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LETTER FROM THE EDITOR

Dear Readers,

This month, the Antitrust Chronicle (AC) addresses recent developments on Single Firm/ Unilateral conduct. A rich variety of articles from Europe, the U.S., India and Mexico illustrate the latest changes to the notion of anticompetitive effects under article 102 TFUE, the legal tests applicable in section 2 cases, enforcement rules in the energy and telecom sectors in Europe, and more.

Single firm conducts have always been the most challenging cases for competition agencies and tribunals, especially so in jurisdictions with young competition regimes. Not only is there a lack of consensus on how to analyze these cases or what test to apply in order to determine a case of abuse, but the fast moving markets in industries such as telecom and the Internet also render it particularly difficult to ascertain when a conduct is perfectly legitimate and when it's harming consumers.

Just in Europe we have witnessed how the DG Competition has opened several investigations under article 102 TFUE. Google, Gazprom and Qualcomm, among others, were targeted by the antitrust watchdog for their allegedly anticompetitive practices. This shows the priorities held by one of the world's most respected antitrust authorities: High-profile cases in complex industries and with uncertain outcomes; yet important enough to devote huge amount of economic and human resources to those markets.

This month, the AC brings our readers two articles from DG Competition officials. Massimiliano Kadar talks about the meaning of anticompetitive effects under article 102. Andrea Redondo and Alvaro García compare enforcement rules in the energy and telecom sectors, the two most investigated for single firm conducts in Europe. From the U.S. perspective, Mark Popofsky and Ariel Martinez question the legal tests applicable in section 2 cases and the rule of reason. George Mason University's contribution, through its Global Antitrust Institute, focuses on the excessive royalties and how these may harm the right incentives to innovate. From Mexico, the investigations head at the Competition Commission, Carlos Mena, explains the new enforcement tools granted to the authority in order to investigate markets, or as he refers to them, the new 'non-traditional' tools. Still in Mexico, Omar Guerrero and Martín Michaus select a very fashionable topic, the Most Favored Nation clauses, and how these might be applied in the country. Finally, Kalyani Singh from India brings us the latest developments in the essential facilities doctrine

Besides these outstanding contributions, the CPI Talks section this month presents an interview with Judge Diane Wood, from the 2nd District Court of New York.

We hope you enjoy reading this new issue of our AC magazine.

Thank you,
Sincerely,

CPI Team

CPI Talks…

Interview with Judge Diane Wood, 2nd District Court, New York

In this issue CPI interviews Judge Diane Wood about forthcoming judicial decisions, disruptive innovation, intellectual property, the role of economics in antitrust and more.

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Section 2 and the Rule of Reason: Report from the Front

By Mark S. Popofsky & Ariel A. Martinez

Courts remain, in the words of one observer, mired in an "exclusionary conduct 'definition' war." Applying Section 2's broad prohibition on "monopolizing" conduct requires courts to select a governing legal test. Section 2 legal tests run the spectrum from rules of per se legality to rules of near per se illegality. Courts continue to grapple with this question.

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"Excessive Royalty" Prohibitions and the Dangers of Punishing Vigorous Competition and Harming Incentives to Innovate

By Douglas H. Ginsburg, Bruce H. Kobayashi, Koren W. Wong-Ervin and Joshua D. Wright

This article discusses the dangers of regulating royalties, including the difficult — if not impossible — task of determining whether a particular royalty is "excessive," and suggest that agencies not apply to IPRs, including SEPs, their laws prohibiting excessive pricing. Should an agency be required by law to apply the prohibition to IPRs, then at the very least it should focus primarily upon the prices of comparable licenses, which are the best available evidence of the market value of a patent.

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The meaning of "anticompetitive effects" under Article 102 TFUE

By Massimiliano Kadar

Countless pages have been written to date on the effects that a given conduct needs to produce in order for it to be considered abusive under Article 102 of the TFEU. Many commentators conclude that there is an asymmetry in the European Union (EU) Courts' approach to the meaning of "effects" between different types of conduct. It is also often concluded that the Courts' approach is too formalistic with regard to certain conducts, namely exclusivity rebates and exclusive dealing, that are presumed by the case-law to have anticompetitive effects.

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Market Investigations as a New Tool for Competition agencies: The Mexican Experience

By Carlos Mena-Labarthe

Competition authorities around the world, particularly in developing countries, can find a way to intervene through these new proceedings to eliminate barriers and create better conditions for more efficient markets in a bold and direct path. The discussion and the political consensus that needs to be created to give the authorities these powers create a beneficial side effect.

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Comparing the Incomparable? An Analysis of the Enforcement of Abuse of Dominance Rules to the Energy and Technology Sectors in Europe

By Alvaro García Delgado & Andrea Redondo

At first sight, energy and ICT sectors could be regarded as having nothing to do with each other. However, if one digs deeper, both areas share a large number of commonalities and it may not be by chance that both sectors accumulate the highest number of Article 102 investigations of the last years.

The Resurrection of Essential Facilities Doctrine and its Applicability in India

By Kalyani Singh

The controversial essential facilities doctrine recently seems to have resurfaced amidst recent developments in competition law. Specifically, the doctrine has found itself right in the center of the hotly debated interface between competition law and intellectual property rights ("IPRs"). Indian competition law, while still in its teething stage, has been gaining significant traction in terms of enforcement. Predictably, there has been a recent uptick in the number of cases relating to these abuses of dominance cases.

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Most-Favored Nation Clauses: a Business Need but Unresolved Topic in Mexico

By Luis Omar Guerrero Rodríguez & Martín Michaus Fernández

Most-favored nation clauses ("MFN") have become a topic of concern for competition authorities worldwide. Competition authorities around the world have rendered some decisions as to what extent those clauses could harm competition and if sanctioned whether they should be analyzed under a per se rule or rather under a rule of reason. However, due to the features and uncertainty regarding MFN clauses, it is not clear to which type of behavior MFN clauses could fall according to the horizontal and vertical conduct segmentation provided by the Mexican legislation.

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CPI Spotlight

At CPI we know that your time is valuable and it is difficult to be constantly informed about the latest news and articles. This section is perfect for you, CPI encapsulates for you the most read product of the month, from news to columns and briefing rooms.

Europe Column: Cartel Leniency Immunity, the Mysterious Case of the Missing Markers

www. competitionpolicyinternational.com/cartel-leniency-immunity-the-mysterious-case-of-the-missing-markers

Announcements

CPI is happy to announce its attendance at the ICN annual meeting in Singapore. We are preparing several events that you cannot miss: roundtables, book signings, seminars and more.

Enjoy mingling with some of the most renowned experts in the world for a good discussion on disruptive innovation, smart mobiles and platforms. More details about our program will follow soon. Check our website for more information.

ICN | TRAINING ON DEMAND

We also invite all our readers to visit our new website and get familiarized with the new features, content and applications. If you have not visited yet the website, go to www. competitionpolicyinternational.com

Last, but not least, follow us on LinkedIn for more interactive discussions with our personnel and with experts from the antitrust community. Leave your comments, opinions or simply open a discussion group about your favorite topic. If something interests you, share it with us. We guarantee you are not the only one.

LinkedIn

What is Next?

This section is dedicated to those who cannot wait to know what CPI is preparing for you for the next month. Spoiler alert!

April is a month devoted to competition agencies. For this edition we will have articles from lawyers, economists, academics and judges who will offer their views on the ex-post evaluation of agencies, judicial review, due process and more.

CPI Talks will bring to you the full content of our exclusive, one-on-one interview with DG Competition Commissioner Margrethe Vestager.

COMPETITION POLICY INTERNATIONAL PRESENTS
BY COURTESY OF THE ALIANZA POR LA COMPETENCIA, CIDAC & CIDE

INTERVIEW WITH JUDGE DIANE WOOD, 2ND DISTRICT COURT, NEW YORK

INTERVIEW TRANSCRIPT

CPI: What do you think will be the 'Hot Topic' issues in antitrust for the coming year?

Diane Wood: The issues raised by the apple e-books case, and more broadly issues raised by markets that involve a substantial internet component, I think are the newest issues on the horizon, and the most challenging. This is partly because they don't respect national boundaries, of course. They're both national issues and international issues at the same time.

Do you expect there to be any Landmark decisions on antitrust coming from the Supreme Court any time soon?

DW: The court has been very interested in intellectual property. What it means, what it takes to have a patent, what does it mean to abuse a patent? So I think the issue of the Intersection between intellectual property law and competition law, which was a very big topic back in the 1980s, is now coming back again as a major issue. And once again, Intellectual Property is a matter of international importance as well as national.

Might this resurgence of Intellectual Property and Copyright as a big topic be related to the blurring of national boundaries?

DW: Boundaries in antitrust law do blur, because markets evolve. One of our biggest challenges in antitrust law is to remember that a snapshot of what the relevant market looks like today may not tell us what it's going to look like next year, once a remedy begins to take effect, or what it's going to look like in 5 years. That's probably part of the issue in the E-books case, but in the IP area we're struggling with boundaries. How big should a patent be? How much should be covered by a patent? How long should a copyright last? And when does it become important to let other people come in and use the same technology? If you have a patent for only 20 years, you know other people will come in in 20 years. If you have an idea and a copyright, say for a Software copyright, other people can use it but only 90 years later. So that has a great effect on competition, and not a good one.

What do you think about the new 'Sharing Economy' firms, like Uber or AirBnB - Is this a matter for competition agencies to tackle, or could this be solved through regulation and market dynamics?

DW: I think the major issues in these sharing economies such as Uber are not competition issues. I think They could be addressed and probably will be addressed by other regulatory measures. You want to make sure that the drivers have enough insurance, that they have a good safety record. You want to make sure that if there is a problem there will be a responsible person. And our traditional regulation of taxi-cab services covers all of that, but these new technologies haven't gone there yet, or it's in a very early stage. But I don't really see it as anything other than new entries, from a competition point of view.

It has been argued that the European Commission is targeting Google for political reasons rather than for antitrust concerns, especially after the FTC closed this case for not finding enough evidence. What is your view about the Google case?

DW: I have worked over the years with the Competition Directorate and the Europeans. That kind of charge has been made over the years, but I don't think this really reflects the seriousness of the European Commission as one of the world's Premier competition agencies. I think one could simply have different views of the evidence. That has happened before between the U.S. and the EU. When I think of the GE-Honeywell case for example: they thought it was a problem, the U.S. didn't. And those differences probably flow from differences in the law.

Economics has increasingly become the centerpiece of antitrust cases. Do you believe the resolution of these cases could become a matter of robust and reliable economic analysis, rather than legalistic argument?
Do you think jurisdictions such as those of Latin America, where many practitioners rely on legal arguments, will naturally evolve to a more economic-based system?

DW: Competition law is an economic law, just as laws regulating securities markets touch very closely on economic matters, and for that matter some laws about product viability do as well. So I think economics is an inevitable part of competition law and I would expect that the Latin American systems, as they evolve, will rely on economic evidence. Now every country is entitled to define the purposes of its competition law as it wishes, and you see some interesting differences among countries. The Mexican law for example mentions market access, and that's not a part of the U.S. law. The U.S. law has gone through different phases, but now people would say that it's about consumer welfare. Market access may be a factor that helps to support consumer welfare, but it's not an end in itself. So I think it's really a question of how economics is going to be used, rather than a whether economics is going to be there. And I don't see how you can avoid it, actually, with competition law.

Mexico recently experienced its first conflict between competition regulators, as the IFT and COFECE sparred over jurisdiction on a telecommunications merger. What can Mexico learn from the experience of the U.S. on this matter?

DW: Any time there's overlapping authority someone is going to have to figure out who has the last word. What typically happens in the U.S. is there's an intra-agency process. They'll sit down and actually talk about whether this really ought to be done in one side or the other. For example, when we were de-regulating the Airline industry, sometimes the Department of Justice thought that it was up to it to take the first step, sometimes the Department of Transportation thought that it was its job. It simply had to be resolved, sometimes by the Solicitor General or by the Attorney General. In the end, it's a question of what's the scope of the law. You have to go back to the written law and interpret it.

SECTION 2 AND THE RULE OF REASON: REPORT FROM THE FRONT

BY MARK S. POPOFSKY & ARIEL A. MARTINEZ[1]

Courts remain, in the words of one observer, mired in an "exclusionary conduct 'definition' war."[2] Applying Section 2's broad prohibition on "monopolizing" conduct requires courts to select a governing legal test. Section 2 legal tests run the spectrum from rules of *per se* legality to rules of near *per se* illegality.[3] Courts, nonetheless, largely apply two dominant paradigms. The first consists of legal tests based on bright-line rules or safe harbors. Familiar examples include the *Brooke Group*[4] below-cost price test for analyzing predatory pricing claims and the *Aspen/Trinko*[5] "profit sacrifice" test for refusals to deal. Developing bright-line rules for Section 2, proponents argue, promotes business certainty and reduces the risk of chilling otherwise procompetitive conduct. The second paradigm is rule of reason balancing. Arguably the default Section 2

1 Ropes & Gray LLP, Washington, D.C.

2 Andrew I. Gavil, *Exclusionary Distribution Strategies By Firms: Striking a Better Balance*, 72 Antitrust L.J. 3, 5 (2005).

3 *See generally* Mark S. Popofsky, *Defining Exclusionary Conduct: Section 2, the Rule of Reason, and the Unifying Principle Underlying Antitrust Rules*, 73 Antitrust L.J. 438 (2006).

4 *Brooke Group v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

5 *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

legal test,[6] courts and commentators have described Section 2's rule of reason in various ways: as mandating a step-wise approach, as requiring a balancing of pro- and anticompetitive effects, or (to borrow from Section 1) a framework for generating the enquiry "meet for the case."[7] However the rule of reason is expressed, its champions contend, its flexibility and fact-intensive approach permits courts to identify anticompetitive conduct without the under-inclusion that is an admitted feature of safe harbors and other bright-line rules.

Recent Section 2 decisions reflect this debate and carry forward longstanding patterns in Section 2 case law. First, courts analyzing claims of predatory pricing or refusals to deal have declined invitations to cut back on the bright-line rules created by *Brooke Group* and the dominant interpretation of *Aspen/Trinko*. Plaintiffs' creative efforts to erode these protective doctrines have largely failed. Second, courts reviewing challenges to exclusive dealing, bundled discounts, and loyalty discounts have confronted an initial choice whether to characterize the asserted mechanism of exclusion as involving price (requiring analysis under *Brooke Group*) or non-price (requiring analysis under the rule of reason, including use of market power, foreclosure, and other screens). Third, courts assessing allegations involving product design have nominally applied a rule of reason framework, but, in practice, look for indicia that the conduct is coercive and lacks a legitimate business justification.

I. PREDATORY PRICING & REFUSALS TO DEAL

Plaintiffs challenging prices as predatory or refusals to deal as unlawful confront the steep hurdles that *Brooke Group* and the *Aspen/Trinko* line of cases erected. Courts are unlikely to sustain claims without well-founded allegations that the defendant priced below cost with a dangerous probability of recoupment (in the case of predatory pricing), or without a profit sacrifice and termination of a prior course of dealings (in the case of a refusal to deal). Not surprisingly, recent litigations asserting such claims feature creative efforts to circumvent these seemingly bright-line Section 2 rules. These attempts have produced mixed results.

Courts have declined invitations to expand duties to deal absent (i) a preexisting voluntary course of dealing and (ii) conduct evincing a profit sacrifice—the rule many courts draw from the Supreme Court's decisions in *Aspen* and *Trinko*. The Tenth Circuit, in *Novell, Inc. v. Microsoft Corp.*,[8] provides a recent example. There, the court rejected a claim that Microsoft unlawfully refused to deal with an independent software vendor when Microsoft stopped providing vendors with access to certain application programming interfaces. The court held that Microsoft's conduct evinced a desire to promote (rather than sacrifice) short-term profits and, therefore, Novell could not fit its case within the narrow *Aspen/Trinko* exception to the principle that a firm may generally choose its business partners freely. Although Novell tried to characterize Microsoft's conduct as not the negative act of refusing to deal, but rather the "'affirmative' act of interference" through withdrawing preexisting support, the Tenth Circuit ruled that "[t]raditional refusal to deal doctrine is not so easily evaded."[9] The Tenth Circuit acknowledged that the *Aspen/Trinko* rule may be underinclusive — it might exonerate some refusals to deal that harm consumers. Nonetheless, the court reasoned: "If the doctrine fails to capture every nuance, if it must err still to some slight degree, perhaps it is better that it should err on the side of firm independence" than "on the other side where we face the risk of inducing collusion and inviting judicial central planning."[10]

Steward Health Care Systems, LLC v. Blue Cross & Blue Shield of Rhode Island,[11]

6 *See generally* Popofsky, *supra* note 3.

7 *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 781 (1999).

8 731 F.3d 1064 (10th Cir. 2013).

9 *Id.* at 1078-79.

10 *Id.* at 1076.

11 997 F. Supp. 2d 142 (D.R.I. 2014).

by contrast, presents a rare instance in which application of the *Aspen/Trinko* test produced a plaintiff-friendly outcome. The case arose from Steward's failed attempt to acquire Landmark Medical Center in Woonsocket, Rhode Island. Steward, which sells health plans and runs community hospitals, abandoned the acquisition, according to its complaint, because Blue Cross refused to accept attractive rates that Steward offered Blue Cross for reimbursement of Blue Cross subscribers treated at Landmark. In particular, Steward averred that Blue Cross rejected proposed reimbursement rates 5 percent below the average rates Blue Cross accepted from other Rhode Island providers. Blue Cross's discriminatory refusal to deal, Steward alleged, formed only part of an anticompetitive scheme to maintain an asserted monopoly in the Rhode Island commercial hospital services market. Blue Cross sent letters to doctors that used Landmark, informing them of Landmark's imminent removal from Blue Cross's network, refused to renew its contracts with St. Anne's hospital (a nearby Steward-owned facility), and engaged in an intense lobbying effort to defeat a bill that would have enabled Steward to implement its community hospital care model in Rhode Island.

Blue Cross argued that Steward failed to state a valid refusal to deal claim, because Steward's complaint alleged that it sought to increase reimbursement rates at Landmark. On a motion to dismiss, the court refused to find that concession dispositive. The court held instead that the complaint contained sufficient allegations that Blue Cross terminated a profitable prior course of dealings, stressing Blue Cross's failure to accept terms it accepted from others. That Steward sought to impose a duty on Blue Cross to buy rather than sell, the court ruled, amounted to a distinction without difference. As in other refusal to deal cases where plaintiffs achieved a positive outcome, discrimination against a customer based on its identity as a competitor is the key to explaining the result in *Steward*. *Otter Tail*,[12] for example, is often viewed through that lens.

Just as recent Section 2 decisions have adhered to the *Aspen/Trinko* doctrine, courts have rejected attempts to water down *Brooke Group*. In *Superior Production Partnership v. Gordon Auto Body Parts Co., Ltd.*,[13] the Sixth Circuit granted defendant summary judgment in a case seeking to challenge low pricing in the market for replacement bumpers. Although plaintiff's expert opined that defendant's prices had a "disturbing" proximity to cost, plaintiff could not adduce triable evidence that prices fell below average total cost or average variable cost. The plaintiff instead argued that its rival's conduct amounted to predation under a "no economic sense" test, because the defendant's conduct was not profit maximizing. The Sixth Circuit rejected this attempt to circumvent *Brooke Group*. Echoing then-Judge Breyer's analysis in *Barry Wright*, the court stressed the value of a bright-line rule to foster conduct the Sherman Act is designed to encourage (price cutting), explaining "without a cost-based test of predation, courts would inevitably punish firms for being the most efficient producers."[14]

II. EXCLUSIVE DEALING & BUNDLED / LOYALTY DISCOUNTS

The choice between applicable Section 2 legal tests remains critically important in cases involving exclusive dealing and related practices, such as bundled discounts and loyalty discounts. The outcome in these cases frequently turns on how the court characterizes the conduct. If the court views the conduct as involving price — typically the case with bundled discounts — *Brooke Group*'s below-cost framework (modified in the case of bundled discounts to include an attribution test) often governs. By contrast, if the mechanism of securing exclusivity is not merely low prices, courts typically apply the rule of reason. The rule of reason analysis, depending on context, may include a screen

12 *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973).

13 784 F.3d 311 (6th Cir. 2015).

14 *Id.* at 326.

that exonerates the conduct in question unless it forecloses a substantial share of the relevant market.

Recent Section 2 cases fit this pattern. The Eleventh Circuit recently applied a rule of reason framework to uphold the FTC's invalidation of an exclusive dealing arrangement in *McWane v. FTC.*[15] There, McWane, an asserted domestic pipe fittings monopolist, implemented a "Full Support Program." Under the program, McWane cut off sales to distributors who purchased from McWane's competitors. According to the court, the FTC's evidence showed both that McWane initiated the Full Support Program to raise a competitor's costs and protect monopoly power and that McWane substantially achieved its objective. Despite entry (through outsourcing arrangements rather than establishment of a domestic foundry), the Full Support Program was designed to foreclose and direct pricing evidence showed it was successful, because "McWane's prices and profit margins for domestic fittings were notably higher than prices for imported fittings, which faced greater competition."[16]

Against this backdrop, the court upheld the FTC's condemnation of McWane's conduct under the rule of reason framework articulated in *United States v. Microsoft*.[17] Because the conduct involved exclusive dealing, the court invoked a substantial foreclosure screen, reasoning that "foreclosure … 'serves a useful screening function' as a proxy for anticompetitive harm."[18] The court found the screen easily met, because evidence showed that the Full Support Program tied up the two largest distributors, who accounted for 50-60 percent of the relevant market. A significant foreclosure percentage, when added to evidence of cost-raising intent, higher prices, and pretextual justifications, amply supported a finding of monopoly maintenance.

McWane involved conduct much like the seminal *Lorain Journal*[19] case — cutting off customers who patronize rivals. Courts do not hesitate to analyze such conduct under principles applicable to exclusive dealing cases. Indeed, according to *McWane*, such conduct "arguably pose[s] a greater threat to competition than a conventional exclusive dealing contract, as it lack[s] the traditional procompetitive benefits of such contracts."[20] When firms use price to induce exclusivity, however, courts frequently reach a different outcome by analyzing the conduct under *Brooke Group*.

In *Eisai, Inc. v. Sanofi-Aventis U.S., LLC*,[21] for example, competitor Eisai challenged Sanofi's discounting structure for Lovenox, the alleged leading product in its therapeutic class. The greater the volume of Lovenox the customer took and the greater the share Lovenox comprised of a customer's purchases within its class, the greater the discount the customer received. Sanofi moved for summary judgment, arguing that Eisai failed to demonstrate that Sanofi's discount structure amounted to the below-cost pricing that *Brooke Group* condemned. Eisai, by contrast, argued that the court should not analyze the conduct under *Brooke Group*, because the conduct did not predominantly involve price. According to Eisai, among other things, Sanofi "imposed disloyalty penalties that were not the same as discounts," "bundled contestable and incontestable demand for Lovenox," and engaged in sharp marketing tactics.[22]

The court declined to find these (or other) attributes of Sanofi's conduct sufficient to remove *Brooke Group*'s price-cost test and apply an open-ended rule of reason analysis. Notably, the court found "further support for its conclusion that this is a pricing case from the fact that Eisai could have increased its

15 783 F.3d 814 (11th Cir. 2015).

16 *Id.* at 838-39.

17 253 F.3d 34 (D.C. Cir. 2001).

18 *McWane*, 783 F.3d at 835 (quoting *Microsoft*, 253 F.3d at 69).

19 *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

20 *McWane*, 783 F.3d at 834.

21 No. 08-cv-4168, 2014 WL 1343254 (D.N.J. Mar. 28, 2014).

22 *Id.* at *26.

discounts" to increase its sales.[23] In other words, Eisai's failure to compete harder doomed its case. The court further held that it would reach the same conclusion even were the conduct characterized as non-price exclusive dealing and analyzed under the rule of reason. Competitors' success, according to the court, showed that Sanofi's Lovenox program did not foreclose competition in a substantial share of the relevant market.[24]

In contrast, the Third Circuit in *ZF Meritor, LLC v. Eaton Corp.*[25] applied the rule of reason — rather than a price-based test — to invalidate defendant's long-term agreements with direct purchasers that, in relevant part, offered lower prices via rebates and conditioned supply on the purchase of a specified percentage of the customer's requirements. As a threshold matter, the court held that the price discounts at issue were not the driving force behind customers' compliance with purchase targets; rather, Eaton enforced compliance by threatening to cut customers off from access to products critical to their business if they failed to meet purchase targets. Refusing to find price the predominant mechanism of exclusion, the court declined to apply *Brooke Group*. Applying a rule of reason framework, the court upheld the jury's verdict finding defendant's conduct unlawful. Evidence showed, among other things, that defendant's program effectively required every direct purchaser in the market to obtain 80-97.5 percent of their requirements from the defendant, severely constricting sales for which rivals could compete. The jury, moreover, permissibly found that the contracts were not short-term — often an exonerating factor under rule of reason analysis of *de facto* exclusive dealing — but rather long-term. Additionally, and in the court's view critically, "there was considerable evidence from which a jury could infer that the primary purpose" of Eaton's contracts "was not to meet customer demand, but to take preemptive steps to block potential competition."[26]

Recent decisions assessing the legality of bundled discounts applied a modified version of *Brooke Group*, consistent with the Ninth Circuit's leading decision in *PeaceHealth*.[27] In *Vesta Corp. v. Amdocs Management Ltd.*,[28] for example, plaintiff alleged that defendants, through a package that bundled together a billing platform and a payment processing solution, illegally excluded plaintiff from the payment processing market. The court ruled that, to show the conduct was anticompetitive, the plaintiff needed to allege the price of payment processing services was below cost "after allocating the discount given by the defendant on the entire bundle" to that product.[29] Plaintiff's complaint failed to meet this attribution test because it contained only speculative allegations as to defendants' costs. The court stressed the importance of fidelity to the attribution test because "[courts] should not be too quick to condemn price-reducing bundled discounts as anticompetitive, lest we end up with a rule that discourages legitimate price competition."[30]

III. PRODUCT DESIGN

Product design remains another unsettled area of Section 2. Some cases have suggested that product designs producing consumer benefits are *per se* legal, at least absent a coercive withdrawal of a prior formulation.[31] *United States v. Microsoft*, although nominally applying a balancing test, appeared to condemn the design conduct at issue there, because it lacked any justification.[32] Other decisions similarly reflect a binary approach to product design: if the conduct lacks any benefit and is coercive, it is invalidated; if the

23 *Id.* at *27.

24 *Id.* at *30.

25 696 F.3d 254 (3d Cir. 2012).

26 *Id.* at 288.

27 *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883 (9th Cir. 2008).

28 No. 3:14-cv-1142-HZ, 2015 WL 5178073 (D. Or. Sep. 3, 2015).

29 *Id.* at *18 (quoting *PeaceHealth*, 515 F.3d at 910).

30 *Id.* (quoting *PeaceHealth*, 515 F.3d at 896).

31 *Allied Orthopedic v. Tyco*, 592 F.3d 991, 998-99 (9th Cir. 2010); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 287 (2d Cir. 1979).

32 *See Microsoft*, 253 F.3d at 58-60.

conduct produces benefits, challenges to the conduct fail.[33]

Two recent cases add to this debate. The courts in *New York ex rel. Schneiderman v. Actavis PLC* and *Mylan Pharmaceuticals, Inc. v. Warner Chilcott Public Ltd., Co.* each confronted allegations of product redesign, but reached different results. In *Actavis*, the Second Circuit upheld a preliminary injunction against Actavis, finding that Actavis's "hard switch" — from an immediate release to an extended release Alzheimer's drug (the only two drugs in the relevant market) — coerced patients to switch to the new drug and impeded generic competition.[34] Toward the end of the patent period, Actavis developed an extended release drug and effectively withdrew its immediate release version. The State of New York argued that Actavis's conduct comprised an anticompetitive "product hop" because generics would not be therapeutically equivalent as required for automatic substitution under state law. Actavis, New York contended, thereby unlawfully maintained monopoly power. The Second Circuit agreed, holding that product innovation — though generally beneficial to consumers — can be anticompetitive when a firm coerces consumers to switch to a new product rather than permitting a new product to compete on the merits, particularly where the prior product was successful and there was no legitimate business justification for withdrawal. Applying *Microsoft*'s burden shifting rule of reason framework, the court rejected Actavis's claimed procompetitive benefits as pretextual in light of ample evidence that Actavis sought to prevent generic substitution to protect revenues after its patent expired.

The Eastern District of Pennsylvania reached a different result in *Mylan*, where the court granted defendants' motion for summary judgment.[35] According to the complaint, defendants redesigned their branded antibiotic, Doryx, to exclude generic competitors. The alleged "product hopping" included, converting capsules to tablet form, introducing scores on tablets to facilitate different dosing, and withdrawing older versions. As in *Actavis*, these changes prevented automatic substitution of generics. In contrast to *Actavis*, however, the court held that plaintiff failed to demonstrate triable evidence of anticompetitive conduct. For one thing, the court found insufficient evidence of monopoly power. For another, the court found that Mylan had numerous other ways of promoting its generic Doryx products other than automatic substitution. Redesigning products without more, even where the redesign prevents automatic substitution, is not, the court held, presumptively anticompetitive. To adopt such a rule would, in the court's view, "risk[] slowing or even stopping pharmaceutical innovation."[36] The court also cast doubt on balancing under the rule of reason even if Mylan had established a *prima facie* case of anticompetitive conduct: "Once the branded drug manufacturer offered a procompetitive justification for the product change that the generic manufacturer could not rebut, courts and juries would have to determine which product changes were 'sufficiently innovative' to justify their anticompetitive effects."[37] The judge "doubt[ed] that courts could ever fashion" an administrable method of calculating this tradeoff.[38]

The contrasting results in *Actavis* and *Mylan* can be viewed through the lens of presumptions courts apply in the course of conducting a Section 2 rule of reason analysis. The *Actavis* court arguably presumed

33 *Compare C.R. Bard, Inc. v. M3 Sys., Inc.*, 157 F.3d 1340, 1371-72 (Fed. Cir. 1998) (upholding jury verdict invalidating product redesign lacking any consumer benefit) *with* Final Jury Instructions Re Genuine Product Improvement at 19, *Apple iPod iTunes Antitrust Litig.*, No. 05-cv-0037 (N.D. Cal. Dec. 15, 2014) (instructing jury that genuine product improvement cannot be considered an anticompetitive act regardless of its effect on competitors).

34 787 F.3d 638, 652-53 (2d Cir. 2015).

35 No. 12-3824, 2015 WL 1736957, at *12-13 (E.D. Pa. Apr. 16, 2015).

36 *Id.* at *16.

37 *Id.* at *15 (quoting *Microsoft*, 253 F.3d at 58-59).

38 *Id.*

conduct that had an impact on rivalry lacked a legitimate justification when the only proffered reason for the product hop was to increase another product's sales. *Mylan* seemingly employed a different presumption: if a generic's only source of harm is an inability to take advantage of automatic substitution laws, the conduct is presumed lawful, at least absent evidence of an inability to market to customers through other means.

IV. CONCLUSION

Courts continue to grapple with the question of which Section 2 legal test to apply to alleged anticompetitive conduct. Recent Section 2 decisions fit longstanding patterns. Where the conduct involves straightforward, single-product pricing or a refusal to deal, courts adhere to the bright-line tests set forth in *Brooke Group* and *Aspen/Trinko*. In other instances, the characterization of conduct — as involving predominantly price versus non-price mechanisms or as innovative versus inherently exclusionary — remains a key determinant in identifying the appropriate legal test. Finding the "enquiry meet for the case"[39] will, no doubt, remain a challenge for antitrust courts for years to come.

39 *Cal. Dental Ass'n*, 526 U.S. at 781.

“EXCESSIVE ROYALTY” PROHIBITIONS AND THE DANGERS OF PUNISHING VIGOROUS COMPETITION AND HARMING INCENTIVES TO INNOVATE

BY DOUGLAS H. GINSBURG, BRUCE H. KOBAYASHI, KOREN W. WONG-ERVIN, AND JOSHUA D. WRIGHT*




In the last several years, competition agencies across Asia, including those in China, Korea, and India, have issued decisions and draft guidelines that prohibit the holder of an intellectual property right (“IPR”) from charging “unfairly high” or “excessive” royalties. In addition to the inherent problems with price regulation (such as harming incentives to compete and to innovate and the difficulties of determining whether a particular price is “excessive”), these decisions and guidelines are highly problematic in that they provide little to no guidance on how the agencies determine whether a particular royalty is too high. Indeed, they would allow the agencies to find an excessive pricing violation based on such vague or impractical standards as:

- whether the royalty “obviously does not match the value” of the IPR, which provides no concrete guidance at all;
- whether an IPR holder charges for expired or invalid patents, which ignores practical and commercial realities, including the impracticality of renegotiating licenses every

time a patent expires and the reality that parties assess generally the value of the licensed portfolio and determine a royalty that accounts for the possibility that some of the portfolio's patents may be invalid or expired; and,

- in the case of standard-essential patents (SEPs), concerns about royalty stacking, which should not be a concern unless there is evidence that royalty stacking would have a severely adverse effect on the product market or, at a minimum, would substantially restrict output.

This article discusses the dangers of regulating royalties, including the difficult — if not impossible — task of determining whether a particular royalty is "excessive," and suggest that agencies not apply to IPRs, including SEPs, their laws prohibiting excessive pricing. Should an agency be required by law to apply the prohibition to IPRs, then at the very least it should focus primarily upon the prices of comparable licenses, which are the best available evidence of the market value of a patent.

I. RECENT DECISIONS AND DRAFT GUIDELINES PROHIBITING CHARGING "EXCESSIVE ROYALTIES"

In February 2015, China's National Development and Reform Commission issued a $975 million fine against Qualcomm based, in large part, upon findings that the company charged "excessive" royalties because it charged for expired patents, required royalty-free grantbacks, bundled SEPs and non-SEPs, and based its royalties on the wholesale net sales price of the end product as opposed to a percentage of the price of a smaller component part.[1] Similarly, the Competition Commission of India recently issued investigation orders against Ericsson alleging the company charged "excessive and unfair royalty rates" because it based royalties on sales of the end-user device as opposed to sales of a component part.[2] Most recently, the Chinese and Korean competition agencies issued draft guidelines that would apply excessive pricing prohibitions to IPRs, focusing upon factors such as charging for expired or invalid patents.[3] One favorable development (at least in the draft IP guidelines) is the apparent shift away from basing an excessive royalty violation on the common industry practice of using the end-user device as the royalty base. This is a favorable development because there are numerous legitimate business reasons for selecting the end-user device as the royalty base, including the reduction of administrative costs and the relative ease of monitoring or verifying the number of units sold. And, of course, mathematically and in terms of the royalty actually charged, the selection of the royalty base is irrelevant as it is the simultaneous relationship between the royalty base and the royalty rate that matters.[4]

II. THE U.S. APPROACH AND THE DANGERS OF REGULATING PRICE

The U.S. antitrust agencies do not regulate price.[5] Rather, in the United States, firms are free

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See Koren W. Wong-Ervin, *Antitrust and IP in China: Quo Vadis?* 5-6 (Apr. 16, 2015), https://www.ftc.gov/system/files/attachments/key-speeches-presentations/wong-ervin_-_2015_aba_spring_meeting_4-16-15.pdf.

2 *See* Koren W. Wong-Ervin, *Standard-Essential Patents: The International Landscape*, Am. Bar Ass'n Intellectual Prop. Comm. Newsletter, Spring 2014, at 13-14, https://www.ftc.gov/system/files/attachments/key-speeches-presentations/standard-essential_patents_the_intl_landscape.pdf.

3 For a summary of China's draft guidelines, see Koren W. Wong-Ervin, *An Update On China's Anti-Monopoly Law Guidelines On IP*, Law360 (Dec. 15, 2015), http://www.law360.com/competition/articles/737570/an-update-on-china-s-anti-monopoly-law-guidelines-on-ip. For the GAI's comments to China and Korea on their draft IPR guidelines, see Global Antitrust Institute Competition Advocacy Program, http://masonlec.org/programs/692.

4 *See, e.g.*, *Ericsson v. D-Link*, 773 F.3d 1201, 1226 (Fed. Cir. 2014).

5 *See, e.g.*, Bill Baer, Assistant Att'y Gen., Antitrust Division, Prepared Remarks at the 19th Annual International Bar Association Competition Conference (Sept.

unilaterally to set or privately to negotiate their prices; it follows that a IPR holder is free to charge a monopoly price, which rewards the very risk-taking and entrepreneurial behavior that lead to innovation and economic growth.[6] This hands-off approach applies to all IPRs, including SEPs.

Requiring by law that prices be "fair" or "reasonable," or prohibiting a firm from charging "unfairly high" prices risks punishing vigorous competition. In general, competition policy should not prohibit a monopolist from charging whatever price for its products, including its IPRs, it believes will maximize its profits. It is axiomatic in economics and in antitrust law that the "charging of monopoly prices … is … what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth."[7] This is particularly important in the case of IPRs; the very purpose for which nations create and protect IPRs is to induce investment in risky and costly research and development. To achieve a balance between innovation and the protection of competition, monopoly prices should be unlawful only if they are the result of conduct that is unlawful on other grounds.

Moreover, economics teaches that, absent information about the prices of unconstrained market transactions, it can be particularly difficult to identify a "fair" price. Indeed, it is even more difficult to assess the "fairness" of prices associated with licensing IPRs both because the fixed costs of innovation require prices well above marginal cost in order to secure an adequate return on investments in innovation, and because IPRs themselves are highly differentiated products, which makes reliable price comparisons difficult, if not impossible. The risk of placing overly strict limitations upon IPR prices is that the return to innovative behavior is reduced, which means firms will reduce their investment in further innovations, to the detriment of consumers. Compounding the problem, with such limits in place, IPR holders will face significant uncertainty in determining whether their licensing practices violate competition laws, and legal uncertainty is the enemy of financial investment.

In addition, in order to determine whether a particular price is excessive, the competition agency would need to calculate a reasonable royalty range as a baseline against which to compare the allegedly excessive price. In our experience, competition agencies will not posses the requisite information necessary to determine market prices generally, and royalty rates for inventions in particular. This is a task that is best left to the market or, as a last resort, to the courts in those limited cases when the parties cannot reach agreement.[8]

III. POSSIBLE METHODOLOGIES FOR CALCULATING A REASONABLE ROYALTY RANGE

Should an agency insist upon applying an excessive pricing prohibition to IPRs, it could use the hypothetical negotiation framework developed under U.S. patent law to determine the *minimum* reasonable royalty. This, however, is a complex methodology intended for use by the courts upon development of a full record, which usually includes detailed expert reports and opportunities for witnesses to testify and be subjected to cross-examination. In addition, it is essential to keep in

11, 2015), http://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-delivers-remarks-19th-annual-international-bar ("We don't use antitrust enforcement to regulate royalties. That notion of price controls interferes with free market competition and blunts incentives to innovate. For this reason, U.S. antitrust law does not bar 'excessive pricing' in and of itself. Rather, lawful monopolists are perfectly free to charge monopoly prices if they choose to do so. This approach promotes innovation from rivals or new entrants drawn by the lure of large rewards."); Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Address at 8th Annual Global Antitrust Enforcement Symposium: Standard-Essential Patents and Licensing: An Antitrust Enforcement Perspective 8 (Sept. 10, 2014), https://www.ftc.gov/system/files/documents/public_statements/582451/140915georgetownlaw.pdf ("In contrast to the FTC's and EC's approach, media reports indicate that China's antitrust authorities may be willing to impose liability solely on the royalty terms that a patent owner demands for a license to its FRAND-encumbered SEPs, as well as royalty demands for licenses for other patents that may not be subject to a voluntary FRAND commitment."); Keith N. Hylton, *Antitrust Snoops on the Loose*, Wall St. J., Apr. 3, 2015, at A9.

6 *See, e.g.*, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).

7 *Id.*; *see also* Joseph A. Schumpeter, Capitalism, Socialism, and Democracy 89-90 (George Allen & Unwin 1976).

8 For a discussion of the difficulties of court-determined rate setting, see Anne Layne-Farrar & Koren W. Wong-Ervin, *Methodologies For Calculating FRAND Damages*, Law360 (Oct. 8-10, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2668623.

mind that a reasonable royalty calculation using the hypothetical negotiation framework sets a *minimum* royalty; the patentee should have the opportunity to prove its lost-profits as part of its damages. In an excessive pricing case, these lost profits equal the profits denied by the "unfairly high" pricing provision.[9] As such, when used in an "unfairly high" pricing investigation, a reasonable royalty calculation should likewise be treated as a minimum starting point to avoid imposing a royalty that undercompensates the patentee—a result that would significantly reduce the patentee's incentives to innovate.

In an action for damages resulting from patent infringement, the goal of a reasonable royalty calculation is to determine the market price the infringer would have paid if it had licensed rather than infringed the patent. Accordingly, that amount should depend upon what a willing licensee and a willing licensor would have agreed to in a hypothetical negotiation. The seminal case in the United States, *Georgia-Pacific Corp. v. United States Plywood Corp.*, describes the proper measure of damages as "[t]he amount that a licensor (such as the patentee) and the licensee (such as the infringer) would have agreed upon (at the time the infringement began) if both had been trying in good faith to reach an agreement."[10] The central tenet of this framework is the willing licensor/willing licensee model, under which the amount awarded must be acceptable to both parties. U.S. district courts have recent adopted modified versions of the *Georgia Pacific* framework in determining prospective royalties in cases involving FRAND encumbered standard essential patents. The U.S. Court of Appeals for the Federal Circuit in *Ericsson, Inc. v. D-Link Systems, Inc.* held that "[t]here is no *Georgia-Pacific*-like list of factors that district courts can parrot for every case involving [F]RAND-encumbered patents."[11] Instead, courts must instruct the jury only on factors that are relevant to the record developed at trial, and must instruct the jury on the actual FRAND commitment at issue. Because each technology and market is different, the evidence considered and the weight placed on each factor will vary based upon the circumstances.

In constructing the hypothetical negotiation, U.S. courts consider evidence of market factors that the negotiating parties would consider in determining the royalty rate. Often comparable licenses are the best available evidence of the market value of the patent. Accordingly, the Federal Circuit recently held in *Ericsson v. D-Link* that evidence about comparable licenses based upon the end product should properly be considered by the jury in determining patent damages. The court reasoned that "[m] aking real world, relevant licenses inadmissible … would often make it impossible for a patentee to resort to license-based evidence."[12] Indeed, as a practical matter, most licenses in many high-tech markets, including smartphones, are negotiated on a patent portfolio basis using the end-user device as the royalty base. A number of considerations may dictate private parties' selection of a royalty base in a freely negotiated license agreement. Industry practice and the convenience of the parties is one such consideration; other commercial dealings between the parties is another.

The Federal Circuit also explained that, while prior licenses "are almost never perfectly analogous to the [licenses at issue in a later] infringement action," that "generally goes to the weight of the evidence, not its admissibility."[13] For example, allegedly comparable licenses may cover more patents than are at issue in the current action, or include cross-licensing terms, or cover foreign intellectual property rights, or be calculated as some percentage of the value of a multi-component product. "Testimony relying on comparable licenses must account for such distinguishing facts when invoking them to value the patented invention."[14] When considering comparable licenses, it is also important to consider factors such as the circumstances, timing, and relative bargaining position of the parties to those licenses. For example, a license entered when the commercial viability of the technology is still uncertain will, in general, result in a lower royalty than a license entered into when the commercial viability of the technology is established or has increased.

9 Specifically, U.S. patent law provides that "[u]pon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement, but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court." 35 U.S.C. §284 (2014).

10 *Georgia-Pacific Corp., v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified and aff'd*, 446 F.2d 295 (2d Cir. 1971).

11 773 F.3d 1201, 1235 (Fed. Cir. 2014).

12 *Id.* at 1228.

13 *Id.* at 1227.

14 *Id.*

Excessive pricing violations should not, however, turn upon there being expired or invalid patents in a portfolio. Not only is this not an antitrust issue, but it would be impractical, if not impossible, for portfolio owners to renegotiate licenses every time an IPR in a licensed portfolio expires or, conversely, every time a new IPR is added to the portfolio, both of which occur frequently. Indeed, the common industry practice of portfolio "rebalancing" (i.e., periodically removing expired or invalid patents and adding new patents) further reduces the risk that the presence of a few invalid or expired patents would impose any significant cost upon the licensee.[15] In our experience, we have found that portfolio licenses in which individual patents have a variety of expiration dates are common industry practice that reduces transactions costs and facilitates licensing.[16]

Similarly, with respect to invalid patents, when a licensor and a licensee negotiate a license for a large portfolio, both parties understand that some of the hundreds or thousands of patents in the portfolio may be invalid. The parties do not invest resources in identifying those invalid patents, which would make the transaction prohibitively costly. Instead, they assess generally the value of the licensed portfolio and determine a royalty that accounts for the possibility that some of the portfolio's patents may be invalid.[17]

Likewise, excessive pricing violations should not turn upon a concern about royalty stacking. The aggregate royalty should be considered, if at all, only when there is evidence that it would have a severely adverse effect upon the product market, or at a minimum substantially restrict output. Some claim that devices like mobile phones, which implement thousands of patents, are subject to royalty stacking concerns. The evidence, however, is not consistent with these theoretical claims. For example, a recent empirical study shows that, contrary to the predictions of the royalty stacking theory, between 1994 and 2013, the non-quality adjusted average selling price of a mobile device fell 8.1 percent per year on average; the number of devices sold each year rose 62 times or 20.1 percent per year on average; the number of device manufactures grew from one in 1994 to 43 in 2003; and since 2001, concentration fell consistently and the average gross margin of SEP holders remained constant.[18]

As the U.S. Court of Appeals for the Federal Circuit explained in *Ericsson v. D-Link*, the burden is on the implementer (or, in an excessive pricing enforcement action, the agency) to provide evidence establishing the actual cumulative royalty, and that royalty must be assessed to determine whether it is excessive.[19] The court of appeals rejected the approach taken by some U.S. district courts of considering the aggregate royalties that would apply if one assumed that all SEP holders charged the same or similar rates. The problem with that approach is that not all patents are created equal and FRAND rates should reflect the value of the particular SEPs at issue. In addition, many licensees do not pay cash royalties for every SEP. Instead, there may be cross-licenses or other business relationships that allow for royalty-free exploitation of some SEPs.

There are several other important principles to keep in mind. First, it is important to distinguish between, on the one hand, an aggregate royalty that reflects the cumulative value of the various SEPs included in a given standard and, on the other hand, an aggregate royalty burden that includes at least some supra-FRAND rates, i.e., individual hold-up rates. The former is simply the cost of making products that benefit from valuable IP, analogous to any other cost of doing business. For example, automakers face an aggregate input cost covering all of the many components needed to produce a car. There is nothing inherently anticompetitive in needing multiple inputs to produce a particular good, nor

15 *See* J. Gregory Sidak, *Evading Portfolio Royalties For Standard-Essential Patents Through Validity Challenges*, 39 World Competition (forthcoming 2016) [hereinafter Sidak], https://www.criterioneconomics.com/docs/evading-portfolio-royalties-for-seps.pdf.

16 In *Kimble v. Marvel Entm't, LLC*, a recent patent misuse case, the U.S. Supreme Court seemed to endorse package or portfolio licenses without requiring a step-down, stating that, with respect to "licensing agreements [that cover] either multiple patents or additional non-patent rights, . . . royalties may run until the latest-running patent covered in the parties' agreement expires." 135 S. Ct. 2401, 2408 (2015), http://www.supremecourt.gov/opinions/14pdf/13-720_jiel.pdf.

17 *See* Sidak, *supra* note 15.

18 Alexander Galetovic & Kirti Gupta, *Royalty Stacking and Standard Essential Patents: Theory and Evidence from the World Mobile Wireless Industry* (Stanford Univ. Hoover Institution Working Grp. on Intellectual Property, Innovation, and Prosperity, Working Paper Series No. 15012, 2015), http://hooverip2.org/wp-content/uploads/ip2-wp15012-paper.pdf.

19 *Ericsson*, 773 F.3d at 1234.

in each of those input suppliers charging the market price for its contribution.[20]

Second, proper apportionment can eliminate the risks of both hold-up and royalty stacking. As long as the inputs for multi-component products are priced according to the value of each patent's contribution to the end product, no SEP holder can be faulted for either hold-up or stacking. Proper apportionment is a reasonable means to accomplish this goal.[21]

Third, it is critical to distinguish between the number of SEPs and the number of SEP holders. Given the prevalence of portfolio licensing, it is the number of SEP holders and not the number of SEPs that is relevant. Even if a license to 1,000 SEPs were required to implement a given standard, if all of those SEPs were held by a single entity that licensed on a portfolio basis, there would be no stack at all.[22]

Fourth, for a variety of reasons, not all SEP holders seek license payments. As the Federal Circuit pointed out in *Ericsson v. D-Link*, "[t]he mere fact that thousands of patents are declared to be essential to a standard does not mean that a standard-compliant company will necessarily have to pay a royalty to each SEP holder."[23]

Lastly, one of the assumptions underlying the Cournot complements problem (the theory upon which the concern with royalty stacking is based) is that each input supplier will price its inputs without regard to the prices charged for other needed inputs.[24] But there is no reason to assume that will necessarily be the case in a standard-setting context. For example, SEP holders will be cooperating with one another (and with all other standard-setting organization members) in the development of the standard, and are therefore likely to know what patents are expected to be asserted and by whom. As a result, there is no reason to presume that SEP holders will set rates without regard to the full complement of known SEPs.[25]

IV. CONCLUSION

Given the dangers and difficulties of regulating prices, agencies should exercise their prosecutorial discretion to refrain from applying excessive pricing prohibitions to IPRs in order to avoid punishing rigorous competition and diminishing the incentive to innovate. If an agency is required by law to apply an excessive pricing prohibition to IPRs, then it should focus upon comparable licenses, which will often be the best available evidence of the market value of the IPR at issue. Whether a portfolio includes expired or invalid patents should not be considered as proxies for "excessive pricing," particularly given the commercial reality that parties generally determine a royalty that accounts for the possibility that some of the IPRs in a portfolio may be invalid or expired.

20 Anne Layne-Farrar & Koren W. Wong-Ervin, *An Analysis of the Federal Circuit's Decision in Ericsson v. D-Link*, CPI Antitrust Chronicle, Mar. 2015, at 4-5 [hereinafter Layne-Farrar & Wong-Ervin], http://www.crai.com/sites/default/files/publications/An-Analysis-of-the-Federal-Circuits-Decision-in-Ericsson-v-D-Link.pdf.

21 *Id.* at 5.

22 *Id.* at 6.

23 773 F.3d at 1234.

24 Augustin Cournot, Researches into the Mathematical Principles of the Theory of Wealth 99-116 (Nathaniel T. Bacon trans., MacMillan Co. 1897) (1838); *see also* Bruce H. Kobayashi, *Does Economics Provide a Reliable Guide to Regulating Commodity Bundling by Firms? A Survey of the Economic Literature,* 1 J. Comp. L. & Econ 707, 714 (2005).

25 Layne-Farrar & Wong-Ervin, *supra* note 20, at 5.

THE MEANING OF "ANTICOMPETITIVE EFFECTS" UNDER ARTICLE 102 TFEU

BY MASSIMILIANO KADAR[1]

Countless pages have been written to date on the effects that a given conduct needs to produce in order for it to be considered abusive under Article 102 of the Treaty on the Functioning of the European Union ("TFEU").

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Many commentators conclude that there is an asymmetry in the European Union (EU) Courts' approach to the meaning of "effects" between different types of conduct. It is also often concluded that the Courts' approach is too formalistic with regard to certain conducts, namely exclusivity rebates and exclusive dealing, that are presumed by the case-law to have anticompetitive effects.

This short paper argues that not only is the Courts' case law consistent, but that it is also sensible from the point of view of legal certainty and administrative and economic efficiency. The paper focuses on exclusionary abuses and does not discuss exploitative abuses. Furthermore, it only discusses the EU Courts' case law and abstracts from the Commission's practice and its enforcement priorities as set out in the Guidance Paper on Article 102 TFEU.

I. ANTICOMPETITIVE EFFECTS AND ARTICLE 102 TFEU

To start with, it may appear slightly paradoxical to write about the meaning of "effects" under Article 102 TFEU, given that the text of Article 102 TFEU does not actually contain any reference to anticompetitive effects. This is different compared to Article 101 TFEU, which refers to the anticompetitive object or effect of an agreement.

In its 1979 judgment in *Hoffmann-La Roche*, however, the Court of Justice made clear that abuse is behavior

> Which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. (para. 91)

It appears, therefore, that some kind of detrimental effect on competition has to be established in order for a given conduct to be found abusive under Article 102 TFEU. In this regard, three different questions arise. First: how likely do the anticompetitive effects of a given conduct need to be in order for such conduct to be abusive? Second: how significant do the anticompetitive effects of a conduct need to be, or in other words, is there a *de minimis* rule in the applicability of Article 102 TFEU? Third: how to show the anticompetitive effects of a given conduct?

II. HOW LIKELY DO ANTICOMPETITIVE EFFECTS NEED TO BE?

The first question is probably the one currently generating the highest uncertainty among commentators. Such uncertainty seems to stem from the fact that the EU Courts have used, and continue to use, different terms to refer to the threshold of likelihood of anticompetitive effects that a conduct needs to produce in order for it to be considered abusive.

At the outset, it must be acknowledged that the Courts have consistently recognized that there is no need for a conduct to produce actual anticompetitive effects in order to have a finding of abuse (see for instance *British Airways*, para. 145 and *TeliaSonera*, para. 64). On the other hand, it has been also held that purely hypothetical anticompetitive effects are not sufficient (see *Post Danmark II*, para. 65). These findings are important. It is clear as the law stands that a given conduct can be abusive even if it does not result in actual anticompetitive effects. Conversely, it cannot be abusive if it produces anticompetitive effects only in the abstract.

The question whether the anticompetitive effects of a given conduct would have to be merely "potential," "likely," or even "likely beyond reasonable doubt," in order to conclude that such conduct is abusive, is worthy of more debate. This is because the language employed by the EU Courts does not appear to be always strictly aligned on one, well-defined standard of probability.

In the 2011 judgment in *TeliaSonera*, for instance, the Court of Justice stated that in the circumstances of that specific case "the at least potentially anti-competitive effect of a margin squeeze is probable" (para. 71). In the 2012 judgment in *Post Danmark I*, instead, the Court of Justice stated that in order to assess the existence of anti-competitive effects, "it is necessary to consider whether that pricing policy, without objective justification, produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests" (para. 44).

In the recent *Post Danmark II* judgment, concerning conditional rebates different from exclusivity rebates, the operative part states that the anticompetitive effects of a conduct must be "probable." However, the judgment also refers to other, apparently lower thresholds of likelihood. For example, while paragraph 74 of the English version of the judgment states that "only dominant undertakings whose conduct is likely to have an anti-competitive effect on the market fall within the scope of Article 82 EC", the same paragraph of the official Danish version states that Article 102 TFEU prohibits conduct which "kan have en konkurrencebegrænsende virkning" (can have an anticompetitive effect), and the French version, i.e. the version in which the judgment was originally drafted, states that Article 102 TFEU prohibits conduct which "est susceptible d'avoir un effet anticoncurrentiel" (is capable of having an anticompetitive effect). In addition, the judgment also makes reference to previous case law (e.g. *British Airways*), which made clear that a rebate scheme produces an anti-competitive exclusionary effect when it is "capable, first, of making market entry very difficult or impossible for competitors of the undertaking in a dominant position and, secondly, of making it more difficult or impossible for the co-contractors of that undertaking to choose between various sources of supply or commercial partners" (para. 50) or when it "tends to make it more difficult for those customers to obtain supplies from competing undertakings" (para. 42).

It is clear that, from a strictly linguistic perspective, the fact that a conditional rebate scheme is likely or probable to produce anticompetitive effects is different from the fact that that scheme is "only" capable of doing so, or that it tends to do so, or that it is potentially anticompetitive. Nevertheless, this apparent inconsistency can be reconciled if one leaves aside arguments "based on a purely semantic distinction" (Opinion of AG Kokott in *British Airways*, para. 76) and acknowledges that the Courts use these terms as synonyms to identify a middle ground between purely hypothetical effects and actual effects. This middle ground, which can be perhaps best captured with the expression "potential anticompetitive effects," can be considered as the point at which a given conduct by a dominant undertaking becomes abusive.

III. HOW SIGNIFICANT DO ANTICOMPETITIVE EFFECTS NEED TO BE?

On the second question, i.e. the magnitude of the anticompetitive effects produced by a given conduct, the General Court made clear in *Intel* that there is no *de minimis* rule in the application of Article 102 TFEU (see para. 116). As such, even conduct producing relatively small anticompetitive effects is liable to constitute an abuse of a dominant position.

The General Court's *Intel* judgment is currently under appeal and a leading commentator has expressed his perplexities related specifically to this point.[2] However, it appears that the recent judgment of the Court of Justice in *Post Danmark II* has in essence confirmed that a given conduct is liable to constitute abuse even when the anticompetitive effects produced are not significant. According to the Court of Justice,

> Fixing an appreciability (*de minimis*) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anti-competitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of

2 See Richard Whish, "Intel v Commission: Keep Calm and Carry on!", in Journal of European Competition Law & Practice (2015), 6.

> eliminating competition on the market on which the undertaking concerned operates. (para. 73)

This position appears to be consistent with the Courts' jurisprudence, and in particular with the fact that, while it is not abusive for a firm to be dominant, the degree of competition in the relevant market is weakened as a result of the very presence of the dominant firm (*Hoffmann-La Roche*, para. 91), and that firm has a special responsibility not to allow its conduct to impair undistorted competition (*Michelin I*, para. 57). This also helps to understand why exclusivity provisions in EU competition law are treated differently under Article 101 TFEU and 102 TFEU, i.e. as infringement by effect under Article 101 TFEU and as infringement by object under Article 102 TFEU, as discussed in more detail in the next section.

IV. HOW TO SHOW POTENTIAL ANTICOMPETITIVE EFFECTS?

After having established that a conduct is abusive when it results in potential anticompetitive effects, and that there is no need for those effects to be significant, the third question is: how to prove to the requisite legal standard the existence of an abuse?

A preliminary point to be made in this regard is that while potential anticompetitive effects are necessary for any conduct to be abusive, the Courts have recognized that it is not always necessary to specifically prove such effects. Behavior that is by its very nature capable to negatively affect competition can indeed be qualified as "abusive by object." It appears that exclusivity rebates (*Intel,* paras. 76 and 77, and *Post Danmark II,* para. 27), exclusive dealing (*Hoffmann-La Roche,* para. 71), and so-called "naked restrictions," i.e. conduct that is inherently anticompetitive, such as paying customers to delay the launch of a product incorporating a competitor's product (*Intel,* para 209), are considered in EU competition law as abuses "by object."

While the Commission is not required to prove the potential anticompetitive effects of abuses by object, it is also not prevented from doing so in cases where it wishes. This assessment can be carried out on the basis of qualitative or quantitative elements (see for instance the Commission decision in *Intel*). In any event, as in the case of agreements that are anticompetitive by object, it remains irrelevant for the infringer to prove that the conduct did not in practice have any anticompetitive effects. In this sense, therefore, there is an irrebuttable presumption of potential anticompetitive effects. There is no presumption of abuse, however, given that the dominant undertaking will always have the possibility to show that its conduct was objectively justified or led to efficiencies (even if sometimes it may be difficult to do so – e.g. in *Intel* there was no specific objective justification defense raised with regard to "naked restrictions"). As such, there is no concept of a "per se" abuse.

For other types of conduct, the Commission will need to establish potential anticompetitive effects to prove the existence of abuse to the requisite legal standard.

As far as pricing abuses are concerned, such evidence will normally be provided by means of the so-called "as efficient competitor test," a price-cost test that aims at establishing if an as efficient competitor is foreclosed from accessing the market because of the dominant undertaking's conduct. As recognized by the Courts, the as efficient competitor test conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking to assess the lawfulness of its own conduct. While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors (*TeliaSonera*, para. 44).

The as efficient competitor test has been explicitly endorsed by the EU Courts in predatory pricing cases. The use of a quantitative test in these cases is perfectly sensible, given that a price cannot be abusive as such, and therefore some additional elements will always be required to show potential anticompetitive effects. These additional elements are pricing below the dominant firm's own average variable costs, or pricing above average variable costs but below average total costs, coupled with additional evidence of potential anticompetitive effects, such as an exclusionary strategy (see *Post Danmark I*, paras. 27 and 28).

The as efficient competitor test has also been endorsed in margin squeeze cases in order to prove exclusion from a downstream market of competitors as efficient as the dominant firm. In these cases, the Courts also made clear that additional evidence of potential anticompetitive effects is required. This is also a sensible approach given that in margin squeeze cases, in particular, the functional relationship of the upstream products to the downstream products needs to be established. For instance, a relevant factor to determine the existence of the abuse can be that the upstream product is indispensable in order for a competitor to supply the downstream product (see *TeliaSonera*, paras. 69 and following).

While the use of the as efficient competitor test has been explicitly validated by the Courts in predatory pricing and margin squeeze cases, the Courts have consistently held that in cases concerning conditional rebates different from exclusivity rebates, the application of the as efficient competitor test is not required by the law (*Tomra)*, even if such a test can be considered an "useful tool" to show potential anticompetitive effects (*Post Danmark II*). This is not surprising given that in rebates cases, there are elements other than costs and prices that can be relevant to assess whether a certain rebate scheme has potential anticompetitive effects. For this reason, according to the Court of Justice, all the relevant circumstances of the case have to be taken into account, and in particular the criteria and rules governing the grant of the rebates, the extent of the dominant position of the undertaking concerned and the particular conditions of competition prevailing on the relevant market (*Post Danmark II*, para. 50).

The potential anticompetitive effects of a conduct, namely in terms of market foreclosure, will also have to be shown for non-pricing abuses different from abuses by object, such as refusal to supply (*Microsoft*, para. 332 and following), and tying, where it cannot be assumed that the tying of a specific product and a dominant product has by its nature a foreclosure effect, for instance because end users have alternative ways to procure products competing with the tied product (*Microsoft*, paras. 867-869; see, however, *Tetra Pak*, para. 135). Factors that can be looked at in these cases to prove potential anticompetitive effects include market share trends, and in particular the exit or marginalization of competitors of the dominant undertaking, or effects on prices and innovation. In non-pricing abuse cases, however, the Courts have not made it clear whether the Commission would have to show that the conduct potentially results in the exclusion of an as efficient competitor. It appears difficult to argue that this would necessarily be the case, not least because it may be hard to find a benchmark for the assessment of competitors' efficiency in the context of non-pricing abuse cases, which by definition do not require the assessment of the cost structure of the dominant firm and its competitors.

In any event, it appears that proof of exclusion of equally efficient competitors may not always be required, perhaps even in the case of pricing abuses. On the one hand, it is clear that the purpose of EU competition law is not to protect inefficient competitors (see *Post Danmark* I, para. 22). On the other hand, there may be some markets in which the emergence of a competitor as efficient as the dominant undertaking is made impossible due to the presence of barriers to entry, such as regulatory barriers. In these cases, the exclusion of even less efficient competitors may be considered as abusive (*Post*

Danmark II, paras. 59 and 60). While this conclusion was reached with specific regard to conditional retroactive rebate schemes, it appears that the same principle could be transposed to other types of abuses too, if the circumstances of the case justify it.

V. CONCLUSIONS

There is no real inconsistency in the EU Courts' case law with regard to the meaning of "anticompetitive effects" in the assessment of conduct under Article 102 TFEU. The perceived asymmetries in the case law are not determined by the willingness of the Courts to steer the case law in one or another direction, as some commentators occasionally claim, but rather by the type of conduct at stake in each individual case. In other words, the different standards of proof required by the Courts to show potential anticompetitive effects are justified by the different nature of the abuses in question.

It appears that the case law has identified a balance between preventing an excessive intrusion in the economic freedom of undertakings, and ensuring an effective enforcement of the competition rules. On the one hand, it does not appear recommendable to establish a lower standard of proof for pricing practices, given that a company's aggressive pricing policy can constitute the very manifestation of competition on the merits, as *Post Danmark I* makes clear (see para. 22). On the other hand, it does not seem justified to impose a higher standard of proof for "object abuses," as long as the dominant undertaking is given an opportunity to demonstrate that its conduct is objectively justified. The existence of clear obligations on dominant firms with respect to conduct that is by its very nature capable of resulting in anticompetitive effects does not appear to be unreasonable, and provides for guidance to dominant companies as to the legality of their behavior. From an administrative efficiency perspective, the Commission and national competition authorities can make the best use of their limited resources by tackling conduct which is likely to be harmful, without the need to engage in a complex and time consuming analysis of the effects of the conduct, thereby increasing deterrence and effectiveness of enforcement.[3]

3 See in this regard Wouter Wils, "The Judgment of the EU General Court in Intel and the So-Called 'More Economic Approach' to Abuse of Dominance", in World Competition, Vol. 37, No. 4, 2014, pp.405-434.

MARKET INVESTIGATIONS AS A NEW TOOL FOR COMPETITION AGENCIES: THE MEXICAN EXPERIENCE

BY CARLOS MENA-LABARTHE[1]

I. WHAT ARE MARKET INVESTIGATIONS?

Market investigations are proceedings by which a competition agency can assess the functioning of a determined market and evaluate it holistically. This, with the purpose of determining whether competition is functioning and, if not, to impose remedies to correct the corresponding failures.

These proceedings do not focus on the conduct of a specific firm and will not seek to determine a violation of the law or to establish general rules for market participants. Instead, they are directed to improve the functioning of the market as a whole. Its all-embracing framework allows market investigations to tackle adverse effects on competition from any source and determine remedies for the whole market.[2]

The first step in market investigations is acknowledging that something in the market is not working well and that it needs intervention from the competition authority. However, in this first moment, authorities cannot be certain of the sources of the problem, there is a suspicion that there might be competition issues that need a remedy or change.

1 Head of the Investigative Authority, COFECE, Mexico. I thank Laura Méndez and Ivonne Santillan for their help in the research needed to prepare this paper.

2 CC3 (Revised) – Guidelines for market investigations: Their role, procedures, assessment and remedies April 2013.

Competition authorities will open an investigation in order to look at the market characteristics. There, they will seek to identify the existence of anticompetitive features that might be reflecting undesired outcomes such as high prices, lack of innovation, low customer responses to prices, among others. At this point, it is important to stress that the identification of anticompetitive features in a market is not a simple task since not all competition problems are obvious.

Once the anticompetitive features are identified, the next step for authorities will be to make a competition assessment of such features and to identify if the source of the problem can be addressed with competition remedies. Authorities will look at behavioral, structural and regulatory features integrally.

Finally, if the authority determines that the origin of the problems is the lack of effective competition conditions, it will be able to come up with solutions to restore the efficient functioning of the market. Normally, the authorities have an available pool of remedies for market investigation findings, including recommendations to other governmental bodies, behavioral remedies such as the imposition of mandatory orders for firms and individuals, and structural remedies such as divestiture of assets. It is important to remark, that as result of these proceedings, authorities do not determine individual responsibilities, so there is no imposition of sanctions. Additionally, it is worth noting that these powers should be exercised responsibly, accordingly, authorities need to balance benefits and disadvantages of such an intervention and authorities will need to evaluate their actions later on.

There has been a debate in trying to identify the nature of market investigations, specifically, if they can be classified in one of the traditional ex-ante or ex-post toolboxes. Some would argue that these tools seem more "ex-ante" as they try to prevent anticompetitive conducts through predicting the possible market outcomes of a present market situation, as it happens in merger review or in regulatory analysis. On the other hand, some commentators have argued that it is more similar to "ex-post" antitrust analysis, as authorities have to look at the evolution of the market, which includes the existence of past behaviors. However, as opposed to antitrust traditional tools, past conducts in market investigations are not subject to sanctions, but they are only a feature to analyze along with other market characteristics.

Market investigations are a new non-traditional tool for competition agencies to intervene more efficiently. From my point of view, market investigations have a mixed nature. They stand half way right in the borderline between an ex-ante and an ex-post tool. They combine both types of analyzes, and they are an optimal resource for competition agencies to enhance efficient markets with both structural and behavioral anticompetitive features, through broader remedies than the traditional antitrust ones. Accordingly, I would classify these tools as corrective in nature and would stress their very different nature.

In Mexico, for example, the power to conduct market investigations is new and its creation corresponds to an urgency for more profound and rapid changes to markets with serious competition problems. Most of the times, markets where privatization occurred and the rules of the markets were not correctly drafted to protect, not to say, promote, competition. In 2013, the Constitution was amended to introduce the powers for the competition authority to "eliminate barriers to competition and regulate essential inputs". Since 2014, the Federal Law of Economic Competition (FLEC) provides that the Federal Commission of Economic Competition (COFECE by its Spanish acronym) [as well as the Federal Telecommunications Institute "IFT" by its Spanish acronym) in the telecommunications and broadcasting sectors] has the power to carry out a special investigation procedure to determine the existence of essential inputs and to eliminate barriers to competition. What we have named "market investigations."

II. THE EXPERIENCE IN MARKET INVESTIGATIONS AROUND THE WORLD

The United Kingdom ("U.K.") is the most experienced jurisdiction in carrying out market investigations. They were introduced back in 2002 through the Enterprise Act to replace those investigations that were already in place with a similar, yet more limited, scope and that were conducted by the Monopolies and Mergers Commission.

As of early 2016, 18 market references had been carried out by the U.K. Some of the sectors in which these procedures have been applied include airports, local bus services, movies on pay TV, cement and private healthcare. Regarding their outcomes, because of the wide pool of remedies available for the U.K.'s competition authority, it has been able to impose a package of remedial measures, instead of single remedies. According to the pursued aim, among such remedies put in place one can find those entitled to market opening, strengthening consumer response or changing the structure of the market, including, exceptionally, divestiture of assets.

From the revision of the U.K. experience, the most challenging issue comes from finding the correct remedies. For instance, in the private motor insurance investigation, the CMA failed to find an appropriate remedy to address the "cost separation"[3] inefficiency.

A 2013 reform in the United Kingdom amended and improved its market investigations regime in different ways. For instance, it defined new timeframes for the conduction of the investigations and for the implementation of the mandated remedies. Currently, there are four market investigations pending, for instance, in the markets of energy and retail banking.

Due to its success, U.K. market investigations inspired a nearly equal regime in Iceland. This regime is based on Art. 16 of the Icelandic Competition Act, which authorizes the Competition Authority to take measures against circumstances or conducts that prevent, limit or affect competition to the detriment of the public interest, even in cases when the provisions of the Competition Act have not been violated.

As a result of a market investigation, in 2013 the Icelandic Competition Authority ("ICA") instructed the operator of the Keflavik Airport to ensure that new competitors in the market for operations of passenger flights (to and from the airport) would have access to vital airport slot times, so they could compete in that market. Among other instructions, the ICA ordered the airport operator to prepare guidelines for the independent slot allocation coordinator considering competitive factors when allocating available slots.[4]

There are also other competition tools available in some jurisdictions to exercise market control that are similar to market investigations. Some of them are aimed to solve market failures not addressed specifically by competition law provisions, to grant access to essential inputs, and most of them, to eliminate regulatory barriers to competition.

- In Spain, since 2013, the National Commission of Markets and Competition has the power to challenge before the Courts Public Administration's legal actions and general provisions hierarchically inferior to law that hinder the maintenance of effective competition in the markets (article 5.4 Law 3/2013). This power is remarkable, because it gives the Commission the power to issue mandatory orders to eliminate regulatory barriers to competition, when most of the countries can only issue non-binding opinions.

- Likewise, in Peru, the competition authority (INDECOPI) has the power to eliminate "bureaucratic barriers to competition." During 2014, the Commission for Elimination of Bureaucratic Barriers of INDECOPI received 297 complaints, 68 percent of which it considered grounded.

- In Australia, the National Access regime establishes mechanisms by which access to infrastructure services can be sought – this power is not limited to specific industries. The mechanisms include declaration and arbitration, access undertakings and the certification of effective state access regimes.[5]

3 Consisting in the fact that the insurer liable for a non-fault driver's claim is often not the party controlling the costs.

4 Icelandic Competition Commission. "Slot allocation at Keflavik Airport disrupts competition in the air transport market." Accessed November 5, 2015.http://en.samkeppni.is/published-content/news/nr/2268.

5 Australia Competition and Consumer Commission, "National access regime under Part IIIA." Accessed November 5, 2015. https://www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/acccs-role-in-regulated-infrastructure/national-access-regime-under-part-iiia

- In the United States (U.S.), Section 5 of the Federal Trade Commission ("FTC") Act, prohibits ''unfair or deceptive acts or practices in or affecting commerce.'' Even when the U.S. Congress did not define, what constituted "unfair methods of competition" the FTC has been entitled to apply the statute. As the FTC has recognized in the "Statement of Enforcement Principles," Section 5 can be applied as a standalone provision to address acts or practices that are anticompetitive but may not fall within the scope of the Sherman or Clayton Act.[6] Some commentators have pointed out that this Section gives FTC a "broad power of market regulation that potentially spans the boundary between competition law and regulation."[7]

From my point of view, it is important for competition agencies to look at the international experience. However, there is no unique model that fits all countries. Each jurisdiction should develop a policy of its own, according to the characteristics of their legal background, their constitutional principles and their markets and the strategic objectives they have established in their competition policies.

III. MARKET INVESTIGATIONS IN MEXICO

In 2013, the Mexican Constitution was amended to promote more competition and establish more independent and powerful authorities, especially in the telecommunications sector. This reform created two new constitutional autonomous bodies, COFECE and IFT, to protect and guarantee free market competition. The constitutional reform established that this authority should be granted with all the necessary powers to fulfill its duty, including the powers to regulate the access to essential inputs, order the elimination of barriers to competition, and mandate the divestiture of assets or shares in the necessary proportions to eliminate anticompetitive effects.

The reason for these major changes — which were approved by the three major national political parties — was the urge to promote competition in a rapid manner and to tackle problems that are mainly of a structural nature. Above all, those problems are associated with unsuccessful liberalization processes, which derived in anticompetitive regulations and weak competitive pressures in general.

Arising from the constitutional amendment, a new competition law was enacted but the process was not an easy one. When the FLEC was being discussed in Congress back in 2014, a congressional advisor wrote a critique of the concepts of barriers to competition and essential facilities saying that they were "UFOs" meaning they were Unidentified Legal Concepts (for its acronym in Spanish, of course). Moreover, many commentators, national and international wrote papers and published editorials arguing against this tool. The private sector opposed the legal provisions vehemently. Nowadays, some doubts remain, and it is our duty at the Commission to remain responsive to concerns regarding the new powers.

IV. BARRIERS TO COMPETITION

Generally, barriers to competition appear to be of a very different nature and can be represented by features such as pieces of legislation, brands' prestige, lack of access to financing or asymmetric information, among many others. Normally, the economic literature deals with barriers to entry but not with other types of barriers to competition.

When discussing the bill in Congress, a big debate emerged because of the lack of a clear definition for "barriers to competition and free market participation." As a result, under

6 The principles to challenge an act or practices as an unfair method of competition in violation of Section 5 on a standalone basis, should consider following principles: (i) the Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare; (ii) the act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and (iii) the Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.

7 Niamh Dunne, Between competition law and regulation: hybridized approaches to market control, Journal of Antitrust Enforcement, (2014), pp. 1–45.

Mexican competition law and for the purposes of market investigations, article 3 of the FLEC provides that barriers to competition and free market participation consist of: any structural market characteristic, act or fact conducted by the economic agents that: (i) impedes access to competitors or limits their ability to compete in the markets; or (ii) impedes or distorts the process of competition and free market participation. In addition, they can be legal provisions issued by any level of government that unduly impede or distort the process of competition and free market participation.[8]

Barriers to competition for the purposes of market investigations do not imply the existence of an anticompetitive behavior, but a feature in the market that might be hindering effective competition. It is also important to say that in market investigations, the remedies are not sanctions, since the special procedure established in article 94 is not of a punitive nature but rather of a corrective one.

V. ESSENTIAL INPUTS

As was the case with barriers to competition, when the bill for the new FLEC was being discussed in Congress, some legislators argued that the bill did not provide a specific definition of "essential input." That the essential facilities (if they could be defined as such) doctrine in many countries had been abandoned. In consequence, they heard arguments for or against the essential facilities doctrine and the evolution of the concept in various jurisdictions.

As a result, the FLEC provides a clear way to identify essential inputs. It can be said that it takes into consideration what has been decided and written about the concept around the world. Article 60 of the FLEC provides that in order to determine its existence COFECE should consider: 1) if the input is controlled by an economic agent with market power; 2) if the reproduction of the input is feasible taking into account technical, legal or economic elements; 3) if the input is indispensable for the provision of goods or services and has no close substitutes; and, 4) the circumstances under which the economic agent managed to control the input.

8 Article 3, subsection IV, Federal Law of Economic Competition. Available at: http://www.diputados.gob.mx/LeyesBiblio/pdf/LFCE.pdf

This provision was carefully developed in order to avoid free-riding problems and discouragement of investment because market investigations are not in any sense protecting less efficient competitors from firms that lawfully acquired its market power as some observers have argued.

VI. DUE PROCESS

With all these powers that represent new possibilities for competition authorities to intervene, of course, the new worries are if due process is protected, and if there is a correct judicial review.

Undoubtedly, the course of investigation procedures plays a critical role in the achievement of credibility and legitimacy for competition authorities. This is the reason why special emphasis was put in Congress when designing the provisions that guarantee due process for economic agents and even for corresponding regulators. It must be said that during the legislative process, the main discussion was how the authority would have to apply the concepts regarding market investigations and how the possible affected parties could defend against a procedure like this.

In Mexico's legislation, market investigations consist of rigorous procedures with specific terms and conditions. The procedure was designed to guarantee due process: right of defense, independence of decision-makers and judicial review.

To begin with, the market investigations procedure may initiate either ex-officio by the Investigative Authority or per request of the Executive Branch; the Investigative Authority is an independent body within the Commission. The investigation officially begins with the issuance of an Initiation Order whose extract is published in the Federal Official Gazette. The purpose of this publication is to enable any person to provide COFECE with elements of investigation during the course of the procedure.

During the investigation stage, the Investigative Authority is compelled to use its investigation powers within the established legal limits foreseen in the FLEC, including the requisition of reports and necessary documents, serve subpoenas to firms and individuals that are related with the case in question, conduct searches and order any diligence that is deemed adequate.[9]

Upon conclusion of the investigation, if the Investigative Authority determines that there are no effective competition conditions in the investigated market, the Investigative Authority shall either issue a preliminary investigative opinion or otherwise propose to the Plenum the closure of the file.

As for the preliminary opinion, the Investigative Authority shall propose the remedies esteemed necessary in order to eliminate the restrictions to the efficient functioning of the investigated market. Remarkably, for the issuance of such opinion the Investigative Authority can request a non-binding technical opinion to the coordinating body of the sector, which helps to avoid a biased approach.

To strengthen procedural fairness, the FLEC provides that the economic agents may come before the Commission in order to present their defense.

It is pertinent to mention at this point that the involved economic agents are given the opportunity to propose suitable and economically feasible measures to eliminate the competition problems identified. Furthermore, in case the Plenum rejects the proposal, it is obliged to justify the motives of its decision.

In compliance with the basic principle of judicial review, according to the 2013 constitutional reform, the decisions of the Commission may be contested through a writ of indirect Amparo. Remarkably, in cases where the Commission imposes fines or the divestiture of assets, the orders will not be executed until the indirect Amparo[10] is resolved.[11]

For the sake of due process, the recent constitutional reform also created new specialized courts and not only will they be responsible for carrying out these indirect Amparo actions but they will also have a major role in competition law enforcement by establishing several criteria concerning the Commission procedures arising from the entry into force of the new legislation.

VII. THE FIRST CASES

In February 16, 2015, an investigation under article 94 of the FLEC was initiated in the market for the provision of air transport services that use the International Airport of Mexico City for its landing and/or take off procedures, under the file IEBC-0101-2015. In February 29, 2016 — only a year after the beginning of the investigation —, the Investigative Authority made public its Preliminary Investigative Opinion concerning such file. As part of the major findings, the Investigative Authority determined the existence of an essential input consisting of the runways, taxiways, visual aids and platforms that form part of the infrastructure of the International Airport of Mexico City. Accordingly, in order to foster competition conditions in the investigated market, a bundle of remedies was proposed, including recommendations for the amendment of sectoral regulation, the creation of an Independent Coordinator for the management of landing and take-off schedules' allocation, the establishment of a schedule Fund for new entrants, as well as several measures for transparency enhancement, among others.

Additionally, in June 24, 2015, the Investigative Authority of COFECE published in the Official Gazette the initiation of another market investigation in the road cargo transportation market in the State of Sinaloa, to determine the existence of possible barriers to competition. This investigation is in still ongoing.

Finally, in January 14, 2016 the Investigative Authority of COFECE published in the Official Gazette the initiation of a market investigation in the production, distribution and commercialization of malt barley seed and grain for beer manufacturing.

VIII. SHOULD COMPETITION AUTHORITIES AROUND THE WORLD HAVE THESE POWERS?

I believe market investigations represent a valuable opportunity for competition authorities

9 Article 28, subsection II, Federal Law of Economic Competition.

10 A writ of *indirect Amparo action* is a native Mexican legal institution. It is a constitutional remedy to obtain relief against violation of human rights committed by an authority or in some cases, even against private entities that unilaterally affect the sphere of human rights of a person.

11 Article 28; subsection VII, Mexico's federal constitution.

to enforce competition principles in markets that appear not to be working well given that these tools enable them to tackle features from any source.

Some critics have established that jurisdictions like Mexico can make use of other tools like market studies in order to obtain a comprehensive understanding of the markets. It is worth distinguishing that market studies, are general reviews that may or may not be provided under the law. However, for authorities it is not only a matter of getting to know how the markets work but to identify how can they be improved and implement measures that represent the best way to achieve that.

Unfortunately, the recommendations arising from market studies are highly valuable yet not mandatory. Thus, I would rather say that the findings of market studies would serve as a complementary tool for the aims of market investigations as the U.K. experience shows. In addition, unlike market studies, market investigations are constrained to look into a relevant economic market and can produce rapid changes that may not be achieved in any other way.

In our legislative process, the legislator considered the concerns expressed by society, including executives, solicitors and scholars, and it came up with a revised version of the bill. Among other changes, the new version included the assumptions under which the market investigations were to be initiated and established the economic agents' opportunity to propose suitable remedies to address the authority's competition concerns. The President of the Republic proposed the legislation with only 14 paragraphs and 625 words and at the end of the day, mostly due to this discussion; the final article is 17 paragraphs and 1191 words long.

From my point of view, the wide range of possibilities that these market investigations offer, allows a flexible approach for authorities to tailor solutions according to specific market circumstances, which make market investigations a desirable tool to have. In the case of structural remedies, I believe this is a step forward because before the reform these remedies, such as divestitures, were only available as a solution to potential anti-competitive effects in mergers or as sanctions of recidivism.

Regarding divestiture powers, it is important to recognize that they are a key power that authorities should use carefully. In the case of Mexico, we are aware of the need to act proportionately to achieve a legitimate outcome so the divestiture of assets is only to be used when other remedies would not be enough to solve the competitive concern.

IX. MARKET INVESTIGATIONS OR TRADITIONAL ANTITRUST ENFORCEMENT TOOLS?

I believe market investigations were conceived to serve as a complementary rather than a competing tool *vis-à-vis* traditional antitrust means. To some extent, market investigations are here to fill in the blanks left by conventional enforcement mechanisms because not every competition failure can be fixed by means of conventional competition tools.

Market investigations are designed to intervene when the identified competition concerns do not seem likely to be "naturally" corrected, or when markets are not working in a competitive manner even in the absence of conducts such as cartels or abuse of dominance. Moreover, as opposed to traditional tools, it is through market investigations that one can identify and correct certain governmental behaviors that may be causing inefficiencies on the workings of the market. As it has been correctly pointed out, this also implies that the investigated conducts include failure to act and that those identified conducts, either acts or failure to act, do not need to be intentional.[12]

Moreover, the fact that a market investigation is being carried out in a certain economic market, does not preclude the possibility of abuse of dominance or cartel investigations to also take place. Meanwhile, the former will be focusing on the overall picture of the market; the later will be targeting misbehavior by the economic agents.

Having said that, the use of either option would depend on the nature of the competition concerns arising from a given market. For instance, in deregulated industries, many of which can be found in the recent economic history of developing countries, market investigations are suitable

12 Richard Whish and David Bailey, Competition Law (Oxford: Oxford University Press, 2014), 467.

to correct the inefficiencies that usually derive, not from wrongdoing, but from prior inadequate market structures or legislation.

Regardless of the broad scope of this new tool, it is not intended to be used systematically in every market that presents failures or in lieu of other tools. For instance, there are anticompetitive characteristics in the market that could possibly be resolved on a natural way in the short run or other markets whose anticompetitive characteristics do not affect but a small portion of the whole market.

In any case, it would be preferable to lean towards the tool that is able to provide the most comprehensive solution to the specific competition concerns. When deciding whether to use conventional enforcement tools or market investigations, each country should look at its own circumstances since economies may profoundly differ from one another.

X. CONCLUSIONS

I believe the possibilities of this new tool are overwhelming. As happens with any other powerful tool, the important issue is how you use it.

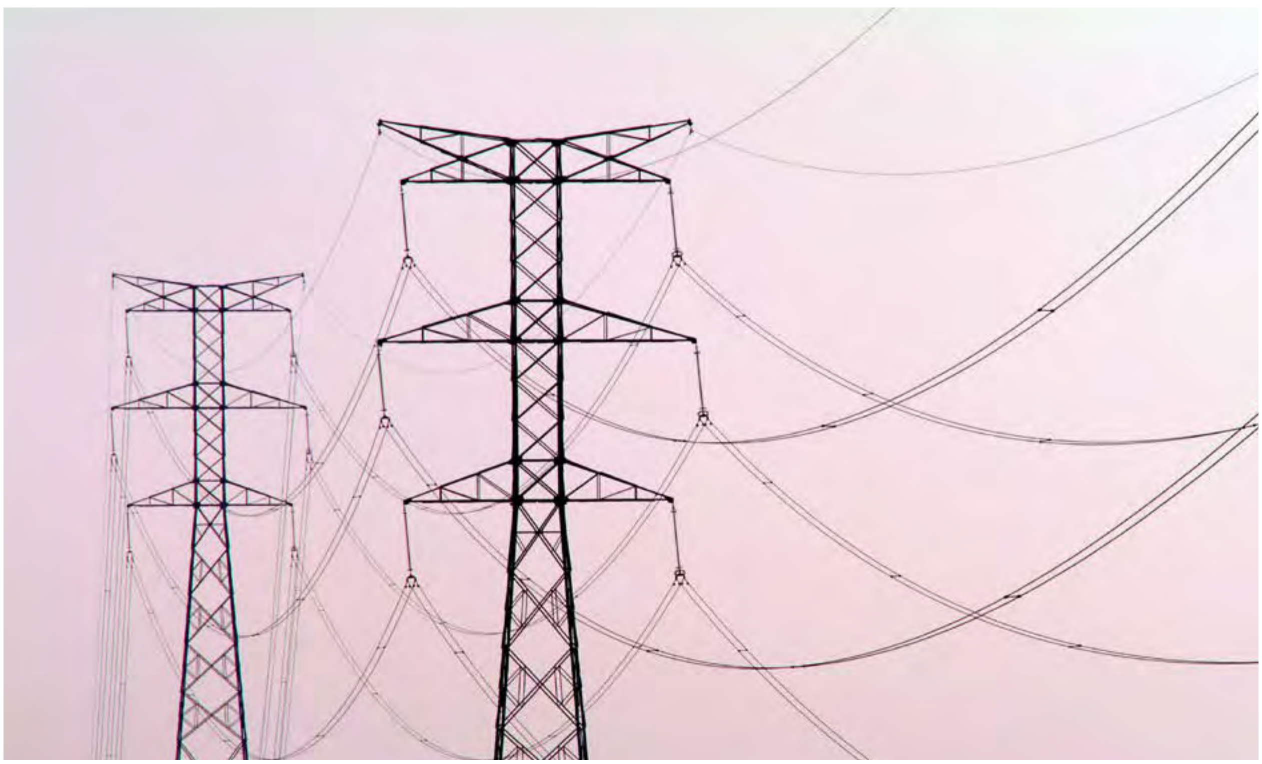
The experience around the world, especially in the U.K., has proven that it can be an efficient and effective way to tackle the lack of competition in specific markets. The possibility of "surgical interventions" in markets where the lack of competition derives mainly from structural problems that cannot be tackled through traditional competition enforcement tools and where advocacy is not enough to create the necessary pressures for change creates excellent possibilities.

Competition authorities around the world, particularly in developing countries, can find a way to intervene through these new proceedings to eliminate barriers and create better conditions for more efficient markets in a bold and direct path. The discussion and the political consensus that needs to be created to give the authorities these powers create a beneficial side effect.

Developing countries with a tradition of government owned enterprises, recent privatizations and reregulation are some of the countries that could benefit more from these powers to ensure the new competition settings become efficient and with competition in the newly created markets.

COMPARING THE INCOMPARABLE? AN ANALYSIS OF THE ENFORCEMENT OF ABUSE OF DOMINANCE RULES TO THE ENERGY AND TECHNOLOGY SECTORS IN EUROPE

By Alvaro García-Delgado & Andrea Redondo[1]



The Earth is filled with energy. Production sources from which our daily current energy is produced – such as water, wind, sun and gas, just to name a few – have been around for immemorial time. Energy markets – by which we primarily refer to gas and electricity markets in this article – have also been regulated for a long period of time, and this in a heavy manner.

1 Case-handlers respectively in units C.2 (Antitrust: Media) and B.1 (Antitrust: Energy, Environment) of Directorate-General for Competition, European Commission. Please note that this article contains the views of the authors and does not represent in any way the views of the European Commission.

On the contrary, technology markets – as we currently know them – are barely still teenagers and new technologies emerge every day leaving others behind. Technology markets, and the ICT sector as a whole, are often flagged as one of the most dynamic economic sectors and it is often difficult to make the new innovations fit into already-existing regulatory initiatives. Furthermore, and despite changing circumstances and with the exception of telecommunications, these markets are usually only very lightly regulated.

Despite these stark differences, both sectors have more things in common than one might think. Enforcement of European Union ("EU") antitrust rules in the two sectors is one of them: with the exception of the *Tomra* case (AT.38113 – Prokent AG/Tomra Systems), all Article 102 TFEU-only prohibition decisions since July 1, 2005 have been taken in the energy and ICT sectors. A comparable situation exists in relation to commitment decisions in 102.

Although these numbers might seem striking, this article will show how both markets have similarities and could on occasions be described as being dependent on one another. For example, low electricity prices are necessary to competitively produce and run IT devices and services, but technology is also needed to make energy-usage more efficient, a good example being smart-meters.

At the same time, however, it could be argued that because of their structure and evolution over time, they are very different markets. As such, it is legitimate to ask oneself whether abuse of dominance rules can apply in the same way to such different markets.

The purpose of the article is therefore to compare two sectors that are *a priori* rather different but which are nevertheless both very high on President Juncker's agenda.[2] This comparative exercise will allow analyzing whether abuses of dominance are dealt with in the same way and, as such, whether the lessons learnt in one of them are transposable to the other and *vice versa*. But to do so, it is first appropriate to have an overview of these markets and see how they have evolved over time in terms of the prosecution of abuses of dominance under Article 102 TFEU.

I. OVERVIEW OF THE ENERGY SECTOR

Historically, energy markets have been heavily regulated. In the 1990s, at a time when in Europe most energy markets were still national monopolies, it was decided to gradually liberalize and open these markets to competition in three waves. The first liberalization package (1996 for electricity, 1998 for gas) opened to competition wholesale markets and retail markets with respect to large users. The second package (2003) opened to competition the remaining segments of retail markets. The cornerstone of this package was the unbundling requirement it imposed, whereby incumbents had to legally and functionally separate their network activities from all their other activities.

While the first two packages had achieved significant progress, there were indications that there was still room for improvement. In order to identify the barriers to entry and expansion still persisting in these markets, the Commission launched a sector inquiry in 2005. The results, published in 2007, identified serious shortcomings in these markets, including high market concentration, lack of liquidity in wholesale markets, little integration between Member States' markets, inadequate level of unbundling and existence of long-term contracts.

The sector inquiry served two purposes. On the one hand, it allowed determining the areas where (even) more regulation was required to achieve a European internal energy market. This led to the adoption of the third energy package (2009) which, among other things, strengthened unbundling requirements.

On the other hand, the sector inquiry served as springboard to competition law enforcement. In the three years that followed the sector inquiry, the Commission adopted eight commitment decisions on the basis of Article 9 of Regulation 1/2003. These antitrust cases concerned a number of issues such as long-term supply contracts (AT.37966 – Distrigaz and AT.39386 – Long term contracts in France), long-term capacity bookings (AT.39316 – GDF foreclosure and AT.39317 – E.On gas foreclosure) and capacity hoarding (AT.39402 – RWE gas foreclosure and AT.39315 – ENI).

It could be thought that after such an intensive legislative and enforcement activity, energy markets would be entirely open to competition and would constitute an internal energy market within the EU. However, recent activity on both fronts has shown that we are not yet completely there.

In terms of regulation, 2015 saw the much-awaited launch of the Energy Union, one of President Juncker's ten priorities. The Energy Union is composed of five closely-related and mutually reinforcing dimensions: security of supply, a fully-integrated internal energy market, energy efficiency, emission reduction and R&D. As the Energy Union Strategy itself states, there is an intrinsic and inseparable link between antitrust

2 On the current Commission's list of ten priorities the Digital Single Market and the Energy Union and Climate are respectively ranked second and third. For more details see http://ec.europa.eu/priorities/index_en

rules and most of these dimensions and strict enforcement of the Treaty's competition rules will help preventing companies from distorting the internal energy market and ensuring that energy flows freely by addressing territorial restrictions as well as foreclosure issues.[3] Early 2016 has also seen the arrival of additional regulatory developments, following the Energy Union Roadmap.

The past few years have also been very active in terms of competition law enforcement in the energy sector. In relation to Article 102, in 2014 the Commission fined the Romanian power exchange EUR 1,031 million for having abused its dominant position by creating an artificial barrier to market entry for EU traders (AT.39984 – OPCOM).

In 2015, the Commission also sent Statements of Objections in two important cases. The first one was sent in March to Bulgarian Energy Holding and its subsidiaries (AT.39849 – BEH gas). In this case the Commission took the preliminary view that BEH may have breached EU antitrust rules by hindering competitors' access to key gas infrastructures in Bulgaria.

The second was sent in April to Gazprom (AT.39816 – Upstream gas supplies in Central and Eastern Europe), in which the Commission took the preliminary view that Gazprom would be breaching EU antitrust rules by pursuing an overall strategy to partition Central and Eastern European gas markets with the aim of maintaining an unfair pricing policy in several of those Member States.

More recently, in December 2015, the Commission adopted a decision rendering legally binding the commitments offered by BEH to end competition restrictions on Bulgaria's wholesale electricity market (AT.39767 – BEH electricity). It is evident from the above that the existence of sector-specific regulation has not prevented the Commission from strictly enforcing its competition toolkit. Quite the contrary, the Commission has relied in numerous instances on the existence of regulation to shape its antitrust cases, and will continue to do so as, in relation to energy markets, antitrust rules and regulation must go hand-in-hand.

II. OVERVIEW OF THE TECHNOLOGY SECTOR

Commissioner Vestager stated in January 2016[4] that "technology markets are no different from any others. What is different is the pace of change". This same pace of change is probably also applicable to antitrust enforcement in the sector.

Since its flagship Microsoft case (AT.37792 – Microsoft) the European Commission has substantially kept up and boosted its enforcement in the ICT sectors and Article 102 has been strictly and consistently enforced. Although there is no overall regulatory framework as regards ICT sectors, telecommunications have been regulated throughout the EU since 1998. Back then Member States agreed to open up their telecommunication sectors and adopted the so-called First Telecoms Package, which included the Liberalization Directive. Implementation of this Package was not easy and the infringement proceedings open against the back-then fifteen Member States neared the three digits.[5] Only four years later, in 2002, a new regulatory framework was adopted. This new framework — the Second Telecoms Package — was made up of five Directives and entered into force in July 2003. This Package significantly boosted competition by, for example, introducing the concept of significant market power ("SMP"), the boosting of portability and the unbundling of the local loop. A Third Package included important reforms to the system in 2009 and that same Package is now again up for reform. Beyond the regulatory framework in the telecommunications sector, 2015 was a notable year for antitrust enforcement in the technological sector: in April 2015 the Commission sent a Statement of Objections to Google in relation to its shopping comparison services (AT.39740 – Google Search). In the press release announcing the sending, the Commission stated that its preliminary view was that Google was "artificially divert[ing] traffic from rival comparison shopping services and hinder[ing] their ability

3 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank: A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM/2015/080 final.

4 European Commissioner M. Vestager, Competition in a big data world, DLD Conference: January 16-17, 2016.

5 J-F. Pons, Deputy Director General D.G. IV – Competition, European Commission, *The liberalisation of telecommunications in Europe and the role of the regulators*, April 12, 1999.

to compete on the market." At the same time, the Commission also opened an investigation into Google's Android mobile operating system (AT.40099 – Google Android). Shortly thereafter, the Commission also opened proceedings against Amazon in order to assess whether the company had engaged in anticompetitive behavior by means of including certain most favored nation clauses in its contracts with publishers (AT.40135 – E-book MFNs and related matters). Finally, only a month later, the Commission also opened two investigations against Qualcomm for allegedly abusing its dominant position by implementing exclusivity payments (AT.40220 – Qualcomm (exclusivity payments)) and engaging in predatory pricing (AT.39711 – Qualcomm (predation)).

This enforcement in the ICT sector is, however, by no means new to the Commission. In fact, one cannot ignore that the sector has also seen the largest fine ever (EUR 1.06 billion) imposed by the Commission against a single company (AT.37990 – Intel) for abusing its dominant position. Moreover, telecommunications companies have also over the past years been frequently sanctioned[6] and in December 2015, the Commission's approach to this type of cases got again confirmed in the *Orange Polska v Commission* (Case T-486/11).

If anything is to be described as new under the current enforcement trends this would be, to use Commissioner Vestager's words, the pace of change. Of significant importance would also be the fact that targeted enforcing of competition laws is complemented by the Digital Single Market Strategy.

This strategy, launched on May 6, 2015, is one of the top priorities of the current Commission and has as its main objective to combat the fragmentation that affects the European ICT sectors and that the Commission perceives as a key pillar for future growth and comprises a number of initiatives.

Finally, in what could probably be regarded as a hybrid between competition law enforcement and policy, the digital sector has also seen the comeback of a tool that had not been used since 2008: sector inquiries. The e-commerce sector inquiry, launched in March 2015, focuses particularly on potential barriers erected by companies to cross-border online trade in goods, services and digital content. Conclusion of the sector inquiry is scheduled for early 2017 and case-specific enforcement may follow where specific competition concerns are identified.

The Court of Justice's ruling invalidating the Commission's EU-US Safe Harbor data sharing agreement (Case C-362/14) – and the recent proposal to replace it with the EU-US Privacy Shield[7] – also deserve a special mention for opening up yet another battlefront for change in the ICT sectors.

All these initiatives clearly evidence the enormous interest that currently exists in the ICT sector. They also make clear that even where there is no sector-specific regulation, antitrust rules continue to be enforced vigorously. Moreover, as proven by the case practice and as confirmed by the Court of Justice, the existence of sector-specific regulation does not preclude application of antitrust enforcement.

III. DIFFERENCES AND SIMILARITIES BETWEEN THE ENERGY AND TECHNOLOGY SECTORS

We have seen that while there are dissimilar degrees of regulation in the two sectors at stake, over the last years the Commission has carried out an equally strict enforcement of antitrust rules in both. However, in order to be able to determine whether Article 102 has been – and still is – applied in the same or different way to both sectors, it is first important to analyze the differences and similarities between the two sectors.

The first difference concerns not so much the level of regulation itself, but the direction the sectorial regulation is taking. Whereas several legislative initiatives have been adopted regarding energy and traditional telecoms, other areas of the technology sector remain largely untouched.

6 The Commission has intervened on several occasions against incumbents who tried to protect their market position through anticompetitive means: decisions against Slovak Telekom and Deutsche Telekom (2014, AT.39523), Telefónica and Portugal Telecom (2013, AT. 39839), Telekomunikacja Polska (2011, AT.39525), Telefónica (2007, AT.38784), Wanadoo (2003, AT.38233) and Deutsche Telekom (2003, AT.37451, AT.37578, AT.37579).

7 European Commission Press Release, *EU Commission and United States agree on new framework for transatlantic data flows: EU-US Privacy Shield*, IP/16/216, February 2, 2016.

Moreover, despite the sheer efforts to liberalize energy markets, there is still a strong presence of national players in these markets as energy companies still find it somewhat daunting to compete in markets other than their own. On the contrary, there are clearly major global players in the ICT sector (although it is less so in telecoms, where the situation resembles more the one present in energy markets).

This could eventually have an impact on market definition in some specific cases. Whereas in energy markets it is still very often the case that the market definition remains national, in technology markets (with the exception of telecommunications) market definitions may tend to be more worldwide. This could turn out to be especially relevant for the purpose of establishing dominance in Article 102 cases.

On the contrary, the chances of putting at risk security of supply are significantly more important in the energy sector given the dependence of the EU on imports. However, as practice has shown, Article 102 cases not only do not put at risk security of supply for European customers but, quite to the contrary, they have significantly reinforced it over the years. Having said that, security (in the form of data security) is also becoming increasingly important in the technology sector. In particular, albeit not a Competition law issue, the Court of Justice's judgment quashing the Data Protection Safe Harbor has boosted the calls to create European technology champions in order to ensure data security.

Finally, in terms of procedure, all Article 102 investigations are bound by the same rules, namely those contained in Regulations 1/2003 and 773/2004. In practice, however, the investigative tools used to initiate proceedings are often different in the two sectors. Whereas in the energy sector it is very often the case that the Commission acts on its own initiative (*ex officio* cases), in the technology sector very frequently cases originate in complaints, be it from competitors or customers.

Despite these sectorial differences, the number of similarities between the two sectors is also strikingly large. These similarities may probably also explain the abundance of Article 102 cases throughout both industries.

To start, it is worth noting that both industries are, for example, built on large customer portfolios and are (or have become) anything but niche markets. In fact, the number of users is frequently counted in millions or even billions of individuals.

Moreover, certain players in both industries may exhibit a high degree of locked-in consumers, combined with a low degree of switching. This may remain so even where, as is the case with energy and telecommunication services, legislation increasingly facilitates and fosters switching of providers.

At the same time, high fixed (sunk) costs and low marginal costs can be common throughout both areas. The importance of economies of scale is also omnipresent in both markets, and the literature often refers to some services in these industries as being natural monopolies (essential facilities). Network effects may also be a similarity between the two industries when one thinks for example about the coverage of networks, the accuracy of search results or compatibility issues between platforms.

In fact, it is also interesting to see that, be it for regulatory or other reasons, the existence of one large player per market may be commonplace. Also, such positions can often remain unchanged over time even in the absence of an abusive conduct and despite unbundling and recent deregulatory efforts.

Finally, it is also interesting to mention that European legislation has already identified and protected universal services in both sectors, including the right to be supplied with electricity and, for vulnerable customers, with natural gas[8] and with communications services at a reasonable quality and an affordable price.[9]

IV. CONCLUSION

At first sight, energy and ICT sectors could be regarded as having nothing to do with each other. However, if one digs deeper and as presented above, both areas share a large number of commonalities and it may not be by chance that both sectors accumulate the highest number of

8 See respectively Directives 2009/72/EC and 2009/73/EC (both part of the Third energy package).

9 Directive 2002/22/EC as amended by Directive 2009/136/EC (Citizen rights' Directive).

Article 102 investigations of the last years.

Therefore, while it is undeniable that there are differences between the two sectors and that the abusive practices might take differenced forms in the two, the competition concerns that lie at the heart of Article 102 TFEU remain the same. As such, abuse of dominance rules must be applied in the same way to both sectors, even if the tools and market dynamics are different. We are therefore not comparing the incomparable, and despite evolving at different speeds, both sectors have a lot to learn from the other in terms of antitrust enforcement.

THE RESURRECTION OF ESSENTIAL FACILITIES DOCTRINE AND ITS APPLICABILITY IN INDIA

BY KALYANI SINGH[1]

The controversial essential facilities doctrine recently seems to have resurfaced amidst recent developments in competition law. The doctrine is typically applied in abuse of dominant cases where a dominant enterprise denies access to its essential facility. Since its inception in 1912, this concept has faced severe criticism to the extent of being redundant. From being formally legitimized to reaching its outer limit, the doctrine seems to have now come full circle in finding implicit application; particularly in abuse of dominance cases.

This article attempts to outline the applicability of essential facilities doctrine in India and the trends likely to follow.

I. THE CONCEPT OF ESSENTIAL FACILITIES DOCTRINE

An essential facilities doctrine specifies when the owner(s) of an essential or bottleneck facility is mandated to provide access to that facility at a "reasonable" price. Typically, considered a subset of refusal to deal cases; the doctrine finds its origin in the U.S. Supreme Court decision in *United States v. Terminal Railroad Association*.[2] Subsequent developments through case-law have laid down the test to establish liability under essential facilities doctrine that shall satisfy the following four elements:[3]

a. control of the essential facility by a monopolist;

b. a competitor's inability practically

1 Senior Associate at Chandhiok & Associates. The views expressed in this article are personal and are exclusively those of the author.

2 *Terminal Railroad Co. v. US*, 224 US 383 (1912)

3 *MCI Communications Corp. v. AT&T*. (708 F.2d 1081, 1132 (7th Cir.)

or reasonably to duplicate the essential facility;

c. the denial of the use of the facility to a competitor;

d. the feasibility of providing the facility.

Over the years, the doctrine has been heavily criticized for being undertheorized and typecast as an "epithet" whose contours are unclear.[4] Incidentally, the U.S. Supreme Court itself in *Trinko* strongly hinted that the doctrine had at the very least reached its outer limits and might not exist at all.[5] Even in the European Union ("EU"), where arguably the doctrine has found stronger support, formal application has been relatively limited.[6] The main reason for such reluctance could be attributed to the general conundrum in determining whether a facility is essential and consequently whether there is a duty to share the facility with others.

Notably however, recent developments indicate an increasing focus on the essential facilities doctrine. Specifically, the doctrine has found itself right in the center of the hotly debated interface between competition law and intellectual property rights ("IPRs"). For instance, the applicability of enforcement guidelines and rules for China's Anti-Monopoly Law with respect to IPRs contain provisions extending the essential facilities doctrine to IPRs.[7] Even in the EU, the Court of Justice of the European Union ("CJEU") recently in the *Huawei*[8] case held that the holder of a Standard Essential Patent ("SEP") may be found in breach of the competition rules by seeking an injunction against a potential licensee in certain circumstances. Particularly, when attributing liability in cases relating to IPRs, the CJEU expressly observed:

> It is, in this connection, settled case-law that the exercise of an exclusive right linked to an intellectual-property right — in the case in the main proceedings, namely the right to bring an action for infringement — forms part of the rights of the proprietor of an intellectual-property right, with the result that the exercise of such a right, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute an abuse of a dominant position.
>
> However, it is also settled case-law that the exercise of an exclusive right linked to an intellectual-property right by the proprietor may, in exceptional circumstances, involve abusive conduct.

These findings seem to indicate an increasing inclination of assessment of conduct of IPR holders within the contours of the essential facility doctrine. While the conventional applicability is still relatively arguable, the reemergence of the concept is quite evident through these developments.

Indian competition law, while still in its teething stage, has been gaining significant traction in terms of enforcement. Predictably, there has been a recent uptick in the number of cases relating to abuse of dominance cases. The Competition Commission of India ("CCI"/"Commission") has also addressed the essential facilities doctrine in some of these cases.

II. INDIAN CASE-LAW ON ESSENTIAL FACILITIES DOCTRINE

Under the Competition Act, 2002 ("Competition Act"), essential facilities doctrine has been applied in cases relating to denial of market access by

4 Philip J. Areeda, "Essential Facilities: An Epithet in Need of Limiting Principles," 58 Antitrust L.J. 841
(1989)

5 *Verizon Comms., Inc. v. Law Offices of Curtis v. Trinko*, 540 U.S. 398 (2004), Also *see*: *Aspen Skiing v. Aspen Highlands Skiing*, 421 U.S. 585 (1985)

6 *See*: *Magill TV Guide/ITP, BBC & RTE*, Decision of December 21, 1989, OJ L 78, 43, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeinungs-und Zeitschriftenverlag Gmbh & Co. KG* [1998] ECR I-779

7 Yong Huang, Elizabeth Xiao-Ru Wang, & Roger Xin Zhang "Essential Facilities Doctrine And Its Application In Intellectual Property Space Under China's Anti-Monopoly Law" 22 George Mason Law Review 1103-1126, 2015

8 *Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH*, Case C-170/13

a dominant enterprise.[9] An exposition of case-law reveals that current jurisprudence is at the expansionary phase of the doctrine explained by Professor Areeda.[10]

A. NSE Case — Doctrine By Implication

The NSE case[11] was one of the first cases where the Commission dealt with abuse of dominance. The prime focus of the case was conduct relating to predatory pricing by the National Stock Exchange ("NSE"). However, the CCI in this case also seemed to implicitly recognize essential facilities.

In this case, allegations were made against NSE for abusing its dominance in the market for currency derivatives ("CD") segment. The complaint was filed by MCX Stock Exchange Limited ("MCX") — a competitor of NSE in the CD segment. Both MCX and NSE operated exchange platform for trades in the CD segment. In addition, Financial Technologies of India Limited ("FTIL") — the promoter company of MCX — also provided software product under the brand name ODIN that was use across multiple stock exchange platforms for trading in various products including the CD segment. Subsequently, NSE introduced its own software NOW for its CD segment. NOW and ODIN were substitutable with respect to the NSE CD segment. It was alleged that NSE refused to share its application program interface code ("APIC") with FTIL; thus disabling ODIN users from connecting to the NSE CD segment. The CCI held this conduct, i.e. NSE's denial of APIC to FTIL as an abuse of dominance. Interestingly in this case, the Commission observed that it was the software (ODIN and NOW) which were essential facilities for trading in stock exchange.

It is important to note that this case is generally not considered to be precedence for the doctrine. However, the basic principle — of attributing liability to NSE for denying APIC to MCX that would enable them to create ODIN compatible with NSE CD segment — resonates with the EU's decision in the Microsoft case.[12]

B. Arshiya Case — A Circumscribed Approach

The concept of essential facilities doctrine was first formally considered by the Commission in *Arshiya*.[13] Unsurprisingly, like most other jurisdictions, this was a case that dealt with infrastructure facility. In this case, allegations were brought against CONCOR a public sector company handling rail freight services through container trains for the Indian railways. The main allegation in this case was that CONCOR was denying access to terminal and sidings owned and exclusively used by CONCOR to other container train operators ("CTO"). In this case the Commission held that CONCOR was not dominant in the relevant market. Nevertheless, the CCI made the following observations on applicability of essential facilities doctrine:

> [T]he essential facility doctrine is invoked only in certain circumstances, such as existence of technical feasibility to provide access, possibility of replicating the facility in a reasonable period of time, distinct possibility of lack of effective competition if such access is denied and possibility of providing access on reasonable terms.

In this case the CCI held that there were no technical or economic reasons as to why the CTO could not create their own terminals or similar facilities. Thus, in this case the CCI seemed to have applied the generally limiting principle when determining whether the facility was essential.

C. Auto-Manufacturers Case — The Expansionary Phase

The second case where the doctrine was expressly dealt with was the auto-manufactures case.[14] This was a case in sharp contrast to the limiting principles established in the Arshiya case. In this case, various auto-manufacturers were found to have abused their dominance in the market for their spare parts, diagnostic tools, manuals, etc. The conduct in question was denial of access to original spare parts to independent repairers.

In the investigation report, the Office of the Director General ("DG") concluded that spare parts, diagnostic tools, manuals, etc. of each Original Equipment Manufacturer ("OEM") constitutes

9 Section 4, Competition Act proscribes abuse of dominance by an enterprise

10 *See* Philip J. Areeda, *supra* n. 4

11 *MCX Stock Exchange Ltd. v. National Stock Exchange of India Ltd. & Ors.*, Case No. 13/2009

12 *EC Commission v. Microsoft*, Case COMP/C-3/37.792,

13 *Arshiya Rail Infrastructure Limited v. Ministry of Railways & Ors.*, Case No. 64/2010 & 12/2011

14 *Shri Shamsher Kataria v. Honda Siel Cars India Ltd. & Ors.*, Case No. 3/2011

essential facilities for the independent repairers to be able to provide consumers with effective after sale repair and maintenance work and for such independent repairers to effectively compete with the authorized dealers of the OEMs. The DG has pointed out that the essential factors to be taken into account in determining whether spare parts, diagnostic tools, manuals, etc. of each OEM would constitute essential facilities for the independent repairers, are: (a) control of the essential facility by the monopolist; (b) the inability to duplicate the facility; (c) the denial of the use of the facility, and (d) the feasibility of providing the facility.

Applying this test, the DG report concluded that the auto-manufacturers had indeed abused their dominance and denied market access to independent repairers

What is perhaps most peculiar in this case is the fact that unlike typical cases, the OEMs in this case did not compete with the independent service providers in the aftermarkets. Generally, denial of an essential facility is considered to be an abuse of dominance when the dominant enterprise is also competing in the market for the downstream market. However, in this case, the DG did not seem to consider the presence in the aftermarket (i.e. market for after sale repair and maintenance work) as a pre-requisite.

The Commission concurred with the conclusions in the DG report and held the auto-manufacturers to have abused their dominance. Interestingly, however, the Commission did not expressly countenance the DG's applicability of the doctrine. This again is in line with the general practice of supporting the doctrine only by implication. Nevertheless, this case appears to have substantially expanded the scope of the essential facilities — not only in terms of defining the facility essential but also when considering denial to be unreasonable with duplication being impractical. Moreover, this also seems to contrast with the decisional practice set by the Competition Appellate Tribunal ("COMPAT") in the *Kansan News case*,[15] where it held that denial of market access can only be abusive when the dominant undertaking is denying access to its competitor.

15 *Fast Way Transmission Pvt. Ltd. & Ors. v. Competition Commission & Ors.*, Appeal No. 116 of 2012

III. ESSENTIAL FACILITIES IN INDIA — THE RULE AND NOT THE EXCEPTION

These cases are indicative of a loosely constructed theory of essential facilities doctrine. The CCI has generally refrained from expressly using the established test but seemed to have implicitly applied the doctrine in principle. Notably, the development of case-law indicates a shift from a reluctant to a more enthusiastic enforcement of the doctrine. Perhaps the main reason for the wide application stems from the responsibility attached to a dominant enterprise. The CCI has in numerous cases held that a dominant enterprise has a special responsibility vis-à-vis others.[16]

This special obligation attached to the dominant enterprise seems to invert the entire exceptionality of essential facilities — making it more of a rule where one is supposed to share its creation with others. Future trends are also likely to mirror this interventionist approach by the CCI. Here it is also important to remember that in India not only exclusionary but exploitative conducts are considered abusive.[17] Resultantly, liability is attached not only when an essential facility is denied but also in situations where it is provided on unfair or discriminatory terms. These enforcement priorities are likely to strongly reinforce application of essential facilities in future cases. In line with international developments, interface between competition law and IPR is also the center-focus in abuse of dominance cases in India. Currently, the Commission is investigating allegations of abuse of dominance by Ericsson that primarily deals with its conduct relating to SEPs owned by Ericsson.[18] Additionally, in January 2016 the Commission decided to order an in-depth investigation of Monsanto's conduct.[19] In this case, the main allegation was that Monsanto

16 *In Re. M/s HT Media Limited & M/s Super Cassettes Industries Limited*, Case No. 40/2011; *Belaire Owners' Association vs DLF Limited, HUDA & Ors.*, Case No. 19/2010

17 Ibid

18 *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ)*, Case No. 50/2013; *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson*, Case No. 76/2013; and *M/s Best IT World (India) Private Limited (iBall) v. M/s Telefonaktiebolaget L M Ericsson (Publ) & Ors.*, Case No. 04/2015

19 *Department of Agriculture, Cooperation & Farmers v. M/s Mahyco Monsanto Biotech (India) Limited & Ors.*, Ref. 02/2015 & 107/2015

was licensing its Bt cotton technology on unfair terms. These cases are classic illustrations of the tug of war between an IPR holder's right to exploit its right to the exclusion of others; and the obligation of the monopolist to deal with others.

It is going to be interesting to see how the Commission deals with these cases. While it is unlikely that the sanctity of IPRs are going to be completely disregarded, the decisional practice nevertheless does indicate a relatively restricted freedom in asserting such rights.

MOST-FAVORED NATION CLAUSES: A BUSINESS NEED BUT UNRESOLVED TOPIC IN MEXICO.

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I. INTRODUCTION

Most-favored nation clauses ("MFN") — a commonly used contractual mechanism — have become a topic of concern for competition authorities worldwide. Competition authorities around the world have rendered some decisions as to what extent those clauses could harm competition and if sanctioned whether they should be analyzed under a per se rule or rather under a rule of reason.

New technological platforms have revamped traditional channels through which products or services are offered (e.g. online stores, online booking services, e-books, comparison price sites, etc.) and, therefore, competition authorities around the globe have tried to meet with current rules those new challenges brought by technology.

MFN clauses[3] have sound business reasons to exist in contractual relationships.

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3 MFN clauses are also referred as "*price parity clauses,*" "*most-favored customer clauses,*" "*meeting competition clauses*," "*price parity clauses*," "*prudent buyer clause*" and "*non-discrimination clause*," among many others.

These clauses have their origin in international investment and trade law whereby a MFN treatment allows that an investor or its investment would necessarily be treated "no less favourably" than another investor or inversion[4]. This "no less favourably" concept aims to equalize the terms between two parties not only on their strict negotiation but also based on the terms that are offered to third parties.

From a competition perspective, MFN clauses are basically those agreements whereby a seller agrees that a purchaser will benefit from the terms and conditions that are at least as favourable as those offered to third parties. This kind of agreements allows that a buyer would automatically benefit from a most favourable term or condition that the seller agrees with any other party in order to equalize conditions among them. In short, a MFN clause "entitles a customer to obtain the most favorable terms that a supplier offers to any other customer"[5] and although MFN clauses typically refer to price commitments, they are also related to other terms and conditions.[6] Thus, MFN clauses are a formal-contractual presentation of long-time standard business practices[7] whereby a buyer will request a seller to lower prices or modify certain terms of their agreement, if he learns that such seller has given such benefit to another customer.

Literature on the subject has agreed[8] that MFN clauses can be a result either of bilateral negations or unilateral impositions. Moreover, a distinction of MFN clauses has been recently identified by the United Kingdom's Competition Markets Authority ("CMA") when conducting an investigation in the private motor insurance ("PMI") sector. During this investigation,[9] the CMA reviewed if MFN clauses contained in the agreements executed among PMI providers and certain car insurance price comparison websites might be anticompetitive. On a report published on September 2014 related to such investigation, the CMA identified and distinguished between narrow and wide MFNs.[10] Narrow MFNs seem to be acceptable under a competition scenario but wide MFNs did not. For the specific case, the CMA resolved that:

- Narrow MFNs, which provided that the price on the PMI provider's own website will never be lower than the price on the PCW, were unlikely to raise a competition concern as such clauses would only limit the competitive constrain exerted by the own-website channel on PCW's that would eventually allow consumer trust in the services offered; and

- Wide MFNs, which provided that the price through any other sales channel, including other PCWs, would never be lower than the price on a given PCW, should be considered as anticompetitive as they aimed to soften price competition between PCWs in relation to PMI.

Despite the aforementioned distinction, authors like Whish and Bailey have expressed that those MFN clauses can restrict competition as they could aim to or have the effect of marking resale price maintenance conducts more effective or by transforming a recommended or maximum resale price into a minimum price.[11] Yet, although MFN clauses are generally analyzed as vertical restrain

4 OECD (2004), *Most-Favored-National Treatment in International Investment Law*, OECD Working Papers on International Investment, 2002/02, OECD Publishing. Available at: http://www.oecd.org/daf/inv/investment-policy/WP-2004_2.pdf

5 Whish R. and Bailey, D. *Competition Law*, Eight Edition, Oxford Press University 2015, page 688.

6 See: Vandenborre, Ingrid and Frese, Michael J. *Most Favored Nation Clauses Revisited*. European Competition Law Review, pages 588 to 593.

7 See: Vandenborre, Ingrid and Frese, Michael J. *Most Favored Nation Clauses Revisited*. European Competition Law Review, pages 588 to 593.

8 See: (i) González-Díaz and Bennett, "*The law and economics of most-favored nation clauses*," Symposium: parity clauses. Competition Law & Policy Debate, Volume 1, Issue 3, 2015 and (ii) Vandenborre, Ingrid and Frese, Michael J. *Most Favored Nation Clauses Revisited*. European Competition Law Review, pages 588 to 593, among others.

9 Further information about the investigation is available at: https://www.gov.uk/cma-cases/private-motor-insurance-market-investigation

10 The distinction between MFNs has also been referred to as wholesale MFNs and retail-price MFN or could also be distinguished to MFN clauses applicable to unit prices or clauses that refer to a total purchase value, among many other several variations. The CMA concluded that narrow MFNs not necessarily would raise a competition concern but that wide MFNs were more likely to soften or reduce competition.

11 See: Whish R. and Bailey, D. *Competition Law*, Eight Edition, Oxford Press University 2015, pg. 688.

conducts[12] — as such provisions are implemented in different stages of the commercialization and distribution chain —, it seems that the imposition and execution of MFN clauses might also produce horizontal consequences. To this we turn.

II. MFNS AND HORIZONTAL CONSEQUENCES

Since 1995, Jonathan B. Baker[13] has already claimed that the "vertical good, horizontal bad" antitrust maxim constituted an oversimplification of each sort of conduct.[14] In order to sustain his argument, Baker explained that horizontal consequences might be generated from vertical restrains and used as an example MFNs. The reason behind such argument relies on the fact that MFN clauses, as it occurs with other vertical restrains, could incentive explicit or tacit collusion that could eventually affect horizontal competition by directly dampening competition.

For instance, by implementing MFN clauses, cartel members could use these agreements as credible mechanisms to monitor and ensure other cartel members do not cut prices given that a possible deviation will easily be detected. Moreover, MFN clauses can also encourage horizontal competitors to tacitly coordinate or dampen competition as cartel members would have little incentives to deviate from an agreement if they cannot provide different terms and conditions to its customers given the MFNs. Furthermore, it seems that MFNs could also be used to set or coordinate a minimum price that could also be used as a tacit agreement to fix certain prices.

III. MFNS AND VERTICAL CONSEQUENCES

MFN clauses can also generate other anticompetitive effects than just incentivizing collusion. Although several factors[15] should be taken into consideration when reviewing MFNs, the following vertical effects might raise from their imposition:[16] (i) they could reduce seller's incentive to lower prices to new buyers; (ii) limit the scope of price discrimination; (iii) increase market power on the downstream market for dominant firms; (iv) create barriers to entry when MFNs are imposed by dominant firms; (v) make vertical price-fixing more effective;[17] and/or (vi) raising rivals' costs and excluding other firms. These effects would significantly raise competition concerns as they would only allow increasing market power for dominant firms and imposing barriers to entry markets and/or excluding competitors.

Despite that international experience demonstrates that MFNs can produce horizontal or vertical effects, there is commercial rationality behind MFNs that is generally analyzed under the market efficiencies they might create. Several authors[18] have agreed that MFNs can also

12 See: *The European Commission Guidelines on Vertical Restrains* [2010], OJ C130/1, 48.

13 Jonathan B. Baker served as the Chief Economist of the Federal Communications Commission from 2009 to 2011, and as the Director of the Bureau of Economics at the Federal Trade Commission from 1995 to 1998. He also worked as a Senior Economist at the President's Council of Economic Advisers, Special Assistant to the Deputy Assistant Attorney General for Economics in the Antitrust Division of the Department of Justice.

14 See: Baker, Jonathan B, *"Vertical restraints with horizontal consequences: competitive effects of most-favored-customer" clauses,"* Business Development Associates, Inc., Antitrust 1996 Conference, Washington, D.C. 1995. Available at: https://www.ftc.gov/es/public-statements/1995/09/vertical-restraints-horizontal-consequences-competitiveeffects-most

15 Such as (i) if the firm adopting MFNs has substantial market power or a dominant position; (ii) whether the market has barriers to entry; (iii) market concentration; (iv) the coverage scope of the MFNs and (v) market transparency.

16 For further analysis of such effects refer to: (i) Vandenborre, Ingrid and Frese, Michael J. *Most Favored Nation Clauses Revisited*. European Competition Law Review, pages 588 to 593, (ii) González-Díaz and Bennett, *The law and economics of most-favored nation clauses*, Symposium: parity clauses. Competition Law & Policy Debate, Volume 1, Issue 3, 2015, (iii) Baker, Jonathan B, *Vertical restraints with horizontal consequences: competitive effects of most-favored-customer" clauses*, Business Development Associates, Inc., Antitrust 1996 Conference, Washington, D.C. 1995 and (iv) Baker, Jonathan B and Chevalier, Judith A., *The Competitive Consequences of Most-Favored-Nations Provisions*. Antitrust Vol. 27, No. 2, spring 2013, among others.

17 See: Vandenborre, Ingrid and Frese, Michael J. *Most Favored Nation Clauses Revisited*. European Competition Law Review, pages 588 to 593. Also see: *The European Commission Guidelines on Vertical Restrains* [2010], OJ C130/1, 48 and the European Commission Guidelines on Vertical Restrains, paragraph 48.

18 Further specific analysis of the efficiencies and justifications of MFNs is addressed in (i) Vandenborre, Ingrid and Frese, Michael J. *Most Favored Nation Clauses*

generate procompetitive effects and efficiencies that could support their use under a rule of reason analysis. Such efficiencies aim to mitigate (i) "hold-up" and "free-rider" problems, (ii) counteract incentives to avoid contracting delays and (iii) reduce transaction costs and recoup sunk costs in certain investment and long-term relationships. The efficiencies or justifications could support that the imposition of MFN clauses is not necessarily anticompetitive.

Europe and the U.S. have had recent experiences on the subject[19] due to the investigations related to e-books, online booking services and Amazon's price parity policy.

Between 2011 and 2013, the European Commission undertook an investigation for the use of MFN clauses between Apple and five significant publishers.[20] In January 2010, five significant book-publishers[21] in the United States entered into agency agreements through which each publisher celebrated an agreement with Apple for the sale of e-books were each publisher would set the price at which Apple was supposed to sale them. Such agreements contain retail-price MFN clauses through which publishers had to lower e-books prices to match the lowest price at which another e-book was sold. Yet, in 2011, the European Commission began a formal investigation against the publishers and Apple.

During its proceeding, the European Commission considered that MFN clauses served as a commitment mechanism to align the publishers and force Amazon to also entered into agency agreements with them as Amazon was facing a possible exclusion of the market. Moreover, the European Commission considered that a possible turn from Amazon to an agency agreement could only be the result of a concerted practice aiming to raise retail-prices of e-books or at least avoiding the appearance of lower prices. Nevertheless, in the following years, the European Commission closed its investigation as a result of commitments presented by the liable parties that included, among others, new agency models and a five-year ban of MFN clauses.

Other relevant cases that provide guidance on the matter were the European investigations related to the online booking sector. Since 2010, several local competition authorities[22] from the European Union such as Austria, Denmark, France, Germany, Hungary, Ireland, Italy and Sweden along with Switzerland and the United Kingdom initiated investigations regarding several MFN clauses in the online booking sector. In such cases, hotels and online travel agencies ("OTA") executed several MFN clauses which restricted the OTAs possibilities to provide discounts to room prices, availability and cancelation terms. A general consensus regarding the effect that could arise from the MFNs under investigation consists on that such clauses would limit competition between OTAs and would increase barriers to entry and expansion for other OTAs. Some cases are still under investigation, others have been settled and others have been condemned by the competition authorities[23]. Yet, each decision involves specific analysis that is worth of a review for understanding

Revisited. European Competition Law Review, pages 588 to 593, (ii) González-Díaz and Bennett, *The law and economics of most-favored nation clauses*, Symposium: parity clauses. Competition Law & Policy Debate, Volume 1, Issue 3, 2015, (iii) Baker, Jonathan B, *Vertical restraints with horizontal consequences: competitive effects of most-favored-customer" clauses*, Business Development Associates, Inc., Antitrust 1996 Conference, Washington, D.C. 1995 and (iv) Baker, Jonathan B and Chevalier, Judith A., *The Competitive Consequences of Most-Favored-Nations Provisions*. Antitrust Vol. 27, No. 2, Spring 2013, among others.

19 Some of the most relevant cases are: (i) Case No. COMP/38427 *PO Pay Television Film Output Agreements*; (ii) Case COMP/AT.39847 *E-BOOKS*; (iii) Amazon price parity policy and e-books distribution; (iv) HRS-Hotel Reservation Service, *Bundeskartellamt* decision of December 20, 2013; (v) online booking services investigations performed by national competition authorities (NCAs) in such market in Austria, Denmark, France, Hungary, Ireland, Italy and Sweden along with Switzerland and the United Kingdom; (vi) MFN between E.ON and Gazprom (EC PR IP/05/710), (vii) MFN between Hollywood Studios and producers of cinema digital equipment (EC PR IP/11/257), (viii) EU merger case between Universal/EMI (Case M 6458), among many others.

20 Case COMP/AT.39847 *E-BOOKS*, Public version of the European Commission's decision is available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39847/39847_26804_4.pdf

21 The five publishers under investigation were Penguin, Simon & Schuster, HarperCollins, Hachette and Holtzbrinck/Macmillan.

22 Local competition authorities from the European Union are normally referred as National Competition Authorities or NCAs.

23 See specifically: HRS-Hotel Reservation Service, German National Competition Authority (Bundeskartellamt) decision of December 20, 2013.

MFNs treatment and application.

Additionally, since 2013, Amazon's price parity policy has also been under review by the local competition authorities in Germany and United Kingdom and the European Commission. Broadly, the investigation concerns MFN clauses applied to retailers offering products in Amazon's online trading platform, Amazon Marketplace whereby retailers agreed to offer their products at the most favorable price via Amazon Marketplace compared to their offer either on other online platforms or their own online shops. Yet, Amazon agreed with the authorities to ban such clauses and the case was, once again, settled without further guidance.

Notwithstanding, it is unclear whether MFNs could be allowed or sanctioned under the current Mexican competition policy. A case-by-case analysis would have to be performed and the use of foreign precedents has to be performed with caution. In order to use foreign precedents, we need to understand the legal system and rules where the case was decided.

Moreover, contrary to other jurisdictions, although the Mexican competition legislation sanctions both, horizontal and vertical conducts, the Federal Economic Competition Law ("FECL") only contains a closed short-list of conducts that could constitute a competition violation. Such short-list ensured that fundamental human rights of legal certainty are protected, and thus, no catch-all provision is contained in our competition statute. Moreover, the FECL sanctions anticompetitive conducts either from the purpose (object) of the conduct or based on the effects it might generate within or having effects in the Mexican territory. However, due to the features and uncertainty regarding MFN clauses, it is not clear to which type of behavior MFN clauses could fall according to the horizontal and vertical conduct segmentation provided by the Mexican legislation.

For example, under the Mexican competition legislation, MFN clauses could be used to establish a cartel agreement if implemented as a mechanism through which competitors fix or manipulate certain prices. Such mechanism would allow fixing a "most-favorable" price in benefit of all buyers, which implies the standardization or coordination of prices that under a normal competition scenario would probably be different. If this was implemented, under this hypothetical, it is possible that such conduct could be understood as an artificial fixation of prices that could be sanctioned under article 53-I of the FECL and 254 Bis of the Federal Criminal Code.

On the other hand, based on the vertical consequences previously identified, the imposition of MFN clauses might also constitute a violation of articles 54, 55 and 56 of the FECL. Mexican competition legislation sanctions thirteen specific conducts as vertical restrains only if (i) the firm or firms that implemented such conducts, have individual or joint substantial market power and only if (ii) such conduct has either the purpose (object) or effect of unlawfully displacing competitors, impeding their access to markets or establishing exclusive advantages on their detriment. Among the thirteen short-listed conducts, it is feasible that MFNs could fall within: (i) vertical price-fixing or resale price maintenance conduct (section II, article 56), (ii) could be contrary to the wording introduced in the FECL for sanctioning price discrimination (section X, article 56) and (iii) it's even possible that MFNs could constitute a boycott to pressure or displace competitors or force them to perform certain conducts (section VI, article 56) as it occurred in the first finding of the e-books case in Europe.[24]

The fact that other jurisdictions have delineated the treatment as how should MFNs be reviewed or sanctioned, it is not necessarily applicable for the Mexican case. Although foreign law and experience could guide on the internal analysis of this contractual mechanism, its application is limited. It would be applied only if Mexican law recognizes or regulates the same conduct. In that regard and based on the fact that the FECL only sanctions specific short-listed conducts, framing the conduct would be a challenging task. In fact, if the effects that MFNs generate were found as cartel violation by the Mexican competition authorities, the per se rule and criminal consequences (5 to 10 years imprisonment terms) could be applicable. If so, competitive behavior could be inhibited by the fear of not being targeted as cartelist. The risk will increase in case that corporate criminal liability – a newly created concept under Mexican law – encompasses competition violations. A more

24 Case COMP/AT.39847 *E-BOOKS*

conservative approach, unless a naked cartel evidenced on the facts, is to analyze MFNs under a rule of reason.

Therefore, although MFN clauses could be claimed as procompetitive as they have an underlying commercial reason that could make markets and competition more efficient, it is also possible that they could be claimed as anticompetitive for inferring on free-unilateral price determination or establishing barriers to entrance markets. Yet, despite that MFN clauses are of common world-wide use in commercial relations and have even been included as standard clauses worldwide in commercial agreements, the Mexican case is still very ambiguous[25] and would require a case-by-case analysis.

25 In fact, the ambiguity of such topic could allow a request for formal guidance under the FECL before the Federal Economic Competition Commission to clarify their position before this kind of contractual mechanisms.


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