINGYANG SAGA

In the past months, there were two Qingyangcases – one investigation against cartel conduct and one against abuse of dominance, one by NDRC and one by a SAIC branch.

Both NDRC and a local SAIC branch targeted Qingyang, a manufacturer of both allopurinol active ingredients and allopurinol drugs for the treatment of gout (a type of arthritis disease). In November 2015 and in February 2016 respectively, SAIC's local office in Chongqing and NDRC each punished Qingyang for engaging in antitrust infringements concerning the same products.

In the case investigated by SAIC's Chongqing office, the key allegation was that Qingyang had committed an abuse of dominance, more specifically a refusal to deal.[4] The facts were as follows.

For the production of allopurinol active ingredients a manufacturer needs to go through a series of government approval processes, including environmental impact assessment, certification of safe production, and drug production qualification, etc. At the time of the abusive conduct, Qingyang was the only company with valid government licenses to manufacture allopurinol active ingredients, which in turn were deemed indispensable for the production of allopurinol drugs.

For this and other reasons, the SAIC Chongqing office held that Qingyang had a 100 percent share in the relevant market upstream, the market for allopurinol active ingredients. From October 2013 to March 2014, Qingyang was found to have refused to supply allopurinol active ingredients to its competitors in the allopurinol drug market downstream. During these six months, Qingyang was the only downstream producer with access to allopurinol active ingredients. Not surprisingly, Qingyang's share in the allopurinol drug market rose from 10 percent to close to 60 percent, within just six months.

SAIC's Chongqing branch also made a quite detailed examination of the actual effects of Qingyang's conduct, finding that the conduct had caused significant harm to the market, the industry and customers. The authority found that prices for allopurinol active ingredients had increased from 240/kg to 535/kg, and were passed on to end customers purchasing allopurinol drugs.[5]

Following its investigation, SAIC's Chongqing office imposed a fine of close to RMB 440,000 (around USD $66'000) on Qingyang.

In the NDRC case, Qingyang was fined for a price fixing and market allocation cartel.[6] The conduct underlying the NDRC investigation started right after the refusal to deal sanctioned by SAIC's Chongqing bureau.

After the six-month period during which Qingyang had cut off supplies for rival allopurinol drug makers and gained a share of close to 60 percent in the downstream allopurinol drug market, it restarted supplies of allopurinol active ingredients to some of its competitors.However, according to the NDRC decision, these renewed supplies were not unconditional: in April 2014, Qingyang and three others competitors downstream reached an agreement to increase the prices of allopurinol drugs, and to allocate spheres of influence by dividing up several of China's provinces among them. NDRC also found Qingyang to have threatened the other cartelists with cutting supplies of active ingredients again in case of non-compliance with the agreement.

This cartel lasted for about six months too, and the four cartelists were fined in total around RMB 4 million (around USD $600,000).

In May 2016, NDRC's Jiangsu branch reported actions taken against a similar price fixing cartel at the local level.[7] That case also involved a chemical ingredient for the production of drugs. Six companies were found to have held "industry alliance" meetings to fix minimum sales prices. NDRC fined those companies lightly, taking into account the relatively short period of infringement and the limited negative effects on the market.

III. ANTI-COMPETITIVE MERGERS – CARROT AND STICK

Like in many other jurisdictions, a filing is compulsory in China if a transaction qualifies as a reportable transaction (called "concentration between business operators" in China) and the revenue thresholds are met. Before filing and clearance, the transaction cannot be implemented.

Since mid-2014, MOFCOM operates a streamlined filing regime for transactions deemed "simple cases." Compared to standard cases, "simple case" filings require less information to be submitted to MOFCOM, and are generally cleared faster – in most cases, within phase 1 of the procedure. Today, around 70 percent of transactions

4 Adrian Emch, Effects Analysis in Abuse of Dominance Cases in China – Is Qihoo 360 v.Tencent a Game-Changer?, Competition Law International 11, 28 (2016).

5 Chongqing Administration for Industry and Commerce, Administrative Penalty Decision, [2015] Yu Gong Shang Jing Chu Zi No. 15, October 28, 2015, see: http://www.saic.gov.cn/zwgk/gggs/jzzf/cfjd/201512/t20151221_165120.html.

6 NDRC press release, NDRC investigated and punished allopurinol drug monopoly agreement case, January 28, 2016,see: http://www.ndrc.gov.cn/gzdt/201601/t20160128_772979.html.

7 Jiangsu China press release, Six companies fined for violating the Anti-Monopoly Law, May 25, 2016, see: http://jsnews.jschina.com.cn/system/2016/05/25/028773762.shtml.

are filed as "simple cases." Over the past months, several pharmaceutical deals have gone through the "simple case" procedure, for example Furen Medicines Group's acquisition of equity in Kaifeng Pharmaceutical.[8]

At the same time as making it easier for some transactions under the "simple case" regime, MOFCOM has started cracking down harder on reportable transactions that were not filed, in breach of the law. [9]Over the past few months, MOFCOM has published several decisions where it sanctioned companies for breach of the AML's merger control rules. Two of these decisions were addressed to pharmaceutical companies.

The first case concerned Fosun Pharmaceutical Group'sacquisition of 65 percent in Suzhou Erye Pharmaceuticals.[10] In September 2015, MOFCOM published its decision sanctioning Fosun Pharmaceutical Group for violation of the AML. In that transaction, the buyer was a large Chinese private company, and the target a former state-owned antibiotics manufacturer in Southern China.

Fosun Pharmaceutical Group requested consultation with MOFCOM about the transaction. However, during the consultation period, the company completed part of the transaction by acquiring 35 percent shares of the target (of a total of 65 percent shares to be acquired). MOFCOM found the 35 percent stake acquisition to give rise to the acquisition of a "controlling right," without further explaining the details of its reasoning.

MOFCOM fined Fosun Pharmaceutical Group RMB 200,000 (around USD $30,000). Later on, it appeared that Fosun Pharmaceutical Group re-filed the remaining 30 percent share acquisition with MOFCOM,[11] which was unconditionally cleared following a "simple case" procedure.

The second case is Dade Holdings' acquisition of 50 percent of shares in Jilin Sichang Pharmaceutical.[12] In that case, Dade Holdings split the acquisition into two steps: 19 percent of shares in the target were acquired in 2011, and the remaining 31 percent in 2015.

Here, MOFCOM considered the second step to amount to an acquisition of a "controlling right," triggering the merger filing obligation. Yet Dade Holdings' had already implemented the second step of the transaction, registering the increased shareholding in the target's business license. MOFCOM held that this conduct breached the AML's merger control provisions. As Dade Holdings on its own motion submitted a merger filing after closing, MOFCOM imposed a (relatively low) fine of RMB 150,000 (around USD $23,000).

Both cases shed light on the MOFCOM's recent practice of getting tougher on companies attempting to evade their merger filing obligations. These two pharmaceutical cases follow this general trend although, with two out of seven recent failure to file decisions, they are represented prominently compared to other sectors.

Like for most other sectors, there have not been a significant number of MOFCOM interventions in terms of substantive antitrust analysis in pharmaceutical mergers in the past few months. The last public decision imposing remedies in a pharmaceutical merger was Thermo Fisher Scientific/Life Technologies, back in January 2014.[13]

IV. "ADMINISTRATIVE MONOPOLIES" – ENFORCEMENT BROUGHT TO A NEW LEVEL?

"Administrative monopoly" is the popular term for abuse of administrative powers to restrict competition.

Since the AML's entry into force, its "administrative monopoly" provisions have only been sporadically used. However, in the past few months, we have seen a tick-up of enforcement actions against "administrative monopolies," and the pharmaceutical sector was disproportionately represented in those actions.

The first action took place in Bengbu, a city in Anhui Province. In April and May 2015, a local healthcare authority in Bengbu issued several notices laying out rules for collective tenders for around 90 local hospitals. In these notices, the local authority designated the specific producers of 30 types of drugs, even though there were alternative producers in the market.In addition, the authority set different requirements for local companies and non-local companies to be admitted to the tender processes.

NDRC intervened, finding that the authority had abusively used its administrative powers to restrict non-local bidders' participation in the tenders, in violation of the AML.[14]

The AML does not empower NDRC to directly impose sanc-

8 Furen Medicines Group/Kaifeng Pharmaceutical, MOFCOM Simple Case Public Notice, June 20, 2016, see: http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/201606/20160601342147.shtml.

9 Adrian Emch & Jiaming Zhang, Chinese Competition Law—the Year 2015 in Review, Global Competition Litigation Review 30, 34 (2016).

10 Fosun Pharmaceutical Group/ Suzhou Erye Pharmaceuticals, MOFCOM Administrative Penalty Decision, Shang Fa Han [2015] No. 669, September 16, 2015, see: http://fldj.mofcom.gov.cn/article/ztxx/201509/20150901124896.shtml.

11 Shanghai Fosun Pharmaceutical Development and Fosun Industrial (Hong Kong)/Suzhou Erye Pharmaceuticals, MOFCOM Simple Case Public Notice, June 24, 2015, see: http://fldj.mofcom.gov.cn/article/jyzjzjyajgs/201506/20150601021728.shtml.

12 Dade Holdings/ Jilin Sichang Pharmaceutical, MOFCOM Administrative Penalty Decision, Shang Fa Han [2016] No. 173, April 21, 2016, see: http://fldj.mofcom.gov.cn/article/ztxx/201605/20160501311079.shtml.

13 Thermo Fisher Scientific/Life Technologies, [2014] MOFCOM Public Announcement No. 3, January 14, 2014, see: http://fldj.mofcom.gov.cn/article/ztxx/201401/20140100461603.shtml.

14 National Development and Reform Commission [2015] Fa Gai Ban Jia Jian No.2175, August 17, 2015, see: http://jjs.ndrc.gov.cn/fjgld/201508/t20150826_748682.html.

tion on government bodies held to infringe the "administrative monopoly" provisions, and hence NDRC only issued a "recommendation letter" to the provincial government overseeing the Bengbu healthcare authority, requesting rectification measures to be taken. Interestingly, although nothing in the AML compels it to do so, NDRC published its "recommendation letter," a move that could be interpreted as a warning to other government bodies.

Shortly after, NDRC took two actions in Sichuan and Zhejiang Provinces against very similar government activities in the healthcare area.[15] This string of cases shows NDRC's determination to tackle local protectionism in tendering processes at provincial level in the pharmaceutical sector.

In June 2016, the State Council issued a notice establishing the so-called "fair competition review system."[16] This system works somewhat like an "advocacy" type of mechanism, in a decentralized way. Each government body (and entity with a public policy mandate) is required to conduct a self-review when formulating new business-related rules or policies, in order to check whether they may give rise to anti-competitive effects.

The main driver behind this development may have been NDRC's antitrust bureau, and one of its objectives may have been to establish a new with "more teeth" to tackle "administrative monopolies" than the current AML regime allows. This new system – starting to take effect from July 1, 2016 – applies to all sectors. However, given NDRC's cases in Anhui, Sichuan and Zhejiang Provinces, the pharmaceutical industry may continue to be a prime candidate for enforcement action.

V. CONCLUSIONS

In this paper, we have discussed a wide range of recent antitrust enforcement actions in the pharmaceutical sector in China over the past months. All three AML enforcement bodies have been involved, and all types of anti-competitive conduct have been targeted.

The multiple actions described above put the pharmaceutical sector very clearly into the spotlight. Very few other sectors – perhaps none, except the automobile industry – have seen the same level of antitrust enforcement activism in recent months.

Furthermore, there does not seem to be an end in sight to this activism. The authorities have publicly vowed to focus on the healthcare sector, and are clearly keeping up with that promise. For example, in June 2016, NDRC launched a new round of nationwide pricing probes against pharmaceutical companies, hospitals, procurement agencies and industry associations. Recent press reports indicate that NDRC may have kicked off an inquiry against a number of pharmaceutical and medical device companies in Shanghai, and that the scope of that investigation may be relatively broad. Hence, there is a lot of potential for further news on antitrust actions in China's pharmaceutical industry.

15 NDRC press release, Sichuan, Zhejiang Province's Health and Family Planning Commissions promptly correct the conduct eliminating or restricting competition in violation of the Anti-Monopoly Law in the process of collective procurement of drugs, November 2, 2015, see: http://www.sdpc.gov.cn/gzdt/201511/t20151102_757334.html.

16 Opinions of State Council on Establishing the Fair Competition Review System in the Market System, [2016] Guo Fa No. 34, June 1, 2016, see: http://www.gov.cn/zhengce/content/2016-06/14/content_5082066.htm.

ANTITRUST IN THE EU DIGITAL MARKETS: A CASE STUDY

BY TIMOTHY COWEN & STEPHEN DNES[1]

I. INTRODUCTION

The growth of large online platforms around the world has led to increased attention toward innovation policy. Dominant platforms such as search engines and social media have led many to question whether innovation is being stifled and whether economic growth, particularly when driven by smaller companies, is being held back. Low economic growth is the issue facing many parts of the world and one question posed by this article is whether we can afford to take the risk that monopolization provides huge gains for a few while depriving many of opportunity.

This article will place EU competition law policy in comparative perspective, drawing comparisons with U.S. federal antitrust law, which differs on a number of key points relating to innovation. As a starting point, both EU and U.S. policy and law both seek to foster innovation. However, they can be argued to do this in slightly different ways. For example, important EU precedents, such as the Microsoft decision, indicate that EU law displays a strong preference for fostering competition among small and medium enterprises ("SMEs") that compete to meet customers' needs in many varied and dynamic ways.[2] On this view, a large platform is regulated to preserve a single market in which new product innovation at a "small feasible component level" is promoted and organizations providing such products can grow, leading to desirable goals such as new products, market integration and employment growth. Aside from the position taken in the law, the Commission's appetite for competition law intervention is also now clearly a part of an overall Digital Single Market strategy.[3]

By contrast, U.S. federal antitrust law has taken a subtly but significantly different approach. Increased sensitivity to critics of earlier antitrust policy led to an antitrust "revolution" in the course of the 1970s and 1980s, chiefly at the hands of the federal judiciary. Important controls over business practices such as vertical restraints, or vertical integration between different players in a supply chain came to be regulated far less strictly, if at all,[4] and duties to deal with rivals were radically curtailed.[5] Evidence and pleading requirements were heightened for those alleging anti-competitive conduct.[6] Overall, great faith was placed in the belief in certain economic arguments that markets would be self-healing and that anti-competitive conduct would be disciplined by larger stronger more vertically integrated players, rather than the law.[7] These changes were an important factor in U.S. competition and technology policy that has created a small number of larger, often vertically integrated, players that run the major technology platforms and provide their own services over those platforms.

Recent cases at the intersection of competition law and technology policy have drawn out important differences between the EU and U.S. In the EU, competition law and technology policy is not likely to be well served if it were simply to copy U.S. policy; no one in the EU is going to create another Google, Amazon, IBM, or Facebook platform, given the challenge of scaling the enormous heights of the barriers to entry that a new entrant would now face. However, fostering innovation and encouraging competition among SMEs can and should mean allowing markets to be served by both the major technology platforms and products from SMEs that can be supplied

1 Partner, Preiskel & Co LLP, and Stephen Dnes, Senior Consultant, Preiskel &Co and Lecturer, University of Dundee, Scotland.

2 Case T-201/04 Microsoft

3 See also statements by the newly appointed Director General for Competition (Laitenberger) September 2015. For more details on the EU's Digital Single Market policies, see http://ec.europa.eu/priorities/digital-single-market/.

4 For many years now, the U.S. agencies have published only Horizontal Merger Guidelines (most recently in 2010) and have not updated much earlier vertical guidelines, signaling that vertical merger challenges will be pursued comparatively rarely.

5 See Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) (strengthening the test for a plausible case to avoid summary dismissal).

6 Ashcroft v. Iqbal, 556 U.S. 662 (2009).

7 J. Schumpeter, Capitalism, Socialism and Democracy (1942; reprinted 1994 London: Routledge).

over such platforms. Preventing abuse by dominant vertically integrated platforms then becomes critical to enable innovation at the level of smaller product markets such as those met by applications and technology services.

This article highlights a number of important precedents to show how EU competition policy fosters a competitive marketplace, before applying these points to the ongoing investigation into Google, whose resolution may yet prove to be the most important restatement of EU competition policy ondigital markets.

II. COMPETITION POLICY DEBATES OVER ONLINE BUSINESS PRACTICES

Much of the difference between EU and U.S. competition policy towards online platforms reflects different positions in competition policy debates on the likelihood of competitive harm. In turn, the policy position applied can have a profound effect on a third party developer or entrant seeking access to market. The debate is especially clear in relation to the law on foreclosure and tying, which governs the combination of separate products by dominant companies, such as formerly separate online services.

Although the law on tying shares similar basic features across many jurisdictions,[8] important interpretive differences give rise to stricter regulation of tying of online services in the European Unionthan in the United Stated. This is especially clear with regard to the separate products requirement in tying law.

A. Separate Products Requirement

Both EU and U.S. competition law analyze whether it is truly the case that an alleged tying practice combines separate products; in both cases, showing that the affected products are not truly separate will defeat the claim.[9] However, a different standard is applied by each system. In the United States, the leading precedent on technological tying, *U.S. v. Microsoft Corp ("Microsoft II")*, altered an otherwise somewhat stricter rule to provide significant deference towards technological tying.[10] Inthis approach, separate products will only be found where there is no "plausible" case that combining the products leads to innovative benefits:"the question is not whether the integration is a net plus, but merely whether there is a plausible claim that it brings some advantage."[11]

Thus, the D.C. Circuit adopted a rule by which cases, in which the separate products requirement is even somewhat debatable, fall to be regulated chiefly by market forces. In the event that the market does not discipline the tying practice, it is entirely possible for it to remain entrenched for a significant period of time, since it will almost always be possible to arrive at some "plausible" case that even heavily distortive tying practices might carry some benefit.

By contrast, EU competition law has left more discretion to competition authorities in assessing the separate products element of the law. In the EU's Microsoft tying case, involving the tying of windows operating system with Microsoft's Media Player, several factors suggesting that there might be a separate product market received significant weight, including:

- "The factual and technical situation that existed at the time when…the impugned conduct became harmful," that is, the point at which the decision to combine the product is made.[12]

- The existence of a relatively small group of consumers seeking copies of Windows without Media Player for the workplace.

- Indirect evidence included aspects of the nature and features of the software, their historical development, the state of the market and commercial practice, such as the existence of independent suppliers and alternative sources of downloads.[13]

- Suspicions relating to findings of "commercial usage" in a market that might already be distorted by a large market share.[14]

The Court also stated that a number of factors that dominant companies would be likely to argue would not be given significant weight. Even where a "natural link" exists between products, or where combining them is consistent with commercial usage, the Court stated that combining products can still be found abusive unless the combination is objectively justified.[15] It also expressly rejected the argument that technical integration formed part of the "normal and necessary," "constant improvement" of products, instead looking to the purpose and technical constraints in the market which suggest-

8 International Competition Network, Report on Tying and Bundled Discounting, June 2009 (available at http://www.internationalcompetitionnetwork.org/uploads/library/doc356.pdf)

9 For the U.S. position, see Jefferson Parish Hospital District No. 2 v. Hyde, 466 U.S. 2 (1984); in the EU, see Case T-83/91Tetra Pak v. Commission [1994] ECR II 755, upheld on appeal in Case C 333/94 P Tetra Pak v. Commission [1996] ECR I 5951 ('Tetra Pak II') (tying cartons and carton machinery).

10 United States v. Microsoft Corp, 147 F3d 935 (DC Cir. 1998).

11 Id. at 948.

12 Microsoft at para 914. The point was repeated in the context of remedies at para 942.

13 Microsoft at paras 926 to 935.

14 Id. at para 940.

15 Id. at para 942. See Case C-333/94 P Tetra Pak II, para. 293 above, para. 37."[E]ven when the tying of two products is consistent with commercial usage or when there is a natural link between the two products in question, it may none the less constitute abuse within the meaning of Article 82 EC, unless it is objectively justified."

ed that two separate products had been combined.[16]

In summary, whereas the Court of Appeals for the D.C. Circuit had adopted a standard by which a plausible case of efficiencies would result in a finding of a single, new product, and thus no tying, the EU position differs by requiring the dominant company to objectively justify its position that integration should take place in circumstances where there were separate products in existence. The bias toward vertical integration in the U.S. system means that innovation at the level of smaller markets will more easily be foreclosed and restricted. The EU courts are, in effect, adopting a position more likely to foster innovation and growth at the level of smaller markets where smaller and more agile companies can provide their services. This is consistent with EU technology policy from the Lisbon Agenda through to the i2010 and Digital Single Market Strategy. It also supports and fosters SMEs to deliver economic growth in the European Unionwhere such companies are the motor for innovation and employment.

B. The Long Shadow of the One-Monopoly-Profits Theory

One important theoretical factor explaining some of the difference in approach seen between the two systems is the strong influence of the so-called "one monopoly profits" or "one monopoly rents" theory on U.S. antitrust law.[17] The theory, which is closely associated with Chicago school thinkers such as Judge Robert Bork, argues that under certain conditions it would not be necessary to tie two products in order to gain monopoly profits. Instead, the firm can simply increase the price of the product for which it has market power, and make its profit there.

The claim is that monopoly rents can only be had once ("one monopoly profits"), and that this can be done best by anticompetitive conduct in the market where there is market power rather than in another one. For instance, a photocopier manufacturer might increase the price of copiers, rather than increase the price of tied products such as service. On the one-rents view, an increase in service price will simply depress the sale price of the copier, resulting in no additional profits.

On this view, tying the products could possibly even decrease monopoly profits were the practice to lower overall demand for the product – in turn suggesting that the tyingpractice is pro-competitive since the monopoly profits could simply be extracted from increasing the price of the product in which there is market power.

The argument that monopoly profits exist only in a particular market casts doubt upon the "leverage" theory of tying, which argues that firms could use market power in one market to gain market power in another.For instance, the copier manufacturer might seek a monopoly on a separate but related service market.

For a number of simple markets, the one-rents theory is not wholly unreasonable. However, the theory depends on a number of assumptions that are unlikely to hold in many markets, and are especially unlikely to hold in technology markets. Perhaps the most notable of these is that consumers have similar demand profiles. In the copier example above, the copier manufacturer might find tying service or consumables an effective way to identify high-use users who value the copier more. Tying copiers and service or consumables would be a way to segment the market between high and low-use users, effectively charging a different total price to each. In this way, monopoly profits can be extracted from the high-use users without experiencing the loss of low-use consumers that would follow from simply increasing the price ofthe copier. Tying can thus be an effective way to extract increased rents from consumers, and for this reason has been repeatedly pursued by businesses over many decades.[18]

In technology markets, the constant dynamic of new innovation creating different solutions to pre-existing needs means that once a position of market power is attained, the holder can adopt a practice of foreclosing entry that is likely to deprive it of that power. This is not always the case since dominant companies can adopt the opposite strategy, one of constant innovation in order to meet consumer needs, while at the same time ensuring that their approach to the market complies with the duty to compete on the merits with the products and services of other players.

C. The Limited Relevance of the One-Rents Theory in the Online Marketplace

The one monopoly rents theory led to Judge Bork famously arguing that "analysis shows that every vertical restraint should be completely lawful."[19] However, there would be great danger in carrying over that thought into the current century from the simple markets and different time where it belongs. In technology markets in particular, technological tying can be a potent means to create barriers to entry that foreclose rivals. For example,adominant firm may have obtained market power in circumstances where there is a network externality at work; including circumstances where each individual additional user obtains a benefit from being a member of a network in whichcommunicating with other users is valuable. Telecommunication and communications networks of all types often exhibit such characteristics and, where abuse of dominance leads to market foreclosure, competition law requires access or interoperability with essential inputs so that all can compete on the merits of their individual products.

Platforms are also often operating in two-sided markets. A theory such as the one-rents theory relies on competition in the target market; competition is assumed to discipline "leveraging".

16 Id. at paras 935 to 937.

17 See e.g. Blair and Kaserman, Antitrust Economics (OUP, 2009) Ch. 18 (discussing economic approaches to analysis of tying arrangements).

18 See e.g. International Salt Co. v. United States 332 U.S. 392 (1947); Tetra Pak, cited above.

19 Robert H. Bork, The Antitrust Paradox (Free Press, 1978), 288.

However, where entry into the target market depends on inputs from the dominant company, there is substantial scope for the dominant company to achieve "leverage" from one market to another. If online service providers rely on traffic from users of a dominant search engine, the decision of the dominant search engine to hinder or block traffic to them will deny them access to those users and access to the market. Moreover, it is likely to be profitable for a dominant platform to foreclose rivals in downstream product markets. Even if a strategy of foreclosure led to a small amount of the search engine's advertising revenue to be reduced in the short term, it is likely that the effect of traffic diversion into the search engines' own downstream products with different revenue and profit profiles can lead to higher profits for the firm overall. Put another way, if it pays to abuse a dominant position then abuse will occur and that is why we have laws against it.

In more complicated markets, it seems that the one-rents theory has little to offer the analysis, in turn suggesting that precedents motivated by it are of limited relevance in the case of dominant online platforms. It is perhaps for this reason that even Judge Bork, who had so loudly beat the drum for the one-rents theory, argued for competition law regulation in the case of dominant technology platforms.[20]

D. Attention to Separate Product Requirements Masks Factors in Online Markets

The caution of the decision of the D.C. Circuit in Microsoft is understandable to the extent that courts would reasonably wish to avoid getting into the position of regulating product design decisions.[21] However, such an approach may understate important dynamics in two-sided technology markets.

A two-sided market exists where demand in one market depends on demand in another. For instance, the demand for newspapers is an important factor driving the demand for advertisements in newspapers.[22] Markets affected by two-sided dynamics are not new. With the growth in advertising funded models in internet businesses they have become prevalent in certain parts of the technology ecosystem, particularly in recent years. Importantly, they defy the market-disciplining ethos implied by analysis such as the D.C. Circuit's "plausible efficiency" standard, which is unlikely to apply satisfactorily to the more complicated dynamics of two-sided markets.

The nub of two-sided market analysis is the importance of considering both relevant markets. If competition exists across two markets, market power is likely to be a factor of the overall position across both. Simple examples of innovative products in simpler markets, such as the decision to integrate car radios and cars, are misleading in the case of a complicated two-sided market as they understate this dynamic.

In the case of an online platform, the decision of the dominant operator of one side of the market is likely to have significant effects on market power across the combined market. In some two-sided markets, platform providers may have a strong incentive to attract platform users. A dominant payment network might, for instance, have incentives to attract card issuers and acquirers (although whether the incentives are optimal is of course an additional question). In other markets, strong incentives might exist to exclude certain platform users in favor of an integrated product. In the process, an important competitive fringe, composed of a range of companies, who are often smaller, more agile and well placed to respond to user demand, might be excluded. As a result, the platform provider can put monopoly provision of the combined services in place, at the expense of innovation and choice for consumers.

Even if there is a case that a degree of integration of products is desirable as a matter of short term efficiency, it is unclear why as a matter of policy it needs to come at the expense of a thriving range of competitive providers of services which guarantees that consumers can choose between innovative service providers. The ability of smaller companies to access the wider market using the platform in turn allows them to reach consumers and grow, preventing the existence of a dominant platform from standing in the way of innovation and growth.

III. EU COMPETITION LAW AND THE DIGITAL SINGLE MARKET

The above discussion suggests that the more important question in a multi-sided market is the overall level of competition and the incentives faced by parties such as payment networks or search providers and platforms, as well as the competition that exists at the level of products services or components rather than doctrinal questions such as the line between separate and new products. Seen in this way, EU competition policy is to be commended in its ability to consider the competitive dynamics of emerging technologies in a context-sensitive way, and to intervene quickly to assure competition in digital marketplaces.

The EU Commission's enforcement record is good in this regard since it has intervened in a series of decisions such as the Microsoft case, the Apple Developer Guidelines case and the review of IBM's bundling of maintenance and mainframes. Its intervention was swifter in some cases and not others, which creates serious issues for confidence and investment and knock on effects on whether companies will be tempted to enter and grow. The Commission's ongoing investigation into Google's abuse of dominance in online searches can safely be said to have gone on for far too long.

20 Harry First, "Bork and Microsoft: Why Bork Was Right and What We Learn About Judging Exclusionary Behavior," paper presented at Yale Law School, September 27, 2013.

21Microsoft, above n. 10.

22 See e.g. Rochet and Tirole, "Two-sided markets: An overview," discussion paper available at http://web.mit.edu/14.271/www/rochet_tirole.pdf.

A. Microsoft

The approach of EU competition law to platform markets can be seen particularly clearly in the Microsoft case.[23] In the course of the 1990s and 2000s, Microsoft drew antitrust scrutiny around the world for its software design practices, which were thought potentially to distort competition in certain software markets. Microsoft's decision to combine Microsoft Windows and Windows Media Player into a combined package was challenged as unlawful tying of the two products.[24] Microsoft also faced additional challenges in relation to browser choice, network interoperability and developer access to toolkits known as APIs.[25]

The *Media Player* case shows that reasonably prompt competition law enforcement will preserve a competitive marketplace. In the late 1990s, Microsoft Windows enjoyed a market share over 90%, making it an indispensable platform for software developers looking to access the software market for personal computers. Even if Microsoft's player was arguably not as advanced as those developed by others, it could be assured a certain market share by virtue of its visibility on every PC with Microsoft's Windows software. The reason for intervention was that a company in Microsoft's position could undermine a competitive market in media players, to the detriment of different media players and ultimately to the detriment of competition for media players in fulfilling the choices of consumers.

Faced with such a clear potential for competitive harm, the EU courts are to be commended for taking a sensible and appropriate approach. The courts took a firm position in favor of preserving a competitive marketplace since there was sufficient evidence that a separate product market had existed before the integration occurred. Indeed, the decision enables dominant companies to comply with their duties more easily by building a process to examine their actions for the effects they may have on others before taking action. This is a limited imposition given what is at stake. Also, since the law requires that a dominant company has to prove an objective justification before vertical integration takes place and that any justification for integration is necessary and proportionate.

Frequently, this requires dominant companies to heed their market position where small steps are available that significantly decrease the scope for competitive harm, such as labeling their own offerings or providing competitors with platform access on reasonable terms. The decision is clear in its preference for a competitive marketplace as the main driver of innovation, rather than allowing rewards from the accretion of market power or potential efficiency derived from vertical integration to be owned by yesterdays' innovators. In essence the decision is a victory for continuing diversity and plurality over short term claims by firms with market power for doubtful efficiency gains.

B. Apple Developer Guidelines: "There's an App for that", Thanks to the EU Commission.

A similar pattern of favoring a competitive and diverse developer marketplace in the context of a multi-sided technology market can be seen in the European Commission's investigation into the Apple Developer Guidelines.[26] In April 2010, Apple decided to restrict the terms and conditions of its license agreement with independent developers of mobile applications running on the iPhone operating system. This would have restricted the use of third party players which had allowed developers to use competing programming tools and languages when developing iPhone apps.[27]

The case provides another example of a dominant platform provider attempting to leverage market power into related markets. At the time of the case, the iPhone was the predominant smartphone, and the apps market was in its infancy. A restriction such as Apple's could easily have altered developers' use of third party tools, as they would not have been able to license such applications for the iPhone. Since the iPhone became the largest market for many app developers, there was little scope for competitive switching to discipline the market. The conditions were ripe for leveraging market power in handsets and operating systems into related applications markets.

The Commission's decision to launch a prompt investigation and precipitate a rapid change in Apple's terms and conditions is to be applauded. The case was resolved less than six months after the change, before lasting damage to the marketplace had occurred. Apple dropped the change to its terms and conditions, paving the way for the competitive app marketplace seen today. It could be said that the wide range and peculiar diversity of apps for myriads of user needs is a direct result of the Commission's swift action.[28] The success of this lesser-noted case might serve as a lesson for future investigations about the importance of promptly resolving competitive harm before it becomes entrenched.

C. IBM

In the same year as the Apple investigation, the Commission instigated an investigation into IBM concerning its alleged abuse of dominance in the mainframe maintenance market. The allegation was that IBM held a dominant position in legacy mainframe computers, bundled its mainframes with its own maintenance and hindered access to critical spare parts, potentially distorting competition in the market for independent players. Although the case took somewhat

23 Microsoft n. 2 above.

24 Microsoft n. 2 above.

25 For an extensive analysis of the U.S. and EU cases, see Gavil and First, The Microsoft Antitrust Cases (MIT press, 2014).

26 European Commission, Antitrust: Statement on Apple's iPhone policy changes, Press release of September 25, 2010.

27 The case also concerned restrictions to warranty policies, which Apple also agreed to alter. See European Commission Press Release, n. 26 above.

28 See European Commission Press Release, n. 26 above.

longer, being resolved only by December 2011, the Commission achieved a significant victory in preventing the leverage of market power from one market to another, related market, in a reasonable time frame.

The economic importance of the case is often overlooked. Mainframe computers perform mission-critical business processes, which demand a very high level of reliability. They are used by major companies and governments for computing that needs to be highly dependable such as billing, benefits systems and tax collection. Maintenance can be performed by smaller players. A healthy market for third party maintenance providers ("TPMs") can exist, limiting market power that might otherwise arise, and if it did would be likely to allow significant extraction of consumer surplus by segmenting different groups with different demand profiles. IBM had adopted a number of business practices which struck at the heart of these independent service organizations.

First, IBM began to restrict TPM access to IBM spare parts while continuing to provide its own repairers with access. Until November 2002, TPMs enjoyed the same 24/7 access to spare parts as IBM engineers. From November 2002, however, TPM spare part access was restricted to normal business hours.

Secondly, certain crucial spare parts (stand-alone processor books) could only be bought from IBM and were subject to an exchange-only policy. The exchange-only policy required that the defective spare part be returned to IBM within 48 hours of delivery. Before October 2009, if TPMs failed to meet the deadline or failed to return the part altogether – referred to as a non-return – a much higher non-exchange price was applied to the part. From October 2009, a non-exchange price was charged for non-returns and a 3 percent daily fee applied for late returns. Depending on the series, model and configuration of the Mainframe, the non-exchange price could be up to 4139 percenthigher than the exchange price.
Thirdly, IBM appeared to have unreasonably delayed access and withheld information on the existence of Machine Code Updates. This threatened TPMs' ability to provide their customers with adequate answers to technical issues.

The three restrictions constituted a direct threat to the existence of an independent market for mainframe maintenance. Applying a similar concern to preserve competition in related markets, and to prevent leverage of market power, the Commission resolved the case in December 2011 through a set of commitments accepted under Article 9 of Regulation 1/2003. The commitments require IBM to make spare parts and technical information swiftly available, under commercially reasonable and non-discriminatory terms, to independent mainframe maintainers. The commitments acted swiftly to allow smaller players to operate and to preserve competition that might otherwise have been eliminated by market power in a related market.

D. Reuters Instrument Codes

The same enforcement pattern can be seen in the Commission's investigation into restrictions relating to Thomson Reuters Instrument codes ("RICs") used to run financial software.[29] RICs identify a particular security and are embedded into financial software. As a result, there is the opportunity to undermine the scope to switch away from RICs to competing providers of real-time data, as expensive and sensitive trading systems would require an extensive redesign. The Commission's decision was to allow third party developers to handle RICs. This is to be welcomed to the extent that it will allow market power from RICs' embedded status in a variety of software to be addressed in much the same way as third party access to parts was critical in the case of IBM mainframes. Unlike the IBM case, the commitments stop short of allowing direct third party handling of RICs, a point which has been much debated and is currently being litigated.[30]

E. Google

The same issues arise with the Commission's longstanding, high-profile investigations into the search giant Google. Google provides search and a number of related services, with a European market share that has persisted over many years at over 90 percent. It also supplies the mobile operating system Android, which currently has an estimated 68 percentmarket share in Europe.[31]

Just as third party access to spare parts proved critical in the IBM case, a range of innovative online service providers depend on search traffic from Google. Some have joked that "the best place to hide a dead body is page two of the Google search results," a slightly glib expression of the seismic impact Google's search engine rankings have on the success, or failure of online businesses.[32] It is not just online service providers that are affected by Google's dominance in online searches. The vast and growing "search engine optimization" industry bears witness to the importance of the rankings for many ordinary brick and mortar businesses. In a world where most internet users rely on Google to point them to online resources, it is critical to be on the first page of search results. Google has, in effect, amassed substantial power over what users may see online and controls access to many businesses.

Such power is not, in itself, illegal under EU competition law, which distinguishes amassing market power from its abuse.[33] This

29 Case AT.29654 – Reuters Instrument Codes.

30 Case Case T-76/14 Morningstar.

31 Android Switchers Drive iOS Growth in Europe's Big Five, Kantar World Panel, May 6, 2015 (available at http://www.kantarworldpanel.com/global/News/Android-Switchers-Drive-iOS-Growth-in-Europes-Big-Five-Countries).

32 Chad Pollitt, "The Best Place to Hide a Dead Body is Page Two of Google," Huffington Post,April 18, 2014 (available at http://www.huffingtonpost.com/chad-pollitt/the-best-place-to-hide-a-_b_5168714.html).

33 Article 102 TFEU refers to "abuse of a dominant position," not its cre-

is in line with the theory that success in business should not be penalized and indeed that innovation should receive reward. However, special duties arise in the case of the successful business that has become dominant since that position may then stifle innovation.The law seeks to ensure that further entry is not foreclosed, so that the crown for success in the competitive race can be passed from one successful firm to another, preventing firms from winning by killing off the competition. Dominant companies must have due regard to their impact on the competitive market structure. An analogy can be drawn between this duty and duties of care in tort law, which seek to promote risk-bearers to take cost-effective steps to minimize the social cost of their risky activities.[34] Companies such as Google are required under EU law to objectively justify their positions taking actions that adversely impact on others' and take a proportionate approach to potential market distortions arising from the way that they run their businesses.

The ongoing EU Commission investigation now approaching its fifth anniversary concerns allegations that Google has failed to fulfil this duty. The main allegations concern Google's alleged self-promotion of search results, favoring its own specialized ("vertical") search services, and the misappropriation of third party content, such as reviews.[35] These practices undermine competition in related markets where Google is present, such as online shopping, news, images, weather, videos and maps. They undermine investment in third party products, which a third party provider knows is likely to be undermined if it falls foul of search result manipulation or content misappropriation. Google has taken steps to integrate formerly disparate products in much the same manner as was condemned by the European Commission and the Court in the Microsoft/Windows Media Player case. The investigation could well conclude that Google did not heed the important duties placed on dominant companies by EU law to consider, and to carefully review its actions on an objective and evidenced basis before adopting any form of integration and proportionately ensuringthat it avoidedcompetitive harm from integrating separate products into its dominant platform.

Alongside the search investigation, an additional investigation into Google's Android operating system was opened in April 2015. The investigation will assess whether Google has adopted similar practices in relation to its Android operating system to hinder development and market access for rival operating systems, communications applications and mobile services. The main allegations turn on alleged exclusive pre-installation, software modification and tying practices aimed at distorting competition, by leveraging power in the operating system into other, related markets. It would also be open to the Commission for it to consider that the embedding of Google's dominant search engine in Android and provision of both search and operating system software free of charge was designed to extend Google's dominance originally established in the search engine used in PC's to other more portable computer devices, reserving to itself a series of separate but related markets in the process.

Both investigations are ongoing, and it remains to be seen how they will be resolved. At the time of writing, the Android investigation was at a relatively early stage, whereas the search investigationappeared to be moving towards a prohibition decision, and a likely fine.

Remedies are a particular issue in technology markets and addressed fully in a seminal article by the small group of EU officials at the center of enforcement in many of these cases. In an influential article on remedies following the Microsoft cases, these officials stated:

> In its 2004 decision, the Commission found that Microsoft had abused its dominant position in PC operating systems by (1) refusing to supply interoperability information necessary for competitors to be able to effectively compete in the workgroup server operating system market; and (2) tying its Windows
>
> Media Player with Windows. The decision ordered Microsoft to disclose the information that it had refused to supply and to allow its use for the development of compatible products. The disclosure order was limited to interface specifications (not source code) and to ensuring interoperability with the essential features that define a typical workgroup network. It applied not only to the complainant Sun, but to any undertaking that had an interest in developing workgroup server operating systems.
>
> The conditions under which Microsoft makes these disclosures have to be reasonable and non-discriminatory. Microsoft may require a reasonable and non-discriminatory remuneration for the production of the documentation, as well as for specific intellectual property rights that the Commission's decision might prevent it from fully enforcing against beneficiaries of the order to supply (provided that Microsoft could establish that these specific intellectual property rights are valid in the EEA). With respect to tying, the decision ordered Microsoft to provide a version of Windows that did not include Windows Media Player.[36]

ation, unlike Section 2 of the U.S. Sherman Antitrust Act of 1890, which forbids "monopolization" but not necessarily the exploitation of market power already accrued.

34 See e.g. Cooter and Ulen, Law and Economics (Pearson, 2011), ch. 6.

35 The investigation also considers restrictions on switching in advertising markets. See e.g. Press Release "Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns", April 25, 2013 (describing the case in the context of commitments proposals, which were rejected).

36 See for more detail on remedies Per Hellstrom and others, "Remedies in European Antitrust Law" 76 Antitrust Law Journal No 1 2009.Per Hellstrom is Head of Unit for Antitrust: IT, Internet and Consumer Electronics for the European Commission's Directorate General Competition. Frank Maier-Rigaud is a Senior Economist for the Energy and Environment Directorate for the European Commission's Directorate General Competition and is affiliated with both the Department of Economics, University of Bonn

Although it is still developing, the Android case might follow a similar remedial approach. There will no doubt be difficulties in defining the scope of the decision and with the ability to ensure that it cannot be bypassed by technological means. It is to be hoped that the lessons learned from Microsoft and other cases are borne in mind in the current case.It isrefreshing to know that the current EU Commissioner for Competition has made clear her concern about the effects of Google's actions and appetite for an increase in enforcement efforts by sending Google a statement of objections in April 2015.[37]

It is very much hoped that the EU Commission will follow the pattern of its earlier practice and send a clear signal to dominant companies that they cannot simply promote and display their own products at the expense of competition. Taking an effective decision would help to promote a competitive online marketplace, and the Commission would be enforcing the rules for all on an equal basis.

(Germany) and the Max Planck Institute for Research on Collective Goods (Bonn, Germany). Friedrich Wenzel Bulst is an Attorney in the IT, Internet and Consumer Electronics Unit for the European Commission's Directorate General Competition.

37 Margrethe Vestager, "Competition policy in the EU: Outlook and recent developments in antitrust," speech delivered at the Peterson Institute for International Economics, April 16, 2015.

IV. CONCLUSION

This article has surveyed recent cases concerning EU competition law enforcement efforts in technology markets, with reference to a few cases and policy initiatives. The record shows that the European Unionhas developed a consistent and principled approach to enforcement that should promote innovation. It will affect all businesses that use technology and promises to ensure that agile and innovative smaller and medium sized technology enterprises will prosper. In this, EU policy differs from U.S. policy, resulting in the emergence of a small number of very large vertically integrated platforms in the United States.

Despite the differences considered above in the law and policy objectives applied by the two jurisdictions, it should be recalled that prosecutorial discretion would enable a more consistent approach to be achieved, given sufficient political will. There appears to have been a strongly arguable case against Google's search bias even under U.S. law. In March 2015, one of several FTC staff reports into Google's alleged search practices was leaked, and appears to have found serious concerns about search manipulation.[38] Although the politically appointed Commissioners acting atthe FTC ultimately decided not to pursue a case, too much can be made of these differences in legal points since they would be much less important if prosecutorial discretion were to change.That is something that may change with the prevailing political wind.

As the final stages of the long-standing EU investigation into Google approach, an opportunity arises for the European Unionto apply the same principled position in favor of innovation as seen in previous cases and to ensure that the playing field is level for all. It is only by such enforcement that dominant platforms can be prevented from substantially distorting competition in related markets, ensuring access for innovative players with much to offer a world needing their products and services and an economy in need of increased economic growth.

38 B. Mullins, R. Winkler and B. Kendall, "Inside the U.S. Antitrust Probe of Google," Wall Street Journal, March 19, 2015. Curiously, only alternate pages of the report were leaked.

A RELUCTANT STANDARD-BEARER FOR CHICAGO SCHOOL ANTITRUST

BY MAX HUFFMAN[1]

I. CHICAGO SCHOOL ANTITRUST

Chicago School Antitrust is the name given to a set of ideas of antitrust law interpretation and enforcement that emerged from the 1960s and 1970s. Leading proponents are – or were – Robert Bork, Justice Scalia's colleague on the D.C. Circuit; and Richard Posner and Frank Easterbrook, both also Chicago Law School professor turned judges.[2] The Chicago School favors restraint in enforcement and a narrow focus on economic efficiency, which is argued to serve consumer interests through the operation of unrestrained economic markets.

II. JUSTICE SCALIA A CHICAGO SCHOOLER?

Justice Scalia was a law professor at Chicago, and then an Executive Branch appointee, when the primary ideas of Chicago School Antitrust were being tested and developed. He was a colleague to Judge Bork, who was one of the (if not the) leading voices in the Chicago School.[3] Some of Justice Scalia's most famous positions, including-originalism, owe their genesis to earlier thinkers on the topic, notably including Judge Bork.[4]

Justice Scalia was part of the intellectual ferment that gave rise to the deregulatory mindset in the 1970s and 1980s. He left the Jones Day law firm, moved to the UVA law faculty, and was involved in the intellectual conversations around ideas including textualist interpretive philosophy (statutes), originalist interpretation (constitutions), and free-market economic thought.

Originalism, for which Justice Scalia is known, and free-market ideology have something important in common. Both, as they are primarily espoused and sometimes applied, are theories of hands-off approaches to deciding issues. One is as a matter of constitutional adjudication. The other is as a matter of economic regulation. From this perspective, U.S. antitrust law can be analogized to constitutional originalism. Antitrust is not a field in which Congress or a Fourth Branch agency meddles to any great degree, in the way that (for example) airline regulation is. It is instead a body of law that is curated by the courts – and, over history, frequently by the Supreme Court, where Justice Scalia made his career. A judge with a professed inclination to be hands off in constitutional interpretation – an originalist – might also be inclined to be cautious in antitrust enforcement. And that is a philosophy that the Chicago School of antitrust interpretation represents better than does any other.

One might therefore expect a thinker engaged with originalist interpretive philosophy also to be engaged with Chicago School ideology. And, in fact, Robert Bork, both the strongest originalist of his generation and a leader in the Chicago School of antitrust, demonstrates that marriage well. Justice Scalia adopted the originalist philosophy from Judge Bork and advanced it from the pulpit of the Supreme Court. For the most part, he did not take the same leadership role in advancing the Chicago School tradition in antitrust.

1 Professor of Law, Indiana University Robert H. McKinney School of Law.

2 Max Huffman, Marrying Neo-Chicago with Behavioral Antitrust, 78 Antitrust L.J. 105 (2012).

3 Robert Bork, The Antitrust Paradox: A Policy At War with Itself (1978).

4 See IlyaSomin, The Borkean Dilemma: Robert Bork and the Tension Between Originalism and Democracy, 80 U. Chi. L. Rev. 243 (2013).

III. WHY NOT?

Justice Scalia is well known for his leadership in the development of modern administrative law. Administrative law, the body of law that governs the regulatory state, is the sibling of antitrust. That is both because serious antitrust is largely administrative in nature and because regulation is frequently seen as the alternative to antitrust. But Justice Scalia has never been closely associated with Chicago School Antitrust and his tenure on the Court gives no reason to think that is an oversight. In 1986, the year he was appointed to the Supreme Court, Justice Scalia was invited to participate in a panel at the Antitrust Section Spring Meeting. His remarks, "The Role of the Judiciary in Deregulation," do not mention antitrust at all.[5] If Justice Scalia could properly be considered a Chicago Schooler, why did he not also advance the Chicago School's ideas on antitrust during his three decades on the Court?

One likely reason is that the Rehnquist Court – famously – rarely heard antitrust cases.[6] It was low on Chief Justice Rehnqhist's agenda. This does not answer the question entirely, however, because a certiorari grant only requires four votes.

A second reason is that Justice Scalia was overshadowed as an antitrust thinker by Justice Stevens, who had concentrated on antitrust in private practice, had taught the course at the Chicago Law School, and had served on both a Legislative Branch and an Executive Branch commission on antitrust, before being appointed to the Supreme Court.[7] Justice Breyer, a former Harvard Law School professor, an expert in administrative law, and an author of important antitrust opinions while a judge on the First Circuit, might later have been considered (and currently is considered) the Court's leading antitrust thinker.

A third reason might be that antitrust is a decidedly poor exemplar for Justice Scalia's textualist interpretive philosophy.Textualism in the antitrust arena produces perverse results. Early antitrust cases, relying on text more than they did the purposes of the law, sometimes seemed to hold that any commercial contracts might present antitrust problems because they "restrained trade", in however limited a manner.[8] No serious thinker makes a practice of applying textualist interpretive philosophy to antitrust law.[9]

5 Antonin Scalia, The Role of the Judiciary in Deregulation, 55 Antitrust L.J. 191 ((1986).

6 See Herbert Hovenkamp, The Antitrust Enterprise 6 (2005).

7 SeeMark R. Patterson, Justice Stevens and Market Relationships in Antitrust, 74 Fordham L. Rev. 1809 (2006).

8 See, e.g.United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 328 (1897).

9 In a 2013 article, Professor Lande did apply textualist analysis to the antitrust laws, but not in the manner of arguing for that approach. See Robert Lande, A Traditional and Textualist Analysis of the Goals of Antitrust: Efficiency, Preventing Theft from Consumers, and Consumer Choice, 81 Fordham L. Rev. 2349, 2362, 2365-83 (2013).

IV. JUSTICE SCALIA'S ANTITRUST RECORD

Justice Scalia was not silent on antitrust, however. He wrote nine opinions in total during his tenure on the Court. These are:

(1) F. Hoffmann-LaRoche Ltd. v. Empagran S.A., 542 U.S. 155, 176 (2004) (Scalia, J., concurring);

(2) Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004);

(3) Hartford Fire Ins. Co. v. California, 509 U.S. 764, 800 (1993) (Scalia, J., dissenting in part);

(4) FTC v. Ticor Title Ins. Co., 504 U.S. 621, 640 (1992) (Scalia, J., concurring);

(5) Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 486 (1992) (Scalia, J., dissenting);

(6) Summit Health, Ltd. v. Pinhas, 500 U.S. 322, 333 (1991) (Scalia, J., dissenting); and

(7) City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991);

(8)Texaco Inc. v. Hasbrouck, 496 U.S. 543, 576 (1990) (Scalia, J., concurring); and

(9) Business Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717 (1988).

Of the nine, three opinions – one in dissent, one in the majority, and one in concurrence – show Justice Scalia's efforts to advance his theories and, in one case, has outsize influence. Even if he was a reluctant Chicago Schooler, Justice Scalia did have an influence on the modern treatment of claims relating to conduct by dominant firms, an area of substantial interest to proponents of Chicago School Antitrust.

Section 2 of the Sherman Act outlaws conduct by which a dominant firm monopolizes or threatens to monopolize an industry. Section 2 has always presented a serious intellectual challenge for anybody thinking hard about its prohibition. The problem is that monopolizing – trying to become a monopoly – is, in borderline cases, indistinguishable from being an effective competitor. The only reason firms engage in innovation (whether related to product or process), charge competitive prices, or provide excellent customer service, is precisely to achieve some semblance of monopoly power, which may or may not rise to the level of "monopolizing."

The Supreme Court rendered some important opinions on dominant firm conduct during Justice Scalia's tenure. These casescame at a crux time in the development of antitrust law. In the early 1990s it was not clear whether the Chicago School theories, announced in the ’60s and ‘70s and serving as the basis for Reagan-era antitrust enforcement, would have lasting effect – or whether they would be relegated to historical footnote. In retrospect, Justice Scalia’s limited contributions seem to have tipped the scale in favor of the Chicago School’s lasting impact.

V. KODAK V. IMAGE TECH. DISSENT

In Eastman Kodak v. Image Tech. Servs., Justice Blackmum wrote for the majority that a firm – Kodak – with monopoly power caused by consumers’ being locked in to their purchases could be liable for forcing those consumers to purchase its repair services and thereby keeping other repair centers out of the market. The core of the Eastman Kodak holding was the theory of monopoly power based on consumers’ being locked in to a relationship with a durable goods manufacturer. Copiers of the sort that were at issue in the case were huge purchases and, once made, consumers lived with their machines for decades. The Court reached this conclusion despite the fact that Kodak was in vigorous competition for consumers who had not yet committed to a purchase.[10]

Kodak was a monopolist even though it had a small share of the primary market. It was a monopolist because once somebody bought a photocopier, he or she was locked into a decades-long relationship with Kodak, which could then proceed to provide parts and services at a cost and quality structure that ignored the competition for the initial purchase decision. Because of the Court’s acceptance of challenges to the Chicago School based on information economics and practical realities, many see Kodak as the leading exemplar of “Post-Chicago School Antitrust.”[11] I have argued that Eastman Kodak represents an application of behavioral antitrust principles.[12]

Justice Scalia dissented in Eastman Kodak, advancing the traditional Chicago School Antitrust approach of skepticism to theories of harm from dominant firm conduct.[13] Referring to “the sledgehammer of [Sherman Act] § 2,” Scalia argued that the majority opinion “makes no economic sense” and “threatens to release a torrent of litigation and a flood of commercial intimidation that will do much more harm than good.” “[A] rational consumer” could not be locked in to a relationship with a manufacturer permitting that manufacturer to extract monopoly rents through a product tie. That consumer would know in advance that, once the purchase was made, Kodak would have the kind of bargaining power after the purchase that comes from the long-term ownership of an enterprise copier. That consumer would therefore have the up-front ability to bargain over terms for service and replacement parts because of the competition in the market for the initial purchase. “We have never premised the application of antitrust doctrine on the lowest common denominator of consumer.”

Justice Scalia advanced the Chicago School position that antitrust should be based on economic theories of economically rational consumers and economically rational purchase decisions. Justice Scalia’s dissent reflects the deep Chicago School suspicion with Section 2 doctrine specifically (Bork and Easterbrook had argued that instances of harm to be remedied by Section 2 will be rare) and with restraints on commercial activity by large manufacturers generally.

Justice Scalia’s Kodak dissent was a harbinger.Kodak was one of the last plaintiff-side victories leading to a 17-year drought, lasting until 2010 in NFL v. American Needle, before another plaintiff finally won an antitrust case in the Supreme Court.[14] Notably, that drought included important holdings restricting the application of Section 2, including Pacific Bell Telephone Co. v. Linkline Communications (2009), Weyerhauser Co. v. Ross-Simmons Hardwood Lumber Co. (2007), and Verizon Communications Inc. v. Law Offices of Curtis V. *Trinko* (2004).

VI. VERIZON V. TRINKO

In 2004 Justice Scalia had his chance to advance the narrowing interpretation of Section 2 in a majority opinion.Verizon v. *Trinko* involved a claim that Verizon, as a monopoly provider of local telephone service in its particular geographic area, had violated Section 2 by failing adequately to interconnect with regional upstart AT&T – causing harm to plaintiff *Trinko* due to the consequent faulty telephone service.[15] As a pure antitrust case Verizon v. *Trinko* suffers some confounding factors due to the presence of a comprehensive federal scheme for regulating telephone service and requirements for interconnection.[16] The case might readily have been decided on the basis of a simple argument that the Telecommunications Act preempted application of the Sherman Act to the conduct in question.

Justice Scalia nonetheless managed to include a substantial section of the opinion that has been interpreted since as narrowing the application of Section 2.[17] “The opportunity to charge monopoly prices – at least for a short period – is what attracts ‘business acumen’ in the first place; it induces risk taking that produces innovation and economic growth.” Justice Scalia argued that Verizon was uniquely efficient in its ability to serve its customers and “[c]ompel-

10 Eastman Kodak Co. v. Image Tech. Servs. Inc., 504 U.S. 451, 465-79 (1992).

11 See, e.g. Robert Lande, Chicago Takes it on the Chin: Imperfect Information Could Play a Crucial Role in a Post-Kodak World, 62 Antitrust L.J. 193 (1993).

12 Huffman, Marrying Neo-Chicago, 78 Antitrust L.J. at 135-144.

13 Kodak, 504 U.S. at 486.

14 American Needle, Inc. v. National Football League, 560 U.S. 183 (2010).

15 Verizon Comm’n Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

16 Telecommunications Act of 1996, Pub. L. 104-104.

17 Trinko, 540 U.S. at 407-11.

ling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law... Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing..."

In terms of its actual holding, Verizon v. *Trinko* should be understood to be a narrow opinion. The Telecommunications Act of 1996 does not create a new category of conduct that, combined with monopoly power or the dangerous probability of achieving it, will present a Section 2 violation. In terms of its practical importance, Verizon v. *Trinko* goes much further. The Court expressly recognized the importance of monopoly as a goal for a firm in a free market economy. Verizon v. *Trinko* placesa closing bookend to a period of history that began in 1945 with Judge Hand's opinion in Alcoa.Judge Hand had held that even monopoly achieved through superior competitiveness could present a Section 2 problem.[18] In Verizon v. *Trinko*,Justice Scalia advanced a cause that Judge Bork had championed in *The Antitrust Paradox*, [19] emphatically holding to the contrary.

VII. EMPAGRAN CONCURRENCE

Also in 2004, the Supreme Court interpreted the impenetrable language of the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"). The interpretive question had bedeviled the lower courts for more than two decades and spawned a number of scholarly discussions. There was a deep and irreconcilable split in the U.S. courts of appeals. The FTAIA problem presented in Empagran had echoes of the core interpretive problem in antitrust generally. The FTAIA, like the Sherman Act itself, was enacted in 1982 after years of common law development, and was meant to capture the parts of that common law that Congress approved.[20]

Justice Breyer's opinion engaged in a careful statutory interpretive exercise drawing on all available evidence of Congress's intent in 1982, including drawing on the pre-statutory common law in a manner not dissimilar from Judge Taft's 1898 opinion in *United States v. Addyston Pipe & Steel Co.* The Court concluded that the FTAIA did not allow recovery for foreign injury caused by foreign conduct.

To one member of the Court, however, the interpretive question was simple. Justice Scalia wrote a four-line concurrence:

> I concur in the judgment of the Court because the language of the statute is readily susceptible of the interpretation the Court provides and because only that interpretation is consistent with the principle that statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories.

Empagran thus provided Justice Scalia his primary opportunity to apply his textualist approach to statutory interpretation in an antitrust case.[21]

VIII. IN SUM

Justice Scalia was not a prominent antitrust jurist. It would be impossible, however, in light of his long tenure on the Court and his engagement with the core intellectual philosophies that underlie much of modern antitrust, for him not to have had an impact on the body of law. And in *Kodak* (dissenting), *Empagran* (concurring), and *Trinko* (for the majority), he did.

18 See Unites States v. Aluminum Co. of America, 148 F.2d 416, 430-31 (1945).

19 Robert Bork, The Antitrust Paradox: A Policy At War with Itself (1978).

20 SeeMax Huffman, A Retrospective on Twenty-Five Years of the Foreign Trade Antitrust Improvements Act, 44 Houston L. Rev. 285, 289-304 (2007).

21 Scalia's Texaco Inc. v. Hasbrouck concurrence can also be read as showing textualist interpretation, in that case applied to the Robinson-Patman Act. See496 U.S. at 576-81.

THE ROLE OF INNOVATION IN MERGER CONTROL – A HOT TOPIC

BY RACHEL BRANDENBURGER[1],
LOGAN BREED & FALK SCHÖNING[2]

I. INTRODUCTION

While the U.S. and EU antitrust agencies have previously mentioned "innovation" as a relevant factor in their merger control analyses, recent statements and enforcement actions on both sides of the Atlantic reflect the agencies' growing emphasis on innovation in their merger investigations and decisions.

In the United States, both FTC Chairwoman Edith Ramirez and FTC Commissioner Maureen Ohlhausen have made this clear in recent statements. In 2014, Chairwoman Ramirez 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.[3]

Earlier this year, Commissioner Ohlhausen said: "Transactions combining tech firmscan raise some of the most interesting and difficult issues in merger review, such asdefining the relevant market in a certain way for the very first time or evaluating competition not just for a share of customers, but for the market as a whole."[4]

Last month, Acting Associate Attorney General Bill Baer said: "We legitimately worry about non-price effects. We take into account the impact of a merger on innovation, on the intensity of research and development, and on the quality of products and services."[5]

The message from the other side of the Atlantic is similar. In April, EU Competition Commissioner Margrethe Vestager gave a speech entitled "Competition: the mother of invention." She said: "One of the simplest defenses against innovation is to buy up rivals that create innovative products. That's why, when we look at high-

1 Senior Advisor & Foreign Legal Consultant to Hogan Lovells U.S. LLP (Admitted in England & Wales)

2 Logan Breed is a partner in Hogan Lovells in Washington, DC. Falk Schöning is a partner in Hogan Lovells in Brussels.

3 Interview with FTC Chairwoman Edith Ramirez, ABA Section of Antitrust Law, The Mergers & Acquisitions Committee, Volume XIV, No. 2, Spring 2014.

4 Maureen K. Ohlhausen, Commissioner, U.S. Federal Trade Commission: "Antitrust Tales in the Tech Sector: Goldilocks and the Three Mergers and Into the Muir Woods." Antitrust in the Technology Sector: Policy Perspectives and Insights from the Enforcers, Palo Alto, CA, January 26, 2016

5 Acting Associate Attorney General Bill Baer Remarks at American Antitrust Institute's 17th Annual Conference, June 16, 2016, available at https://www.justice.gov/opa/speech/acting-associate-attorney-general-bill-baer-delivers-remarks-american-antitrust-institute.

tech mergers, we don't just look at whether they may raise prices. We also assess whether they could be bad for innovation." She went on to explain that:

> 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.[6]

Shortly after taking office last year as the Director-General of DG Competition, Johannes Laitenberger explained said that innovation analysis plays two roles in European Commission competition law enforcement: "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."[7]

This approach is mirrored in a Competition policy brief the European Commission published in April 2016. Called "EU Merger Control and Innovation," the policy brief explains the European Commission's approach in recent merger cases. It notes that "The EU framework for merger control allows the Commission to assess the impact of mergers and acquisitions on innovation. The framework puts the competitive harm caused by reduction of innovation on an equal footing with increased prices and reduced output. [...]."[8] The policy brief refers to provisions in the European Commission's Horizontal Merger Guidelines[9] and Non-Horizontal Merger Guidelines[10] that cover the treatment of innovation in merger analysis, and it explains that innovation can affect the assessment of market power, efficiencies and remedies in merger control.[11]

6 Margrethe Vestager, EU Commissioner for Competition, "Competition: the mother of invention", European Competition and Consumer Day, Amsterdam, The Netherlands, April 18, 2016.

7 Director-General of DG Competition Johannes Laitenberger, "Competition and Innovation", CRA Annual Brussels Conference – December 9, 2015.

8 EU Competition policy brief 2016-01 "EU merger control and innovation", April 2016.

9 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2004/C 31/03)

10 Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings (2008/C 265/07)

11 EU Competition policy brief 2016-01 "EU merger control and innovation", April 2016, p. 3

II. POLITICAL CONTEXT

As the statements from antitrust officials on both sides of the Atlantic demonstrate, innovation is an increasingly significant factor in merger control enforcement. There are several reasons for this development. First, because technological development is now fundamental to business success in so many industries, assessing the impact of mergers on innovation now plays a key role in merger control. This applies not only to technology industries, of course, but also to other industries such as pharmaceuticals, medical devices, energy, mobile telecommunications and others.

Second, innovation is at the heart of wider policies than simply antitrust or merger control. In the European Union, the current European Commission led by President Juncker laid out an ambitious political agenda entitled the "Europe 2020 strategy"[12] when it came into office. The Europe 2020 strategy focuses on delivering growth through more effective investment in education, R&D, sustainability, job creation and poverty reduction. Innovation is one of five ambitious goals by which the European Commission hopes to achieve the goal of becoming an "Innovation Union."[13]

In the United States, President Obama's Administration adopted a "Strategy for American Innovation" and in his 2015 State of the Union Address, President Obama said: "Twenty-first century businesses will rely on American science and technology, research and development...I want Americans to win the race for the kinds of discoveries that unleash new jobs."[14]

In this article, we consider how the U.S. and EU antitrust agencies assess the impact of a merger on innovation. Merging parties may argue that their merger will improve the merged company's ability to innovate, and innovation-based arguments may also be used to demonstrate that current market shares are not indicative of the parties' potential future market power. Innovation can also affect the definition of the market affected by the merger (the relevant market) – if the industry is evolving rapidly, the relevant market may be broader than a static snapshot of the current offerings available to consumers. On the other hand, the antitrust agencies may consider that the merger will result in the termination of promising innovation work by one or both of the merging companies or that it will reduce the merged company's incentive to innovate in the future. Thus, as we demonstrate below, merging parties should consider the potential procompetitive and anticompetitive effects of their merger on innovation from the outset and be prepared for discussions about this hot topic with the agencies reviewing their merger.

12 Communication from the Commission: EUROPE 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final.

13 Ibid, page 5.

14 White House Press release: The White House Releases New Strategy for American Innovation, Announces Areas of Opportunity from Self-Driving Cars to Smart Cities, October 21, 2015.

III. THE EUROPEAN PERSPECTIVE

As stated above, innovation is a crucial part of the political agenda set by the European Commission's "Europe 2020 strategy."[15] Competition policy can contribute to these political goals in a number of ways. Obvious examples include state aid for innovative projects and antitrust enforcement in the area of standard essential patents. The role that merger control can play in relation to innovation generally has gained attention only recently. Interestingly, when the European Parliament published a study on "The Contribution of Competition Policy to Growth and the EU 2020 Strategy"[16] in 2013, the authors of the study did not highlight merger control as capable of having an impact on the "Innovation Union" – only antitrust, liberalization, and sector specific measures were mentioned.

The European Commission has focused on the effects of a merger on innovation in a number of decisions in the last few years. Indeed, the potential loss of innovation can go to the heart of the alleged anticompetitive effects of a merger, as the following decisions show.

In its decision on the acquisition of Alstom's energy business by General Electric in 2015,[17] the European Commission considered that Alstom was an important innovator on the market for heavy duty gas turbines and was concerned about the loss of Alstom as "an independent innovator" as a result of the merger. The European Commission said:

> Alstom's heavy duty gas turbine technology is one of the most advanced, flexible and cleanest available, particularly well-suited to meet European customers' requirements for operational flexibility. The transaction as notified would have reduced customer choice, R&D and innovation, with serious risks that certain Alstom heavy duty gas turbine models would be discontinued and that the newly developed and most advanced model (GT 36) would not be commercialised.[18]

To address the European Commission's concerns, the merging parties offered to divest Alstom's heavy duty gas turbine technology for certain existing and next generation gas turbines to a third party, together with Alstom's R&D engineers and two test facilities i.e. "advanced R&D capabilities and incentives to continue pushing innovation in this important market for Europe."

Also in 2015, the European Commission cleared the acquisition of GSK's oncology business by Novartis subject to divestment commitments to ensure that the merger's impact on innovation would not impede competition. The European Commission's concerns related to both late-stage (phase III) and earlier stage (phase I and II) pipelines in connection with the same drugs – the latter not traditionally being a focus of the European Commission's concerns in pharmaceutical mergers. As Director-General Johannes Laitenberger has explained: "Novartis would likely have stopped developing two innovative drugs to treat certain cancers when acquiring similar drugs from GSK [,,,,,,,] the clearance included a novel remedy. Not only did the companies divest the drugs of concern and the clinical trial programme, but Novartis committed to co-fund the clinical trials."[19]

While the regulatory requirements for the testing of newly developed pharmaceuticals make it relatively easy for the European Commission to establish a theory of harm based on innovation, assessment of the impact on innovation is not limited to life sciences mergers.

For instance, when the European Commission opened an in-depth investigation into ASL's acquisition of space company Arianespace in 2016, it based its decision to do so on the potential impact of the merger on innovation in the satellite manufacturing business: "Overall, the Commission is at this stage concerned that the transaction might lead to higher prices, less customer choice and a reduction in research and development efforts in the satellite, launcher and launcher equipment and launch services markets."[20]

In May 2016, the European Commission prohibited the proposed acquisition of O2 by Hutchison[21] not only because of concerns about price and consumer choice but also because of harm to innovation. Commissioner Vestager said:

> We had strong concerns that consumers would have had less choice finding a mobile package that suits their needs and paid more than without the deal. It would also have hampered innovation and the development of network infrastructure in the UK, which is a serious concern especially for fast moving markets.[22]

While the innovation argument in that case may have been specific to the underlying network technology involved, mergers in the mobile and telecommunication sectors are generally likely to trigger assessments of their impact on innovation – as are mergers in other sectors as well.

As EU Commissioner Vestager said in a speech on May 24:

15 Communication from the Commission: EUROPE 2020 A strategy for smart, sustainable and inclusive growth, COM(2010) 2020 final, page 20.

16 European Parliament, Directorate General for Internal Policies, Policy Department A: Economic and Scientific Policy, "The Contribution of Competition Policy to Growth and the EU 2020 Strategy", July 2013.

17 Case COMP/M.7278 GENERAL ELECTRIC / ALSTOM (THERMAL POWER - RENEWABLE POWER & GRID BUSINESS), decision of September 8, 2015.

18 Commission Press Release IP-15-5606 of September 8, 2015.

19 Competition and Innovation", CRA Annual Brussels Conference – December 9, 2015.

20 Commission Press Release IP-16-430 of February 26, 2016.

21 Case COMP/M.7612 - HUTCHISON 3G UK / TELEFONICA UK.-

22 Commission Press Release IP-16-17/04 of May 11, 2016.

"[…] protecting innovation is an essential part of competition enforcement. And not just in obvious high-tech industries like IT."[23]

Further, as Director-General Johannes Laitenberger noted last year, merging parties may argue that their proposed merger will have positive effects on innovation, i.e. it will generate procompetitive efficiencies.[24]

In line with the European Commission's Horizontal Merger Guidelines, the European Commission may conclude that the innovation efficiencies - if merger specific, verifiable, and likely to be passed on to consumers - outweigh any impediment to competition the merger will cause – although examples of such decisions are rare.

Typically when analyzing efficiencies, the European Commission will examine the rationale for the merger. For example, the merging parties may claim that the merged entity will combine R&D programs that will lead to more innovation on the market affected by the merger rather than loss of competitive innovation between the parties had they remained independent.

Efficiency claims relating to investment in innovation in mobile telecommunication networks were raised in two mobile telecommunications mergers in Ireland and Germany in 2014. The European Commission analyzed whether the mergers would bring material additional benefits in terms of network coverage, speed and quality. In both cases, it concluded that any improvements would be limited and would not outweigh the consumer harm the merger gave rise to and/or would be not merger-specific.[25] These decisions illustrate how high the threshold for acceptance of an efficiency argument by the European Commission is.

IV. THE U.S. PERSPECTIVE

The U.S. antitrust agencies' approach to innovation in merger cases is largely the same as the European Commission's. The U.S. agencies' most recent edition of the Horizontal Merger Guidelines, issued in 2010, includes an entire section titled "Innovation and Product Variety" explaining how the agencies view the potential impact of a merger on competition. First, the agencies note the broad principle that "[c]ompetition often spurs firms to innovate" – with the implication that reductions in competition will commensurately reduce the remaining firms' incentive to innovate. More specifically, the agencies posit that a merger may harm innovation "by encouraging the merged firm to curtail its innovative efforts below the level that would prevail in the absence of the merger," either by creating a "reduced incentive to continue with an existing product-development effort" or by "reduc[ing the] incentive to initiate development of new products."

The guidelines also note that mergers can have a procompetitive effect on innovation. In particular, "[w]hen evaluating the effects of a merger on innovation, the Agencies consider the ability of the merged firm to conduct research or development more effectively," and "[t]he Agencies also consider the ability of the merged firm to appropriate a greater fraction of the benefits resulting from its innovations." On the other hand—just as the European Commission is skeptical of innovation-based efficiencies defenses—the U.S. guidelines question whether reductions in R&D costs can be cognizable efficiencies in many cases because they may be "difficult to verify" or "result from anticompetitive reductions in innovative activities." The guidelines do not attempt to reconcile this stated reluctance to count R&D cost savings as cognizable efficiencies with their acknowledgment of the potential procompetitive benefits of the combined firm's ability to retain a larger proportion of the gains from its innovations.

In practice, the U.S. agencies' merger investigations regularly consider the effect that a pending merger may have on innovation, and many of the complaints filed by the agencies regarding mergers that were blocked or permitted with remedies discuss the impact of those potential mergers on innovation competition. For example, DOJ's complaint in its recent challenge to the proposed Halliburton/Baker Hughes merger, which ultimately resulted in the parties abandoning the deal, repeatedly cited likely reductions in competition to develop key emerging technologies because the merging parties "possessed unrivaled…research and innovation capabilities" and they "play leading roles in driving technological innovation" in the industry.[26]

The proposed merger between Applied Materials and Tokyo Electron, the two largest providers of semiconductor manufacturing equipment, is another recent example. The parties abandoned the merger in the face of a likely DOJ challenge. DOJ informed the parties that it was particularly concerned about "the development of equipment for next-generation semiconductors,"[27] and the parties' proposed remedy did not address this reduction in innovation competition for the semiconductor manufacturing equipment of the future.

DOJ also focused on innovation in its challenge to AT&T's proposed acquisition of T-Mobile in 2011. DOJ's complaint argued that T-Mobile's primary business strategy was to "find innovative

23 Margrethe Vestager, EU Commissioner for Competition, "How competition supports innovation", Regulation4Innovation, Brussels, May 24, 2016.

24 Competition and Innovation", CRA Annual Brussels Conference – December 9, 2015, p. 5.

25 See Case No. COMP/ M.6992, Hutchison 3G UK/Telefónica Ireland, Commission decision of May 28, 2014, section 7.10., and Case No. COMP M.7018 Telefónica Deutschland/E-Plus, Commission decision of July 2, 2014, sections 6.9, and 6.10.

26 Complaint, United States v. Halliburton and Baker Hughes (April 6, 2016), available at https://www.justice.gov/opa/file/838651/download.

27 U.S. Dep't of Justice, Press Release, "Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy" (April 27, 2015), available at https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department.

ways to overcome scale disadvantages" and that its goal was to "break down industry barriers with innovations."[28] For example, DOJ alleged that T-Mobile was "an innovator in terms of network development and deployment," and that AT&T repeatedly had to respond to T-Mobile's innovations. Following DOJ's challenge, the parties ultimately abandoned the transaction.

In some cases, the FTC and DOJ may investigate whether innovation by one of the merging parties could lead to potential competition that would be eliminated by the merger. This means that in dynamic markets, even a relatively small competitor may be a much more significant competitive constraint than its current market share would indicate, so the merger may raise competition concerns. This can be the case, for example, where the smaller player has promising pipeline products. In one recent case, the FTC sued to block Steris Corp.'s acquisition of Synergy Health on the theory that even though Synergy was only a small player in the U.S. sterilization market, it was set to become a significant threat to Steris by importing X-ray technology that it had developed in Europe.[29] The court ultimately rejected the FTC's motion for a preliminary injunction because the parties proved that Synergy had canceled the project, but the case demonstrates the U.S. antitrust agencies' willingness to challenge mergers even where the merging parties are not currently strong competitors.

V. DEFINING INNOVATION

The antitrust agencies' recent cases and policy statements underscore the importance of innovation for merger control assessment, but the term "innovation" remains ill- or un-defined. Unlike revenues, volumes or market shares, innovation cannot be assessed based on equivalent hard data. Since the guidelines do not precisely describe the concept of innovation, the antitrust authorities are left – or, to put it another way, have discretion - to establish their own approach on a case-by-case basis.

In some industries such as pharmaceuticals or medical devices, innovation can be assessed relatively easily by reviewing clinical trials and analyzing the parties' produce development pipelines. However, in other industries, the task is much less straightforward. In such cases, the agencies consider all available evidence in assessing potential effects on innovation, including the merging parties' internal data and documents and information provided by customers, competitors and experts, to gain insights and form their own views on innovation and potential future market trends in the case in question.

VI. CONCLUSIONS

The emphasis that the antitrust agencies are increasingly placing on innovation analysis in merger reviews leads to the following conclusions.

With increasing technological development across many industry sectors, the importance of innovation in the assessment of mergers is likely to increase even further and become a standard feature of merger investigations in the United Statesand Europe.

To assess these issues, the antitrust agencies increasingly require access to the internal documents and data of the merging parties and third parties. Thus, more litigation-type document production requests are increasingly becoming part of merger investigations by the European Commission as well as the U.S. antitrust agencies.

Lastly, antitrust agencies in the European Unionand United States- and elsewhere around the world – increasingly cooperate with each other when they are reviewing the same merger. The assessment of the impact of a merger on innovation and how to address any concerns about that impact will therefore become part of the increasingly global dialogue about mergers in the same way as other effects of a merger on competition already are.

28Complaint, United States v. AT&T (August 31, 2011), available at https://www.justice.gov/opa/documents/Justice-ATT-TMobile-Complaint.pdf.

29 Complaint, FTC v. Steris Corp. and Synergy Health PLC (May 29, 2015), available at https://www.ftc.gov/system/files/documents/cases/150529sterissynergytro.pdf.

FOCUS ON INNOVATION: A REVIEW OF THE TAIWAN FAIR TRADE COMMISSION'S INVESTIGATION ON GOOGLE

BY SU-WAN WANG &
ELIZABETH XIAO-RU WANG[1 2]

I. INTRODUCTION

The Taiwanese Competition Authority has recently confronted issues surrounding Google's search practices. Specifically, a number of independent providers of digital map programs complained to the Taiwan Fair Trade Commission ("TFTC") about Google's search result algorithms. These firmsalleged that Google's search results gave Google Maps, and not competing map services, favorable placement on its search results pages, reflecting an unfair competitive practice. The map providers also claimed that Google's conduct deprived them of business opportunities, resulting in a loss of revenue, and violating Taiwan's competition statutes. In responding to these concerns, the TFTC conducted a multi-year investigation and closed the probe in the summer of 2015 with a finding of no violations.

Drawing on publicly available information, this article describes the key elements of the TFTC's analysis and the basis for its decision. In the investigation, the TFTC focused its analyses under the framework of the abuse of dominance, where the alleged abuse took the form of refusals to include competing maps on Google's search results pages.

We start our discussion by providing background of the case. We then explain how the TFTC's examined whether Google had market dominance, and whether Google's conduct constituted an abuse of dominance. We then describe the two primary economic tests employed by the TFTC for the agency's refusal to deal analysis, the essential facility test and the profit sacrifice test. Lastly, we offer brief concluding remarks.

II. CASE BACKGROUND

In Taiwan as in many other countries, when a user enters a query containing location information on Google, Google may show the relevant locations on a map at the top on the search engine results page ("SERP"). The maps on Google's SERP, known as Google Maps, are a type of "thematic" results that draw on specialized location-related searches that Google performs using its internal map data. For example, a query of "誠品書店 (Eslite Bookstore)" on Google Taiwan would return a map showing three branches of the Eslite Bookstore, with addresses of each location pinned into the map. (See screen shot below.) This map is placed at the second spot on the SERP after the official website of www.eslite.com, and it contains the thematic results from Google Maps, which are built from Google's internal map data.

1 Ms. Su-Wan Wang is a Commissioner at Taiwan Fair Trade Commission ("TFTC"). Dr. Elizabeth Xiao-Ru Wang is a Senior Vice President at Compass Lexecon.Commissioner Wang was involved in the TFTC investigation on Google. Dr. Elizabeth Wang has consulted for Google, but was not involved in the Taiwan case. The views expressed in this paper, however, are solely those of the authors and do not reflect any confidential information gained during the authors' work on that matter. All the facts characterized in this paper reflect information in the public record. They do not reflect or represent the views of the Taiwan Fair Trade Commission, Compass Lexecon, or any of the organizations with which the authors are affiliated.

2 The authors gratefully acknowledge helpful comments from Kenneth Heyer, Michael Salinger, Anne Layne-Farrar, Harry Foster, Julia Gorman, D. Daniel Sokol and several others regarding the issues discussed in this paper.

A group of independent Taiwanese map providers argued that Google had manipulated its search algorithms and result rankings by placing Google Maps results at eye-catching spots on the SERP, while failing to include other maps on Google's SERP or use maps based on competing map providers' data. The map providers claimed that Google's conduct led them to lose business opportunities and suffered a loss in revenue.[3]

In response to these concerns raised by the map providers, the TFTC initiated an in-depth investigation in the winter of 2012.[4] The Commission's probe focused on the following key areas: whether Google is a monopolistic enterprise, and whether Google abuses its dominance by refusing to include competing providers' maps. After evaluating the available evidence, the TFTC found that Google was a monopolistic enterprise in the market for internet searches. However, it also concluded that Google did not reduce users' choice of map services, and that Google Maps did not hinder independent map providers' abilities to engage with their customers. With the evidence "inadequate to determine that Google Inc. has violated the Fair Trade Act",[5] the Commission ended the investigation in the summer of 2015. As TFTC Vice-Chairperson Chiu Yung-ho noted: "[o]ur investigation shows that this [search display] practice could be seen as providing convenience to users and in line with users' benefits."[6]

III. THE ANALYSIS OF MARKET DOMINANCE

The Taiwan Fair Trade Act ("TFTA") went into effect in February 1992 and was last amended in 2015. It covers two broad categories of business behavior: (i) exclusionary conduct, which generally addresses traditional antitrust issues (including abusive conduct by a monopolistic enterprise, mergers and acquisitions, concerted conduct, and other restrictive conduct) and (ii) unfair trade practices, which addresses practices such as counterfeiting and false advertising, among others.[7]

The TFTC's primary approach in analyzing complaints against Google Maps relied upon an abuse of dominance framework. The TFTA defines amonopolistic enterpriseas" any enterprise that faces no competition or has a dominant position to enable it to exclude competition in the relevant market."[8] Based on the criteria specified by the Act, a company that possesses a market share over 50 percent is presumed to be a monopolistic enterprise.[9] Article 9 of the TFTA states that:

[m]onopolistic enterprises shall not engage in any one of the following conducts:

- directly or indirectly prevent any other enterprises from competing by unfair means
- improperly set, maintain or change the price for goods or the remuneration for services
- make a trading counterpart give preferential treatment without justification or
- other abusive conducts by its market power.

When assessing whether Google is a monopolistic enterprise in internet searches, the TFTC examined Google's market shares in internet search as well as an online advertising platform. The TFTC observed that Google is the largest internet service provider in Taiwan, and its 2013 revenue inTaiwan is over NT$2 billion (approximately USD$70 million), the minimum size requirement of a monopolistic enterprise.

3 The Legality of Google's Vertical Search Service from the Perspective of Monopolistic Enterprises（以獨占事業的觀點論析Google垂直搜尋服務的違法性）" (Chen 2015), by Haokai Chen (陳浩凱) who is a case handler of the TFTC investigation on Google Maps, Taiwan FTC Newsletter（公平交易通訊）, No. 066, November, 2015 (in Chinese). The English version of this article appears in Taiwan FTC Newsletter No. 066, December, 2015.

4 Taiwan Fair Trade Agency Closes Investigations Into Google", by Debra Mao and Brian Womack, August 6, 2015, http://www.bloomberg.com/news/articles/2015-08-06/taiwan-fair-trade-agency-closes-investigations-into-google.

5 TFTC 2015.

6 See "Taiwan Fair Trade Commission Closes Investigations Into Allegations that Google Abused Dominant Position", by D Daniel Sokol, August 8, 2015, "http://lawprofessors.typepad.com/antitrustprof_blog/2015/08/taiwan-fair-trade-commission-closes-investigations-into-allegations-that-google-abused-dominant-posi.html.

7 Taiwan Fair Trade Act, available http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=1295&docid=13970.

8 See Article 7 of the TFTA.

9 See Article 8 of the TFTA.

According to statistics from StatCounter, in 2013 Google accounted for a 59.72 percent share of internet searches, and a 52.02 percent share of online keyword ads in Taiwan,[10] both above the 50 percent threshold for classifying a firm as dominant. The Commission further recognized that competitive rivalry between the services of internet search engines has the characteristics of a winner-take-all competition and that it is therefore difficult for smaller market players or potential entrants to impose effective competitive constraints. Based on these reasons, the TFTC found Google to be a monopolistic enterprise.

Independent map providers alleged that Google had abused its dominant position by manipulating its search algorithms in order to provide Google Maps with preferred placement on Google's SERPs. As noted above, the TFTA prohibits a monopolistic enterprise from impeding its competitors.

IV. THE ANALYSIS OF REFUSAL TO DEAL

In essence, the independent map providers' complaints against Google Maps can be characterized as objecting to Google (as a search engine) refusing to put competing maps on Google's SERPs. As discussed in Chen (2015), the TFTC examined Google's failure to include competing maps through the lens of a refusal to deal by a monopolistic enterprise. The TFTC has articulated a position that refusals to deal with competitors are generally lawful, even for a monopolistic enterprise. The TFTC has explained that having market dominance by itself is not an antitrust violation under Taiwan's competition law, and that a monopolistic enterprise can legitimately disadvantage or even drive its less efficient competitors out of the market by virtue of becoming a low-cost provider offering better and cheaper services to consumers. As Taiwan's competition law aims to protect competition and not competitors, and because it is concerned over the chilling effect that government intervention in refusal to deal cases can have on R&D, innovation or other conduct that might improve consumer welfare, the TFTC is highly cautious about intervening in such cases. The TFTC will, however, consider a monopolistic enterprise's refusal to deal as a violation of the TFTA only if at least one of two relatively uncommon sets of circumstances is present: (i) where the monopolistic enterprise refuses to share an essential facility with competitors; or (ii) where the monopolistic enterprise sacrifices its short-term profits to exclude competitors.

A. The Essential Facility Test

Although the TFTA does not explicitly outline an essential facilities doctrine, the TFTC has effectively adopted a standard that it is a violation of Taiwan's competition law for an owner to use an essential facility to exclude competition.Thus, a key component of the TFTC's analysis of whether Google's alleged exclusion of competing maps is unlawful was to determine whether Google's successful search engine is an essential facility. What constitutes an "essential facility" has been the subject of much debate within the antitrust community. The U.S. appeals court decision on the MCI Communications v. AT&T Corp. perhaps provided formulation of an essential facilities test: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[11] The TFTC examined the replicability and uniqueness of (or lack of alternatives to) Google's search engine for users seeking to access services provided by other map providers.

After considering a number of characteristics in the business of search engines, the TFTC found that Google's search engine cannot be easily replicated by a competitor in the short run. It explained that the services provided by search engines often feature economies of learning. As more queries are conducted on a search engine, the more accurate and better targeted the search engine's search results become. The fact that Google is the most popular search engine in Taiwan contributes to the high quality of its search results. In addition, Internet search is a two-sided market where users attract ad revenue which can fund R&D, and R&D leads to more innovations in search services that attract more users conducting more queries on the search engine. This positive feedback effect among users' queries, ad revenue, R&D and innovation allows Google to maintain advantages over its rivals. For these reasons, the TFTC concluded that it is difficult and economically prohibitive for a rival to catch up with Google and to produce an alternative search engine with similar scale and quality in the short run.

Importantly, however, the TFTC observed that Google's search engine is far from being the only channel for users to access map information. Users can visit websites containing competing maps through a number of methods. For example, a user can search for the targeted website through portal sites (such as the Taiwan government's portal at www.gov.tw), or can enter the website's URL directly; she can also circumvent Google search in the future if she bookmarks the website.

Furthermore, TFTC found that Google Maps does not hinder the ability of independent map providers from continuing to practice their existing business model. Taiwanese map providers typically offer local businesses (e.g. a restaurant or a shop) map information for a fee so that the business can embed a map with its location within its webpage. When its potential patrons can easily find the location of a business for free through Google search, businesses may have less incentive to pay for a map services that can supply maps for their own websites. However, Google's provision of Google Maps results does not obstruct map providers from approaching customers and continuing to offer them their map services.

In conclusion, the TFTC found that Google is neither the sole nor an indispensable channel for users to access map information, and that Google Maps does not hamper other map providers' existing business model. Therefore, Google's search engine does not

10 Chen (2015) in Supra note 2.

11 708 F.2d at 1132-33.

constitute an essential facility for purposes of providing map services.

B. The Profit Sacrifice Test

The TFTC recognizes that it can be difficult to distinguish between competitive and exclusionary conduct. In the process of determining whether a refusal to deal by a monopolistic enterprise constitutes exclusionary conduct, the TFTC utilizes a profit sacrifice test. This test examines whether the monopolistic enterprise has sacrificed short-run profits in exchange for foreclosing its rivals. In response to the other map providers' complaints during the Google Maps investigation, Google explained that including Google Maps results displaying location information on the SERPs had improved user search experiences by allowing users to more easily find what they were looking for. Including information like Google Maps (as well as other thematic search results) in the main search result pages is an innovation that has been adopted by many search engines and has become an industry norm. The TFTC found no evidence that Google sacrificed any short-run profits by excluding competing maps from favorable placement.

The TFTC employed a three-prong approach in applying its profits sacrifice test. First, it noted that prior to launching Google Maps in Taiwan, Google had never included any competitors' maps. Therefore, including Google's own map search results was not a termination of an existing profitable arrangement. Second, Google's organic search results are not paid links where the ranking of the ads depends on the bids from the advertisers and the ads' quality scores.[12] Google offers its Google Maps for free. It does not directly generate any revenue from its organic search results, regardless of whether the search result is a Google Map, a competing map, or another link to a company's website. By putting Google Maps at eye-catching spots on the SERP, Google does not lose any revenue it would have gained if the competing maps had been placed in those spots instead. Third, when it is free to include organic search results on the SERP, it makes no economic sense for Google to assign competing maps to more preferred placements than its own Google Maps.[13]

TFTC's profit sacrifice test found that Google's placement of Google Maps is not an example of anticompetitive conduct, but instead represents an improvement to its users' experience. Had the placement of Google Maps harmed consumers, competitors would have easily differentiated themselves from Google by excluding such features. However, the fact that other search engines such as Yahoo Taiwan have also chosen to display map search results is an indication that such a practice is beneficial to users.

12 For discussion of Google's advertising revenue, see "How Exactly Does Google AdWords Work?" by Chuck Topinka, August 15, 2014, http://www.forbes.com/sites/quora/2014/08/15/how-exactly-does-google-adwords-work/#473c113441ec.

13 See Chen (2015).

V. CONCLUSION

As highlighted by the TFTC's investigation on Google Maps, the enforcement of competition law often faces difficult tasks in distinguishing between competitive conduct and exclusionary conduct. Although the TFTC found that Google is a monopolistic enterprise in providing internet searches, it found that Google's exclusion of competing maps does not violate the Taiwan Fair Trade Act. Evidence reviewed by the TFTC indicated that Google's search engine is not an essential facility for map providers, and that in providing Google Maps results, Google is not sacrificing profits but enhancing its product to improve its users' search experiences. The TFTC concluded that if it were to stop Google from displaying its Google Maps, it would not only harm consumer welfare, but could also hinder Google and other internet businesses' incentives to innovate.

A TURNING OF THE TIDE: VICTIM REDRESS THROUGH PRIVATE ANTITRUST LITIGATION

BY KARIN E. GARVEY[1]

I. INTRODUCTION

Access to the courts is necessary to seek redress for anticompetitive activity, but the costs of litigation can deter victims of anticompetitive conduct from filing suits, particularly where individual claims are small and the procedural tool of collective actions is not available. Additionally, access to evidence is necessary to prove an antitrust violation, but pre-trial disclosure is not available everywhere. Indeed, until collective actions and pre-trial discovery are part of the legal landscape, victims of anticompetitive conduct will not be properly compensated.

In the United States, there is a robust class action procedure, just as there is wide-ranging pre-trial discovery. In the European Union, on the other hand, until recently there has been little of either. This paper explores the differences between the U.S. and EU regimes and the fact that the tide is turning in the European Union with the issuance of new legislation.

Both historically and currently, there appears to be an intersection of the availability of group litigation, in one form or another, and the availability of pre-trial discovery or disclosure. In general, the availability to a party of potential evidence in the possession of its opponent helps that party make its case in court. This is all the more true in antitrust litigation where, oftentimes, the defendants' wrongdoing is secret.That potential evidence is only relevant if the victim is able to bring a case in the first place – something that, due to the expense of litigation, is only feasible through some sort of group action.

II.COLLECTIVE LITIGATION

A. U.S. Class Action Litigation

Class action litigation has been widely used in the United States since the mid-1800s. Enacted in 1833, Equity Rule 48 provided for "group litigation" in situations in which multiple similar individual suits were filed.[2] Eventually, the statutory law regarding class action litigation was codified in Federal Rules of Civil Procedure ("Federal Rules") Rule 23 in 1938. Probably the most significant change to Rule 23 was the 1966 revision that standardized class actions as being "opt-out" (i.e. an individual or entity that fits within a class definition is automatically considered part of the class unless that individual opts out of the litigation).

The class action mechanism is widely used in the United States in the antitrust context. In antitrust cases, although collective damages might amount to billions of dollars, the small size of individual claims compared to the enormous resources required to litigate an antitrust action against a group of commercial entities (usually large corporations) makes it impractical – perhaps impossible – for individuals to seek compensation for their losses. Banded together, though, victims are able to seek redress.[3]

1 Of Counsel, Labaton Sucharow LLP. J.D., Northwestern University; A.B., Harvard University.

2 Fed. R. Equity 48, 42 U.S. (1 How.) lvi (1843) (repealed 1912).

3 See, e.g. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 266 (1972). "Congress has given private citizens rights of action for injunctive relief and damages for antitrust violations without regard to the amount in controversy. 28 U. S. C. § 1337; 15 U. S. C. § 15. Rule 23 of the Federal Rules of Civil Procedure provides for class actions that may enhance the efficacy of

B. History of EU Collective Litigation

Over the past century, there have been few collective actions in Europe. Recently, that tide has begun to shift. Many countries have enacted legislation regarding collective actions, oftentimes for violations of specific laws. For instance, Germany does not have a general right to collective action, but the German antitrust statutes permit collective actions in limited circumstances. And, in several European countries, there have been moves not only to enact legislation expressly providing for collective redress but also for the use of certain vehicles – such as Stichtings (foundations) in the Netherlands – to which injured parties can assign their claims.

In 2015, the United Kingdom took several significant steps regarding collective actions. A new statute – the Consumer Rights Act (the "CRA") – amended the Competition Act 1998 to enable follow-on and stand-alone collective actions to be brought before the Competition Appeal Tribunal (the "CAT"). Most significantly, the Competition Act was amended to include opt-out collective actions.[4] Although the availability of the opt-out class action mechanism is more in line with U.S. class action litigation, the CRA does maintain certain provisions widely favored in the European Union such as a "loser pays" principle and a bar on exemplary damages.[5] Notably, on June 21, 2016, for the first time, the CAT accepted an application for an opt-out collective proceeding.[6]

In 2013, the EC issued a set of principles and recommendations regarding collective actions for both injunctive relief and damages.[7] The Recommendation's goal, which stemmed from an earlier EC "Resolution" and "Communication" regarding collective redress,[8] is to facilitate access to justice in relation to violations of rights under Union law and to that end to recommend that all Member States should have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse.[9] The Recommendation recognized that there are particular areas of the law – including competition – in which an availability of some sort of collective redress would be of "value."[10]

The modern economy sometimes creates situations in which a large number of persons can be harmed by the same illegal practices relating to the violation of rights granted under Union law by one or more traders or other persons ("mass harm situation"). They may therefore have cause to seek the cessation of such practices or to claim damages.[11] The Recommendation noted that "[t]he possibility of joining claims and pursuing them collectively may constitute a better means of access to justice, in particular when the cost of individual actions would deter the harmed individuals from going to court."[12] Having said that, the EC was clear in the Recommendation that it wanted to avoid "an abusive litigation culture" and, therefore, instructed that, as a general rule, punitive damages, intrusive pre-trial discovery procedures and jury awards should be avoided.[13]

Some other key components of the Recommendation are that it:

- preserves the "loser pays" principle common in the EU;[14]
- adopts the "opt-in" style of collective redress)), exclusively;[15] and
- bars contingency fees that create an incentive "to litigation that is unnecessary from the point of view of the interest of any of the parties."[16]

In 2014, the EC issued a "Directive" regarding private antitrust damages litigation.[17] Although earlier EC papers leading up to the adoption of the, Directive included policy suggestions regarding collective redress, the Directive expressly notes that it does not "require Member States to introduce collective redress mechanisms."[18] Given that the stated goal of the Directive was to enhance private antitrust enforcement, the decision to omit collective actions from the Directive has led to criticism.

The Member States were instructed to implement the princi-

private actions by permitting citizens to combine their limited resources to achieve a more powerful litigation posture."

4 CRA Schedule 8, 47B(7)(c), 47B(11).

5 CRA Schedule 8, 47C(1).

6 Notice of an Application to Commence Collective Proceedings under Section 47B of the Competition Act 1998, Case No. 1257/7/7/16.

7 Commission Recommendation of 11 June 2013 on Common Principles for Injunctive and Compensatory Collective Redress Mechanisms in the Member States Concerning Violations of Rights Granted under Union Law (2013/396/EU) (the "Recommendation").

8 Recommendation (4)-(5).

9 Id. (10).

10 Id. (7).

11 Id. (2).

12 Id. (9).

13 Id. (15).

14 Id. (III.13).

15 Id. (V.21-24).

16 Id. (V.29-30).

17 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 (the "Directive").

18 Directive (13).

ples in the Recommendation by July 26, 2015[19] and to collect statistics regarding collective actions in their countries that are to be reported no later than July 26, 2016.[20] But, per Article 288 Treaty on the Functioning of the European Union ("TFEU"), the Recommendation is not binding. The EC will "assess the implementation of the Recommendation on the basis of practical experience by 26 July 2017 at the latest."[21]

III. ROLE OF DISCOVERY

A. Discovery in the United States

Wide-ranging discovery has been available in the United States since the enactment of the Federal Rules in 1938. The Federal Rules provide for, among other things, depositions as of right, document productions and interrogatories.Ever since the 1946 amendments to Federal Rule 26, the Federal Rules have encompassed the notion that the scope of discovery is not limited to admissible evidence. As the Supreme Court stated,

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.[22]

Over the years, the discovery provisions of the Federal Rules have been revised in various ways. Most recently, the Federal Rules were revised effective December 2015 to, among other things, specifically refer to a concept of proportionality:

> Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense *and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.*[23]

Although the use of the term "proportionality" is new, this provision boils down to an inquiry regarding burden – a concept that was already in the Federal Rules.

In the United States, no distinction is made among types of civil litigation – whether the case is a class or an individual action, a suit regarding product liability or antitrust – the same broad discovery rules apply.

B. Discovery in the European Union

The vast majority of countries in the European Union have civil law systems in which discovery plays a very small role, if any. In Germany and France, for instance, the applicable codes of civil procedure allow for pre-trial disclosure only where a litigant is able to specifically identify a document and describe why that document is relevant to the lawsuit and, even then, only with a court order. There is no compulsory production in either country, although parties are free to make voluntary disclosures.

The United Kingdom, though, is a common law country. And, while pre-trial discovery there has never been quite as abundant as in the United States, litigants in the United Kingdom have access to far more discovery than do litigants elsewhere in the European Union. Most notably, parties are obligated, as part of "standard disclosure" to produce,among other things, the documents on which they rely in addition to the documents which adversely affect its own case or support another party's case.[24] Having said that, if a party believes "that it would be disproportionate to the issues in the case to permit inspection of documents within a category or class of document disclosed under" the standard disclosure rule, it may deny inspection of that class of documents but must make a statement to that effect in its disclosure statement.[25] In addition, the court can order the production of particular documents or "classes of documents."[26] And the court can also order production from third parties.[27] Parties are also obligated to produce not only documents within their control but also documents that "have been" in their control.[28] And, the obligation to disclose is one that "continues until the proceedings are concluded" such that if a party becomes aware of documents that should have been disclosed, the party must notify all other parties "immediately."[29]

C. The Directive: A New Dawn on Discovery

Whereas discovery in the United States is uniform across various types of litigation, in the European Union, different regulations and directives have been enacted that provide for – or prohibit – discovery in different contexts.

In the antitrust context, in June 2013, the European Commis-

19 Recommendation VI.38.

20 Id. VI.39-40.

21 Id. VI.41.

22 Hickman v. Taylor, 329 U.S. 495, 507 (1947).

23 Fed. R. Civ. P. 26(b)(1) (emphasis added to depict new text).

24 Civil Procedure Rule 31.6 (U.K.).

25 Id. 31.3(2) (U.K.).

26 Id. 31.12 (U.K.).

27 Id. 31.17 (U.K.).

28 Id. 31.8 (U.K.).

29 Id. 31.11 (U.K.).

sion proposed a new directive regarding private antitrust enforcement that, among other things, addresses pre-trial disclosure. The directive was signed into law a year and a half later in the Directive.

The EC recognized that there was a dearth of private antitrust enforcement in the European Union, something it attributed, in significant part, to the unavailability of evidence with which a plaintiff could prove its case. The Directive seeks to enable victims of anti-competitive conduct to seek damages effectively,[30] and one of the tools that a litigant needs to seek damages is access to evidence.

Actions for damages for infringements of Union or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.[31] The Directive sought to rectify what it termed "an information asymmetry."[32] The Directive placed the power to order disclosure with the national courts; they will be responsible to assessing the requests and determining issues such as proportionality.[33]

Significantly, the Directive removes requirements that parties seeking disclosure ask for the precise documents they seek and allows them to seek documents by reference to categories of information.[34] Specifically, regarding requests for disclosure of categories of documents, the Directive instructs that thecategory should be identified by reference to common features of its constitutive elements such as the nature, object or content of the documents the disclosure of which is requested, the time during which they were drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive. Such categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts.[35]

The Directive also specifically warns against "fishing expeditions."[36] The Directive further provides that claimants should be able to seek documents from third parties in addition to defendants.[37]

Unsurprisingly, in light of the emphasis placed by the European Union and its Member States on privacy, the Directive contains several provisions aimed at protecting confidential information. The Directive specifically mentions "the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form."[38] The Directive, though, goes on to caution that "[m]easures protecting business secrets and other confidential information should, nevertheless, not impede the excise of the right to compensation."[39]

Regarding documents held by a competition authority in connection with an investigation, the Directive provides that, once an investigation is closed, certain documents may be ordered disclosed by a national court.[40] But, the Directive also says that a national court may not order the disclosure of a leniency statement or settlement submission.[41] The Directive reasons, "To ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions, such documents should be exempted from the disclosure of evidence."[42]

The Member States have until December 27, 2016 to introduce national legislation to implement the Directive,[43] and are currently at different points of implementation. The United Kingdom, for instance, in January 2016, published "Competition Policy, Consultation: Implementing the EU Directive on Damages for Breaches of Competition Law" (the "Consultation"). The Consultation sets out how the United Kingdom intends to implement the Directive which, as the Consultation stated, requires "relatively minor changes."[44]

Other countries, however, have not spoken on the Directive at all. The EC will review the Directive and issue a report to the European Parliament no later than December 27, 2020 that includes information on three specified topics regarding private competition litigation (none of which relate to disclosure).[45] The EC may include a legislative proposal with its report.[46]

D. Privacy laws: An Added Wrinkle

Underscoring discovery in the European Union is the fact that there are broad regulations designed to protect EU citizens' privacy. After

30 Directive (3.).

31 Id. (14).

32 d. (15).

33 Id, (16), Art. 5 3.

34 Id. Art. 5 2.

35 Id. (16).

36 Id. (23).

37 Id. Art. 5 1.

38 Directive (18).

39 Id. (18).

40 Id. Art. 6 5.

41 Id. Art. 6 6.

42 Id. (26).

43 Id. Art. 21 1.

44 Consultation 2.1.

45 Directive Art. 20 1-2.

46 Id. Art. 20 3.

operating for nearly two decades under Data Protection Directive 95/46/EC, in January 2012 the EC proposed a comprehensive reform of its data protection rules. And, earlier this year, the European Union adopted a new EU Data Protection Regulation and accompanying Directive.[47] According to its terms, "[t]his Regulation protects fundamental rights and freedoms of natural persons and in particular their right to the protection of personal data."[48] Among other things, it prohibits the transfer of personal data – which is broadly defined – processed in the European Union to another country whose privacy laws the European Union believes are inadequate.[49]

Given that most member states in the European Union have their own privacy laws in addition to any applicable EU regulations, analysis of privacy issues in the European Union is complicated – to say nothing about the issues these laws present when EU documents are sought in U.S. discovery.

E. The Effect of the "Brexit" on Competition Litigation

Last month's historic referendum in the United Kingdom in which the majority of voters cast their ballots to leave the European Union will, no doubt, have multiple effects on legal affairs in Europe. Exactly what those effects will be, though, remains to be seen – and it will be a while before there is clarity on the issue.

Until the United Kingdomserves its notice of intent to withdraw from the European Union pursuant to Article 50 of the TFEU, the two years during which the United Kingdom will negotiate the terms of its exit do not begin to run. Once it serves the notice, though, the European Union and the United Kingdom will begin negotiations regarding its future relationship with the European Union. Of course, these negotiations will touch far-ranging aspects of business, trade, the environment, law – just to name a few. With regard to the subjects of this paper, among the details of the UK withdrawal that will need to be ironed out are whether the United Kingdom will still be subject to the Directive. If the United Kingdom elects a Norway-like relationship with the European Union, it would be. On the other hand, the United Kingdomcould opt for a cleaner break. Similarly, with regard to group actions, as discussed, the United Kingdom has been gearing up to be more of a central location for collective actions, particularly with its adoption last fall of opt-out class actions. It is unclear, going forward, whether decisions of other member states or EC decisions will be binding on the UK courts, irrelevant to the UK courts, or something in the middle. Similarly, how the rest of the European Union will treat decisions of the UK competition tribunal remains to be seen.

And, in terms of policy influence, as noted above, the United Kingdom, with its common law system, has always had far more pre-trial disclosure than other European countries. And, as its recent adoption of opt-out collective action indicates, it will be a friendly environment for group actions. Whether its future absence from EU discussions about issues relating to litigation practices will stymie the growth of the EU's disclosure and collective action procedures remains to be seen. But, it is hard to imagine that the absence of the British voice in those discussions will not have some of effect.

IV. CONCLUSION

With the issuance of the Directive, and its provisions regarding disclosure, and the Recommendation, regarding collective actions, it is clear that the EC has recognized that changes must be made to the EU litigation landscape to provide victims with a viable opportunity to seek redress for injuries stemming from anticompetitive conduct. As notable as those facts are, equally significant is the express recognition by the EC of the need for those changes. Importantly, the EC's Recommendation acknowledged that collective actions "may constitute a better means of access to justice" and that disclosure is necessary to afford a party "effective exercise of the right to compensation guaranteed by the TFEU."

While the European Union properly wants to avoid litigation "abuse" and "fishing expeditions," its recent pronouncements through the Directive and Recommendation are significant. They do not afford victims of anticompetitive conduct all of the rights and necessary tools to fully protect their interests, but they are a step in the right direction.

47 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (the "Regulation"); Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016.

48 Regulation Art. 1 2.

49 Regulation Art. 45.

TERRITORIALITY ISN'T OVER

BY ROBERT O'DONOGHUE[1]

I. INTRODUCTION

Economist Jorge Padilla recently lamented "I have a clear view: territoriality is over...The question is not so much therefore whether territoriality is meaningful or not, but to what extent – and how – extraterritorial competition law enforcement is going to have an impact on trade liberalization and trade flows."[2]

At least in the context of private antitrust damages litigation, however, these rueful comments are premature. The United States has long grappled with these issues in a series of complex, and not always consistent, cases arising under the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), going all the way to the Supreme Court in F Hoffmann-La Roche v.Empagran 542 U.S. 155 (2004).

Curiously, however, the territorial scope of competition law has received very limited scrutiny indeed in over 60 years of EU competition law. A small number of cases and decisions arose in the context of administrative decision-making (and appeals therefrom) at the EU level, notably Woodpulp,[3] Gencor,[4] Intel[5] and Innolux.[6] But to my knowledge at least the issue has notsurfaced in the sphere of private antitrust damages actions.

Until now that is. On May 23, 2016 the English High Court struck out two separate damages claims in the case of Iiyama Benelux BV & others v. Schott AG & others [2016] EWHC 1207 (Ch.) ("Iiyama")[7] purely on the basis that the claims as advanced did not fall within the territorial scope of EU competition law, and specifically Article 101 TFEU.

The damages actions arose in the context of two separate but related cartels in cathode ray tubes ("CRT") and glass used as an input in CRTs. The claimants' parent entity purchased finished products containing CRT monitors (which contained CRT glass as an input) in Asia which it then branded as Iiyama products and onward supplied to its subsidiaries in the EU. The EU subsidiaries sought damages in the English courts for the loss alleged to have been

1 Brick Court Chambers (robert.odonoghue@brickcourt.co.uk).

2 Jorge Padilla, 7th International Concurrences Review conference, Paris, June 14, 2016, quoted http://globalcompetitionreview.com/news/article/41250/padilla-territoriality-over/.

3 AhlströmOsakeyhtiö and Others v. Commission, Cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, EU:C:1988:447.

4 Case T 102/96, Gencor v. Commission, EU:T:1999:65.

5 Case T-286/09,Intel Corporation v. Commission, EU:T:2014:547.

6 Case C-231/14 P Innolux Corp. v. Commission, EU:C:2015:451.

7 I did not act in the Iiyama case. Both I do act for various defendants in a related case involving the LCD cartel.

suffered by the subsidiaries in their onward sales to customers due to the cartelized components. The defendants succeeded in having these claims struck out before trial. The gravamen was that the relevant transactions, and effects on competition, all took place in Asia and did not engage EU competition law as a territorial matter. That the High Court considered the issues in this regard to be sufficiently clear to merit summary dismissal is striking.

This article teases out the salient background in the Iiyama case, the High Court's main findings, and where the judgment leaves us on the vexed question of territorial application of competition law. It might be thought that the issues are largely ones of posterity in the wake of the recent UK plebiscite which voted to leave the European Union. But the issues of territoriality would actually assume greater, not lesser, importance if the UK leaves the European Unionsince it would become all the more important to understand the demarcation between UK competition and EU competition laws, including when agreements or practices that facially have a UK dimension might remain subject to EU competition law due to their territorial effects.

II. THE BACKGROUND IN LIYAMA

The salient facts in Iiyama can be stated briskly. It concerned two separate but related cartels in CRTs and CRT glass (which is an input into CRTs). These two cartels were the subject of separate EU Commission decisions in 2012 finding infringements of EU competition law.

The CRTs (and CRT glass which they contained) were incorporated in monitors that entities like Iiyama then sold under their own brand name. CRTs are an older technology that was eventually displaced by LCD technology.Iiyama sold finished CRT monitors to end-customers. Its case was that the overcharges involved in the cartels caused it loss and damage in selling on to its customers. It commenced proceedings in the English courts to bring these claims. The plaintiff entities were Iiyama's local subsidiaries in the UK, Netherlands, France, Germany and Poland, as well as a Japanese parent company entity. The defendants were certain UK subsidiaries of the cartelist groups. These UK entities provided an "anchor" for the plaintiffs to then join in other non-UK defendant entities as necessary parties to the litigation.

A critical aspect to understand for purposes of the territoriality argument is the relevant supply chain underpinning the claim. The judgment describes it as follows (para. 43):

> (i) CRT glass was made in Asia (or otherwise outside the EEA).
>
> (ii) It was supplied to CRT manufacturers outside the EEA (in Asia) who turned it into tubes (CRTs).
>
> (iii) The tubes were then sold to a monitor manufacturer, or in some cases to dealers who sold on to monitor manufacturers. This step was generally in Asia (but in any event outside the EEA)...
>
> (iv) The completed monitors were then sold to Liyama Corporation, a Japanese company (and therefore in Asia).
> (v) Liyama Corporation then sold the monitors to one of the claimant companies. At this point the monitors entered the EEA.
>
> (vi) The claimants then sold the monitors within the EEA.

So, it will immediately be seen that: (a) the plaintiffs did not purchase any products directly from the defendants; (b) the relevant purchases of monitors were made in Japan by Iiyama Corporation and the competition to supply and manufacture CRTs and CRT glass took place in Asia also; and (c) the sales by Iiyama Corporation to its EU subsidiaries were intra-group transactions.

The defendants applied to strike out the claim in its entirety. The simple point they made was that, in substance, any harm to competition as alleged was suffered in Asia, and this did not engage EU competition law as a territorial matter. They argued that the plaintiffs based their claim on EU Commission decisions finding a cartel between Asian producers of CRTs/CRT glass panels that was orchestrated in Asia. During the cartel period, Iiyama Corporation (which was not itself a plaintiff) purchased finished products from original equipment manufacturers ("OEMs") who had purchased the CRTs used in such monitors from Asian distributors or other Asian sources.

The defendants' case was that Asia was the point (temporal and geographical) at which any alleged overcharge of a member of the plaintiff group took place. Thereafter, the finished goods were transferred variously to Iiyama's EU subsidiaries at prices determined internally by the plaintiff group. The consequences of those internal transfers for the plaintiff group companies did not fall within the scope of what EU competition law is protecting against as a territorial matter. A claim for damages based on EU competition law was also therefore bad in law.

III. THE HIGH COURT'S FINDINGS

There were various strands to the High Court's judgment. The first concerned a specific basis for strike out of the claim in the case of the CRT glass cartel. The EU Commission decision in the case of CRT glass found an EEA-wide cartel. The CRT glass defendants argued that there was no causal link between the EU Commission decision finding of an EEA-wide glass cartel – which the plaintiffs relied on – and the cartel that, on the plaintiffs' own case, necessarily underpinned the claim based on the purchases made by Iiyama Corporation in Asia (and then internally supplied to its EU subsidiaries).

The High Court accepted that there was a disconnect between the EEA-only glass cartel found by the EU Commission and the chain of causation pleaded by the plaintiffs based on purchases in Asia. It therefore separately struck out the claim on this basis due to lack of causation. As the High Court put it (paras. 98-99):

> The pleaded case against the Glass defendants bases itself on the CRT Glass Decision. That Decision found a European cartel, in which glass (or perhaps transformed products into which glass was incorporated) was sold into the European market by the cartelists to their European customers. It is a claim based on that infringement that the claimants seek to pursue in their Particulars of Claim.
>
> However, their elaborated case goes off in a different direction. It alleges sales outside Europe to people who were not their European customers (and who were not the claimants either). That sort of claim is not within the infringement found by the Commission, and there is no pleaded suggestion as to how price fixing by a cartel in Europe in relation to European pricing and European customers (which is what the Commission found and what the pleading ostensibly relied on) would have an effect on pricing in Asia of components manufactured in Asia and which passed down a chain outside Europe before ending up in monitors bought into Europe by the claimants. The two things are fundamentally different.

This issue is not analyzed further in this article since it was a point of causation that was specific to the glass claim, and not a general point to do with territorial jurisdiction under EU competition law.

A second issue concerned an interpretative issue as to how the EU Commission's CRT decision itself dealt with the issue of territorial application of EU competition law. Because the Iiyama damages claim "followed-on" from the EU Commission decision, it was obviously important to establish if the decision itself shed light on the territorial scope, or limits, of the infringements found. Particular focus was placed on recital 1020 of the CRT Decision which stated:

> 1020. The sales of CDT colour display tubes] and CPT [colour picture tubes] directly or indirectly concerned by the infringement in the EEA (duly taking into account its enlargement in 2004) are:
>
> (a) Direct EEA Sales (that is CDT or CPT directly sold to customers in the EEA by one of the addressees of this Decision);
>
> (b) Direct EEA Sales Through Transformed Products (that is CDT or CPT incorporated intra-group into a final computer monitor or colour television and subsequently sold to customers in the EEA by one of the addressees of this Decision); and
>
> (c) Indirect Sales (that is the value of the CDT or CPT sold by one of the addressees of this Decision to customers outside the EEA, which would then incorporate the CDT or CPT into final computer monitor or color television products and sell them in the EEA).

The EU Commission then added:

> 1021. However, for the purpose of establishing the value of sales in this case, the relevant EEA turnover consists of those sales where the first "real" sale of CDT or CPT – as such or integrated in a final computer or color television product – was made into the EEA during the period of the infringement by one of the addressees of this Decision. This refers only to points (a) and (b) of Recital (1020). Although the value of all indirect sales made into the EEA (point (c) of Recital (1020)) could have been included in the relevant value of sales, this is not necessary in this case.

On this basis, the decision gave the impression that the scope of its findings was limited to direct sales to customers in Europe and direct sales of transformed products. It also gave the impression that these findings did not extend to so-called indirect sales, albeit the Commission considered that it could in principle decide to include the value of "Indirect Sales" when imposing a fine (in the event it decided not to do so). The High Court found that this was the correct way to read the CRT Decision, and that a follow-on claim that relied on the contrary interpretation was misconceived. But, again, this point is specific to the wording of the relevant EU Commission decision.[8]

The real interest in the judgment lies in its tackling the issue of the territorial application of EU competition law head-on; in other words ignoring the two points adverted to above, which happened to be pleading-related issues specific to the particular Iiyama claims.

On the pure territoriality point the High Court's judgment is relatively short and devastating. The court first recalled the two possible tests for territoriality under EU competition law.

It first cited the "implementation" test in Woodpulp. In that case the EU Court of Justice ("CJEU") held that Article 101 TFEU has two elements: (a) formation of an agreement; and (b) implementation thereof (para 16). It further held that Article 101 TFEU could apply to entities based outside the EU only if it related to direct sales of the relevant products to purchasers established in the EU and if vendors engaged in price competition in order to win orders from those customers (paras 12–13), i.e. the EU "implementation" doctrine.

8 The wording was not unique however. The Commission's decision in the LCD cartel adopts an identical approach.

The court agreed with the defendants' characterization that: (a) both the CRT and CRT glass cartels were alleged to have been outside the European Union; (b) they related to prices charged in sales outside the European Union; (c) those sales were effected outside the European Union; and (d) then at the end of the relevant supply chain the cartelized products or transformed products were sold to the claimants in the European Union. This fell short of "implementing" the cartel in the European Union; it was implemented (on these facts) outside the European Union. By contrast in Woodpulp, the target of the cartel was EU pricing, and sales were made into the European Unionby the cartelists.

A hoary old issue arises under EU competition law as to whether a sort of "qualified effects" test exists as a standalone alternative to the "implementation" test. The Gencor case of the EU's General Court appeared to suggest this – citing a test based on an "immediate, substantial and foreseeable effect" in the European Union[9]– although this suggestion has not hitherto been accepted by the higher CJEU.

The English court side-stepped this issue since it was prepared to assume that the plaintiffs were right that qualified effects was a standalone alternative to implementation. But it had no hesitation in finding that this possible alternative test was not satisfied either.In particular, it found that the claims floundered on an "immediate" effect. The court held that, while immediacy is a concept which is capable of flexible application, depending on the facts, it could not be satisfied in the case of the Iiyama claims, even to a level to allow the claim to proceed to trial to test the proposition further on the facts. It found that (para. 158):

> The consequences of the non-EU cartels fixing their prices for glass and CRTs will have been felt in the market into which they were sold, which is not the EU market. Even if the effect of those sales is ultimately felt in the EU in the manner which the claimants would like to rely on, that is not an immediate effect. If a label is required, it is a 'knock-on effect,' and it is apparent from Intel that that is not sufficient.

9 Gencor arose under the EU Merger Regulation so strictly speaking it was not dealing with the territorial scope of EU competition law more generally. As the court noted in Iiyamathe test in Gencor was arguably not posed as a test for the scope of Article 101 TFEU but as a justification for imposing jurisdiction (in casu under the EU Merger Regulation) on non-EU entities as a matter of international law (para. 127). But the subsequent Intel judgment of the General Court (Intel v Commission, Case T-286/09) seems to accept that qualified effects in the sense posited in Gencorisan alternative test to implementation. In June 2016 the CJEU heard the appeal against this judgment, including on the territoriality point. A ruling is not expected for several months.

IV. SOME REACTIONS

The first short, but important, point is that the judgment makes clear that while the territorial scope of EU competition law raises inter alia issues of public international law and comity, the legal issues go beyond this. In particular, it confirms that it is a question of substantive law under EU competition law as to whether, as a territorial matter, EU competition law can apply in a specific set of circumstances. In other words, the issue is that the plaintiff must show that EU competition law is engaged. The issue is not one (simply) to do with a court exercising discretion over proceedings before it for reasons of public international law or comity. It is a requirement of substantive law that the court has jurisdiction to do so as a territorial matter.

Second, the Iiyama judgment does not take any position on whether EU competition law should, formally, accept a second standalone test for territoriality based on a form of qualified effects test. As noted, the court was prepared to accept, for purposes of its analysis, that there was (or may be) a second test to this effect but concluded that the claims failed on this front also.

Interestingly, in reaching this conclusion, the court concluded that Intel case – which remains pending before the CJEU – did not assist the plaintiffs on territorial jurisdiction. In that case Intel was found to have made payments to computer OEMs in exchange for them slowing down deployment of or not fully exploiting products with non-Intel chips in them. The OEM contract in question was made in China, with the chips sold to Lenovo in China and put into PCs/laptops there that were later sold worldwide. The court in Iiyama distinguished this case on the basis that in Intel:

> the anti-competitive practices were designed to produce an effect in the EEA (and elsewhere), because it was intended that Intel's customers (the computer manufacturers) would deliberately not sell products there. Those customers were complicit in the behaviour, and their complicity had, and was intended to have, an effect in the EEA. It was therefore entirely accurate to describe the behaviour as being 'implemented' in the EEA, which was what the Commission and [General Court] found. Sales made by Intel were part of the background, but were irrelevant to that analysis. What is significant about that passage is the frequent references to implementation within the EEA.

In other words, the key issue in Intel was not that Intel did not sell its chips in the EU but that it paid OEM customers not to sell certain PCs/laptops in the European Union. That agreement clearly was implemented in the European Union; there was an agreement that the OEM customer would not to sell at all into the European Union.

Third, whilst, superficially, the European Unionand United States appear to proceed on different bases as respects territoriality, in truth the differences are probably small in practice. Unlike the

Sherman Act, Article 101 TFEU contains express territorial limitations. Its wording prohibits "all agreements between undertakings... and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market." This is not unique to Article 101 TFEU. As Advocate General Wathelet noted in Case C-231/14 P Innolux v. Commission EU:C:2015:292 "the wording of Articles 101 TFEU and 102 TFEU clearly states that those articles exclusively relate to practices which restrict competition within the European Union, rather than outside it" (para. 38).

But the FTAIA also now includes specific wording on this issue as a matter of U.S. Federal law, namely that jurisdiction does not extend to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless such conduct has a direct, substantial, and reasonably foreseeable effect (a) on trade or commerce which is not trade or commerce with foreign nations, or (b) on import trade or import commerce with foreign nations. Justice Breyer explained how the FTAIA works in F Hoffman-La Roche Ltd v.Empagran SA (2004) 542 US 155 at 162:

> This technical language initially lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Acts reach provided that the conduct both (1) sufficiently affects American commerce, i.e., it has a direct, substantial, and reasonably foreseeable effect on American domestic, import, or (certain) export commerce, and (2) has an effect of a kind that antitrust law considers harmful, i.e., the effect must giv[e] rise to a [Sherman Act] claim.(emphasis in original)

The basis for these limitations was explained as follows in F Hoffman-La Roche Ltd v.Empagran SA (2004) 542 US 155:

> First, this court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations…This rule of construction reflects principles of customary international law – law that (we must assume) Congress ordinarily seeks to follow…This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world.

Ultimately, however, there appears to be a high degree of convergence between U.S. and EU antitrust laws on these issues.[10] Indeed, the ruling in Motorola Mobility v. AU Optronics Corp., 775 F 3d 816 (7th Cir 2014) seems very close in substance to that in Iiyama. It is of course true that EU competition law does not, unlike U.S. Federal antitrust law, ban indirect purchaser claims – indeed, it positively recognizes them. But the conclusion in Motorola was not confined to the indirect purchaser claim issue. A key plank of the ruling was that, irrespective of the ban on indirect purchaser claims, Motorola's injury occurred when it purchased abroad.Likewise, in Iiyama, the key point was that the losses, and distortion of competition, all occurred in Asia, and that the decision by the Iiyama Corporation to then supply the finished products to its EU subsidiaries did not "re-injure."Judge Posner also dealt with an important related point to do with Motorola's insistence that it dictated the price at which it bought mobile phones from its subsidiaries. He noted that "it would be odd to think that Motorola could obtain antitrust damages on the basis of its own pricing decisions." Thus, a further point may be that an injury said to result from an intra-group pricing decision is not a relevant antitrust injury (although Iiyama did not decide the case on this basis).

Finally, it will be interesting to see if plaintiffs seek to avoid the conclusions in Iiyamaby relying on other theories, and how the courts will react to those. One theory thatplaintiffs have tried in the United States is that the domestic effect of the anticompetitive conduct – higher prices – gave rise to their foreign injury of higher prices abroad because the defendants could not have maintained their global price-fixing arrangement without fixing the prices in the United States as well. In other words, there was a "but for" relationship between the domestic and foreign injuries.

This theory was rejected in Empagran S.A. v. F. Hoffmann-Laroche, Ltd., 368 U.S. App. D.C. 18, 417 F.3d 1267, 1271 (D.C. Cir. 2005) ("Empagran II"). The reason is that a "but for" test is necessary but not sufficient as a matter of causation: the requirement under the FTAIA was to show a direct or, more likely, proximate causal relationship between the domestic effect and the foreign injury (and not merely a "but for" relationship). A similar conclusion was reached in In Re Dynamic Random Access Memory 546 F.3d 981 by the Ninth Circuit. This conclusion seems right; if not, territoriality would become irrelevant in practice since any global cartel could posit a "but for" effect of the kind advocated by the plaintiffs in Empagran II and DRAM.To posit these effects is almost a truism and would make causation redundant in every global cartel, which cannot be right.

Another analytical route may be to approach the question from the perspective of the applicable law, which will always be a question in an international dispute. In the European Unionthis issue will generally be determined by Rome II Regulation (Regulation 864/2007), although unharmonized national law rules may continue

10 One possible difference is that the EU qualified effects test – if indeed one exists in law separately from implementation – appears stricter on plaintiffs than the qualified effects test as applied in U.S. law.

to apply to older cartels. Rome II fully envisages a conflict-of-law analysis being applied to a claim (allegedly) based on breach of EU competition law: see recitals 22 and 23, and Article 6. A key connecting factor in competition law cases is the identification of the particular market on which the relevant impact, for the purposes of that case, occurred. If, as a result of the applicable law analysis, the law of an EU Member State applies, then that will include Article 101 TFEU (since EU law is part of national law). By contrast, if the agreements, the relevant competition, and the effects occur outside the European Union, a non-EU law ought to apply, in which case EU competition law would not.

V. CONCLUSION

There has been justifiable concern in recent years about the proliferation of antitrust authorities worldwide resulting in "me too" regimes that have the effect of imposing multiple jeopardy for the same conduct and effects. In this sense my economist friend, Jorge Padilla, may well be right in lamenting that territoriality is over in the inter-agency sense.

But it is abundantly clear that the UK and U.S. courts at least understand the problems that extra-territorial application and multiple jeopardy can create, and they have placed real limitations on the extent to which foreign-only conduct and effects can be the subject of domestic damages litigation claims. The Iiyama judgment is part of this trend.

This trend reflects two core notions, one of which is new and the other ancient. It has been clear for centuries, as part of the general law, that States and their courts will not generally act extra-territorially. So, in the same way as states do not generally criminalize acts conducted wholly extra-territorially, antitrust law, too, has its limitations in terms of attacking conduct taking place overseas (even if, through many ripples, it has some domestic effects also).

The related, newer idea is that in an increasingly inter-connected world with proliferating antitrust regimes, there is more, not less, reason for States to be cautious in extending their laws to foreign conduct or effects. It is one thing for public enforcement to express its disapproval, within its territory, of conduct also sanctioned elsewhere. That may be a reasonable expression of sovereign disapproval or in-territory deterrence. But it is quite a different matter for private litigants to have a general right to pursue their litigation in the jurisdiction that happens to be most friendly to that particular claim when they have voluntarily decided to domicile themselves elsewhere for reasons to do with tax or other advantages. To do so gives rise to a real risk of multiple jeopardy and over-compensation (or unjustified compensation where the proper jurisdiction and law would not compensate such a claim). In the EU the antitrust damages system is purely compensatory. If so, it is difficult to see a justification for that, and it would also offend public international law and comity if States, and their courts, were routinely to do this.

INTERIM RELIEF AND PROTECTION OF CONFIDENTIAL INFORMATION IN EU CARTEL DECISIONS: A NEW LOVE STORY

BY KYRIAKOS FOUNTOUKAKOS
& CAMILLE PUECH-BARON[1]

I. INTRODUCTION

Imagine the following scenario.

You are the lawyer advising a multinational company that was sanctioned by the European Commission for participating in a cartel. The Commission has prepared a 300-page decision with detailed information about the cartel, including information that your client sees as business secrets (e.g. information about pricing, products affected by the cartel, customer names, employee names and even some secret know-how concerning specific products). You identify the information as confidential and the Commission accepts your claims, albeit provisionally, and publishes a provisional non-confidential version of the decision on its website, with the information redacted. Some years later, potential private damages claimants put pressure on the Commission to disclose documents relating to the cartel including the full, confidential version of the decision. Following a debate with the Commission services and an "appeal" to the Commission's Hearing Officer, the Commission rejects your confidentiality claims and decides to publish an "extended", allegedly non-confidential, version of the decision that discloses the information that your client considers to be confidential.

Your client wants to fight to prevent publication. Surely, there is something you can do? You can appeal to the EU General Court ("GC") and ask the President of the GC to grant interim relief to prevent publication pending adjudication of the action. What are the chances the President of the GC will order interim relief by finding that your client would otherwise suffer "serious" and "irreparable" harm? What about the balance of interests? Will the President of the GC prefer to protect your client's interests in preserving the confidentiality of potentially valuable information? Or should the interest of the public in transparency and the interest of private damages claimants in getting access to the full decision prevail? Surely, if publication is allowed, this negates the trial in the main case as the information will already be out there for the world to see? Or is damage beyond this required?

This is the scenario that played out before the EU Courts in the last four years in a string of cases that have now created established case law in the area of disclosure of alleged/potential business secrets and other confidential information in cartel decisions.

1 Herbert Smith Freehills LLP.

Has interim relief been granted? Yes, in the vast majority of these cases. It seems that, after years of the EU Courts being very strict in granting interim relief in general (to the extent that lawyers were advising clients to not even try), applicants and the EU Courts are now learning to love interim relief again.

In this paper, we will look at the test recently established by the EU Courts that companies have to meet to secure interim relief in such situations.

II. OVERVIEW OF THE CONDITIONS FOR AN APPLICATION FOR INTERIM RELIEF

What are the main, traditional conditions for obtaining interim relief?

The EU Courts have consistently held that the purpose of interim proceedings is "to guarantee the full effectiveness of the judgment on the substance" (Case C-65/99P(R) Willeme v. Commission, §62). Interim relief is a necessary element of effective judicial protection which is a fundamental right enshrined in Article 6(1) of the European Convention on Human Rights (the "ECHR") and an established principle of EU law, which the EU Courts are mandated to uphold.

Admissibility. Pursuant to Article 156(1) of the Rules of Procedure of the GC and Article 160(1) of the Rules of Procedure of the European Court of Justice (the "ECJ"), an application to suspend the operation of a measure is admissible only if the applicant has challenged that measure before the GC/ECJ in a separate application.

Conditions. Pursuant to Article 156(3) of the Rules of Procedure of the GC and Article 160(3) of the Rules of Procedure of the ECJ, an application for interim measures must state (i) the pleas of fact and law establishing a prima facie case (fumusboni juris); and (ii) the circumstances giving rise to urgency. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent. Where appropriate, the judge hearing such an application must also weigh up the interests involved (Case C-445/00R Austria v. Council, §73).

A prima facie case is established where either (i) at least one of the pleas in law appears, prima facie, to be relevant and not unfounded in that it reveals the existence of difficult legal issues without an immediately obvious solution calling for a detailed assessment which cannot be carried out in the context of the interim measures action, or (ii) there is a major legal disagreement between the parties whose resolution is not immediately obvious (Case T-52/12R Greece v. Commission, §13).

As regards the condition of urgency, it has been consistently held that the urgency of an application for interim relief must be assessed in the light of the need for an interlocutory order in order to avoid "serious" and "irreparable" harm to the party seeking the relief (Case C-329/99P(R) Pfizer Animal Health v. Council, §94). Particularly where harm depends on the occurrence of a number of factors, it is enough for that harm to be foreseeable with a sufficient degree of probability (Case C-335/99P(R) HFB and Others v. Commission, §67). The test is difficult to meet as proof is required that the harm is both serious and, more importantly, irreparable. Harm which is purely pecuniary in nature will only in exceptional circumstances be regarded as irreparable or as being reparable only with difficulty (Case T-198/03R Bank Austria Creditanstalt AG v. Commission, §53). It will be regarded as irreparable if it cannot be quantified (Case C-551/12P(R) EDF v. Commission, §60).

The measure requested must, further, be provisional inasmuch as it must not prejudge the points of law or fact in issue or neutralise in advance the effects of the decision subsequently to be given in the main action (Case C-149/95P(R) Commission v. Atlantic Container Line AB and Others, §22).

III.THE DEVELOPMENT OF INTERIM RELIEF CASE LAW REGARDING THE PROTECTION OF CONFIDENTIAL INFORMATION IN EU CARTEL DECISIONS

A. Early days: theAkzo Nobel and Evonik Degussa interim relief cases – the test relaxed: automatic interim relief where information is provided as part of the leniency procedure

In November 2012, the Akzo Nobel and Evonik Degussa interim relief cases (Cases T-345/12R and T-341/12R) paved the way to the possibility for an undertaking seeking the protection of information covered by professional secrecy contained in a cartel decision to successfully obtain the suspension of publication of that information pending adjudication of the case in the main proceedings.

In those cases, both applicants had requested that the President of the GC order the Commission to refrain from publishing a more detailed version of the Hydrogen Peroxide and Perborate cartel decision than the one that had been available on its website for five years, pending adjudication in the main proceedings as to whether information contained in that extended decision deserves protection.

In support of their arguments, Akzo Nobel and Evonik Degussa had put forward the fact that they had provided the information in question to the Commission as part of the leniency procedure and it should thus be protected as confidential.

Weighing up of interests. The President of the GC started with the balancing of interests. He recalled that the purpose of the interim relief procedure is to guarantee the full effectiveness of the future judgment in the main proceedings. Therefore, the interim order must neither prejudge the future judgment on the substance of the case nor render it illusory by depriving it of its effectiveness. If the application for interim measures were to be dismissed, a judgment that would annul the contested decision in the main proceedings would be illusory: the Commission would have been able to publish the more detailed version of the cartel decision in the meantime and a win in the main case would be meaningless. The President of the GC concluded that the applicants' interests prevailed over the Commission's interests, especially since granting interim relief would only maintain, for a limited period of time, the status quo that had existed for several years.

Urgency. As noted above, to show urgency, a party seeking interim relief must show that it will suffer "serious" and "irreparable" harm if interim relief was not granted.

The President of the GC found that this test was met. The serious and irreparable harm consisted of damage to the company's "fundamental right to privacy". The President found that, if he dismissed the application for interim measures, the immediate publication of the more detailed version of the cartel decision would lead to a risk that the applicants' fundamental rights to the protection of professional secrecy, enshrined in Article 8 of the ECHR and Article 7 of the Charter of Fundamental Rights, would irreversibly lose its meaning in relation to the information at stake and that the applicants' right to an effective remedy would be jeopardised. He concluded therefore that, provided there was a prima facie case that the information was indeed confidential, the applicants' fundamental rights may be seriously and irreparably harmed and that, consequently, the condition of urgency was satisfied.

Prima facie case. The President of the GC stated that the question to be resolved, i.e. whether the contested decision infringes the applicants' right to professional secrecy because the more detailed version of the cartel decision contains information provided as part of the leniency procedure, could not be easily answered and required a detailed examination in the main proceedings.

Further, the President of the GC held that, prima facie, the applicants could rely on the fact that the information provided in the context of the leniency procedure would enjoy enduring protection from publication, notably on the basis of the Commission's jurisdictional practice in respect of applications from third parties for access to documents pursuant to the Public Access Regulation.[2]

The President of the GC therefore concluded that there was a prima facie case and, consequently, since all the conditions were satisfied, granted the suspension of the operation of the contested decision and ordered the Commission to refrain from publishing the extended version of the Hydrogen Peroxide and Perborate cartel decision.

B. The Pilkington interim relief case[3]

Following the Akzo Nobel and Evonik Degussa interim relief cases, it was clear that, where the information at stake had been provided to the Commission as part of the leniency procedure, prima facie, such information could not be published pending adjudication in the main proceedings as to whether it indeed deserved protection. It was unclear, however, whether such a ruling would also apply where the information at stake was not provided to the Commission as part of the leniency procedure.

A few months after the orders in the Akzo Nobel and Evonik Degussa cases had been handed down, the order of the President of the GC in Pilkington's interim relief case in March 2013 (Case T-462/12R) clarified that interim relief is also available to protect any information claimed to be confidential, even if such information has not been provided to the Commission as part of the leniency procedure.

In October 2012, Pilkington requested that the President of the GC order the Commission to refrain from publishing a more detailed version of the Car glass cartel decision than the one that had been available on its website since February 2010, pending adjudication in the main proceedings as to whether information contained in that extended decision was covered by professional secrecy. Pilkington was not a leniency applicant during the administrative procedure before the Commission.

1. Order of the President of the GC - the test relaxed further: automatic interim relief in cases of publication of any information that is prima facie confidential

Weighing up of interests. In addition to recalling the principles set out in settled case law and reproduced above, the President of the GC noted that the delay in the publication of a more detailed version of the cartel decision was due to the Commission since it waited until April 2011 to engage in the process of re-publishing a decision it adopted in 2008. Further, he held that the interests of damages claimants in having access to the information in question did not prevail over Pilkington's interests in the protection of professional secrecy because, while the right of the first would simply be delayed if interim relief was granted and the information at stake was ultimately considered not to be confidential, Pilkington's right would be "reduced to nothing" if its application for interim relief was dismissed.

Urgency. Similarly to his ruling in the Akzo Nobel and Evonik Degussa cases, the President of the GC held that, if the Commission were allowed to publish the information at stake pending adjudication in the main proceedings, there would be a risk that Pilkington's fundamental rights to the protection of professional secrecy would irreversibly lose its meaning in relation to that information. He also held that Pilkington's right to an effective remedy would be jeopardised and, therefore, concluded that the condition of urgency was satisfied.

Prima facie case. The President of the GC held that it is only

2 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents, OJ L145, 31.5.2001, p. 43-48.

3 The authors represented Pilkington in the interim measures case before the President of the GC, and then before the Vice-President of the ECJ.

where the information at stake is "obviously not confidential" that there is no prima facie case. He found that this was not the case here on the basis that (i) Pilkington's confidentiality claims related to a large number of pieces of information; (ii) the Hearing Officer had accepted the confidential nature of some pieces of information, which showed that the information at stake could not be classified en bloc as non-confidential; and (iii) Pilkington's arguments to justify the confidential nature of information that is more than five years old were prima facie not irrelevant. Consequently, he concluded that a detailed examination of the information in question was required, which could not be done at the interim measures stage.

As all the conditions were satisfied, the President of the GC granted the suspension of the operation of the contested decision and ordered the Commission to refrain from publishing the extended version of the Car glass cartel decision.

2. The Commission decides to appeal to the ECJ

Following this order, it became clear that the test for obtaining interim relief in cases concerning publication had been relaxed dramatically. The urgency criterion would be met almost automatically given publication immediately harms the fundamental right to privacy and renders the main action illusory. This was subject to the prima facie criterion being met, i.e. that the information was at least prima facie confidential. But this was always a very low threshold and the orders had confirmed that, in situations of confidentiality, all that the applicant had to show was that the information was not obviously non-confidential.

The Commission, which had refrained from appealing in Akzo Nobel andEvonik Degussa, saw that this approach had potentially very wide-ranging implications and appealed the order to the Vice-President of the ECJ (Case C-278/13P(R)).

3. Order of the Vice-President of the ECJ – threshold for urgency raised somewhat: information must be shown to be of confidential nature for the harm to be serious and irreparable

The Commission relied on the following two grounds of appeal: (i) an error of law in the assessment of the condition relating to urgency; and (ii) an error of law in the assessment of the condition relating to the establishment of a prima facie case, in conjunction with the condition relating to urgency. The Commission lost the case but, importantly, achieved a narrowing of the legal test.

In relation to the first ground of appeal (urgency), the Vice-President of the ECJ disagreed with the reasoning of the President of the GC. He rejected the view that harm caused to fundamental rights would automatically be irreparable. He demanded that something beyond harm to privacy be shown as damage.

The Vice-President of the ECJ therefore held that the President of the GC erred in law by considering that violations of Pilkington's fundamental rights "were in themselves sufficient for the purpose of establishing the likelihood of serious and irreparable harm in the particular circumstances of the case." However, as the Vice-President of the ECJ found that the operative part of the order was well founded on other legal grounds, he did not annul the order, but performed a substitution of grounds as regards the condition of urgency, as follows:

- He found that the alleged harm was sufficiently "serious" because, if the information at stake was indeed covered by professional secrecy, as it is specific commercial information, its publication would necessarily cause Pilkington significant harm. Therefore, the information must, at least prima facie, be of a confidential/business secrets nature to show that its disclosure can lead to serious harm.

- As regards the "irreparable" nature of the alleged harm, although he acknowledged that the alleged harm was purely financial and could in principle be made good by means of an action for damages, he recalled settled case law pursuant to which harm of a financial nature can be considered irreparable if it cannot be quantified (Case C-551/12P(R) EDF v. Commission, §60). In the present case, he found that the harm could not be quantified because "[i]t would be impossible to identify the number and status of all the persons who in fact acquired knowledge of the information published and thus assess the actual impact which publication of that information might have on Pilkington's commercial and financial interests."

In relation to the second ground of appeal, the Vice-President of the ECJ held that the President of the GC did not depart from the principles established in settled case law with regard to the existence of a prima facie case. It was correct to find that the majority of Pilkington's confidentiality claims raised complex issues necessitating a very detailed examination, which could not be performed at the interim proceedings stage in light of the volume of the information concerned.

It follows that he dismissed the Commission's appeal in its entirety, thus confirming that, even where the information at stake has not been provided to the Commission as part of the leniency procedure, it may nonetheless benefit from interim protection.

C.Latest developments: the AGC and Evonik Degussa interim relief cases – the test confirmed: importance of showing that the information is indeed, at least prima facie, confidential

The interim relief wins were of course not the end of the story. The main trials continued with the Commission being prevented from publishing the information in question pending adjudication.

The GC handed down its judgments in the Evonik Degussa, Pilkington and AGC cases on 28 January and 15 July 2015 (Cases T-341/12, T-462/12 and T-465/12). In the Evonik Degussa and AGC cases, the applicants had relied both on the fact that the information had been provided as part of the leniency procedure and that it constituted business secrets. The Pilkington case was focussed only on the confidential/business secrets nature of the information (leniency was not an issue as Pilkington was not a leniency applicant). On that point, the GC held that the applicants had failed to put forward arguments that would demonstrate that the information in question, despite its age, still constituted essential elements of their commercial position. Therefore, it found that the information at stake was not covered by professional secrecy and dismissed the appeals.

Evonik Degussa and AGC appealed to the ECJ.[4] Both appeals are pending at the time of writing this article. Once more, in order to prevent the Commission from publishing the revised version of the cartel decisions before final adjudication by the ECJ of the main case, the companies also applied for interim relief before the Vice-President of the ECJ seeking the suspension of such publication.

On January 14, 2016, the Vice-President of the ECJ rejected the interim relief sought by AGC (Case C-517/15P(R)). A few weeks later, on March 2, 2016, he allowed the interim relief sought by Evonik Degussa (Case C-162/15P(R)).

Although, at first sight, these orders may appear contradictory, it is clear that they are both in line with the previous case law. Let's recall the test established by the Vice-President of the ECJ. The urgency test will not be met by simply claiming breach of the fundamental right to privacy. The applicant must also show that the information is at least prima facie "confidential"/"business secrets" such that its disclosure results in serious harm to its commercial or pecuniary position and that any harm is irreparable (and, if pecuniary, it is unquantifiable and therefore irreparable).

The difference in the two cases was that AGC had not challenged in its application the GC's finding that the information at stake did not constitute business secrets hence that finding had become definitive (AGC had only challenged the leniency point, i.e. whether the information should be protected because it was provided via the leniency procedure; a different point to actually demonstrating that the information is indeed of a confidential/business secrets nature). Therefore, the Vice-President considered that the analysis of urgency had to be based on the premise that the information was notprima facie confidential (§33). Hence serious harm could not be shown (§40-43). On the contrary, in the Evonik Degussa case, the appeal was expressly also directed at the part of the judgment finding that the information was not of a confidential nature/business secrets. Therefore, following the approach in Pilkington, prima facie, at interim relief stage, the Vice-President considered that the urgency criterion had to be based on the premise that the information was confidential (§83-86) and hence its disclosure would result in serious and irreparable harm given that pecuniary harm was unquantifiable (§92-96).[5]

This approach almost conflates the prima facie and urgency criterion in cases of confidentiality. In case there is no prima facie case on the confidential nature of the information, it automatically follows that the urgency criterion cannot be met because the information is not confidential and hence its disclosure cannot result in serious harm.

The order in Evonik Degussa's case is also interesting in that it contains a number of notable statements in relation to the balance of interests showing that, when weighing up the interests at stake, the interest of undertakings in the protection of their confidential information would most likely always prevail over any other consideration. Indeed, the Vice-President of the ECJ stated that it prevails over (i) the public interest in knowing as quickly as possible the reasons for any action of the Commission because the public has already been informed by the initial publication of the cartel decision; (ii) the interest of economic operators in knowing what conduct is likely to expose them to penalties because, as the Commission itself acknowledges, previous Commission decisions cannot be relied on by economic operators; and (iii) the interest of damages claimants because there are other ways for claimants to seek the information they need in support of their claims.

4 Pilkington did not appeal to the ECJ.

5 In both Evonik Degussa and AGC the Vice-President held that pecuniary damage arising from private damages actions would not be sufficient to meet the criterion of urgency (see §93 and §56 respectively). On the contrary, pecuniary damage arising from disclosure of the information as such to competitors, customers, suppliers, financial analysts and the public, is unquantifiable and therefore meets the criterion of urgency (see Evonik Degussa, §95).

IV. CONCLUDING REMARKS

So, four years and six interim relief orders later, where do we stand? Going back to our original scenario, is it still worth applying for interim relief and how can you maximise chances of success? The answer is yes and there are clear points that an applicant must focus on.

First, the balance of interests would almost always be in favour of the undertakings challenging the publication of information in cartel decisions claimed to be confidential. This is particularly the case where a relatively long period of time has elapsed since the first publication of the cartel decision, so that delaying the publication of a more detailed version of that decision simply amounts to maintaining the status quo for a little longer.

Second, on the prima facie case, the threshold is low but must still be met on the basis of cogent arguments. As it is not for the judge hearing the application for interim measures to rule on the confidential nature of the information at stake (this is the role of the GC/ECJ in the main proceedings), all that is required in order to establish a prima facie case is that the information at stake is not, prima facie, not confidential. In this regard, the fact that the information in question is more than five years old is not, per se, an obstacle to the establishment of a prima facie case; however, it is for the undertakings claiming that the information still constitutes business secrets to demonstrate why this is the case.

Third, the condition of urgency has been relaxed but not as much as in the original Akzo Nobel, Evonik Degussa and Pilkington orders. It is not enough to show that publication will breach the fundamental right to privacy. The applicant must also show that it will suffer "serious" harm beyond the breach of privacy. This will be shown, in conjunction with the prima facie test, if the applicant can show that the information is prima facie of a confidential/business secrets nature. The "irreparable" criterion has also been relaxed. Despite harm being of a financial nature, which traditionally was not accepted as irreparable, the orders show that it can be irreparable if it cannot be quantified which will almost always be the case in cases of publication given the diverse nature of the public that will have access to the information. Indeed, it suffices to prove that it is impossible to identify the number and status of all the persons who acquired knowledge of the information published, and thus to assess the actual impact which publication of that information might have on the undertaking's commercial and financial interests.

While the test has been relaxed, the requirement to show damage beyond breach of privacy will not always be easy to meet. In essence, the applicant must show that prima facie the information is of a confidential nature such that its disclosure will lead to some serious and irreparable harm. As case law develops, the EU Courts, in the main actions, will clarify what type of information cannot be regarded as confidential and undertakings may therefore find it more and more difficult to establish a prima facie case. This is clear from paragraph 48 of the order of the Vice-President of the ECJ in Evonik Degussa's case where he stated, in support of his findings that there was a prima facie case, that "the Court has not yet given a ruling on either the question of which criteria are to be taken into consideration in order to establish whether particular information constitutes a business secret, or […] on the question of the alleged confidentiality of information such as that at issue in this case."

Interim measures and the protection of confidential information may therefore well be in love at the moment but it remains to be seen whether it is of the enduring kind.

COMPETITION POLICY INTERNATIONAL