Antitrust Chronicle

AUGUST · VOLUME 2 · SUMMER 2016

JUDICIAL RECAP:
WHAT HAS HAPPENED IN THE LAST YEAR ?

CPI COMPETITION POLICY INTERNATIONAL

TABLE OF CONTENT

LETTER FROM THE EDITOR

Dear Readers,

This month, the Antitrust Chronicle (AC) brings you a "Judicial Recap" of important antitrust judgments from the previous year from a variety of jurisdictions.

Are we starting to see more evidence of international best practices taking hold across jurisdictional lines when it comes to abuse of dominance, cartel and merger cases, or do we still see many points of sharp differences?

According to the judgments in the cases from this month's AC, judges are suggesting that in some cases agencies should work harder, and in other cases agencies are doing a good job of defining and implementing these antitrust best practices.

Highlighted cases include recent judgments in the U.S. (Tyson Foods,Staples/Office Depot, and FTC v. Penn State Hershey Medical Center),the EU (Airfreight, Toshiba v. Commission), Canada(TREB Decision) and the German investigation into Facebook.

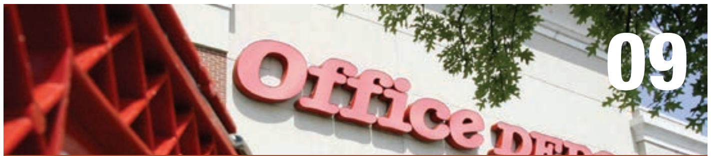
We are also very pleased to bring you our "CPI Talks" interview with Esteban Greco, the new head of the Argentinian Competition Authority, in which he discusses plans to reinvigorate Argentina's competition enforcement and the challenges looking ahead.

We were happy to see such a great turnout at George Washington University in Washington D.C. in late August for the CPI debate on the role of Antitrust and Regulation in the new Matchmaker Economy. A big "Thank You" to Bill Kovacic and the other great speakers for helping make it such a successful event!

We sincerely hope you enjoy reading this "Judicial Recap" issue of our AC magazine.

Thank you, Sincerely,
CPI Team

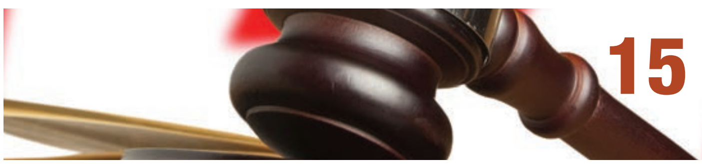
SUMMARIES



Staples/Office Depot: Clarifying Cluster Markets

By Krisha A. Cerilli

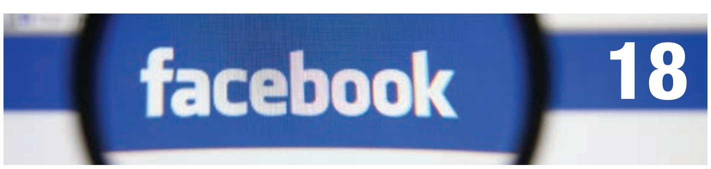
The recent challenge to Staples acquisition of Office Depot brought to the forefront several key aspects of antitrust merger analysis. In suing to block the deal, FTC alleged that the acquisition would substantially lessen competition in the sale and distribution of consumable office supplies to large business customers. Staples and Office Depot disputed important elements of the Plaintiffs' case, including the definition of the relevant market and estimation of market shares, and the likelihood of sufficient entry and expansion by rival firms. This article discusses the cluster market framework from prior cases, before turning to the cluster market analysis in Staples/Office Depot and its implications.



Canada's TREB Decision on Abuse of Dominance: Points of Possible Divergence

By Randall Hofley

The recent Canadian Competition Tribunal decision in Commissioner of Competition v. Toronto Real Estate Board provides a detailed outline of each element of Canadian abuse of dominance law and, while generally consistent with analogous U.S. and European Commission law, some potential differences arise, most notably as regards anticompetitive intent, the participation of the target in the relevant market and the role of intellectual property rights.most important restatement of EU competition policy towards on digital markets.



How Many "Likes" for the German Facebook Antitrust Probe?

By Dr. Anna Blume Huttenlauch

The German Federal Cartel Office caused quite a stir, not only among antitrust lawyers, when it recently announced that it had opened an investigation against Facebook based on the allegation of abuse of dominance. This article addresses three questions at the heart of the proceedings which will shape the future discussion about the case.

Rebates: Formalism, Effects and the Real World

By Lia Vitzilaiou

Rebates by dominant undertakings are a controversial area in competition law. While they can be part of genuine price competition and lead to lower prices, they can be also used by dominant firms as a means to exclude competitors and effectively harm customers. Under one approach, a rebate must be regarded as abusive if it is generally "loyalty enhancing" regardless of its concrete effects on the market. This approach derives from the traditional case law of European Union courts and is considered to be the prevailing view of jurisprudence to date. Under another approach, the practical effects of rebates should be assessed through economic tests and the rebates' impact on competition should be quantified. This article addresses these approaches and related case law.

The Impact of Tyson Foods v. Bouaphakeo on Antitrust Class Actions

By Aaron M. Panner & Rachel P. May

Tyson Foods was a recent "donning and doffing" case at the U.S. Supreme Court involving whether an employer had failed to compensate employees for time spent putting on and taking off protective gear. The case presented questions of potentially enormous importance for class-action litigation generally as well as antitrust class actions. The judgment in this case is likely to reinforce the trend among the courts of appeals to uphold class certification in price-fixing cases, laying to rest the argument that the use of statistical evidence to establish injury is categorically impermissible in class actions.

FTC v. Penn State Hershey Medical Center: Third Circuit Appeal Could Lead to Important Decision for Future Hospital Mergers

By Pete Levitas & Bryan M. Marra

On May 9, 2016, District Judge John E. Jones III of the Middle District of Pennsylvania denied a joint motion by the Commonwealth of Pennsylvania and the FTC seeking a preliminary injunction to enjoin the proposed merger of Penn State Hershey Medical Center and PinnacleHealth System. Judge Jones rejected the request for an injunction based on his holding that the government had failed to define a proper geographic market. The resulting decision could offer clarification regarding the appropriate method to determine the relevant geographic market. A loss might force the FTC to rethink its approach to hospital merger enforcement.

The General Court's Rulings in Airfreight: A Commentary

By Jeremy Robinson

In its Airfreight rulings, the EU General Court has measured a Commission decision on a complex set of circumstances against exacting criteria of clarity and consistency, and found the Commission decision wanting. Although an unwelcome ruling for the Commission, it is questionable whether many cartels will present such a complex picture of evidence as that of the airline industry, and it may be doubted whether the Commission may now be at greater risk of falling at the first hurdle on appeal. It serves as a reminder that, even when the existence of a cartel and detailed evidence of its workings have been revealed through immunity and leniency applications, that is only the first stage of a long process to enforce the law.

Toshiba v. Commission – How (not) to Prove Awareness, and Decisively Influence People

By Jacquelyn MacLennan & Aqeel Kadri

On September 9, 2015, the EU General Court handed down its judgment in Case T-104/13 Toshiba v. Commission. The Judgment is important in two respects, firstly for its findings on the standard of proof required for a finding of participation in a single and continuous infringement of competition law, and secondly for its application of the legal test for the finding of joint and several liability for competition law infringements.

Screen Cartel Cases set the Boundary: Territorial Limits of EU Cartel Damages

By Nicholas Heaton

The English High Court has given important guidance on the territorial scope of EU cartel damages claims in two recent judgments, both concerning cases brought by the same group of claimants. These cases both addressed an issue that has arisen in a number of recent cartel damages claims: Can claims for breach of EU competition law be made in respect of purchases made outside the EU? Claimants have sought to adopt novel arguments in order to bring such claims in an attempt to bring in one place claims concerning worldwide purchases. The first of these judgments makes clear what claims cannot be made and the second highlights two theoretically possible claims that could be made, but which may be difficult to prove.

CPI TALKS

Interview with Esteban Greco, head of the Argentinian Competition Authority.

A new era of Argentinian competition enforcement is underway with a new head of agency, new staff and new policies. Mr. Greco tells us in this interview what challenges he has faced sincetaking office, the first steps he made, what are the Commission´s priorities and more. Do not miss the opportunity to learn more about the renaissance of this Latin-American competition agency.

CPI SPOTLIGHT

THE UNIVERSITY OF MELBOURNE

The Melbourne Law School is pleased to announce its new online Global Competition and Consumer Law program.

Developed for both law and non-law graduates, this program is one of only a handful in the world to give you in-depth coverage of every major aspect of policy, law and economics in this field. You willget accessto advanced expertise and boost your career trajectory with a respected qualification from Australia's No.1 university.

Delivered completely online through cutting-edge technology, the course gives you unprecedented access to global leaders in the field. You will graduate with a world-recognized qualification that will open doors and enhance your global career pathway.

Global Competition and Consumer Law Program: Give yourself a competitive edge. Take control of your career with a prestigious master's degree from one of the world's top 10 law schools.

ANNOUNCEMENTS

Matchmakers events are on! After the success of our last Matchmakers event in Washington DC (videos available in our Briefing Room section), we continue with more events in October and November.

More details will follow

WHAT IS NEXT?

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

The Septemberedition of the AC will address a highly complex and interesting topic:Standard Settings in antitrust.With contributions from top-notch academics and practitioners, our magazine will discuss, among others, informal standard settings in technology markets, FRAND litigation in various jurisdictions, SSO policies and effects in innovation and much more.

INTERVIEW WITH ESTEBAN GRECO: HEAD OF THE ARGENTINIAN COMPETITION AUTHORITY

1. Mr. Greco, you took office in February 2016, after a long period of inactivity in the agency. What was the first thing you had to do?

When I took office in February, I realized that the National Commission for Competition Defense ("CNDC") had all sort of problems, from infrastructure to human resources, and a large back-log of files, some of them very old, that had to be dealt with. In particular, M&A cases had an average delay of 2.6 years. So my first task was to put some order within the Commission's staff and organize a system to deal with the old files. In this respect, we are implementing a simplified procedure to fast-track simple M&A cases, so that we can allocate more resources to antitrust and complex M&A cases. Simultaneously, we had to constitute the Commission selecting the rest of the members. Our approach was to bring lawyers and economists with recognized experience in the area of competition policy, law and economics and industrial organization. I am happy that highly qualified professionals have joined me in this mission.

2. What other challenges are you facing in the first months in the office?

We are facing many challenges at the CNDC. It is worth saying that in Argentina we have an advantage in that we do not have to build from the ground up. The CNDC was one of the first agencies with action in competition enforcement in Latin America, and there are valuable professionals working in the agency. But in recent years, competition law enforcement in Argentina has been very erratic and subject to political considerations.

We face at least three main challenges: (i) achieve best practices in competition matters; (ii) promote competition culture; and (iii) propose changes in the legal framework to improve institutional design and develop modern tools for competition enforcement.

About the first challenge, we are reorganizing the internal structure of the Commission. We aim at developing a staff of qualified professionals who would apply technical criteria independently to changes in the government. Our final goal is to create a long term view for competition policy in Argentina. As part of this idea, we are currently hiring lawyers and economists, both at junior and senior levels, and organizing training programs to give our staff all the necessary tools to analyze competition cases. For example, we already received a group of specialists from the FTC and the World Bank who lectured about cartels and cartel prosecution. We are also in conversations with the FTC to organize other sessions later in the year. We would like to extend this training program to other competition agencies, universities and other competition organizations, such as the OECD and the UNCTAD. Simultaneously, we are preparing an internal initial training program, led by one of our most recent hires, addressed to our new staff of young professionals, who are starting their career in the area. The idea is that they would soon be ready to start working on specific cases within the Commission. We need to improve our capabilities and this is certainly a way to do it.

A second challenge is the development of a culture of competition in Argentina and the return of Argentina as a relevant player at the international level. To address these issues we are creating an area of competition advocacy within the CNDC. One of the main goals of this area is the promotion of competition among the general public and the local business community. There is a big misunderstanding about the role of competition policy in the economy and the mission of the competition agency. Many people view us as a price control agency. I want to make clear that we know our role and we want the general public to understand and endorse our actions. The second main goal is the return of Argentina and the CNDC to the international discussion on competition. We want to reactivate and increase our links with other agencies, as well as international competition forums, as a way to improve our practice and learn from the international experience. It is our view that we can only benefit from sharing methodologies and information with our colleagues around the world, especially as competition cases become increasingly international.

Finally, but not less important, we would like to build a new institutional arrangement, with an independent competition agency, so that competition law enforcement is driven by competition considerations and not by other issues. This is something that has been on the agenda for a very long time. In fact, our 1999 Competition Act provided for the creation of an independent competition tribunal that would be in charge of competition law enforcement. By 2014, the tribunal had not been constituted and it was ultimately eliminated. This experience shows that the implementation of the independency issue is not trivial and, therefore, we have to think creatively and learn from international experience so as to come up with a solution that is politically implementable. Whatever the institutional design we come up with, the important issue is that the renewed agency has to have independence to issue sanctions and be clear that there will be no political influence in imposing fines.

3. Can we expect other changes in the existing legislation to include or improve investigative tools like leniency programs?

Yes, this is something that we would like to introduce in a reform of our competition law. In fact, anti-cartel activity is one area that needs special enhancement and we believe that a leniency program would facilitate cartel detection and, therefore, help our cartel prosecution actions. On the other hand, and related to this, the fines we are allowed to impose according to our current legislation are outdated and very low. We need to update critical figures, such as the amounts of possible fines and the thresholds for merger review. The current figures have not been updated since 2001, when the exchange rate between the Argentine peso and the U.S. dollar was 15 times lower than today. This has created a situation in which many small operations must be notified to the Commission, and the fines that can be imposed for anticompetitive behavior are very low. We are proposing that these figures be excluded from the law, so that they canbe more easily updated, as the macro and business environments change.

4. We have seen in the news that the competition authority is seeking to introduce more competition in large industries such as the air travel sector and mobile communications. What are the agency´s priorities for the next year? Are these priorities aligned to the sector inquiries launched one month ago?

Yes. The agency is committed to competition law enforcement at all levels. We have a series of market studies ongoing right now, covering 12 different sectors in Argentina. You mentioned air travel and mobile communications. We also have studies on other sectors such as aluminum, credit cards, pharmaceuticals, dairy products, soap, vegetable oil, steel, petrochemicals and beef. We will use these studies to makea diagnosis of the competition conditions in Argentina, as a first step to understand where we are. Some of these studies may derive in a market investigation and may trigger the production of pro-competitive recommendations from the CNDC. The outcome of these studies will help define the priorities for next year, in the sense that we will be able to identify those markets in which competition is weakest and needs adjustments.

5. Finally, any other message you would like to share with the antitrust community?

Yes. I would like to say that I am confident that we are starting a new chapter in the history of competition policy enforcement in Argentina. The new government that took office in December 2015 truly believes that competitive markets are a valid institution to efficiently allocate resources in the economy. In this context, therefore, competition law enforcement is a top priority to the government. This new approach to competition law enforcement includes the adoption of technical and professional foundations for decisions, so as to orient the Commission towards best practices in competition matters. The main goal implies prioritizing defense of competition as public policy, as an instrument to promote consumer welfare and, at the same time, improve productivity and opportunities to enhance economic development.

Argentina has a long history of competition policy and action. It was one of the first countries in Latin America with a competition law and it has a very important competition community. In the private sector, there are lawyers and economists with expertise. Hence, we have the capabilities to do our job. Now, we also have the political support.

We have a lot of work to do and a large and challenging agenda ahead of us. We are committed to this task and we are happy to contribute to making Argentina a more competition-friendly-environment for doing business.

STAPLES/OFFICE DEPOT: CLARIFYING CLUSTER MARKETS

BY KRISHA A. CERILLI[1]

I. INTRODUCTION

The recent challenge to Staples, Inc.'s ("Staples") acquisition of Office Depot, Inc. ("Office Depot") brought to the forefront several key aspects of antitrust merger analysis. In suing to block the deal, the Federal Trade Commission ("FTC"), together with the District of Columbia and Commonwealth of Pennsylvania (collectively, "Plaintiffs"), alleged that the acquisition would substantially lessen competition in the sale and distribution of consumable office supplies to large business customers.Staples and Office Depot vigorously disputed important elements of the Plaintiffs' case, including the Plaintiffs' definition of the relevant market and estimation of market shares, and the likelihood of sufficient entry and expansion by rival firms.

The case culminated in a nearly three-week preliminary injunction hearing before Judge Emmet G. Sullivan of the United States ("U.S.") District Court for the District of Columbia. In an unusual twist, at the close of the Plaintiffs' case-in-chief, Staples and Office Depot announced that they would rest without calling any witnesses. Staples' counsel asserted that the Plaintiffs had failed to establish their prima facie case, including establishing the relevant market, and, as such, there was "no need for additional evidence or rebuttal."[2]

The decision by Staples and Office Depot to rest after the close of the Plaintiffs' case raised the stakes—and the scrutiny—related to the Plaintiffs' alleged relevant market. If the court accepted the Plaintiffs' relevant market, Staples and Office Depot faced evidence that their combined share totaled 79 percent—a concentration level that carried a daunting presumption of anticompetitive harm.[3] While Staples and Office Depot critiqued this share estimate, their first and primary line of attack for avoiding a presumption of harm was contesting the relevant market. In stark terms, Staples and Office Depot argued that the Plaintiffs' alleged relevant market was "gerrymandered" and "made-for-litigation," and that the Plaintiffs had "sliced and diced the market in an attempt to achieve high concentration levels."[4]

In the end, Judge Sullivan held that the Plaintiffs had alleged a properly defined relevant market. In ruling, he observed that the relevant market combined the concept of a cluster market (consumable office supplies) and a targeted customer market (large business customers).[5] While the court's treatment of both aspects of the relevant market definition is significant, this article will focus on the cluster market aspect. The parties' dispute concerning the scope of the cluster market in Staples/Office Depot underscores key issues related to cluster market analysis.

This article begins with a brief discussion of the cluster market framework from prior cases, before turning to the cluster market analysis in Staples/Office Depot and its implications.

1 Krisha Cerilli is an attorney in the Federal Trade Commission's Bureau of Competition, Mergers IV Division, and was a member of the FTC team that litigated the Staples/Office Depot case. The views expressed herein are the author's own and do not represent the views of the Federal Trade Commission or any individual Commissioner. The author is grateful for the contributions of Tara Reinhart and Debbie Feinstein to this article.

2 FTC, et al. v. Staples, Inc., et al., No. 15-2115 (EGS), 2016 WL 2899222, at *2 (D.D.C. May 10, 2016).

3 Staples, 2016 WL 2899222, at *18, 20 (referring to the market shares as "striking," and concluding that the concentration levels "far exceed" what is "necessary to entitle Plaintiffs to a presumption that the merger is illegal").

4 Defs.' Proposed Findings of Fact and Conclusions of Law (Public Version) 4-6, FTC, et al. v. Staples, Inc., et al., No. 15-2115 (EGS)(D.D.C. Apr. 20, 2016), ECF No. 438 (hereinafter, "DFOF/COL").

5 Staples, 2016 WL 2899222, at *7.

II. PRIOR CASE LAW ON CLUSTER MARKETS

The Sixth Circuit's decision in *ProMedica* Health System, Inc. v. Federal Trade Commission[6] contains perhaps the most fulsome discussion of the cluster market standard prior to Staples/Office Depot. As the court described in *ProMedica*, the "first principle" of product market definition is "substitutability": a relevant product market should include all reasonable substitutes, with the operative test being whether a hypothetical monopolist controlling the products in the proposed market would profitably impose a price increase.[7] If too many customers would switch to substitutes outside of the proposed market in response to the price increase, such that the price increase would be unprofitable, then the proposed market is too narrow and should include additional substitutes.

ProMedica further noted that certain cases involve "hundreds if not thousands" of distinct product markets.[8] In *ProMedica*, for instance, which involved a hospital merger, the merging hospitals offered hundreds of distinct medical procedures that were not functionally interchangeable (e.g. chemotherapy is not a substitute for a hip replacement). Each distinct procedure therefore could be assessed as a distinct relevant market. But, as the court observed, it would be administratively burdensome to evaluate each of the hundreds of markets separately.[9]

That is where the cluster market concept arises. *ProMedica* endorsed the concept of aggregating the distinct relevant markets together into a single "cluster" for analytical convenience. Such aggregation is permissible, the court held, when the competitive conditions in the separate markets are similar.[10]

ProMedica is not the first or only case to endorse the concept of a cluster market based on analytical convenience. The concept has origins in the Supreme Court's landmark decision in *Brown Shoe Co. v. United States.*[11] In *Brown Shoe*, the Court first observed that the "outer boundaries" of a relevant product market are determined by evaluating the scope of reasonable substitutes.[12] But the Court then endorsed evaluating the markets for men's, women's and children's shoes together (even though distinct shoe sizes and types were not substitutes) because the competitive conditions for each market were similar.[13] More recently, the cluster market approach has become a common feature of hospital merger cases.[14]

It is worth noting that, because the cluster market concept has developed over decades, cases have used the term "cluster" to refer to concepts other than the approach utilized in *Brown Shoe* and *ProMedica*. In particular, cases have also recognized a distinct concept in which the product market itself consists of a package or bundle of products or services. In *United States v. Grinnell Corp.*, for instance, the Supreme Court endorsed an "accredited central station service" market, which included several distinct services, such as fire alarm and burglar alarm services.[15] The Court reasoned that the accredited central service stations offered "a single basic service," namely the "the protection of property through use of a central service station."[16]

In that scenario, distinct product markets were not being aggregated for analytical convenience (as in *ProMedica*). Rather, there was a single market in which customers purchased a bundle or package of goods.*ProMedica* referred to this latter scenario as a "package-deal" approach, and explained that it can arise when customers value the convenience of purchasing certain items together, as a package.[17] Another useful description is that the latter approach represents a bundlemarket.

As described below, the distinction between a cluster market and a bundle market became a point of contention in Staples/Office Depot.

III. THE CLUSTER MARKET IN STAPLES/OFFICE DEPOT

A. Judge Sullivan Affirms the Plaintiffs' Cluster Market

In Staples/Office Depot, the Plaintiffs alleged a cluster market consisting of thousands of consumable office supply items, including pens, file folders, Post-it notes, binder clips, and copy paper.[18] As Judge Sullivan observed, "a pen is not a functional substitute for a paperclip."[19] Nevertheless, citing *ProMedica* and the Plaintiffs' economic expert, Judge Sullivan concluded that it was appropriate

6 749 F.3d 559 (6th Cir. 2014).

7 Id. at 565; see alsoU.S. Dep't of Justice & Fed. Trade Comm'n Horizontal Merger Guidelines (2010), §§ 4.1.1-4.1.3 (hereinafter "Merger Guidelines"). Specifically, antitrust principles call for evaluating whether the hypothetical monopolist would impose a small but significant non-transitory increase in price ("SSNIP").Merger Guidelines §§ 4.1.1-4.1.2.

8 ProMedica, 749 F.3d at 565.

9 Id.at 565-66.

10 Id.

11 370 U.S. 294 (1962).

12 Id. at 325.

13 See id. at 327-28 (concluding that markets for men's, women's and children's shoes did not need to be subdivided into smaller groupings when "considered separately or together, the picture of this merger is the same" and further subdivisions were "impractical").

14 See e.g.FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 1075-76 (N.D. Ill. 2012).

15 384 U.S. 563, 571-72 (1966).

16 Id.at 572.

17 ProMedica, 749 F.3d at 567-58.

18 Staples, 2016 WL 2899222, at *8.

19 Id.

to cluster the consumable office supply items for "analytical convenience," because "market shares and competitive conditions are likely to be similar for the distribution of pens to large customers and the distribution of binder clips to large customers."[20] Thus, Judge Sullivan affirmed the propriety of cluster markets for analytical convenience and used the "similar competitive conditions" standard as the test for whether it is appropriate to include items in the cluster.

Judge Sullivan also observed that the cluster market alleged by the Plaintiffs was quite broad. Specifically, the Plaintiffs' market included all methods by which a large customer could purchase the office supply items in the cluster, including "procurement through a primary vendor relationship, off contract purchases, online and retail buys."[21] In other words, the market was not limited to one channel of distribution, as was the case in Federal Trade Commission v. Sysco Corp., where the relevant market was defined as "broadline foodservice distribution."[22] Instead, the market accounted for large customers' purchases through contracts with primary vendors, non-contract spot purchases from other office supply vendors, purchases through retailers and purchases directly from office supply manufacturers. The Plaintiffs' economic expert, Professor Carl Shapiro, explained that this candidate market satisfied the hypothetical monopolist test, the standard economic test for defining relevant markets.[23] Judge Sullivan endorsed and approved of Professor Shapiro's analysis.[24]

Notably, despite the breadth of the market definition, the Plaintiffs still demonstrated that Staples and Office Depot had a combined share of 79 percent.[25] The evidence suggested a plausible candidate market that was even narrower—the procurement of the cluster items only through the large customer's primary vendor—in which Staples' and Office Depot's shares would have been even higher.[26] Such a market would have excluded the other procurement channels (e.g. off-contract and retail buys), and the hypothetical monopolist would have faced substitution to those other channels. The Plaintiffs did not seek to establish that this narrower potential market also satisfied the hypothetical monopolist test, but instead included all substitutable channels of distribution.

B. Staples and Office Depot Failed to Undermine the Plaintiffs' Cluster Market Approach

While the Plaintiffs' cluster market followed the approach of *Brown Shoe* and *ProMedica*, Staples and Office Depot nonetheless vigorously disputed its propriety. Staples and Office Depot's arguments were unavailing, but are instructive of the disputes that can arise when dealing with cluster markets.

1. "Gerrymandering" Argument

Staples and Office Depot strenuously objected to the fact that the Plaintiffs did not include certain office products in their cluster market. Most notably, the cluster did not include ink and toner, even though, by all accounts, ink and toner are consumable, i.e. used up and reordered. Staples and Office Depot argued the market was therefore "gerrymandered and artificially narrow," and designed to inflate their market shares.[27]

In ruling for the Plaintiffs, Judge Sullivan rejected this argument. He observed that ink and toner (and the other office products excluded from the market) were subject to different competitive conditions from the consumable office supplies included in the Plaintiffs' cluster.[28] For instance, large customers not only purchased ink and toner from office supply distributors, but also made substantial purchases from printer and copier manufacturers through managed print service ("MPS") arrangements in which customers purchased the printers and copiers, maintenance services and ink and toner together.[29] Those printer and copier manufacturers generally did not sell other consumable office products. As such, ink and toner failed the similar competitive conditions test for inclusion in the proposed cluster market.

Other market definition principles also reveal why Staples and Office Depot's gerrymandering argument was misplaced. As referenced above, per *Brown Shoe*, the "outer boundaries" of a relevant product market are established by the inclusion of reasonable substitutes for products in the candidate market. In light of that, virtually every case on record that has found a proposed product markettoo narrowinvolved situations in which the plaintiff had excluded relevant substitutes.[30]

But that was not the case in Staples/Office Depot. Ink and toner are not substitutes for binders, file folders and the other products included in the Plaintiffs' cluster market. As Professor Shapiro explained, customers could not switch to ink and toner in response to a hypothetical monopolist controlling the sale and distribution of the cluster items. Or, put more plainly, "[t]he fact that there's competition in ink and toner doesn't help a large customer who needs paper or office supplies."[31] As such, there was no basis for conclud-

20 Id. (internal citations and quotation marks omitted).

21 Id. at *12.

22 113 F. Supp. 3d 1, 24 (D.D.C. 2015).

23 Staples, 2016 WL 2899222, at *12-13.

24 Id. at *12-13, 16.

25 Id. at *18-19.

26 Expert Report of Carl Shapiro (Public Version) at 11-12, FTC, et al. v. Staples, Inc., et al., No. 15-2115 (EGS)(D.D.C. Mar. 20, 2016), ECF No. 280-36.

27 DFOF/COL ¶ 4; see alsoStaples, 2016 WL 2899222, at *9.

28 Staples, 2016 WL 2899222, at *13-14.

29 Id.

30 See e.g.United States v. Oracle Corp., 331 F. Supp. 2d 1098, 1119-20, 1159-60 (N.D. Cal. 2004); United States v. Sungard Data Sys., Inc., et al., 172 F. Supp. 2d 172, 191-92 (D.D.C. 2001).

31 Shapiro Hr'g. Tr. 2783:15-17, FTC, et al. v. Staples, Inc., et al., No. 15-

ing under standard market definition principles that the Plaintiffs' market was too narrow to be a relevant antitrust market because of the "exclusion" of ink and toner.

Notably, Staples and Office Depot invoked the hypothetical monopolist test in their post-hearing conclusions of law.[32] But their proposed findings of fact lacked any application of the test, or any evidence or critique showing that Professor Shapiro's application of the test was faulty. As referenced above, the Plaintiffs' market definition was very broad—comprising allmethods by which a large customer could purchase pens, pencils and other cluster items. In the end, there simply was no evidence in the record indicating that a hypothetical monopolist controlling this candidate market would not profitably impose a price increase. In light of that, as Judge Sullivan concluded, the Plaintiffs' candidate market was a properly defined relevant antitrust market.[33]

It is worth recalling here that a cluster market is an aggregation of distinct relevant markets for analytical convenience. The "similar competitive conditions" test articulated in *ProMedica* establishes when it is permissible to include product markets in a cluster. But the cases (including *Brown Shoe* and *ProMedica*) do not suggest any requirement to include additional product markets (such as an ink and toner market) in a cluster, or even to cluster any markets at all.

Moreover, it is hard to imagine a scenario in which defendants would be legitimately prejudiced by a plaintiff's decision to exclude additional non-substitute products from a cluster market. If the excluded products faced similar competitive conditions as the included products (for which the plaintiff would be alleging competitive concern), this would only imply additional antitrust liability for the defendants. If instead the excluded products faced different competitive conditions from the included products—most likely meaning lower market shares for defendants—defendants may very well want to include the additional products in the cluster to dilute their shares in the problematic markets. But this is not a legitimate use of clustering, and is likely to lead to the error of overlooking harm in the problematic markets.[34]

> Professor Shapiro elaborated on this error in his Staples/Office Depot analysis:
>
> [A] common-sense approach reveals why it would be a major error to include, say, the sale and distribution of furniture in the relevant market. To see why, suppose that large customers spend far more on furniture than they do on consumable office supplies, but as a group they buy relatively little of their furniture from Staples and Office Depot. Suppose also that they buy most of their furniture from firms that specialize in furniture and sell few if any office supplies. In this situation, including furniture in the relevant market would greatly reduce the market shares of Staples and Office Depot. Critically, those lower shares would not accurately reflect the competitive significance of Staples and Office Depot in selling consumable office supplies to large customers.[35]

The potential for this error is indeed why courts have adopted the similar competitive conditions test for cluster markets.[36]

2. "Commercial Realities" Argument

In criticizing the Plaintiffs' relevant market, Staples and Office Depot emphasized that they sold many products in addition to those in the Plaintiffs' cluster, including ink and toner, furniture, janitorial supplies, breakroom supplies and technology products.[37] Staples and Office Depot also noted that many large customers purchased these additional items from them, often pursuant to the same bids or contracts through which they procured consumable office supplies.[38]

Invoking language from *Brown Shoe*, Staples and Office Depot argued that the "commercial realities" of this broader selling and purchasing behavior required a broader market definition encompassing all products.[39] Judge Sullivan rejected this argument, concluding that *Brown Shoe*'s "commercial realities" language was not on point.[40]

Indeed, while *Brown Shoe* mentions "commercial realities," it grounds product market definition in substitutability, not the breadth of what a company sells. It is not unusual for merging parties to sell many distinct products—effectively operating in multiple relevant antitrust markets—but for a merger to raise competitive concerns only in certain markets.[41]

2115 (EGS) (D.D.C. Apr. 4, 2016).

32 DFOF/COL ¶ 31 ("The key question is whether a hypothetical monopolist in the alleged market profitably could impose a small but significant and non-transitory increase in price ("SSNIP").").

33 Staples, 2016 WL 2899222, at *17.

34 Pls.' Proposed Findings of Fact and Conclusions of Law (Public Version) 9, 283, FTC, et al. v. Staples, Inc., et al., No. 15-2115 (EGS)(D.D.C. Apr. 20, 2016), ECF No. 444.

35 Reply Report of Carl Shapiro (Public Version) at 5, FTC, et al. v. Staples, Inc., et al., No. 15-2115 (EGS)(D.D.C. Mar. 20, 2016), ECF No. 280-38 (hereinafter, "Shapiro Reply Report").

36 See FTC v. ProMedica Health Sys., Inc., No. 3:11 CV 47, 2011 WL 1219281, at *55 (N.D. Ohio Mar. 29, 2011) (stating that it would be "inappropriate and misleading" to include obstetrics in a relevant cluster market for hospital services, because the competitive conditions for obstetrics were different from other hospital services).

37 DFOF/COL 72-73.

38 Id. at 107-12.

39 Id. at 32, 74; see alsoStaples, 2016 WL 2899222, at *14.

40 Staples, 2016 WL 2899222, at *14.

41 See e.g. FTC v. CCC Holdings, Inc., et al.,605 F. Supp. 2d 26, 34 & n.10 (D.D.C. 2009) (alleging harm for partial loss estimation and total loss

An alternative standard invoking the breadth of all products or services sold by the merging parties (unmoored from substitutability and the hypothetical monopolist test) would be difficult to apply and would leave customers vulnerable with respect to products in which the merger eliminated substantial competition. As Professor Shapiro explained, such an approach lacks a "limiting principle," and would allow a merger to monopoly"on the hope that customers could protect themselves from the monopoly power thus created by virtue of the fact that they also purchase other products from the monopolist."[42] Yet economic principles indicate that customers could not protect themselves from a monopolist in that scenario, including by threatening not to buy the out-of-market products. Specifically, one would expect that customers are already making use of the threat not to buy the out-of-market products today, so that threat does not alleviate the harm from a merger to monopoly with respect to the products in the candidate market.[43]

3. Proposed Alternative "Bundle" Market

As a corollary to the "commercial realities" argument, Staples and Office Depot floated the notion that the product market should have been treated as a bundle market, rather than as a cluster market. Staples and Office Depot sent mixed messages related to this argument, and Judge Sullivan did not explicitly address it in his opinion. In any event, this argument did not undermine the Plaintiffs' case.

As referenced above, a bundle market (or "package-deal" market) is one in which a group of products or services is viewed as a single product offering. As noted, this scenario can arise when customers value purchasing a group of products or services together. Citing Grinnell and invoking this concept, Staples and Office Depot at times suggested a potential product market consisting of a bundle of the products large customers purchased pursuant to their bids and contracts.[44] Similarly, Staples and Office Depot's economic expert (though not called at the hearing) observed in his report that large customers "typically demand that distributor intermediaries supply a bundle of products that is far broader than the FTC's and Professor Shapiro's claimed relevant market."[45] He therefore questioned "whether it is more appropriate to define the product market in this matter in terms of intermediary services, including bundling and distribution," rather than as a cluster of particular products.[46]

Staples and Office Depot's suggestion of a bundle market was unavailing for several reasons. As an initial matter, Section 7 of the Clayton Act prohibits mergers that substantially lessen competition "in any line of commerce."[47] As described above, the Plaintiffs presented unrebutted expert testimony that their alleged market satisfied the hypothetical monopolist test, which thus qualified the market as a relevant line of commerce. On its face, a statement positing that a bundle market may be "more appropriate" does not refute the Plaintiffs' relevant market. Relevant markets "need not be mutually exclusive," and once a relevant market has been identified, "[t]hat a larger or smaller grouping of sales might also constitute a market is beside the point."[48]

Moreover, there was no basis to conclude that the adoption of a bundle market would have obviated competitive concerns. Staples and Office Depot presumably had in mind that the bundle market would include ink and toner for customers that purchased ink and toner through their office supply distributor rather than an MPS provider. But in such a bundle market, Staples and Office Depot's market shares likely would have been higher than in the Plaintiffs' alleged cluster market. Such a market posits that customers value the "package deal" of purchasing general office supplies, copy paper andink and toner from a single provider. But such a market would by definition exclude the MPS providers that only sell ink and toner and the specialty paper merchants that only sell copy paper.[49] The exclusion of these firms from the market would only serve to increase the share of office supply distributors like Staples and Office Depot that carry all office supply categories.

Perhaps realizing this, Staples and Office Depot floated the concept of a bundle market, but also disputed it by arguing that customers frequently fractured their spending for various product categories. For instance, their briefing on the merits contended that large customers "routinely purchase from multiple suppliers," purchasing technology products from "specialty technology vendor[s]," janitorial products from "specialty vendors" and janitorial service companies and ink and toner from manufacturers.[50] Staples and Office Depot's

valuation software, but not "add-on" products typically sold with the software, where the add-on products were also "sold by a large number of companies" in addition to the merging parties); FTC v. Libbey, Inc., et al., 211 F. Supp. 2d 34, 39 & n.10 (D.D.C. 2002) (alleging harm in the foodservice glassware market, but not the retail glassware market where imported glassware suppliers "dominated").

42 Shapiro Reply Report at 5-6.

43 Id. at 5-6 & n.6.

44 DFOF/COL 74, 98, 100, 111 (quoting Grinnell, 384 U.S. at 572, to state that office supply companies "'recognize that to compete effectively, they must offer all or nearly all types of' office products, beyond those contained in the FTC's limited 'product market,'" and stating that large customers put out bids for and purchase "a bundle of goods that includes far more than just office supplies").

45 Expert Report of Jonathan Orszag (Public Version) 37, FTC, et al. v. Staples, Inc., et al., No. 15-2115 (EGS)(D.D.C. Mar. 20, 2016), ECF No. 277-2.

46 Id. at 41.

47 15 U.S.C. § 18.

48 9C Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 929d (3d ed. 2007).

49 See, e.g.Sysco, 113 F. Supp. 3d 1 at 18, 28-30, 37 (finding a market for broadline foodservice distribution, and excluding specialty food distributors that offered some, but not all, food product categories).

50 Defs.' Brief in Opp'n to Pls.' Mot. for a Prelim. Injunction (Public Version)

invoking of the bundle market concept thus reached a point of contradiction.

IV. CONCLUSION AND IMPLICATIONS

As summarized above, Judge Sullivan upheld the Plaintiffs' alleged cluster market of consumable office supplies, rejecting Staples and Office Depot's attacks on the market. Judge Sullivan's ruling did not break new ground, in that it is a straightforward application of the cluster market approach accepted in *Brown Shoe* and *ProMedica*. Nonetheless, the ruling is significant in that it contains a clear endorsement and articulation of the approach in a modern setting and outside of the hospital merger context. In rejecting Staples and Office Depot's assertions of "gerrymandering" and unmoored "commercial realities" criticisms, Judge Sullivan also upheld and reaffirmed established market definition principles.

Finally, because Staples and Office Depot directed so much energy and attention to contesting the relevant market, it is easy to lose sight of the breadth of the Plaintiffs' other evidence. As described by Judge Sullivan, the Plaintiffs did not simply rest on a presumption of harm from high market shares. They also presented extensive evidence related to anticompetitive effects. For instance, Professor Shapiro presented multiple bid data analyses demonstrating that Staples and Office Depot overwhelmingly won from and lost to each other.[51] The Plaintiffs also cited numerous ordinary course documents demonstrating fierce head-to-head competition between the merging parties, and in which Staples and Office Depot recognized each other as "the most viable office supply vendors for large businesses in the United States."[52]

Judge Sullivan concluded that this evidence "strengthen[ed]" the Plaintiffs' case that the merger was likely to harm competition.[53] Notably, Judge Sullivan referenced this evidence in his market definition discussion. Addressing Staples and Office Depot's contention that the Plaintiffs' relevant market did not reflect "commercial realities," Judge Sullivan replied:

> To the extent that the "commercial realities of the industry" are important in this case, the Court agrees with Plaintiffs that the commercial realities are "that Defendants are the largest and second-largest office supplies vendors in the country; they are each other's closest competitor for large business customers; bid data show that they lose bids most often to each other; and large customers currently benefit greatly from their head-to-head competition." Pls.' FOF 288.[54]

Thus, Judge Sullivan used the Plaintiffs' effects evidence as the final word on Staples and Office Depot's "commercial realties" criticism. Even when merging parties stake their defense on an attack on market definition, they should not ignore the broader evidentiary record.

at 19-21, FTC, et al. v. Staples, Inc., et al., No. 15-2115 (EGS)(D.D.C. Mar. 16, 2016), ECF No. 248-1.

51 Staples, 2016 WL 2899222, at *20.

52 Id. at *21.

53 Id.

54 Id. at *14.

CANADA'S TREB DECISION ON ABUSE OF DOMINANCE: POINTS OF POSSIBLE DIVERGENCE

BY RANDALL HOFLEY[1]

I. INTRODUCTION

"Abuse of dominance", or monopolization, law is generally engaged in Canada and elsewhere when an entity with market power undertakes conduct, unilaterally, that has the effect of lessening or preventing competition in a relevant market.Case law with respect to abuse of dominance in Canada has been limited and, as such, has looked to "abuse"law (and enforcement) in the U.S. and the European Union for insights, indeed guidance. The recent Canadian Competition Tribunal decision in *Commissioner of Competition v. Toronto Real Estate Board*,[2] no exception in this respect, provides a detailed outline of each element of Canadian abuse of dominance law and, while generally consistent with (the authors' understanding of) analogous U.S. and European Commission ("EC") law, some potential differences arise, most notably as regards "anticompetitive intent", the participation of the target in the relevant market and the role of intellectual property rights ("IPRs").

By way of introduction, the *TREB* decision concerned restrictions the Toronto Real Estate Board ("*TREB*") placed on the ability of "virtual realtors", called Virtual Office Websites or VOWs, to access and use certain real estate ("MLS") data. In short, *TREB* imposed restrictions on its VOW members that it did not impose on its "bricks and mortar" members. Finding that *TREB* had market power and that *TREB*'s restrictions were intended to exclude a (potential) competitor(s) from and had the effect of preventing competition for MLS-based residential real estate brokerage services in Toronto,[3] the Competition Tribunal ordered *TREB* to provide MLS data to all of its members on the same terms.[4]

II. ANTICOMPETITIVE INTENT

Consistent with the law in the U.S. and EC, the *TREB* panel confirmed that a subjective intention to restrict competition need not be shown for abuse of dominance to exist. Instead, the anticompetitive nature of conduct may be inferred using an objective standard, with evidence of subjective intention relevant to the Tribunal's consideration of the reason(s) for which certain acts were conducted.[5] Having said that, the *TREB* panel did hold that a party can be found to have engaged in "anti-competitive acts" if those acts are intended, subjectively or objectively, to have a predatory, exclusionary, or disciplinary effect on (potential) competitors.[6] Moreover, the Tribunal noted that evidence of subjective procompetitive intentions may provide a le-

1 Randall Hofley, Partner, Blakes.I was assisted in the preparation of this article by Mr. Joshua Krane and Mr. Nabeel Thomas of Blakes, for which I am grateful.The views expressed herein are, however, only those of the author and are solely based his understanding of relevant U.S. and EC law, for which no expertise is claimed.

2 The Commissioner of Competition v. The Toronto Real Estate Board (April 27, 2016), CT-2011-003 online: Competition Tribunal http://www.ct-tc.gc.ca/CMFiles/CT-2011-003_Reasons%20for%20Order%20and%20Order_385_38_4-27-2016_8854.pdf [*TREB*].

3 I.e. amounted to an abuse of dominance.

4 This decision has been appealed to Canada'sFederal Court of Appeal.

5 In *TREB*, the Competition Tribunal confirmed the requirement that the impugned conduct be intended to exclude, predate, or discipline a competitor or potential competitor, but noted that this intention could be objective rather than subjective and as such, the Commissioner of Competition does not need to prove a subjective intent to restrict competition in order to find an entity liable for abuse of dominance. *TREB* at paras 274 and 278. See also Brian A. Facey and Dany H. Assaf, "Monopolization and Abuse of Dominance in Canada, the US, and the EU: A Survey." Antitrust Law Journal, Vol. 70, No. 2 (2002), pp. 513-591 at p 544 [Facey & Assaf].

6 *TREB* at para 275.

gitimate business justification for the conduct but only where such justification outweighs any anticompetitive effects that were either subjectively intended or reasonably foreseeable.[7]

This jurisprudence – particularly its emphasis on subjective intent – would seem to diverge somewhat from the prevailing U.S. monopolization law, which requires that the defendant must only be shown to have willfully acquired or maintained its monopoly by engaging in exclusionary conduct.[8] It would also seem to involve considerations (and evidence) beyond that prevailing in the European Union, wherein abuse of dominance is an objective concept,[9] and subjective intent, while relevant, is not sufficient in and of itself.[10] This potential divergence between the jurisdictions may, however, be of limited practical import, save perhaps as providing an additional test for the Commissioner of Competition to meet in Canada, because abuse of dominance can still only be found in Canada when the "anticompetitive act" has prevented or lessened or is likely to lessen or prevent competition in a relevant market, irrespective of the target's intent.

III. PARTICIPATION IN THE RELEVANT MARKET

In reliance on an appeal ruling of the Federal Court of Appeal, the *TREB* panel held that a party may abuse its dominant position even where it does not participate in the market affected, such as where the target controls a significant input (to competitors) in the affected market or makes rules that control the conduct of those competitors.[11]

This approach would seem to be consistent with EC abuse of dominance law, where an entity dominant in one market has been found liable if its conduct results in anticompetitive effects in another, for example downstream, market.[12] Indeed, the abuse of dominance enforcement guidelines also state that where a company "leverages" its market power from one market into another, Article 102 (abuse of dominance) is engaged.[13] Query, however, whether the *TREB* panel approach would be followed in the U.S. where the entity did not participate in the relevant market, or at least control an essential facility for that market. Said otherwise, if the target did not have price setting power in a market in which it did not participate, would liability under Section 2 of the Sherman Act be precluded?[14] In this regard, it is interesting to note that in United States v. National Association of Realtors,[15] a seemingly parallel enforcement action in the U.S. to *TREB* in Canada, the U.S. DOJ sued the National Association of Realtors ("NAR") for imposing restrictions on the ability of VOWs to use and supply MLS data to their customers under Section 1 of the Sherman Act relating to agreements in restraint of trade, notSection 2 relating to monopolization.[16] A further question arises as to whether the *TREB* decision could be explained as an application of the U.S. "essential facilities doctrine", which could lead to liability for conduct by an entity that does not participate in the relevant market;[17] although, the USSC in Trinko held that access to the essential facility must denied outright for the doctrine to apply, even assuming the Court were to recognize the doctrine.[18]

---

7 *TREB* at para 285 (citing Commissioner of Competition v. Canada Pipe Ltd, 2006 FCA 233at para 67).

8 United States v. Grinnell Corp, 384 US 563, 570-71 (1966) [Grinnell]; American Football League v. National Football League, 205 F Supp 60, at p 79 (D Md 1962). See also Frank X. Schoen, "Exclusionary Conduct After Trinko," NYULaw Review, Vol. 80:1625, 1625-1664. [Schoen] (citing Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws ...."); Matushita, 475 U.S. at 595-97,(ignores subjective intent and looks only at conduct); United States v. Microsoft Corp., 253 F.3d 34, 59 (D.C. Cir. 2001) ("… intent…is relevant only to the extent it helps us understand the likely effect of the monopolist's conduct.").

9 By which a dominant entity's recourse to methods different from those expected in the course of normal commercial competition hinders the maintenance or growth of competition: Hoffmann-LaRoche. T19791 3 C.M.L.R. 211 at p 541.

10 I understand that, in the EC, intent has been considered relevant in certain types of abuse of dominance cases, notably regarding predatory pricing. (Case C-62/86 AKZO Chemie BV v. EC Commission, ECR I-3359, [72] (1991)) and vexatious litigation— (Case T-11/96 ITT Promedia NV v. EC Commission, ECR II-2937, [60]; [55] (1998)).

11 *TREB* at para 179, citing Commissioner of Competition v. Toronto Real Estate Board, 2014 FCA 29, [*TREB* FCA] at para 13. One such example noted by the *TREB* panel was through setting product standards or making rules that insulate certain competitors from competition. *TREB* at para 181.

12 Sweet & Maxwell, "Market where abuse occurs", EC Competition Law Reporter, 2012 [ECCLR]. In one such case, a decision by a manufacturer of a raw material used in the production of a drug by another firm to stop supplying the raw material was held to be an abuse of dominance despite the fact that the supplier did not have a dominant position in the market for the finished drug. ECCLR (citing Istituto Chemioterapico Italiano SpA and Commercial Solvents Corp v. EC Commission (6 & 7/73) [1974] E.C.R. 223).

13 European Commission, "DG Competition discussion paper on the application of Article 82 of the Treaty to exclusionary abuses", December 2005, at para 17.

14 See, for example, Grinnell at p 570-571 and Verizon Communications Inc. v. Law Offices of Curtis V Trinko, LLP, 540 US 398, 407 [Trinko].

15 US v. National Association of Realtors, amended complaint at https://www.justice.gov/atr/case-document/file/505861/download [NAR Complaint]; final judgment at https://www.justice.gov/atr/case-document/final-judgment-142 [NAR Judgment].

16 See, e.g. NAR Complaint paras 1-6; NAR Judgment pages 5-9. Sherman Act, 26 Stat 209, 15 USC s 1 [Sherman Act].

17 NYU LAW Review at pp 1638, 1641. See also Facey & Assaf at p 559 and Schoen at p 1641.

18 Trinko at p 11.

IV. IPRS

A unique feature of the *TREB* case involved TREB's assertion that it had copyright over the real estate data atissue, and that its restrictions were a mere exercise of copyright exempt from sanction and not subject to (what it claimed would amount to) a compulsory license.[19] The *TREB* panel concluded that *TREB* failed to establish any copyright in the relevant MLSdatabase but that even if copyright existed, all of the impugned restrictions on the MLS data, which included an access restriction, constituted more than the mere exercise of any IPR because they "attache[d] anticompetitive conditions to the use of its intellectual property"[20] and thereby "…confer[ed] on *TREB* and its above-mentioned Members advantages beyond those derived from the Copyright Act."[21] This obiter dicta would seem to go beyond that in the U.S. and perhaps even the EC.

Under U.S. law, absent exceptional circumstances, a unilateral refusal to license generally will not be a basis for liability.[22] The high value placed on the right to refuse to license competitors and customers is consistent with the USSC jurisprudence on refusals to deal generally, although a refusal to license that terminates a voluntary and profitable course of dealing, forsaking short-term profits to achieve an anticompetitive end may result in antitrust liability.[23]

Under EC law, a refusal to license can constitute an abuse, but again this is an exceptional circumstance.[24] An EC court has held that a refusal to license an IP right is an abuse where the refusal is not objectively justified and the refusal: a) relates to a product or service indispensable to the exercise of a particular activity on a neighboring market; b) is of such a kind as to exclude any effective competition on that neighboring market; and c) prevents the appearance of a new product for which there is potential consumer demand.[25] This standard, like the U.S. standard, may bemore stringent than that outlined in *TREB*.

V. CONCLUSION

While Canadian, U.S. and EC "abuse of dominance"law would seem to be generally aligned, the recent *TREB* decision raises – at least in three areas – a potential source of divergence between the jurisdictions. While some of these differences may not be of practical import or simply reflect a unique statutory aspect of Canadian law, only further case law – ideally covering transnational practices - will confirm the (in)consistency of Canadian law with that of its major trading partners in this important area.

19 Canada's Competition Act includes an express exemption from the abuse of dominance provisions, for "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under" Canada's various intellectual property statutes (s. 79(5), Competition Act).

20 *TREB* at paras 721, 754. The *TREB* panel also rejected the suggestion that any order it issued would involve the imposition of a compulsory license on the grounds that *TREB* makes "the components of the Disputed Data available to its Members in other ways" and "it is settled law that the Tribunal has the jurisdiction to order the supply of a proprietary product." *TREB* at paras 760-761.

21 *TREB* at paras 757-758. It remains unclear whether an outright refusal of access would be exempt given the *TREB* panel's reference to two of the three restrictions as going beyond mere access while finding all three impugned restrictions contrary to the abuse of dominance provisions.

22http://globalcompetitionreview.com/know-how/topics/80/jurisdictions/23/united-states/

23http://globalcompetitionreview.com/know-how/topics/80/jurisdictions/23/united-states/

24https://www.slaughterandmay.com/media/64581/the-eu-competition-rules-on-intellectual-property-licensing.pdf at pp 17.

25https://www.slaughterandmay.com/media/64581/the-eu-competition-rules-on-intellectual-property-licensing.pdf at p 18

HOW MANY "LIKES" FOR THE GERMAN FACEBOOK ANTITRUST PROBE?

BY DR. ANNA BLUME HUTTENLAUCH[1]

I. INTRODUCTION

The German Federal Cartel Office ("FCO") caused quite a stir, not only among antitrust lawyers, when it announced five months ago that it had opened an investigation against Facebook based on the allegation of abuse of dominance.[2] Even though little is public about the status of the investigation and its progress so far, there are three fundamental questions at the heart of the proceedings which will shape the future discussion about the case.

- First: Is there a market on which Facebook is "dominant", i.e. do social networks constitute a market for the purpose of antitrust analysis?
- Second: What particular features and market dynamics need to be taken into account when assessing the competition on multi-sided platforms such as a social network?
- And third: If Facebook is considered dominant, can a breach of data protection rules amount to "abusive behavior" within the meaning of antitrust law?

II. IS THERE A MARKET ON WHICH FACEBOOK IS "DOMINANT"?

The first discussion point revolves around the question whether services that are provided free of monetary charges can, as a matter of principle, constitute a market.

Facebook is a social networking platform, which connects more than 1.3 billion users worldwide. It allows users to engage with each other for social purposes: They connect, share, communicate and express themselves online or through their mobile app by posting pictures or videos, sharing links to their timelines, commenting or "liking" other user's activities or playing games connected to Facebook. The platform's services are provided for free, i.e. users do not pay to use Facebook. Instead, the system is monetized through advertising, i.e. providing non-search advertising services on Facebook's networking platform (both on PCs and on mobile devices).

In the past, German courts and the FCO considered monetary charges and price-setting as essential competitive parameters for services to constitute a "market." The view expressed explicitly or implicitly in the body of case law created over the past decades was that if there is no payment, there is no market. Therefore, for example, the FCO did not consider the viewer side of free TV to constitute a market in its *Axel Springer/ProSiebenSat1* decision (as opposed to the advertising side).[3] Based on this theory, the services of a social media platform for which users do not pay any money, would not qualify as a "market."

This is different from the view taken by the European Commission who analyzed several "markets" in its recent *Facebook/Whatsapp* decision, most of which did not involve paid services.[4] The Commission is currently also investigating Google's dominance on internet search markets (which are "free" to users). Even in the past, the Commission was less inclined to reject the existence of a market only because no charges were being paid.[5]

1 Dr. Anna Blume Huttenlauch, LL.M. (NYU) is a partner of BLOMSTEIN, a boutique law firm specialised in antitrust and public procurement law based in Berlin. She is admitted to the Bar in Germany (Rechtsanwältin) and to the New York Bar.

2 Press release of March 2, 2016, [http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591568.](http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/02_03_2016_Facebook.html?nn=3591568)

3 B6-103/05 – Axel Springer/ProSiebenSat1.

4 See COMP/M.7217 - FACEBOOK/ WHATSAPP.

5 See, for example, COMP/M.1889 – CLT-UFA/CANAL+/Vox; COM-

It is quite remarkable that the FCO is currently in the process of abandoning its earlier view and drawing closer to the Commission's position. It has started to acknowledge that companies can compete on aspects other than price, such as the quality of service or the amount of data collected on each individual user. By opening an investigation against Facebook based on an abuse of dominance allegation the FCO implicitly takes the position that even services for which no monetary compensation is paid can, in principle, constitute a market. For instance, providing user data in exchange for a specific service can be sufficient to qualify as a "market relationship." The authority also explicitly confirmed this position in a paper that was published jointly with the French *Autorité de la Concurrence* on the general interrelations of Competition Law and Data in June 2016.[6]

Moreover, draft legislation that is expected to enter into force in Germany by the end of 2016 will explicitly endorse this change of dogma and clarify that services provided free of charge can in principle constitute a market and are therefore not per se out of the scope of competition law analysis.[7]

III. WHAT PARTICULAR FEATURES AND MARKET DYNAMICS NEED TO BE TAKEN INTO ACCOUNT WHEN ASSESSING COMPETITION ON MULTI-SIDED PLATFORMS?

The finding that social networks can, in principle, constitute a market still begs the question whether Facebook is dominant on such a market.

When the European Commission analyzed social networks in the context of Facebook/Whatsapp, it did not reach a conclusion on the exact market definition or Facebook's market position. It did, however, note a number of online services that include a social networking functionality as well. This spectrum includes quite a variety of services of very different nature and focus, including consumer communication services with some sort of networking functions. Thus, the competitive landscape is highly differentiated. Companies clearly considered part of the same competitive orbit as Facebook by the Commission include Google+, LinkedIn, Twitter and MySpace. In terms of the geographic scope, the Commission assumed an at least EEA-wide, if not worldwide, market for social networking services.

It has been discussed among economists, legal scholars and antitrust practitioners whether it is appropriate to assess market power in digital economies according to traditional criteria or whether specific market dynamics need to be reflected in the competition analysis. In particular, there is a question to what extent market shares are indicative of market power in platform and network markets or whether other factors can be more telling, such as indirect network effects, scale effects, congestion and the extent to which users are active on multiple platforms ("multi-homing"). Moreover, market shares are difficult to determine according to traditional parameters because these cannot be easily applied. For example, where services are provided for free, turnover will not be an appropriate measurement of market power. Instead, the number of registered users or, possibly even only the number of "unique users," page impressions, the time spent by users on certain platforms and the extent to which users are active on multiple platforms or use one platform exclusively ("single homing") are better indicators.[8]

Generally, while network effects and scale benefits have an inherent tendency to support concentration, multi-homing and congestion risks tend to decrease concentration effects. For example, the more users active on a dating platform or a social network, the more attractive it will be for new users.

In relation to data-driven markets, an additional level of complexity comes in because the more control a network has on user data, the better it will be able to optimize its services for its users and keep them in the network. This can make it harder for new entrants to establish a critical mass of users and build up a competitive alternative. However, concentration in this sense must not necessarily be harmful to competition. Instead, it can be ambivalent. With a sufficient degree of platform differentiation and users using various platforms, innovative new offers can become a competitive alternative quite quickly in some markets.

Two important factors in the analysis of data-driven markets – which were also pointed out by the British Competition and Markets Authority in its 2015 report *The Commercial Use of Consumer Data* – are first: whether data is scarce or whether it can easily be replicated ("non-rivalry of data"). And second: whether the scale/scope of data collection matters in the specific context of, for example, a social network such as Facebook.[9]

The FCO is considering all these parameters in its current investigation. Of course, the dynamics of the social network market and its particularities must be closely examined, e.g. to what extent

P/M.6281 – Microsoft/Skype.

6 Competition Law and Data, June 10, 2016, http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2.

7 See https://www.bmwi.de/BMWi/Redaktion/PDF/G/neunte-gwb-novelle,property=pdf,bereich=bmwi2012,sprache=de,rwb=true.pdf.

8 See also the FCO's working paper Market Power of Platforms and Networks, published on June 9, 2016, http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2016/09_06_2016_Think-Tank.html. The draft legislation that will enter into force in Germany by the end of 2016 also takes account of some of these factors and their relevance for the competitive analysis of certain markets.

9 The Commercial Use of Consumer Data, June 2015, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/398283/Consumer_Data_-_CFI.pdf; p. 95.

network effects exist and whether multi-homing is common practice among users. It will remain to be seen whether the FCO will actually come to the conclusion that Facebook can be considered "dominant" according to these standards or whether it will identify market dynamics that undermine this proposition.

IV. CAN A BREACH OF DATA PROTECTION RULES AMOUNT TO "ABUSIVE BEHAVIOR"?

In relation to the abusive conduct, the allegation currently investigated by the FCO is (1) whether Facebook's conditions of use and its specific terms of service on the use of user data are in breach of data protection rules and (2) to what extent such a breach could be connected to Facebook's possibly dominant position.

Facebook users must agree to the collection and use of their data by accepting Facebook's terms of service, which the FCO considers "opaque and difficult to understand."

The FCO acknowledges that privacy concerns are not in and of themselves within the scope of intervention of competition authorities but rather governed by data protection law. In addition, not every breach of the law by a dominant company is necessarily abusive conduct. However, given the importance of user data to advertising-financed internet services, such as Facebook, the authority examines whether there is sufficient transparency, i.e. whether consumers are sufficiently informed about the type and extent of data collected.After the investigation became public,Andreas Mundt, President of the FCO said: "Dominant firms are subject to special obligations. These include the use of adequate terms of service as far as they are relevant to the market." If the FCO finds its theory of harm confirmed, it could come to the conclusion that Facebook's specific conduct in question constitutes an abusive imposition of unfair conditions on users.

The position paper on Competition Law and Data, which the FCO co-published with the French Authority in Juneadds clarity to the theory of harm that the FCO is testing.[10] This paper states that privacy policies can be considered from a competition law angle whenever:

> they are liable to affect competition, notably when they are implemented by a dominant company, for which data serves as a main input of its products/services: In those cases, there may be a close link between the dominance of the company, its data collection processes and competition on the relevant markets, which could justify the consideration of privacy policies and regulations in competition proceedings.

It is worth noting that the European Commission took a different position in its Facebook/Whatsapp decision in 2014 (albeit under a different theory of harm).[11] The Commission tested a number of theories of harm in relation to the proposed merger of the consumer communication service Whatsapp and the social network Facebook. However, it did not consider any privacy-related concerns flowing from the increased concentration of data in Facebook's control as falling within the scope of EU competition rules. Instead, it viewed the EU data protection rules as the appropriate regime to test and scrutinize such potential concerns. In the Facebook/Whatsapp decision, the Commission only analyzed potential data concentration to the extent that it was likely to strengthen Facebook's position in the online advertising market (or any sub-segments thereof). Since Whatsapp was not active in online advertising and since Whatsapp did not collect any advertising-relevant user data, the transaction did not give rise to any horizontal overlaps between the merging parties in this respect. Moreover, the Commission noted that a number of market participants collect user data along with Facebook, including Google, Apple, Amazon, eBay and Microsoft. Facebook's share in the collection of data across the web amounted to only between 6 and 7 percentwhereas the remaining shares were out of Facebook's exclusive control.

The fact that the FCO is now analyzing a competition law infringement, where a breach of data protection rules is connected to market dominance, could have significant consequences. Sanctions provided by the German data protection law regime are currently capped at €300,000 in Germany, whereas fines imposed by the FCO can amount to 10 percent of worldwide turnover. In Facebook's case this could, in theory, mean a fine of 1.8 billion USD. Naturally, a number of other companies active in data-driven markets are also watching the investigation closely.

V. CONCLUSION

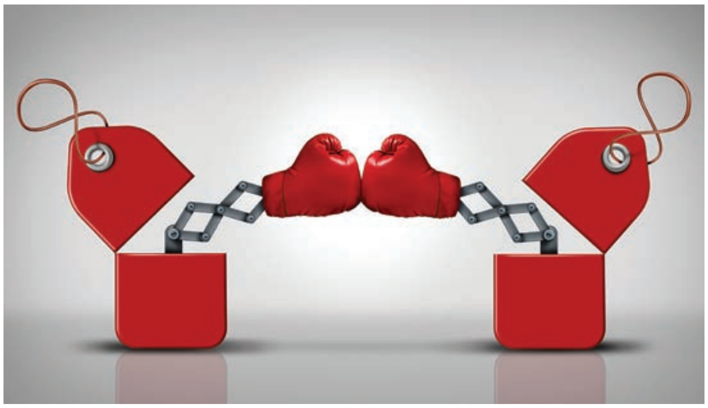
In recent years, the FCO opened investigations into booking platforms, online distribution, amazon.com and now Facebook. While all of these investigations pursue different theories of harm, this level of activity shows that the agency is prepared to step into a gap left by other authorities in Europe and worldwide. It also means that tech-giants face a greater risk of scrutiny in Germany than elsewhere. However, if other competition authorities follow these footsteps, this risk may soon expand across Europe and potentially further. The FCO's Facebook investigation is conducted in close contact with data protection officers, consumer protection associations as well as the European Commission and the competition authorities of the other EU Member States. The European Competition Commissioner, Margarethe Vestager, has already voiced very clearly that the FCO is exploring new territory; its pioneer role may soon inspire other competition authorities to follow. Given its significance for all kinds of digital economy business models, it will continue to be under close watch by stakeholders and businesses across Europe.

10 Competition Law and Data, June 10, 2016, http://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Berichte/Big%20Data%20Papier.pdf?__blob=publicationFile&v=2.

11 See COMP/M.7217 - FACEBOOK/ WHATSAPP.

REBATES: FORMALISM, EFFECTS AND THE REAL WORLD

BY LIA VITZILAIOU[1]



I. INTRODUCTION

Rebates by dominant undertakings are a controversial area in competition law. While they can be part of genuine price competition and lead to lower prices, they can be also used by dominant firms as a means to exclude competitors and effectively harm customers.

Under one approach, a rebate must be regarded as abusive if it is generally "loyalty enhancing," regardless of its concrete effects on the market. This rather formalistic approach derives from the traditional case law of European Union ("EU") courts[2] and is considered to be the prevailing view of jurisprudence to date.

Under another, more economic, approach, the practical effects of rebates should be assessed through economic tests and the rebates' impact on competition should be quantified ("effects-based approach").

II. EU COURTS VS. EUROPEAN COMMISSION

According to the prevailing case law of EU courts to date, there is generally no need to demonstrate actual or even concrete anticompetitive effects for a rebate to qualify as an abuse of dominance under Article 102 TFEU. In fact, certain rebate schemes, when applied by dominant firms, may be automatically considered as abusive (e.g. exclusivity rebates).

However, the European Commission ("the Commission") has expressed its preference for the effects-based approach, both in its Guidance[3] and its recent decisional practice. With respect to rebates, as with other pricing practices, the Commission has adopted a methodology based on cost data and introduced the As-Efficient-Competitor ("AEC") test, which focuses on whether the rebate is likely to prevent competitors as efficient as the dominant firm from expanding or entering a market. In general, the Commission does not consider the rebate to be capable of anti-competitive foreclosure when the price remains above the long-run average incremental cost ("LRAIC") of the dominant firm. On the contrary, if the price is below the average avoidable cost ("AAC"), then the rebate scheme is considered capable of foreclosing even as-efficient competitors.

III. THE RULING ON *POST DANMARK II*

Although the prevalent caselaw of EU courts and National Competition Authorities ("NCAs") to date generally follows the formalistic approach, a recent judgment of the Court of Justice of the European Union ("CJEU") on a preliminary ruling request, can be considered as a step towards the effects-based approach. It is also the first time that the CJEU recognized that the AEC test may be used for the assessment of rebates and there is no reason for its confinement to *strictosensu* pricing abuses.

In Case C-23/14 ("*Post Danmark II*"), the CJEU initially repeated the dicta of traditional caselaw and identified three major categories of rebates:

a) Quantity rebates, linked only to the volume of purchases, which are not in principle considered to violate Article 102 TFEU, mainly because they are deemed to reflect the dominant firm's gains in efficiency and economies of scale;[4]

b) Loyalty rebates, which offer customers financial incentives to purchase all or most of their requirements from the dominant firm and which are generally considered abusive, mainly because they are deemed designed to prevent customers from dealing with competitors;[5] and

c) Mixed rebates, which are neither quantity nor loyalty rebates. According to the CJEU, this is the only category of

1 LiaVitzilaiou, SeniorAssociate in LambadariosLaw Firm

2 See e.g. Case T 203/01 Michelin II; Case 85/76 Hoffmann La Roche; Case C-95/04P British Airways.

3 Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, OJ C 45, 24.2.2009, p. 7–20.

4 See e.g. Case T 203/01 Michelin II.

5 Case 85/76 Hoffmann La Roche, and Case T 155/06 Tomra.

rebates for which it is necessary to conduct a detailed analysis and to consider "all the circumstances, particularly the criteria and rules governing the grant of the rebate, and to investigate whether in providing an advantage not based on any economic service justifying it, the rebate tends to remove or restrict the buyer's freedom to choose his sources of supply, to bar competitors from access to the market, to apply dissimilar conditions to equivalent transactions with other trading parties or to strengthen the dominant position by distorting competition."[6]

Despite this rather formalistic breakdown which relies on presumptions, in other parts of the judgment the CJEU seems to depart from this approach: it focuses on the analysis of effects and for the first time acknowledges the relevance of the AEC test with regard to rebates, in line with the Commission's view that this test should not be confined to *strictosensu* pricing abuses.

In particular, the CJEU held that:

a) in order to establish abuse, one should demonstrate that "there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking"[7] and "the anti-competitive effect of a particular practice must not be purely hypothetical";[8]

b) "recourse to the AEC test in cases involving a rebate scheme for the purposes of examining its compatibility with Article 82 EC" should not in principle be excluded;[9] and

c) the AEC test is to be considered as "one tool amongst others for the purposes of assessing whether there is an abuse of a dominant position in the context of a rebate scheme."[10]

In the particular case however, the CJEU held that the AEC test was of no relevance due to its particularities (superdominance, legal monopoly, significant economies of scale, high entry barriers, etc.), which made the appearance of an AEC practically impossible. Of course this does not diminish the importance of the affirmation that the AEC test can be applied in rebate cases and there is no reason to be restricted merely to pricing abuses; it just demonstrates that the AEC test should not be automatically applied in all cases, but – as with any other assessment tool – an examination of all the surrounding circumstances is necessary to determine its applicability.

6 See Post Danmark II, para. 29

7 Case 23/14, para. 66.

8 Id. para. 65.

9 Id. para. 58.

10 Id. para. 61.

IV. THE HEINEKEN CASE[11]

Contrary to the CJEU, the Hellenic Competition Commission ("HCC") did not appear equally broad minded when examining the relevant rebate scheme in the *Heineken* case.[12] This case concerned various commercial practices by Athenean Brewery S.A. ("AB"), a subsidiary of Heineken N.V. and the market leader in the Greek beer market, from 1998 to 2013.

Initially, it should be noted that market data during the 16-year investigation period indicated that no anti-competitive effects had come about: AB's market share reduced every year and by 2013 it shrunk by almost 30 percent;[13] the market shares of its competitors increased every year; there was successful market entry and expansion by new competitors;[14] and AB product prices had not increased nor accused to have increased to anti-competitivelevels.

Despite such indications, the HCC refused to conduct any effects analysis and followed a rigidly formalistic approach, mainly invoking the standard caselaw of EU courts on exclusivity. While AB presented an expert's report with a full economic analysis of its price structure and its rebate scheme, which confirmed the lack of anti-competitive effects, the HCC rejected such analysis primarily as unnecessary.

In particular, the HCC held that AB applied exclusivity rebates, which are prohibited per se as abusive absent an objective justification. The HCC also added that exclusivity agreements by dominant undertakings lead to foreclosure by their nature and it is not necessary to examine their effects on the market.

However, the rebates granted by AB were not conditional on exclusivity; they were not connected with any particular purchase obligation of the customer; and there was no reference to the customers' purchase requirements. Despite these facts, the HCC concluded that AB's rebates were "exclusivity rebates" mainly because the proportion of AB products in the total of beer products distributed by its customers was high. The only explanation for this finding was, according to the HCC, that there was a de facto exclusivity agreement in place, according to which the rebates were granted. The fact that AB's products were the strongest and most popular beer brands in Greece was disregarded by the HCC as irrelevant.

11 In the interest of transparency, it is disclosed that the author participated in AB's defense before the HCC. However, the views expressed herein are strictly personal.

12 Hellenic Competition Commission decision No. 590/2014, published on 01.12.2015, available at http://www.epant.gr/apofasi_details.php?Lang=gr&id=361&nid=746

13 From approx. 80 percentin 1998 it shrunk to approx. 54 percent in 2013.

14 Indicatively, a new entrant gained a 14 percent market share within 3 years.

Furthermore, the HCC held that AB pursued exclusivity mainly because the economic considerations granted to AB customers in the form of rebates were considered "high." The HCC reached such a conclusion essentially by comparing the rebates' arithmetic value with the customers' total gross turnover in AB products. Such method was quite innovative since it finds no grounds on the economic analysis conducted by EU courts or the Commission in similar cases.

The rigidly formalistic approach followed by the HCC and its refusal to look into the effects of the practices in question was a very bold choice, considering that the EU courts generally hesitate to take such a rigid position. Even in cases where the formalistic approach was adopted with regard to exclusivity, the effects likely to be produced by such practices were actually examined and appraised in the particular circumstances of the case.[15] Actually the same line was followed by the HCC itself in the preceding cases of Nestlé[16] and Tasty.[17]

V. IS FORMALISM A SUITABLE APPROACH TO ASSESS REBATES?

The formalistic approach adopted by the HCC in the Heineken case and the traditional EU caselaw, presents, in the author's view, serious disadvantages and it is not necessarily apposite for the assessment of rebates. On the contrary, more steps towards the effects-based approach are necessary, in the same direction as that followed in Post Danmark II.

In brief, one could challenge the suitability of formalism when addressing rebates mainly because:

A. In Principle All Types of Rebates May Lead to Foreclosure

Similarly, all types of rebates may be pro-competitive. Hence, a general maxim that quantity rebates are legal, loyalty rebates abusive and only mixed rebates should be subject to analysis does not necessarily depict their true effect. In principle all types of rebates should be analyzed.

B. "Type" Analysis of Rebates Contradicts the Approach of Case Law to Low Pricing Practices

The effects analysis has been repeatedly applied by the EU courts to low pricing practices, such as selective pricing,[18] predatory pricing[19] and margin squeeze.[20] It is unclear what is the major difference between rebates and those pricing practices, which justifies a diverse treatment in their analysis, and why the effects approach cannot in principle be applied on all rebates irrespective of their "type."

C. Exclusivity rebates

1. No obvious reason to be considered abusive by nature

It is not obvious why exclusivity is presumed to pursue anticompetitive purposes and why an objective justification is required to rebut such a presumption. All the more so, since EU courts in their Article 101 TFEU caselaw and the Commission in its Guidance and its Guidelines on vertical restraints[21] have acknowledged that exclusivity produces benefits for both the supplier and the distributor. It would appear contradictory to take these benefits into account when addressing a dominant firm's conduct under Article 101 TFEU, but disregard them and attribute anticompetitive intent instead, when addressing the same under Article 102 TFEU.

2. Presumptions of abuse due to exclusionary effect contradicts EU case law

Both in Post Danmark I and in TeliaSonera, the CJEU held that not every exclusionary effect is detrimental to competition and that "competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers."[22] Consequently, arguing that exclusion equals abuse without any further analysis appears inconsistent with EU case law and is an insufficient reasoning for such finding.

D. Formalism Ignores Commercial Reality, Market Conditions and Economic Evidence

One could further argue that the formalistic approach ignores the reality of the market underconsideration and is instead based on assumptions and theory. It appears rather exaggerated to suggest that a presumption is so infallible that it is unnecessary to look into the commercial reality, economic evidence, market conditions, and the evolution of business practices or market studies and reject all relevant considerations using the same criteria as decades ago in Hoffman La Roche. Effectively, assumptions and presumptions are the easiest way to protect competitors altogether, irrespective of their efficiency (or lack thereof).

E. Formalism Does Not Contribute to the Evolution of Law

The fact that Article 102 TFEU does not have such a strict wording

15 See indicatively Case C-549/10P Tomra; Case T-201/04 Microsoft; Case C-95/04PBritish Airways

16 Case 434/V/2009, available at: http://www.epant.gr/apofasi_details.php?Lang=gr&id=289&nid=543

17 Case 520/VI/2011, available at: http://www.epant.gr/img/x2/apofaseis/apofaseis667_1_1329733817.pdf

18 See e.g. Case C 209/10, Post Danmark I.

19 See e.g. Case C-62/86 AKZO; Case C 202/07 P, France Télécom.

20 See e.g. Case C 52/09TeliaSonera.

21 Commission notice - Guidelines on Vertical Restraints, SEC(2010) 411 final.

22 Post Danmark I, para. 22; See also by analogy TeliaSonera, para. 43

or conditions as Article 101 TFEU, allows for a more constructive application thereof, leaves room for economic analysis and the examination of each market according to its particularities. However, the formalistic approach and the labeling of certain practices as "abuses by nature" prevents any evolution of the law and appears estranged from the complexity of current business transactions.

F. Peril of Over-Enforcement

The formalistic application of Article 102 could also result in over-enforcement, deter undertakings from charging lower prices based on rebates and unnecessarily restrict their freedom to determine their pricing policy.

G. Against the Right to a Fair Trial and the Presumption of Innocence

One could finally argue that the use of presumptions when applying provisions with a punitive or quasi-punitive character, like antitrust provisions, violates the primary right of the defendant toa fair trial and effectively inverts the presumption of innocence to a presumption of guiltiness.

VI. REAL ISSUES FOR PRACTITIONERS

Apart from those objections to formalism on a theoretical level, its adoption by EU courts and NCAs, as well as the inconsistencies often noted in their decisional practice, has also created some very "real" problems for practitioners.

More often than not, a client who happens to be a dominant undertaking does not have exclusionary intent. Just like any firm, they wish to increase their market share, even to win over customers of their rivals. In fact, this is a manifestation of genuine competition on the merits. While, however, it is plausible to try to attract the customers of competitors, it is punishable to foreclose them; the borderline between the two is very thin, yet the classification of the conduct has very serious consequences.

But in the real world such categorizations and "labels" are often artificial or even inaccurate. For instance, a rebate which leads to de facto exclusivity is presumed abusive, but a selective price cut addressed only to a competitor's client is not. Are those two practices so different in reality to justify such diverse treatment in their analysis? Is the intent of the undertaking so diverse in each of the two cases? Hardly so.

Besides, clients who request advice usually submit their commercial policy as a whole and do not generally pursue different goals by different practices (e.g. pricing practices vs. rebates vs. etc.). It appears impractical and even unrealistic to have to break down those practices into predetermined categories, artificially attribute different intent of the client to each practice and then follow a completely different method of analysis according to each presumed intent.

Especially with regard to rebates, it is quite a challenge to explain to a client the rationale of analysis that formalism dictates. Namely, that if the client grants rebates which can be considered to favor exclusivity, she will be presumed to have exclusionary intent and the rebates' effects will be irrelevant; if she gives some other type of rebates, like mixed rebates, no presumptions on herintent will be made and the rebates' effects will be relevant; and that if she manages to grant simple quantity rebates then herintent will be presumed not to be anticompetitive and again the rebates' effects will be considered irrelevant.

And to make things worse, one must also explain to clients that they would be somewhat "better off" if their commercial policy is examined by the EU Commission, because it generally looks into the effects of business practices; if the same policy is appraised by EU courts, then the client should not be too optimistic; and if the same is appraised by a NCA then… no one can be really sure about the approach to be followed.

If one imagines such conversations in the real world, between a real client and a real lawyer, it is not hard to see the distance between formalism and business reality.

VII. CONCLUDING REMARKS

In view of the shortcomings one could attribute to the formalistic approach to rebates and taking into account the recent decisional practice of the Commission and the CJEU which seems to depart therefrom, further steps are welcome towards a wider adoption of an effects-based approach.

Applying Article 102 TFEU using the same criteria as those expressed decades ago, disregarding all the experience gained in-between and ignoring the development and diversity of current business models appears counterproductive and estranged from commercial reality.

Indeed, the decisional practice of EU courts and NCAs that neglects effects, like the recent Heineken decision of the HCC, can make the application of competition law a simplistic and mechanical process, deter innovation and practically encourage undertakings to adopt the same business policy (e.g. simple quantity rebates), just to be "on the safe side."

Case law evolves and is subject to change. Courts do take into account their past judgments but they are not legally obliged to follow them. Hopefully, thus, a change of course away from formalism and towards effects is not too far away, the CJEU judgment in Post Danmark II just being the starting point.

THE IMPACT OF TYSON FOODS V. BOUAPHAKEO ON ANTITRUST CLASS ACTIONS

BY AARON M. PANNER & RACHEL P. MAY[1]

I. INTRODUCTION

After Justice Scalia's death in February, James Surowiecki published a shrewd commentary in *The New Yorker* arguing that although "Scalia's death will have only a limited impact on the culture wars" – abortion, same-sex marriage and other civil rights issues – the question of Justice Scalia's replacement would have "huge consequences" in the Supreme Court's attitude towards business.[2] The Rehnquist and Roberts Courts had been perceived as very business friendly, and one aspect of that pro-business attitude was a skepticism about litigation. In a series of decisions, many of them decided by narrow majorities, the Court, led by Justice Scalia, has erected a series of barriers to litigation by consumers against corporations, especially by making it more difficult to pursue class action lawsuits.[3] The Court did so in two principal ways. First, it made it easier for corporations to require customers to arbitrate claims on an individual, not a class-wide, basis.[4] Second, the Court tightened standards for class certification under Rule 23.[5]

At its outset, the 2015-16 Supreme Court term looked like it might continue that trend, with three cases on the docket with the potential to affect the availability of the class action device.[6] It didn't happen.

Perhaps the case with the greatest potential to move the law was *Tyson Foods v. Bouaphakeo*, 136 S. Ct. 1036 (2016), which involved a class action (and collective action) under the Fair Labor Standards Act and state law.[7] *Tyson Foods* was a "donning and doffing" case involving whether an employer had failed to compensate employees for time spent putting on and taking off protective gear. As the petition for certiorari framed the issues, that case presented two questions of potentially enormous importance for class-action litigation. The first was whether a class plaintiff could establish liability and damages by relying, not on individualized proof of harm, but on "statistical techniques" that "presume all class members are identical to the average observed in a sample." And the second question was whether a class may be certified when it contains "hundreds of members who were not injured and have no legal right to any damages."[8]

---

1 Aaron M. Panner & Rachel Proctor May are partner andassociate respectively at Kellogg, Huber, Hansen, Todd, Evans & Figel PLLC.

2 James Surowiecki, "Courting Business," The New Yorker (Mar. 7, 2016).

3 SeeCarnegie v. Household Int'l, Inc., 376 F.3d 656, 661 (7th Cir. 2004) ("The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.").

4 See AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011); American Express Co. v. Italian Colors Restaurant, 133 S. Ct. 2304 (2013). Both decisions were authored by Justice Scalia.

5 See Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013); Wal-Mart Stores Inc. v. Dukes, 564 U.S. 338, 367 (2011). Again, both decisions were authored by Justice Scalia.

6 DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015), decided in December 2015, involved the question whether the California Court of Appeal's decision that an arbitration agreement was unenforceable was preempted by the Federal Arbitration Act. That decision applied but did not significantly extend AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011).Campbell-Ewald Co. v. Gomez, 136 S. Ct. 663 (2016), decided in January 2016, involved the question whether an unaccepted offer of judgment made to a plaintiff seeking to represent a class mooted a complaint; the Court held that an unaccepted settlement offer cannot moot an individual claim (irrespective of whether the claimant represents a class).

7 Full disclosure: the authors' law firm represented Respondents in Tyson Foods.

8 Brief for Petitioner at Section (i), Tyson Foods v. Bouaphakeo (S. Ct. filed Aug. 7, 2015).

Those legal issues had obvious potential implications for antitrust class actions as well. When a plaintiff class sues for damages, it must seek certification under Federal Rule of Civil Procedure 23(b)(3). Thus, in addition to showing that the requirements of Rule 23(a) are satisfied – that is, that the class is too numerous to permit joinder of all members; that there are questions of law or fact common to the class; that the claims of the class representative is typical; and that the class representative will adequately protect the interests of the class – the plaintiff must also show that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods" for adjudicating the case. The grant of review in Tyson Foods held out the possibility that approaches long thought indispensable to establishing predominance – that is, using representative evidence, and extrapolating individual class-member injury from statistical analysis – might run afoul of Rule 23(b)(3).

As it turned out, Tyson Foods signals at least a pause – if not a reversal – in the march towards stricter certification standards. The result and the Court's analysis will likely reinforce the majority rule favoring certification in most cases of alleged price fixing and output restraint.

II. THE PREDOMINANCE INQUIRY AND CHALLENGES TO PLAINTIFFS' STATISTICAL EVIDENCE IN ANTITRUST ACTIONS

For decades, antitrust cases involving per se violations of Section 1 of the Sherman Act – price fixing and output restraint, for example – have been among the legal claims most likely to be certified under Rule 23(b)(3). Imagine that all sellers of a commodity – say, sugar – agree to sell the product at the same, elevated price. To make out a claim, the plaintiffs must establish (1) that the defendants conspired; (2) that buyers suffered impact – antitrust injury – as a result of the violation; and (3) that buyers suffered damages.[9] Each of these elements appears to be well suited to class-wide adjudication: whether the defendants reached an unlawful agreement is a prototypical common issue; and if plaintiffs can show that prices of sugar were elevated as a result of the conspiracy, then all purchasers will have suffered impact and damages in the form of overpayment.

But matters are usually not so simple.Although defendants' anticompetitive conductis oftenconceded to be a common issue, the impact on particular buyers may look much more highly individualized. There may be many different grades of sugar, each directed to different groups of purchasers; buyers in certain industries may employ long-term fixed-price contracts; the largest buyers may get deep discounts off list prices; certain buyers may purchase only seasonally; and so forth.

9 See, e.g. In re Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 311 (3d Cir. 2008), as amended (2009).

Plaintiffs typically offer common evidence of antitrust impact and damages in the form of economic models that show, for example, that the anticompetitive behavior raised market prices during the period of the conspiracy over what they would have been absent the anticompetitive behavior. For example, an economist might use multiple-regression analysis – a statistical technique that seeks to isolate the impact of one variable (the existence of a conspiracy) on another (price) – to determine that an alleged conspiracy allowed the defendants to overcharge for their product by 15.6 percent when compared to what the price may have been in absence of the conspiracy.[10] Plaintiffs often use the same model to establish damages by using their business records to show how much of a product each class member purchased, and calculating overcharge based on the average during the conspiracy period (in this example, 15.6 percent).

Defendants, however, may attack the use of such a model to establish class-wide impact by arguing that extrapolating from an estimate of average overcharges to the impact on individual class members improperly ignores the differences among them. As noted, at least in cases involving industrial commodities, many purchases will be made pursuant to individualized negotiations and, sometimes, long-term contracts; there may be variations among individual purchasers' requirements as well, leading to customization rather than perfect standardization. Purchasers may buy only from local factories, and there may be geographic variation in demand or product preferences. Defendants will typically argue that variations among the circumstances of particular buyers makes it more difficult to infer impact – and requires individualized investigation. The prevailing view is that the presence of individualized negotiations alone does not defeat predominance,[11] but some courts have found that evidence of variations in market conditions can indeed defeat predominance.[12] These varying determinations are not, of course, necessarily inconsistent: there may be cases where defendant succeed in showing that variations in market conditions indicate that the alleged conspiracy, even if proven, would not affect all purchasers.

Other issues affecting the propriety of class certification may also arise. One is the question whether certain members of the proposed class suffered any injury at all.For example, in a case involving allegedly unlawful "reverse payment" settlements related to the heartburn medication Nexium, the class was defined to include purchasers of the branded drug in the relevant time period, and the defendants argued that some percentage of purchasers are brand loyal and would have bought branded Nexium even if there was a generic alterative.[13] Defendants argued that certification in these circumstances was improper. The First Circuit rejected that argument. It held that, so long as the class included a relatively small number of uninjured parties, and so long as there was a potential mechanism

10 See In re Urethane Antitrust Litig., 768 F.3d 1245, 1251 (10th Cir. 2014).

11 See, e.g. In re Urethane Antitrust Litig., 768 F.3d 1245, 1255 (10th Cir. 2014).

12 See Blades v. Monsanto, 400 F.3d 562 (8th Cir. 2005).

13 In re Nexium Antitrust Litig., 777 F.3d 9, 17 (1st Cir. 2015).

to ensure that those uninjured parties did not recover damages, any objections based on Article III, due process and the Seventh Amendment were adequately addressed.[14] The possibility that the existence of injury-in-fact would require individualized determination did not mean that such a determination would predominate over common questions and defeat class certification under Rule 23.[15] By contrast, the dissenting judge would have vacated the certification decision to require the plaintiffs to propose, and the court to approve, an administratively feasible mechanism for identifying uninjured parties.[16]

A third issue stems from the Supreme Court's most recent statement on the predominance inquiry in antitrust class actions, Comcast Corp. v. Behrend, 133 S. Ct. 1426 (2013). In Comcast, the plaintiffs offered four theories of antitrust impact, and an economic model showing the damages based on the assumption that all of these theories were cognizable.[17] The district court rejected all the theories but one, but certified the class anyway, and the Third Circuit affirmed.[18] When the case reached the Supreme Court, the Court – in a 5-4 decision authored by Justice Scalia – held that the model was incapable of proving impact or damages in that case: it was developed to show the impact based on four alleged theories of antitrust impact, and was incapable of showing the impact of only one theory.[19] The Court held that the plaintiffs could not satisfy the predominance inquiry "without presenting another methodology," because individual damages questions would necessarily predominate.[20]

On the one hand, Comcast could be read to stand for straightforward principle that an economic model used to prove impact or damages must measure the anticompetitive effect of the challenged conduct, and not something else – a class representative must present a "theory of loss that matche[s] the theory of liability."[21] On the other hand, defendants have suggested that Comcast stands for a further proposition – that to satisfy the demands of Rule 23, plaintiff must show either that there is a common method of proving class members' damages, or at least that the calculation of individual damages will not predominate over common issues.[22]

Tyson Foods potentially implicated all of these controversies. If employees cannot use representative evidence and statistical inference to establish individual damages, why should purchasers alleging an antitrust conspiracy? If the possibility that a class includes uninjured employees defeats certification, why not uninjured purchasers? And if the need to calculate employees' damages for unpaid overtime on an individual basis is enough to defeat certification, why not purchasers' overcharge damages? As it turned out, all of the defendant's objections to certification were rejected, with potentially significant consequences for antitrust litigation as well.

III. TYSON FOODS UPHOLDS THE USE OF STATISTICAL EVIDENCE TO ESTABLISH CLASS-WIDE INJURY

In Tyson Foods, a group of employees from a Tyson Foods pork processing facility in Iowa brought claims under the federal Fair Labor Standards Act of 1938 ("FLSA") and an Iowa state labor law.They claimed that Tyson Foods had withheld overtime pay for time spent putting on ("donning") and taking off ("doffing") special gear to protect them from the hazards of pork processing. There was no dispute that the case posed a common question:[23] whether donning and doffing was covered by the FLSA's requirement that employees be paid for all activities "integral and essential" to their regular work. Assuming the company was required to pay its employees for donning and doffing time, the case also posed the questions of which employees were owed damages and how much.

Because the case involved unpaid overtime, Tyson Foods would owe an employee damages if the amount of uncompensated time plus the time actually worked was over 40 hours in a given week. Because Tyson Foods had kept no records establishing how long its employees had spent donning and doffing – something it was required to do under the FLSA – the class members offered an expert's time-and-motion study as "representative evidence."[24] Based on hundreds of videotaped observations, the expert calculated the average amount of time each employee spent donning and doffing per day (which varied somewhat by department); plaintiffs argued that the class members could rely on this study to prove their individual damages.[25]

Defendants, however, argued that the time any particular employee spent donning and doffing was an individual question that made class certification improper. Defendants' position was that re-

14 See id. at 21.

15 See id. at 21; see also Kohen v. Pacific Inv. Mgmt. Co., 571 F.3d 672, 677 (7th Cir. 2009) (the "possibility or indeed inevitability" that a class "will . . . include persons who have not been injured . . . does not preclude class certification").

16 See Nexium, 777 F.3d at 33 (Kayatta, J., dissenting).

17 133 S. Ct. at 1431.

18 Id.

19 Id. at 1433.

20 Id.

21 In re IKO Roofing Shingle Prods. Liab. Litig., 757 F.3d 599, 602 (7th Cir. 2014).

22 Cf. In re Rail Freight Fuel Surcharge Antitrust Litig.-MDL No. 1869, 725 F.3d 244, 253 (D.C. Cir. 2013) ("No damages model, no predominance, no class certification.").

23 As the Court explained, a question is common when "the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof." Tyson Foods, 136 S. Ct. at 1045 (internal quotation marks omitted; alteration in original).

24 Id. at 1043.

25 Id. at 1044.

liance on a representative sample was categorically inappropriate, because it would "absolve[] each employee of the responsibility to prove personal injury" and "deprive[] [defendant] of any ability to litigate its defenses to individual claims."[26] The key question in the case, then, was whether plaintiffs' representative evidence could be used to prove each individualemployee's injury.[27]

By a 6-2 margin, the Court rejected defendant's argument. Instead, the Court held that the class could rely on representative evidence if "each class member could have relied on that sample to establish liability if he or she had brought an individual action." 136 S. Ct. 1036. As the court explained, "a representative or statistical sample, like all evidence, is a means to establish or defend against liability. Its permissibility turns not on the form a proceeding takes– be it a class or individual action–but on the degree to which the evidence is reliable in proving or disproving the elements of the relevant cause of action." Id.

In the circumstances of Tyson Foods, the representative evidence could establish the unrecorded hours because, under the Court's prior interpretation of the FLSA, when the employer has not kept records sufficient to establish the precise amount of uncompensated hours worked – as Tyson Foods had not – the employee can prove her hours worked by "just and reasonable inference." Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946). In other words, if any employee had brought an individual lawsuit, she could have used the time-and-motion study to prove her uncompensated time by inference. 1036 S. Ct. at 104.

The Court rejected defendant's argument that the use of representative evidence in this context was tantamount to the "trial by formula" rejected in Wal–Mart. In that case, plaintiffs alleged sex discrimination, but they failed to prove that there was any common policy of discrimination.[28] Plaintiffs sought to overcome the absence of commonality by using a sample of employees to determine, on average, how many employees had valid claims and the typical damages suffered by an employee who suffered discrimination. The Court rejected that approach, because it would mean granting recovery to plaintiffs who suffered no injury and denying defendants the right to litigate defenses to individual claims.Since employees were not similarly situated, "there would be little or no role for representative evidence" in an individual suit; the same was true for a class proceeding.[29]

As for the defendant's claim that the class could not be certified because it contained uninjured parties, that issue evaporated before the Court heard argument. Instead, the defendant argued only that plaintiffs could establish a mechanism – prior to judgment – to identify uninjured class members and to ensure that they did not contribute to the size of the award or collect damages.[30] But since the damages had not yet been disbursed, it was still possible for the plaintiffs to propose a methodology that would appropriately award damages solely to those employees who had worked more than 40 hours in a week.[31] The defendant's argument was thus premature.

IV. THE IMPACT OF TYSON FOODS ON ANTITRUST CLASS ACTIONS

Read for all it is worth, Tyson Foods is likely to reinforce the clear trend among the courts of appeals to uphold class certification in price-fixing cases, laying to rest the argument that the use of statistical evidence to establish injury is categorically impermissible in class actions.

First, Tyson Foods confirms that it is generally permissible to use statistical evidence to establish that impact is a common issue subject to class-wide proof. The Supreme Court held, quite sensibly, that if statistical evidence could be used to establish liability and damages in individual litigation, it can be used in a class action as well. In a typical antitrust case, an individual plaintiff could indeed rely on statistical evidence to establish injury: for example, a purchaser might use a regression analysis to show that the market prices it paid were elevated during the period of unlawful conduct. To be sure, such analysis is an approximation. But long-established Supreme Court precedent allows for poof of antitrust impact and damages by "just and reasonable inference," and it has long been established that the use of a model showing market-wide impact supports an inference that plaintiffs were overcharged.[32]

Defendants will also seek to limit the reach of Tyson Foods by pointing out that the case involved a defendant's failure to keep records that it was required to keep; a prior Supreme Court case held that "when employers violate their statutory duty to keep proper records," employees can establish the hours of work performed "'as a matter of just and reasonable inference.'"[33] But antitrust plaintiffs, as noted, are permitted to establish impact and damages in the same way.

To be sure, the fact that a plaintiff may introduce such statistical evidence to establish impact does not mean that any particular study is reliable, and there will be cases where defendants can demonstrate that a study is "unrepresentative or inaccurate."[34] A harder question is what happens when a defendant argues at the certification stage that a model used to prove impact fails to address

26 Id.

27 Id. at 1046.

28 See Wal-Mart, 131 S. Ct. 2541.

29 Tyson Foods, 136 S. Ct. at 1048.

30 Id. at 1049.

31 Id. at 1050.

32 See, e.g.Bigelowv. RKO Radio Pictures, 327 U.S. 251, 264 (1946).

33 Tyson Foods, 136 S. Ct. at 1047 (quoting Anderson v. Mt. Clemens Pottery Co., 328 U.S. 680, 687 (1946)).

34 Tyson Foods, 136 S. Ct. at 1047.

important variations such that it wrongly indicates impact where none exists. The Court indicated that such a defect is a common-question – not an individual question – thus leaving the way clear for certification.[35] *Tyson Foods* thus suggests that – so long as plaintiffs' study is admissible and there is a dispute among experts on the question – the question whether plaintiffs have adequately proven class-wide impact – or impact to any particular constituents of the class – is for the jury.[36]

Second, although it left the question open, Tyson Foods will likely make it harder for defendants to argue that the possibility that a class includes uninjured parties poses an obstacle to certification. At the outset, if there were an Article III problem – i.e. if the question implicated the court's jurisdiction – the Supreme Court might not have been willing simply to disregard the issue.[37]

Perhaps more significant, the Court was content to view the problem of uninjured class members as simply a problem of allocation of a damages award. And that analysis is likely to be a favorable one for antitrust class plaintiffs. Again, the typical way to establish aggregate class-wide damages to a class of purchasers is to estimate the average overcharge and to apply that average to class purchasers. Usually, the aggregate damages will then be allocated to buyers in proportion to the amount they purchased during the class period. No purchases, no damages – no problem.

Defendants may argue that some purchasers will have paid above-average overcharges and others below-average, depending on the precise timing of purchase and the characteristics of the individual purchaser. As a result, it might be argued, some class members will be overcompensated, and others undercompensated by an award based on a class-wide average. But it is hard to see how that objection has much force. Defendants are not any worse off so long as the aggregate damages are not inflated. And an individual plaintiff could reasonably choose to rely on average overcharges to establish damages; the burden would then be on a defendant to show that the average overcharge is too high – an opportunity that would presumably be open to a defendant in a class action as well.

Third, because the Court found any challenge to plaintiffs' allocation method to be premature, Tysons Foods casts little light on the question whether Comcast permits the certification of a class despite the absence of an approved method for calculation of individual damages. It may be fair to read the opinion as reflecting less hostility towards class actions and a greater willingness to accept the remedial benefits of the class action device in certain types of cases than some of the Court's recent opinions.[38] But pitched battles over class certification are not going away, and defendants will continue to subject claims of class-wide impact to searching scrutiny.

That makes sense. The consequences of certification – particularly in the case of a massive class – can be as grave for defendants as the consequences of denial of certification can be for plaintiffs. Once they are certified, even weak claims can put tremendous pressure on defendants to settle because of the threat of ruinous verdicts.[39] Nevertheless, Tyson Foods may suggest – at least pending results in November and a change in personnel on the Court – that the pendulum swing towards stricter certification standards has reached its full amplitude.

35 See id.

36 This will likely make it more important for defendants to object to the admissibility of expert evidence at the class certification stage.

37 Two concurring Justices suggested that there would indeed be an Article III problem if the plaintiffs' method of allocating damages resulted in awarding "relief to any uninjured plaintiff." Tyson Foods, 136 S. Ct. at 1053 (Roberts, C.J., concurring). The concurring Justices argued that because the jury awarded damages less than the plaintiffs asked for, there might be no way to determine which plaintiffs suffered injury.See id. at 1052. In a typical antitrust case, to the extent plaintiffs rely on average overcharges, a jury award below the amount requested by the plaintiffs might simply reflect a jury finding that the overcharge was lower than claimed, which would create no allocation problem. On the other hand, if the concurring Justices' view prevails, defendants will have an incentive to introduce additional objections to aggregate damages – for example, claims that particular subclasses of plaintiffs suffered no damages – to preserve the claim that a lower award cannot stand because it cannot be effectively allocated. For their part, plaintiffs could seek to combat such tactics through the use of special verdict forms in which the jury can confirm that it found all purchasers to have been injured (or specifying which purchasers avoided injury).

38 See supra nn. 3&4.

39 SeeBell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

FTC V. PENN STATE HERSHEY MEDICAL CENTER: THIRD CIRCUIT APPEAL COULD LEAD TO IMPORTANT DECISION FOR FUTURE HOSPITAL MERGERS

BY PETE LEVITAS & BRYAN M. MARRA[1]


I. INTRODUCTION

On May 9, 2016, District Judge John E. Jones III of the Middle District of Pennsylvania denied a joint motion by the Commonwealth of Pennsylvania and the Federal Trade Commission ("FTC") seeking a preliminary injunction to enjoin the proposed merger of Penn State Hershey Medical Center and PinnacleHealth System while the FTC conducted a full administrative trial on the merits of the transaction. Judge Jones rejected the request for an injunction based on his holding that the government had failed to define a proper geographic market – in particular, finding that the "Harrisburg Area" geographic market proffered by the plaintiffs was "unrealistically narrow and [did] not assume the commercial realities faced by consumers in the region."[2]

1 Pete Levitas & Bryan M. Marra. Pete Levitas is a partner and Bryan M. Marra is a senior attorney in Arnold & Porter LLP's Washington office

2 Federal Trade Commission et al. v. Penn State Hershey Medical Center et al., No. 1:15-cv-02362-JEJ, 2016 WL 2622372, at *4 (M.D. Pa. May 9, 2016).

Judge Jones also discussed at some length the "equities" of the transaction. He focused in particular on the importance of alleviating capacity constraints and avoiding construction of a new patient bed tower, which the court concluded represented a "compelling efficiencies argument" for the merger.[3] His decision concluded with an unusually pointed critique of the FTC's hospital merger enforcement priorities. Judge Jones expressed the view that the litigation brought by the FTC could be considered "no small irony [when] the same federal government under which the FTC operates has created a climate that virtually compels institutions to seek alliances such as the Hospitals intend here."[4]

The FTC appealed the decision to the Third Circuit, and oral argument was held on July 26, 2016. Although the FTC raised a number of concerns about the decision below, it focused its appeal on geographic market definition and argued that Judge Jones' analysis of the relevant geographic market was incorrect as a matter of law. The resulting decision could offer a useful clarification regarding the appropriate method to determine the relevant geographic market – and in that scenario, a loss might force the FTC to rethink its approach to hospital merger enforcement.

II. ANALYSIS

In addition to challenging the framework Judge Jones used to analyze the geographic market (and his purported reliance on temporary "price protection" agreements the parties recently entered into with the two largest area health insurers), the FTC also took issue on appeal with how Judge Jones weighed the equities and analyzed efficiencies, his statements regarding the Affordable Care Act, and, by implication, the standard Judge Jones used in ruling on the preliminary injunction motion under Section 13(b) of the FTC Act. Each of these points is discussed in turn below.

A. Geographic Market Definition

Until this case, the proper method for determining a geographic market in hospital merger cases seemed to have been settled, but that issue has received a great deal of attention recently. The FTC suffered a string of losses in hospital merger challenges, dating back to the 1990s,[5] based primarily on what it believed to be overly

3 Id.at *5.

4 Id. at *9.

5 See, e.g. FTC v. Tenet Health Care Corp., 186 F.3d 1045 (8th Cir. 1999);

broad geographic market definitions found by courts relying on what has been called the Elzinga-Hogarty test. That test looks at patient in-flow and out-flow statistics from putative geographic markets to determine whether such areas are susceptible to post-merger price increases (i.e. a small but significant non-transitory increase in price ("SSNIP")) by a hypothetical monopolist.

In 2003, the FTC and United States ("U.S.") Department of Justice ("DOJ") embarked on a major "retrospective" of hospital competition, including assessing the competitive effects of several consummated hospital mergers.[6] This retrospective concluded that some of those mergers had generated anticompetitive effects and led the FTC and the DOJ to a paradigm shift in how they approached geographic market definition. The agencies began to focus on "willingness to pay" modeling and emphasized whether a proposed transaction would enhance the merged hospital's bargaining leverage with insurers over rates – i.e. whether a hypothetical monopolist could impose a SSNIP on an insurer. This new approach has over time been widely accepted in the courts, and the FTC has won a series of hospital merger cases over the past decade using that framework.[7]

Judge Jones' decision in Penn State Hershey seemed to harken back to the earlier analytical approach of relying on patient flow statistics. In his decision, he noted that the "end goal" in the relevant geographic market analysis was to determine the area where "few patients leave…and few patients enter" i.e. to define an area from which the defendant hospitals draw the bulk of their patients, with few patients entering from outside that area to seek medical care and few patients within that area leaving to seek care from other hospitals.[8] Thus, the court found it highly probative that a significant fraction (43.5 percent) of Penn State Hershey's patients traveled to the hospital from outside the FTC's proposed Harrisburg Area geographic market, while "several thousand" of Pinnacle's patients lived outside of it.[9]

The FTC argued on appeal that Judge Jones "failed to properly formulate and apply the test" for the relevant geographic market and that the court erred as a matter of law.[10] The FTC asserted that Judge Jones "wholly ignored the role of the relevant buyers – insurers" and instead the court's analysis focused exclusively on the single patient in-flow statistic from Penn State Hershey.[11] The FTC argued that the court's reliance on this patient in-flow statistic meant, in effect, that Judge Jones had applied the "discredited" Elzinga-Hogarty test, which "has been rejected for use in analyzing hospital mergers by the FTC and by its own creator."[12] The FTC went on to note that "[n]o recent court has used the [Elzinga-Hogarty] analysis" but that courts instead have "scrutinize[ed] the relative bargaining power of healthcare providers and insurers."[13]

The merging parties contest the FTC's characterization of the case below and instead cast the appeal as a "straightforward factual dispute" about the record evidence that should thus be reviewed under the "clear error" standard.[14] The factual dispute, in their view, was whether a hypothetical monopolist in the alleged Harrisburg Area geographic market would in fact be able to overcome insurer resistance and successfully implement a post-transaction SSNIP when the evidence indicated a significant number of hospital patients were willing to travel significant distances for care.[15]

B. "Price Protection" Agreements

Judge Jones also noted(in the context of assessing whether a hypothetical monopolist of the alleged Harrisburg Area geographic market would be able to extract a SSNIP)that the hospitals had recently entered into rate agreements with their two largest insurers. The court emphasized that these agreements maintained existing rate structures and the rate differential between the hospitals for several years.[16] In its appeal, the FTC argued that the court incorporated the existence of these agreements into its analysis of the geographic market and that doing so represents an "unprecedented departure" from legal precedent and the Merger Guidelines approach used by U.S. antitrust enforcers.[17] In particular, the FTC argued in its briefing that the court misunderstood the entire point of the hypothetical monopolist test, which "necessarily assumes that customers face

FTC v. Freeman Hosp., 69 F.3d 260 (8th Cir. 1995).

6 "FTC Chairman Announces Public Hearings on Health Care and Competition Law and Policy to Begin in February 2003," available at https://www.ftc.gov/news-events/press-releases/2002/11/ftc-chairman-announces-public-hearings-health-care-and ; see also FTC and DOJ, Improving Health Care: A Dose of Competition (2004), available athttps://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf.

7 See, e.g.St. Alphonsus Med. Ctr. – Nampa, Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015); ProMedica Health Sys. v. FTC, 749 F.3d 559 (6th Cir. 2014).

8 Penn State Hershey, 2016 WL 2622372, at *3 (internal quotations omitted).

9 Id. at *4.

10 See FTC Brief at 31.

11 Id. at 36.

12 Id. at 40 n.7.

13 Id.

14 Brief of Appellees Penn State Hershey Medical Center and PinnacleHealth System at 15,17, Federal Trade Commission et al. v. Penn State Hershey Medical Center et al., No. 16-2365 (3d Cir. June 13, 2016) (hereinafter "Hospitals' Brief").

15 Id. at 17. The hospitals also take issue with the FTC narrative about the evolution of hospital merger jurisprudence, arguing that the "different outcomes" over time were due to "different facts," not the result of "some sudden discovery of how healthcare bargaining works." Id. at 33.

16 Penn State Hershey, 2016 WL 2622372, at *4.

17 FTC Brief at 47.

the SSNIP, unprotected by a contract."[18] Further, the FTC arguedthat Judge Jones' framework would have "troubling implications" for future cases, allowing merging parties to disrupt the proper definition of a geographic market merely by entering into an agreement with insurers to limit price increases for a few years.[19]

The hospitals argue that the FTC "misread[s] the court's opinion" and assert that Judge Jones had already reached his conclusion on the geographic market and was merely referencing the agreements as part of his discussion, not relying on them as a basis for his determination.[20] The Third Circuit decision on this point seems likely to turn on whether the appellate court views these agreements as integral to Judge Jones' geographic market analysis.

C. Efficiencies

The FTC also argued in its appeal that the court committed legal error by weighing the equities of the transaction with insufficient rigor. The FTC argued that had the district court correctly found in favor of the FTC with regard to geographic market definition, the court would have found the proposed merger presumptively illegal, and thus the burden would have shifted to the hospitals to demonstrate "extraordinary efficiencies." Because the hospitals were "never put… to the burden of crossing that hurdle," the court never performed the "rigorous analysis" required to prove efficiencies, and instead embarked on a "gratuitous discussion of the 'equities'" that did not meet the requirements for the formal "efficiencies defense" – that the claimed efficiency was "merger-specific," "verifiable," and not "speculative."[21]

Specifically, the FTC contended that what the district court credits as an efficiency – the opportunity to avoid building a new patient bed tower – is actually a "classic reduction in output that will lead to higher prices."[22] The hospitals responded that a new patient bed tower may add beds, but may not expand output (i.e. hospital services for patients), while the merger would immediately expand output by enabling the hospitals to better allocate patients between them, and thus that the court correctly credited the claimed efficiency. More broadly, the hospitals object to the notion that the court (and they) should be held to the formal efficiencies standard when the burden never shifted and thus the hospitals were not required to prove an efficiencies defense.[23]

Efficiencies are rarely the issue on which any merger case turns, and it seems unlikely that the issue would rise to that level in this instance. In general, antitrust courts are skeptical of efficiencies claims and that has been true in recent hospital merger cases as well.[24] In this instance, while it is true that the burden-shifting framework had not been triggered, it also seems clear that the lower court did not conduct the usual rigorous analysis of efficiencies that one might expect if, in fact, a court were to rely on them. The lack of extensive analysis, and the fact that the court explicitly stated that it did not rely on efficiencies as part of its decision, makes it unlikely that efficiencies would be a pivotal part of the appellate decision.

D. The Affordable Care Act

The FTC argued that the court committed legal error when it condemned the FTC for seeking to block a transaction that the court believed was undertaken in response to the Affordable Care Act and the regulatory structure created by the federal government.[25] The FTC noted that the "Clayton Act contains no healthcare exception" nor does the Affordable Care Act contain an antitrust exemption, and contended that the court's views infected its decision, but this issue received limited treatment in the FTC brief.[26] The hospitals also treated it as a side issue, noting in a footnote that Judge Jones was merely making a "well-founded observation" that the merger would help the hospitals adapt to the changing health care environment.[27] Judge Jones' statement on the issue seems best viewed as dicta, which likely explains why neither side made it a focus on appeal. But the issue does offer some insight into the lower court's views and

18 Id. at 44-45 (emphasis in original).

19 Id. at 47. It is not surprising that the FTC has contested the court's opinion on this issue. The FTC routinely rejects short-term rate commitments as a cure for what it finds to be otherwise anti-competitive transactions. FTC Chairwoman Edith Ramirez reiterated this point in a speech after the Penn State Hershey decision, noting that "these kinds of arrangements fail to replicate the benefits of competition." Leah Nylen, Ramirez Bashes Efforts to 'Sidestep' Federal Antitrust Scrutiny in Healthcare, MLex, May 12, 2016, available athttp://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=794272&siteid=191&rdir=1 (subscription).

20 Hospitals' Brief at 36-37.

21 FTC Brief at 47-49.

22 Id. at 50.

23 Hospitals' Brief at 38-39, 43. Judge Jones would likely agree with the hospitals in this regard; he states in his opinion that his discussion of efficiencies was "not relevant as a defense to illegality" because he had already found the merger legal (because the FTC had failed to prove the geographic market). Penn State Hershey, 2016 WL 2622372, at *5.

24 See, e.g.Saint Alphonsus Medical Center-Nampa Inc. v. St. Luke's Health System, Ltd., 778 F.3d. 775, 790-91 (9th Cir. 2015).

25 Such views stand in direct opposition to the FTC's long-held position on this issue. The FTC has stated numerous times that it believes that antitrust enforcement is a complement to the new health care environment: "The goals of the [Affordable Care Act] are in harmony [with antitrust enforcement] and not in conflict….There are other practical ways of achieving coordinated care and alternative payment models beyond merging with a close competitor." Seehttp://www.commonwealthfund.org/publications/newsletters/washington-health-policy-in-review/2015/dec/dec-21-2015/obamacare-antitrust-laws-can-coexist (quoting Deborah Feinstein, Director of FTC's Bureau of Competition); cf. St. Luke's Health System, Ltd., 778 F.3d. at 781 ("As the district court recognized, the job before us is not to determine the optimal future shape of the country's health care system, but instead to determine whether this particular merger violates the Clayton Act.").

26 FTC Brief at 57.

27 Hospitals' Brief at 47 n.20.

may affect the approach of the appellate court on the margins.

E. Standard of Review

The FTC also suggestedin its brief that Judge Jones held it to a more stringent standard of review than is appropriate under Section 13(b) of the FTC Act. Although the district court recognized that an application under Section 13(b) is subject to a different standard than the traditional preliminary injunction standard (which must be met by private parties and the DOJ), the court did not appear to apply the more lenient test used by many courts to assess an FTC preliminary injunction request.[28] That more lenient test, employed by the Heinz court (a case cited in the FTC brief,)[29] requires merely that "the FTC has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[30] While Judge Jones cited to a number of cases on this point, (including a different case that used the "serious, substantial, difficult and doubtful" standard) he did not use that language in his opinion, and instead seemed to require the FTC to meet a significantly higher standard, holding simply that "a district court must determine the likelihood that the FTC will ultimately succeed on the merits."[31]

This is a potentially important issue, and if indeed the lower court held the FTC to an unnecessarily high standard it would offer the appellate court another avenue to overturn the district court, but the FTC did not emphasize it in its brief. It cites Heinz as support for the standard that it believes should be applied, but it does not quote the "serious, substantial, difficult and doubtful" language used by the Heinz court and the FTC never actually states in its appeal that the court here applied the wrong standard. It is possible that this somewhat elliptical approach to advocacy is an effort to avoid the on-going controversy surrounding the issue of the proper injunction standard for the FTC.[32] Whatever the reason, it is difficult to predict how the Third Circuit may approach the issue, given that it is not entirely clear what standard the district court applied and that the FTC never squarely raised the issue.

III. CONCLUSION

The FTC's appeal from Judge Jones' decision denying a preliminary injunction asserted that the district court committed a number of legal errors covering a range of issues, but the core of the FTC appellate argument and the likely key to the Third Circuit's decision is the issue of how to properly define the relevant geographic market. Given the way the issue has been framed, if the Third Circuit decides the issue as a matter of law – rather than simply as a factual dispute over how Judge Jones weighed the record evidence in the case – it may well lead to an important decision on the proper method to define the geographic market in hospital merger cases that will have implications in future cases. An appellate ruling in the FTC's favor would further cement the agency's success in shifting the legal terrain for hospital mergers. A loss, however, would reverse years of FTC success, force the FTC to reconsider its approach, and potentially make it substantially easier for hospital operators to combine in the future.

---

28 Penn State Hershey, 2016 WL 2622372, at *2.

29 FTC Brief at 32 (citing FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001)).

30 Heinz, 246 F.3d at 714 (internal quotations and citations omitted); see alsoF.T.C. v. Promedica Health System, Inc., 2011 WL 1219281 (N.D. Ohio March 29, 2011), at *53 (utilizing same standard).

31 Penn State Hershey, 2016 WL 2622372, at *2 (citing FTC v. United Health, Inc., 938 F.2d 1206, 1217 (11th Cir. 1991).

32 See, e.g. Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, H.R. 2745, 114th Congress (2015) (The SMARTER Act of 2015) (passed the U.S. House of Representatives on March 23, 2016) (legislation to make the FTC preliminary injunction standard consistent with the traditional preliminary injunction standard used by the DOJ in merger cases).

THE GENERAL COURT'S RULINGS IN AIRFREIGHT: A COMMENTARY

BY JEREMY ROBINSON[1]

I. BACKGROUND: THE DISCOVERY OF THE AIR CARGO CARTEL AND ITS OUTCOME

The discovery of an international cartel imposing surcharges on the transport of airfreight created shockwaves that are felt still today. Dozens of airlines were implicated; leniency applications were hurriedly prepared; and airlines prepared to defend themselves against worldwide investigations and damages actions. The fines were huge and there have been numerous reports of damages claims settled, presumably for a substantial sum. How one legal department used a compliance program to discover its company's involvement and to take action became an object lesson for practitioners, both in-house and out.

In 2010, five years after the discovery of the cartel, the European Commission imposed fines on 11 airlines totaling almost €800 million. Of those 11 airlines, Lufthansa and its subsidiaries were spared for their part in revealing the cartel's existence. Yet five years later, the decisions – and the fines – relating to all but one of them, were quashed by the General Court.

The Commission investigation began when Lufthansa submitted an application for immunity under the 2002 Leniency Notice. The immunity application covered both Lufthansa and its subsidiaries Lufthansa Cargo AG and Swiss International Air Lines AG. That application stated that there had been anti-competitive contact between a number of undertakings operating in the freight market relating to the fuel surcharge which had been introduced to address rising fuel costs, and the security surcharge which had been introduced to address the costs of certain security measures imposed following the terrorist attacks of September 11, 2001. The Commission carried out dawn raids on February 14 and 15, 2006. Several carriers then made applications under the 2002 Leniency Notice. On December 19, 2007, the Commission addressed a statement of objections to 27 carriers, alleging that they had infringed Article 101 TFEU, Article 53 of the EEA agreement and Article 8 of the agreement between the European Community and the Swiss Confederation on air transport by participating in a worldwide cartel relating to the fuel surcharge, the security surcharge and a refusal to pay commission on surcharges. On November 9, 2010, the Commission adopted a decision addressed to 21 carriers (including the immunity applicants) and withdrew the objections against the remaining carriers.

II. ANALYSIS OF THE GENERAL COURT'S RULING

The General Court's annulment of the Airfreight decision in relation to those airlines who appealed was both surprising and controversial. Surprising in part because five years had elapsed from the Commission decision on November 9, 2010 to the judgments on December 16, 2015. Surprising also, because relatively few Commission cartel decisions suffer what appears to be such a significant reversal. Surprising, finally, because of the substantial fines which have now been annulled (approximately €790 million out of €799 million). Controversial because to some, the decision did not suffer the defects alleged of it. There had been plenty of leniency applicants among the airlines (not least the original immunity application by Lufthansa, so that if there is generally no smoke without fire, how could this decision fall? Controversial too, in the view of the author of a post on Chillin' Competition, because the judgments "don't make sense."[2] According to this view, the only reason why the decision was annulled was that the Court saw an incongruence between the grounds and the dispositive parts. The grounds were clear and the alleged problem was that when imposing fines in the operative part, the Commission distinguished the periods for which it had the power to impose those fines. By contrast, the decision was clear and should not have been annulled. And in any case, the Commission can easily

1 Jeremy Robinson, Partner, Watson Farley & Williams LLP.

2 https://chillingcompetition.com/2016/02/24/the-general-courts-annulment-of-the-airfreight-cartel-decision/.

amend the error in a new decision.

As the Court summarized the case in its press release, the grounds of the decision described a single and continuous infringement of EU competition rules in the EEA and Switzerland through coordination of behavior as regards the pricing of freight services. The operative part of the decision mentioned four infringements relating to different periods and routes. Whereas some of the infringements were found to have been committed by all the carriers concerned, others were found to have been committed by a more limited group of carriers. The contradiction between the grounds and the operative part of the decision was a common feature in all the appeals lodged by the applicant airlines.

What is also striking is that the Court considered that it did not need to engage with the substantive pleas on competition law, for example, in the Cargolux case, as regards: (i) the categorization of the cartel as a restriction by object without demonstrating appreciable anti-competitive effect; (ii) the failure to define with sufficient precision the scope and parameters of the infringements referred to in the contested decision; (iii) the failure to establish a reliable evidential base; (iv) the lack of power to make a finding of infringement regarding certain services; and (v) error of assessment and infringement of the principle of proportionality as regards the setting of the fine. According to the Court, the decision failed to meet basic requirements as regards clarity and consistency, such that – in essence – there was no substance it could review against the claimants' pleas in law.

Not only was this finding puzzling to the author mentioned above, it leads to the prospect that if the Commission retakes its decision, correcting the alleged errors but not addressing the claimants' actual pleas, another round of appellate litigation will begin. That will delay still further any progress in the current court actions for damages brought by the airlines' customers. Already, 10 years have passed since Lufthansa submitted its immunity application. Other carriers rapidly followed suit, suggesting there is at least some substance to the cartel allegations; and according to settled law, it must be open to any individual to claim damages for loss caused by a contract or conduct liable to restrict or distort competition. For how much longer must these customers wait? The question of whether the Court was correct therefore matters greatly.

Of less concern to the Commission, perhaps, was the position of Qantas. After the Commission decision in November 2010, it chose not to appeal. Therefore, whatever alleged defects there may be in the decision relating to it, it is now out of time to appeal and the original decision may stand as the basis of follow-on damages actions.

In the aftermath of the ruling, the Commission had to choose between appealing to the Court of Justice or not; and if not, whether to retake its decision, or drop the case. In favor of appealing to the Court of Justice, the Commission could defend its approach, in particular by noting that the delineation of the infringement into four separate parts did not call into question the existence of a single and continuous infringement. Against appealing, the Commission will have weighed its chances of success against the extra time necessary before a cartel decision could stand and the private damages actions could continue. The Commission chose not to appeal. At the time of writing, it has not, however, issued a new decision or declared firmly that it will do so. Yet it seems more than likely that it will. If it does, then there is the prospect of further appeals on its new decision. Will the Commission continue to describe the cartel as a single and continuous infringement or rework it more thoroughly as separate infringements? The latter may require more work and possibly additional evidence.

How far the Commission considers that it needs to rework its original decision may determine how far it needs to adjust its original fines. Whatever future debates there may be over that future decision, it seems reasonable to expect that there will be a new decision which describes an infringement of competition law on which follow-on damages claims can be based. If the Commission were to take the broader view, it might reason that it is better to achieve a final decision at the cost of possibly lower fines in some cases (and possibly higher fines in others) to unlock damages or settlements, and so to ensure that public and private enforcement complement each other effectively.

However, any alteration to the scope of the original decision will entail changes to the ambit of the follow-on litigation. It is often the case that follow-on damages claims seek to cover a cartel scope beyond that of the decision on which they are based, making the claim in part follow-on and in part stand-alone. Thus, a change in scope of the decision means a change in the balance of stand-alone and follow-on elements.

We now turn to the General Court's analysis of what constitutes a valid decision, in order to address whether the analysis is coherent. From its 20-paragraph analysis of the principles it derives from the jurisprudence, it appears that the Commission's decision was possibly more defective than the Court's own press release summary suggested, since the Court considered that it could not engage with the substance of the appeals. The Court ruled that the mere existence of a contradiction between the grounds and the operative part of the decision would not be sufficient to establish that the decision was vitiated by a defective statement of reasons provided that, first, the decision, taken as a whole, enabled the applicants to identify and plead that lack of consistency;second, the wording of the operative part of the decision was sufficiently clear and precise to allow the applicant to ascertain the exact scope of the decision; and third, the evidence relied upon to demonstrate the applicant's participation in the infringements imputed to it in the operative part was clearly identified and examined in the grounds. Yet the Court found that the decision was vitiated by its defective statement of reasons.

The Court established a preliminary threshold in its review of decisions relating to clarity and consistency. In turn, the requirement for clarity and consistency applies to the statement of grounds, the operative part and the relationship between the two. Only if the decision is clear and consistent can it be said that an applicant can understand the case made against it and the Court can exercise its power of review. As noted, the Court considered that the preliminary threshold of clarity and consistency had not been met.

In its description of relevant law, it appears at first sight that the Court viewedthe Statement of Reasons as occupying a subsidiary role in understanding the decision. The Court stated that as regards the scope and nature of a competition infringement, it was the operative part and not the statement of reasons which was important. Only where there was a lack of clarity in the terms used in the operative part should reference be made, for the purposes of interpretation, to the statement of reasons contained in the decision. The Court then said that for the purpose of determining the persons to whom a decision finding a breach applied, only the operative part of the decision was to be considered, provided that it was not open to more than one interpretation.

This approach which gives priority to the operative part contradicts other statements in the ruling. According to the Court, an absence of or inadequate statement of reasons constituted a breach of essential procedural requirements for the purposes of article 263 TFEU and was a ground involving a matter of public policy which had to be raised by the EU judicature of its own motion. That being so, the mere finding of an inadequate Statement of Reasons is enough to justify annulment of the decision. As the Court found, the Statement of Reasons required by article 296 (2) TFEU had to disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question, in such a way as to make the person concerned aware of the reasons for the measure and thus enable them to defend their rights and the Court to exercise its power of review.

In short, the Statement of Reasons must clearly and unequivocally set out the facts and considerations which had decisive importance in the context of the decision; it had to be logical and contain no internal consistency that would prevent a proper understanding of the reasons underlying the measure. Yet the Court found that the grounds of the decision were themselves not entirely internally consistent because they contained assessments which were difficult to reconcile with the existence of a single cartel covering all of the routes referred to in the operative part as described in the grounds.

A further inconsistency was this: the Commission has indicated that it had taken as the starting date of participation of each of the carriers at issue in the infringement the first anti-competitive contact in which each carrier had taken part, except in the case of certain carriers which, according to the Commission, were not to be held liable for the infringement as regards routes between airports in the EEA. For those carriers, the Commission took May 1, 2004 as the starting date of the infringement, even though it indicated at the same time that they had participated in the single infringement before that date. However, in the grounds, the Commission claimed to be applying the principles derived from the case law according to which, for a single and continuous infringement, a person may be held liable for the participation of an undertaking in an infringement even though it is established that the undertaking concerned participated directly only in one or some of the constituent elements of that infringement, if it is shown that it knew, or must have known, that the collusion in which had participated was part of an overall plan that included all the constituent elements of the infringement.

It is arguable therefore that a decision which is clear on its face (in terms of the operative part) may still fail if the Statement of Reasons is internally inconsistent; consequently, the Statement of Reasons cannot be said to occupy a subsidiary role to the operative part and is essential to the whole.

Turning to the operative part, plainly this is of the utmost importance. The Court citedArticle 6 of the European Convention on Human Rights to argue that the nature of competition breaches and the nature and degree of severity of penalties for competition breaches made those penalties essentially criminal and that consequently where penalties were imposed by decision of an administrative authority, the person concerned had to have an opportunity to challenge any decision made against him before a tribunal that offered the guarantees provided for in Article 6. The Court went on to argue that the principle of effective judicial protection (enshrined in Article 47 of the Charter of Fundamental Rights of the EU, corresponding in EU law to Article 6 (1) of the ECHR) required that the operative part of the decision adopted by the Commission finding a breach of competition rules had to be particularly clear and precise and that the undertakings held liable and penalized were to be in a position to understand and to contest the imputation of liability and the imposition of penalties.

This raises the question of exactly what the Court found to be unclear. It was argued on appeal that according to the grounds of the contested decision, all of the carriers at issue participated in a single and continuous worldwide infringement irrespective of the fact that different carriers operated different routes. However, Articles 1 to 4 of the decision found four separate infringements each containing a different category of routes in which only some of the carriers at issue participated. The Court found that, if the anti-competitive conduct was regarded as comprising a single and continuous infringement concerning all the routes covered by the cartel and in which all the carriers at issue participated, the carriers mentioned in Article 2 of the contested decision between 2004 - 2006 should also have been included in Articles 1 and 4 of the decision. Since they were not, the Court found that the first four articles of the decision could not support the hypothesis of the single and continuous infringement in relation to all the routes covered by the cartel and in which all the carriers at issue participated. Since several of the carriers at issue were not mentioned in Articles 1, 3 and 4 of the contested decision, then the first four articles of that decision must either mean that the operative part found four separate single and continuous infringement each concerning a different category of routes or that the operative part found one single and continuous infringement liability for which was attributed only to the carriers which – as regards the routes mentioned in each of the first four articles of contested decision – participated directly in the unlawful conduct or were aware of collusion regarding those routes and accepted the risk.

As against that, the Court noted that an overall reading of the Statement of Grounds described a single cartel, constituting a single and continuous infringement in relation to all the routes covered by the cartel and in which all of the carriers at issue participated. This was reinforced where the Commission emphasized that the cartel constituted a single infringement and that, in the circumstances, it would be "artificial to split up" the anti-competitive conduct comprising the single and continuous infringement into separate infringements.

The Commission argued in reply to the Court's measures of organization of procedure that the failure to mention some of the carriers at issue in Articles 1, 3 and 4 of the contested decision could be explained by the fact that those carriers did not operate the route referred to in those articles, and that those articles needed to be interpreted as referring to separate single and continuous infringements. The Court rejected this proposition as contradicting the idea of a single and continuous infringement composed of a complex of anti-competitive conduct for which all the participants are liable, irrespective of the route concerned. The Commission's argument would also lead to a finding that the grounds and the operative part of the decision contradicted each other. Furthermore, the carriers mentioned in the first four articles of the decision were held liable for the entirety of the infringement referred to in each article without distinction in each article between the routes operated by those carriers during the infringement period and those which were not.
The Court found that – accepting the Commission's interpretation of the decision - the operative part could be supported by two contradictory lines of reasoning. On the one hand, a carrier mentioned in one of the first four articles of the decision was held liable for the anti-competitive conduct in which had participated even if it did not operate all the routes covered by the article in question. On the other hand, the same carrier, which is not mentioned in one of the other articles, avoids all liability for anti-competitive conduct in which it nevertheless allegedly participated if it did not operate any of the routes covered by that article.

The Court found that the internal consistencies of the decision were liable to infringe the applicant's right of defense and prevent the Court from exercising its power of review.

The question now is what the Commission will do next. It has been suggested that the simplest option would be to redraft the operative part of the decision and retain the single and continuous infringement concept, recalculating the individual fines. It has rightly been said that a finding of infringement without levying fines would not be convincing given the penalties levied on carriers in jurisdictions outside the EU, but such a decision would still leave open the prospect of follow-on damages claims.

III. CONCLUSION

In its Airfreight rulings, the General Court has measured a Commission decision on a complex set of circumstances against exacting criteria of clarity and consistency, and found the Commission decision wanting. Although an unwelcome ruling for the Commission, it is questionable whether many cartels will present such a complex picture of evidence as that of the airline industry, and it may be doubted whether the Commission may now be at greater risk of falling at the first hurdle on appeal. It serves as a reminder that, even when the existence of a cartel and detailed evidence of its workings have been revealed through immunity and leniency applications, that is only the first stage of a long process to enforce the law.

TOSHIBA V. COMMISSION – HOW (NOT) TO PROVE AWARENESS, AND DECISIVELY INFLUENCE PEOPLE

BY JACQUELYN MACLENNAN & AQEEL KADRI[1]

I. INTRODUCTION

On September 9, 2015, the European Union (”EU”) General Court handed down its judgment in Case *T-104/13 Toshiba v. Commission* (“Toshiba Judgment”),[2] one of several challenges to the Decision of the European Commission (“Commission”) in Case *COMP/39.437 – TV and Computer Monitor Tubes* (“CRT Decision”). The Judgment is important in two respects, firstly for its findings on the standard of proof required for a finding of participation in a single and continuous infringement of competition law, and secondly for its application (subject to appeal) of the legal test for the finding of joint and several liability for competition law infringements.

1 Respectively, Partner and Associate in White & Case LLP. The authors represent Toshiba in its challenge to the CRT Decision. The views expressed are the authors’ own and do not necessarily reflect the views of White & Case LLP or any of its clients.

2 Case T-104/13 Toshiba v. CommissionEU:T:2015:610.

More broadly, the CRT Decision has given rise to a number of private damages actions and is thereby contributing indirectly to the evolution of the law relating to such actions in Europe, where this field is still in its infancy. The *CRT* Decision built on principles established in the Commission’s *LCDDecision*,[3] and confirmed by the General Court in the *InnoLuxJudgment,*[4] regarding the ability to take into consideration for fining purposes at least “direct sales of transformed products” by vertically integrated addressees of the Decisions, i.e. sales in the EU of screens incorporating the tubes which were the subject of the Commission Decision, manufactured outside the EU by the addressees of the Decision. The General Court appears to have accepted the Commission’s approach.[5] Topically, the English High Court has just been called on to consider this particular aspect of the *CRT* Decision, regarding the jurisdictional scope of damages claims.[6]

The CRT caseDecisionis also interesting in that the Commission’s investigation initiated a number of “piggy back” investigations, and despite the best intentions of the European Competition Network to be a mechanism to avoid incoherent decisions, the conclusions reached by the Commission and its national competition authority cousins are a case study in inconsistency.[7] While in theory this situation might be solvable by references to the European Court of Justice (“ECJ”) from Member State Courts, and direct appeals of the Commission Decision to the EU Courts, in reality the speed and practicability of such parallel appeal procedures means this has not happened.

This article focuses on the General Court’s treatment of evidence and the standard of proof necessary to find a single and continuous infringement and to find joint and several liability, and some issues arising in private damages cases to date.

II. BACKGROUND

The *CRT* Decision found two separate cartels operating in the broader cathode ray tube (“CRT”) industry – the CPT (Color Picture Tubes

3 Commission Decision of 8.12.2010 relating to a proceeding under Article 101 Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area (COMP/39.309 – LCD - Liquid Crystal Displays).

4 Case C-231/14 InnoLux v, CommissionEU:C:2015:451.

5 Toshiba Judgment, §§154-161.

6 See Iiyama Benelux BV & ors v. Schott AG &ors [2016] EWHC 1207 (Ch).

7 See “Toshiba v Commission: Parental Liability of a Minority Shareholder”, Balazs Csepai, JECLAP, 2016, Vol 7, No.2 p.115.

used in television sets) and CDT (Color Display Tubes used in computer monitors) cartels, each of which constituted single and continuous infringements. Toshiba was only alleged to have participated in the CPT cartel.

The CPT cartel was found to have existed between December 1997 and November 2006. Toshiba's alleged involvement was split into three periods: (i) May 2000 to April 2002, (ii) April 2002 to April 2003, and (iii) April 2003 to March 2006. The finding that Toshiba participated in each of these periods was based on, for period (i), evidence of bilateral contacts with another cartel member; for period (ii), evidence of participation in multilateral meetings; and for period (iii) Toshiba's alleged decisive influence over its joint venture with Panasonic, MTPD.

III. SINGLE AND CONTINUOUS INFRINGEMENT

In the Toshiba Judgment, the General Court set out the test for finding that an undertaking had participated in a single and continuous infringement.[8] The key component in the assessment of whether an undertaking has participated in a single and continuous infringement is that the undertaking in question must have been aware of (or have reasonably foreseen) the anticompetitive activities of the other participants. Only where the undertaking knew or should have known that it was contributing by its conduct to the overall cartel, can it be held liable for it. The undertaking must therefore be shown to have intended to contribute to the common objectives of the cartel and by the same token have been aware of the activity of the other participants in pursuit of that objective (or have reasonably foreseen it and accepted the risk).

Accordingly, the General Court concluded that the Commission had to show that Toshiba knew (or could reasonably have been considered to know) both that its contacts formed part of an overall cartel and were designed to contribute to the objective pursued by it, and of the general scope and essential characteristics of the cartel.[9]

Citing the Charter of Fundamental Rights and the European Convention on Human Rights, the Toshiba Judgment also emphasized that a decision finding an infringement of competition law must be supported by evidence that is "sufficiently credible, precise and consistent to substantiate the firm conviction that the applicant participated in the CPT cartel"[10] and that "any doubt in the mind of the Court must operate to the advantage of the undertaking to which the decision finding an infringement was addressed."[11]

A. Period (i) - May 2000 to April 2002

During this period, it was accepted that Toshiba had not participated in the multilateral meetings held in Asia and Europe. It was alleged, however, that Toshiba had bilateral contacts with three of the other addressees, who had each participated in the multilateral meetings at the heart of the cartel. Toshiba argued that, even if those bilateral contacts were anticompetitive (which it did not accept), the CRT Decision had not shown that Toshiba was aware of the cartel as a whole, as required by the Court's jurisprudence. The CRT Decision also alleged that Toshiba had been kept informed of the cartel by another participant, and that there had been attempts to recruit it to the cartel, all of which showed that Toshiba had the requisite awareness to be found liable for the cartel as a whole. Toshiba disputed those findings.

The General Court agreed with Toshiba that the evidence cited in the CRT Decision did not establish, to the requisite legal standard, that Toshiba had been aware of, and had intended by its conduct to contribute to the common objectives of, the CPT cartel. The General Court's assessment of the evidence concluded that, aside from one meeting, all the other contacts in which Toshiba was alleged to have been involved were in fact between other parties and a joint venture in which Toshiba had an interest (but over which it was not alleged to have exercised decisive influence). The joint venture in question was not an addressee of the CRT Decision. As concerned the one contact in which Toshiba was considered to be involved, the General Court agreed with Toshiba that the contact in question related to CDTs and therefore could not constitute evidence against Toshiba.

The General Court also concluded that there was no evidence that Toshiba intended to contribute to the CPT cartel (and in fact that the evidence, in the form of a letter from Toshiba to the joint venture asking it not to participate in the meetings, showed the contrary). Finally, the Toshiba Judgment rejected the unsubstantiated hearsay evidence of a leniency applicant, claiming that Toshiba was kept informed about the CPT cartel by another participant, as being insufficient to establish Toshiba's liability.

B. Period (ii) – April 2002 to April 2003

In this period, the Commission alleged that Toshiba had participated in four multilateral meetings, which formed part of the single and continuous infringement comprised of four parallel sets of meetings between various participants. Toshiba argued that its participation in one of those sets of meetings ("SML Meetings"), which took place outside the EU, did not lead to the conclusion that it had participated in the single and continuous infringement.

The General Court agreed with Toshiba that the CRT Decision had failed to demonstrate that Toshiba had been aware of the broader cartel and that Toshiba intended to contribute to its objectives. The CRT Decision had simply relied on the finding that the SML Meetings had worldwide scope and an alleged anticompetitive object. The

8 Toshiba Judgment, §§52-54, citing previous case law of the Court, in particular Case T-68/09 Soliver v. CommissionEU:T:2014:867.

9 Toshiba Judgment, §55.

10 Toshiba Judgment, §51.

11 Toshiba Judgment, §50.

mere parallelism of the SML Meetings with the three other types of meeting at issue in the case was not sufficient to establish Toshiba's awareness of the broader cartel.

The General Court thus adopted a principled stance on the burden and standard of proof required to establish an infringement of competition law. By focusing on the requirement that the CRT Decision show Toshiba's intention to contribute to the common objectives of the CPT cartel through its participation in the SML Meetings, the General Court took a more rigorous approach to the assessment of evidence. The EU Courts often permit the Commission significant leeway in establishing the evidentiary basis for an infringement, justifying this for example on the grounds that evidence of secret cartels is often fragmentary and sparse, and therefore the existence of infringing conduct must be able to be inferred from circumstantial evidence.[12] The Toshiba Judgment insisted, however, that the evidence put forward by the Commission must meet the requirement that, in order to show participation in a single and continuous infringement, the addressee hadbeen aware of (or hadbeen able to reasonably foresee) the anticompetitive conduct of the other participants and hadintended to contribute to the common objectives of the cartel. It is not sufficient that two types of conduct have identical objectives; the objectives must be one and the same, i.e. there must be a concurrence of wills between the various participants. This is a welcome development. It reflects the reality of the situation in most cases these days, where the Commission has a multitude of cooperating parties proffering documents and explanations in their own self-interest, so that participation of a party in a cartel does not have to be "inferred" from fragmented scraps of evidence fortuitously identified by the Commission. It is to be hoped that this more demanding approach to the use of evidence becomes the norm.

IV. JOINT AND SEVERAL LIABILITY

An issue which has given rise to a number of judgments from the EUCourts over recent years is the question of joint and several liability for a competition law infringement. The law in the EU has evolved into a position very different to that which a corporate lawyer, schooled in the principle of the "corporate veil" segregating the conduct of subsidiaries and parents and other corporate entities, would most likely predict.

The principle under which an undertaking (invariably a parent or shareholding company) can be held jointly and severally liable with another undertaking for the latter's anticompetitive conduct in the EU can be stated very simply. Liability may be imputed to the parent or shareholder where the subsidiary or joint venture "does not decide independently on its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, having regard in particular to the economic, organisational and legal links between those two legal entities."[13] In those circumstances, the subsidiary or joint venture forms a single economic unit with the parent company.

In assessing whether the above test is satisfied, the EU Courts have developed the concept of "decisive influence." Though it is generally stated in the jurisprudence that there are two parts to the decisive influence test ((i) that the parent was in a position to exercise decisive influence, and (ii) that it actually did exercise such influence), in reality only the second limb of the test is of any real consequence, and it does not seem that the first limb is a necessary prerequisite to satisfying the second limb.[14]

Though the emphasis on the second limb of the test would suggest that it was incumbent on the Commission to adduce sufficient existence of decisive influence, in the Toshiba Judgment the General Court unfortunately did not show the same, desirable level of rigor in considering whether the test for "decisive influence" was met as it did whenconsidering the test for finding a single and continuous infringement.

A. Period (iii) – April 2003 to March 2006

In March 2003, Toshiba decided to exit the CRT market and transferred its activities in this regard to a joint venture it formed with Panasonic, MTPD. Toshiba initially held 35.5 percentof the shares, with Panasonic holding the remaining 64.5 percent. In March 2007, Panasonic became the sole owner of MTPD.

In the third period covered by the CRT Decision, Toshiba's liability was derived wholly from the alleged participation of MTPD in the CPT cartel; the CRT Decision held Toshiba jointly and severally liable with Panasonic and MTPD for MTPD's alleged conduct.

Toshiba's challenge to its liability for period (iii) was thus based on the finding in the CRT Decision that Toshiba formed a single economic unit with MTPD. The CRT Decision based its finding that Toshiba exercised decisive influence over MTPD on Toshiba's holding various "negative veto rights" over certain decisions relating to MTPD's management. Toshiba appointed a minority of the members of MTPD's board, but certain strategic decisions required at least one of the Toshiba-appointed directors to vote in favor. In addition, the joint venture agreement provided that Toshiba and Panasonic would jointly adopt the initial business plan (covering the first two years) for MTPD.

12 See for example Joined Cases C 204/00 P, C 205/00 P, C 211/00 P, C 213/00 P, C 217/00 P and C 219/00 P Aalborg Portland and Others v. CommissionEU:C:2002:333, §§55-57, and Joined Cases C 403/04 P and C 405/04 P Sumitomo Metal Industries and Nippon Steel v.CommissionEU:C:2005:812, §51.

13 See for example Cases C-293/13 P and C-294/13 P Fresh Del Monte Produce v. Commission and Commission v. Fresh Del Monte Produce EU:C:2015:416, §75.

14 As recognized in Advocate-General Kokott's Opinion in Cases C-293/13 P and C-294/13 P Fresh Del Monte Produce v. Commission and Commission v. Fresh Del Monte Produce EU:C:2014:2439, §74, and, implicitly, in, for example, Case T-77/08 Dow Chemical v. Commission EU:T:2012:47, §75.

The General Court's assessment of whether Toshiba exercised decisive influence over MTPD is notable for its acceptance of an abstract analysis of the joint venture agreement in order to establish the exercise of decisive influence, and a failure to be concerned with the practical reality of how the joint venture worked. In essence the court held that, where the joint venture agreement provided, even at a very high level, that the partners were jointly responsible for setting the policy followed by the joint venture, their exercise of influence over its commercial policy could be presumed. The General Court equated this assessment with the assessment of control carried out in merger control. Indeed, the principles relied upon in the CRT Decision and in the Toshiba Judgment are derived from those enumerated in the Commission Consolidated Jurisdictional Notice under Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings.[15]

The General Court found that Toshiba's contractually-required approval of the business plan and budget, which was extended beyond the initial two-year period envisaged in the joint venture agreement (for reasons which served Panasonic and which were explained by Toshiba to both the Commission and the General Court) was also an indication that Toshiba exercised decisive influence over MTPD. The Toshiba Judgment also cited with approval the findings of the CRT Decision in relation to various other indicia – Toshiba's appointment of directors to MTPD's board, who were either formerly or (in the case of one) currently employed by Toshiba; Toshiba's role in decisions over MTPD's plant closures; and its "preferred-supplier" relationship with MTPD – as additional indicators of decisive influence. The Court found that it was the sum of these indicia that supported the finding that Toshiba formed a single economic unit with MTPD, even if any one of these factors alone may not have been sufficient.

The Toshiba Judgment's findings on Toshiba's joint and several liability for the alleged conduct of MTPD are significant because the judgment marks the latest stage in the line of evolving case law of the General Court on the liability of shareholding companies for the conduct of joint ventures. The fact that Toshiba has appealed this aspect of the judgment means that the ECJ will now have the opportunity to review the development of this case law. This is particularly desirable as several judgments[16] of the General Court have seen the adoption and subsequent application of certain principles without confirmation by the EU's highest court: for example the importance of any commercial relationship between shareholder and joint venture (as suggested in Fuji) or the ability of the shareholder to influence the day-to-day management of the joint venture (RWE, Sasol). Notably, the ECJ has not yet considered a case where liability has been imputed to a minority shareholder.

Of particular importance is the acceptance in the Toshiba Judgment that a theoretical analysis of the arrangements for the joint venture is sufficient, and the agreement concerned can be presumed to have been implemented without the need to investigate whether in practice these arrangements allowed the shareholder to exercise "decisive" influence and be held liable for the joint venture's conduct. This seems difficult to reconcile with the principle, as repeatedly stated by the ECJ, that the subsidiary or joint venture "carries out in all material respects the instructions given to it", which appears to require some investigation into how any management arrangements have actually been implemented. In the Toshiba Judgment, it was accepted that Panasonic was responsible for the operation and management of MTPD, and its Panasonic-appointed President controlled day-to-day management and took most of the important business decisions. Toshiba's arguments about the fact that, as a matter of corporate law, it could not control the directors it appointed to the MTPD board, and explaining the peripheral role it played in decisions on MTPD's business plan and other commercial matters, were ignored. The Toshiba Judgment endorses a shift toward the type of ex ante assessment conducted in merger control, despite the fact that the relevant events have already occurred. This represents a rather stark contrast to the General Court's commendably strict adherence to the necessary standard of proof when reviewing the finding that Toshiba participated in a single and continuous infringement. Information relating to how a company is run is not likely to be concealed or concealable, and should therefore be readily available to review. There is no reason justifying this difference in approach. Liability for a minority shareholder in a joint venture, who to all intents and purposes believed authority was delegated to the majority parent (and who may be moving to extricate itself from the business completely, as in the case of Toshiba) has major repercussions in terms of the direct penalty imposed by the Commission and further, in terms of private damages actions which now inevitably follow on from a Commission decision. A finding of liability by the Commission should therefore be subject to the full constraints and safeguards granted by judicial review by the EU Courts.

V. PRIVATE DAMAGES

The CRT Decision has spawned a number of private damages actions around Europe. Although the cartels ended some ten years ago, the CRT Decision was not adopted until December 2012, and a variety of issues are set to arise if proceedings reach trial (which has been the rare exception in damages claims in Europe to date), including liability of non-defendant addressees in contribution claims, and the correct application of the single economic unit doctrine as regards joint ventures in damages claims (both in "anchoring" claims or claims for contribution from joint venture parents).

One particularly interesting issue in the CRT Decision that has recently been addressed in a claim in the High Court in England & Wales concerns the territorial limits on damages actions. In Iiyama

15 OJ C95/1, 16.4.2008.

16 Such as Case T-132/07 Fuji Electric v. CommissionEU:T:2011:344; Joined Cases T-141/07, T-142/07, T-145/07 and T-146/07 General Technic-Otis and Others v. CommissionEU:T:2011:363; Case T-543/08 RWE and RWE Dea v. CommissionEU:T:2014:627; Case T-541/08 Sasol and Others v. Commission EU:T:2014:628.

Benelux BV & ors v. Schott AG & ors,[17] the High Court considered a claim by Iiyama, a manufacturer of computer monitors, against several participants in the CDT cartel. The claim related to monitors that Iiyama had purchased in the EEA but which had been manufactured outside the EEA. The CDTs purchased by Iiyama Corporation (the Claimants' parent company) from the Defendants were "transformed" into computer monitors outside the EEA and then sold in the EEA to the Claimants. The Claimants argued that the CRT Decision had found that sales of computer monitors in the EEA were affected by the CDT cartel and that implicitly the infringement extended to these products. The Judge ruled against Iiyama, striking out the claim in full, stating that the CRT Decision found no infringement in relation to CDTs sold outside the EEA. The only mention of such sales was in relation to the calculation of the fine, and even then was not in fact factored into that calculation. Accordingly, no "follow-on" claim could be maintained in respect of the monitors bought by the Claimants. The Judge went on to find that any cartel affecting the CDTs used in the monitors purchased by the Claimants was neither implemented in the EEA, nor produced any immediate effects in the EEA, and therefore no "stand-alone" claim could be maintained. In effect, the Judge concluded that the sales alleged by the Claimant Iiyama to be affected by the cartel had an insufficient connection to the cartels that were the subject of the Commission Decision. Of critical importance was the chain of supply through which Iiyama had acquired the cartelized products, all the stages of which took place in Asia.

An even more recent decision of another judge in the English High Court, involving the Commission's LCD Decision,[18] has added a degree of nuance to the position taken in the English CRT proceedings. The chain of supply was similar to that in the CRT claim; the Defendants sold the cartelized products (LCD panels) to OEMs outside the EU, which then sold finished products to Iiyama Corporation, which then resold those products to its subsidiaries in the EU, which then sold them to dealers. The court concluded that, in light of the applicable EU case law (namely Woodpulp),[19] the supply chain would not seem to involve any implementation of the cartel within the EU and thus be within the territorial scope of Article 101 TFEU. Thus, if the focus of the claim was that the Claimants paid an overcharge outside the EU which was passed on to the Claimants' subsidiaries in the EU, then such claim would not seem to relate to implementation of the cartel inside the EU and be permissible. This reasoning is consistent with the finding made by the court in the Iiyama v. SchottCRT case. However, the court found that, to the extent that the claim alleged damage arising out of the cartel's implementation in the EU (because the effectiveness of the cartel outside the EU was dependent on the existence of the cartel implemented in the EU), the claim was sufficiently arguable not to warrant the grant of summary judgment for the Defendants.

At the time of writing, an application for leave to appeal is pending CRT proceedings, and a great deal of attention will be focused on how these similar cases will be finally determined, should they reach trial.

Private damages litigation arising out of competition law infringements is still an emerging field in Europe, by contrast to the United States where private antitrust enforcement is very well established. The adoption of the Damages Directive[20] is intended to facilitate "follow-on" damages actions in the EU, but for many often-recounted reasons, including the cross-border aspect of such actions in Europe, antitrust actions in the private sphere remain relatively rare. This is changing, at least as regards "follow-on" cases, and litigation in different jurisdictions based on the CRT Decision is likely to result in noteworthy new principles in this area of law.

VI. CONCLUSION

Despite the infringement having ended ten years ago, the CRT Decision continues to promote interest in both the public and private law spheres. The next chapter of the story may see important clarifications in the law on joint and several liability for minority shareholders for competition law infringements, and a number of key issues in private damages claims.

17 [2016] EWHC 1207 (Ch).

18 Iiyama (UK) Ltd and other companies v. Samsung Electronics Co and other companies [2016] EWHC 1980 (Ch).

19 Case C-89/85 Ahlström Osakeyhtiö v. Commission, ("Woodpulp") EU:C:1988:447.

20 Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ L349/1, 5.12.2014.

SCREEN CARTEL CASES SET THE BOUNDARY: TERRITORIAL LIMITS OF EU CARTEL DAMAGES

BY NICHOLAS HEATON[1]

I. INTRODUCTION

The English High Court has given important guidance on the territorial scope of European Union ("EU") cartel damages claims in two recent judgments, both concerning cases brought by the same group of claimants. In the first case, iiyama v. Schott & others (May 23, 2016 [2016] EWHC 1207 (Ch)), the Court struck out claims said to be worth nearly €1bn. In the second claim, iiyama v. Samsung Electronics & others (July 29, 2016, [2016] EWHC 1980 (Ch)), the claims survived but were significantly cut back.

1 Nicholas Heaton is partner in Hogan Lovells competition litigation practice.

These cases both addressed an issue that has arisen in a number of recent cartel damages claims, including in the English AirCargo claim: Can claims for breach of EU competition law be made in respect of purchases made outside the EU? Claimants have sought to adopt novel arguments in order to bring such claims in an attempt to bring in one place claims concerning worldwide purchases. The first of these judgments makes clear what claims cannot be made and the second highlights two theoretically possible claims that could be made, but which may be difficult to prove.

II. BACKGROUND TO THE CLAIMS

The two cases have remarkably similar fact patterns. The first claim (the "CRT claim") concerned two separate cartels which were subject to infringement decisions by the European Commission (the "Commission"): the Cathode Ray Tube ("CRT") cartel; and the CRT glass cartel. TVs and PC monitors used to be manufactured using CRTs, which were made from CRT glass.

The claim was brought by the iiyama group, a seller and distributor of computer monitors, which had purchased monitors from original equipment manufacturers ("OEMs") in Asia containing both CRT and CRT glass. Importantly, however, the CRTs and CRT glass incorporated in the monitors iiyama purchased had all been purchased in Asia, outside the EEA.

The second claim (the "LCD claim") related to a Commission decision finding a worldwide cartel in LCDs, used to make TVs and computers monitors. Again (with the possible exception of a small percentage of monitors bought after the end of the LCD cartel) iiyama did not purchase monitors that contained LCDs that had been sold in the EEA.

In both cases the basic supply chain (simplified here) had involved an initial sale of CRT/CRT glass/LCDs by the alleged cartelists to third party OEMs in Asia who manufactured the monitors.Those monitors were then sold in Asia to a Japanese company in the iiyama group which then sold the monitors to the claimant companies, who were other group companies based in the EU, who in turn sold the monitors within the EEA.

In both cases the defendants applied to strike out the claim and/or for summary judgment and/or a declaration that the English Court did not have jurisdiction. In both cases the defendants' central argument was that, as the purchases of allegedly cartelized products relied on by the claimants as the basis of their claims had been made outside the EU, the claim was outside the territorial limits of

EU competition law. It was argued that the claims must fail for that reason.

The defendants' applications in the CRT claim were heard first and the judgment published just before the hearing in the LCD case. It is helpful, therefore, to look first at how the argument was dealt with in the CRT claim.

III. THE PARTIES' ARGUMENTS IN THE CRT CLAIM

At the hearing of their applications, the defendants argued that the claim disclosed no cause of action because the purchases of the allegedly cartelized products, on which the claim was based, had been made outside the EU and so their sale could not be an infringement of EU competition law. In this regard, the defendants argued that the claim failed to satisfy the requirements for the territorial scope of EUlaw established by the European courts in cases concerning the jurisdiction of the Commission. There are two key cases in this area, Ahlström and others v. Commission [1988] ECR 5193 ("Woodpulp") a cartel case, in which the Court established the now well known "implementation" test, and Gencor Ltd v. The Commission [1999] ECR II-753 ("Gencor") a merger case, in which the Court applied the so called "qualified effects" test:

- In Woodpulp the ECJ held that producers of woodpulp established outside of the common market but engaged in price coordination relating to sales made directly into the common market had breached Article 85 (now Article101) because such direct sales amounted to the implementation of an anticompetitive agreement within the common market; and

- In Gencor the CFI held in relation to a proposed merger that, notwithstanding the fact that all of the companies were not EU domiciled (save for a single holding company), the proposed merger was contrary to the then merger regulation. In so ruling, the CFI applied the above implementation test from Woodpulp. It also detailed a test for the territorial limits of EU law which required that the effect in the EU of the extra-EU conduct in question must be foreseeable, immediate and substantial effect.

There is some controversy as to whether these are in fact two separate tests and how they relate to one another. In the CRT claim, however, the defendants contended that whether the Court applied the Woodpulp "implementation" test, or the "qualified effects" test, as set out in Gencor, the claim failed and so it was not necessary to determine which test was correct.

The claimants argued that the fact that their monitors (which contained the CRT and CRT glass) were sold in the EU provided sufficient connection to the EU for EU competition law to apply, even if the CRTs and CRT glass had been purchased outside the EU. In advancing their case, the claimants sought to rely on InnoLux v. European Commission (2015) Case C-231-14P ("Innolux") concerning the fines imposed in relation to the LCD cartel. In that case, the Court had upheld fines that were calculated in part on the basis of the sale by the addressees of products containing LCD (so called "transformed products") into the EU. The claimants said that this was authority for the proposition that the sale of transformed products in the EU (in this case monitors containing CRT and CRT Glass) was sufficient to amount to a breach of EU competition law even if there was no sale of the cartelized products within the EU. The claimants also relied on a recital in the Commission's CRT cartel decision, which described the sales of CRTs "concerned by" the infringement as including indirect sales, i.e. CRTs sold by addressees of the Commission's decision to customers outside the EEA which were then incorporated into products and sold by third parties into the EEA. The claimants argued that the Commission's reference to indirect sales as being "concerned by" the infringement in the EEA meant these sales were also a means by which liability could be established.

IV. THE JUDGMENT IN THE CRT CLAIM

The Court held that, if the sales by the alleged cartelists said to be subject to the two cartels had occurred outside the EU (whether they were sales of the cartelized product itself or a product incorporating it) then there was insufficient connection with the EU to involve a breach of EU competition law. There was, therefore, no basis for a claim for breach of EU competition law in respect of those sales, and the claim must fail for that reason. In reaching this conclusion, the Court, for the first time, applied the established EU case law on the territorial scope of EU competition law to a damages claim.

In particular, the Court found that sales outside the EU could not be said to be "implementation" of anticompetitive behavior in the EU (applying Woodpulp) as "the mere fact that, even if true, there is some end of the road effect in the pricing of [the claimants'] purchases in Europe does not mean that it was implemented there."

Nor did the Court find that there was a foreseeable, immediate and substantial effect within the EU (applying Gencor). In particular, as the effect of the cartels was initially the sales of CRT Glass or CRTs to third party monitor producers based outside of the EU, this was not a sufficiently immediate effect on the EU market.

The Court also dismissed the claimants' reliance on InnoLux and noted that InnoLux concerned matters relating to fines and the CJEU did not consider that the same territorial considerations necessarily applied to both infringement and the power to fine. As to the CRT decision itself, the recital relied on was part of the remedies section of the decision (and not the section addressing liability) and the Commission's statements elsewhere in the decision appeared to be "positively disclaiming [indirect sales] as being relevant."

V. THE LCD CLAIM

As explained above, the LCD claim was based on very similar facts and supply chain. The hearing of the defendants' applications occurred very shortly after the Court's judgment in the CRT case was handed down. The judge in the LCD case was able to consider it and he essentially adopted its reasoning in the LCD case. In doing so he found that the claim for loss caused by an overcharge on purchases by iiyama of monitors containing LCD sold by the cartelists outside the EU was outside the territorial scope of EU competition law. The judge rejected an argument that the territorial scope of the damages claim for breach of EU competition law was in some way different from its scope for public enforcement purposes.

In the LCD claim, however, iiyama advanced two claims not pursued in the CRT case. The first was an argument that but for the implementation of the LCD cartel in the EU, LCDs would have been available in the EU at a lower price. iiyama said that in those circumstances it would have purchased monitors containing LCD purchased in the EU and that it had suffered a loss by not being able to do so. The judge accepted that such a claim would be within the territorial scope of EU competition law and could be pursued by iiyama. Such a claim, while theoretically possible, would no doubt face some significant hurdles in terms of proving causation. Iiyama will have to show that absent the LCD cartel in the EU, using LCD sold in the EU and made into monitors there, would have been less costly than using monitors made in Asia from Asian supplied LCDs.

The second argument made by iiyama, was that if there had been no implementation of the cartel in the EU, the worldwide cartel would have collapsed and iiyama could have purchased monitors using Asian supplied LCD at a lower price. The judge observed that both these claims would likely raise important points of policy in relation to matters such as the scope of the tort or whether there was any test of proximity for the harm claimed, but that these issues were not suitable to be determined on a summary basis.

In the LCD case, therefore, iiyama's claim will be permitted to continue, but limited to those claims within the scope of EU competition law, which does not include claims for an "overcharge" on purchases of the allegedly cartelized product made outside the EU.

VI. CONCLUSION

These two judgments are important in the development of cartel damages claims in the EU because they show how the territorial limits of EU competition law are to apply to such claims. A claimant who did not purchase (directly or indirectly) any of the cartelized products within the EU may still have a claim if she can show the EU implementation of a cartel somehow caused her loss. A claim for an "overcharge" on a purchase (directly or indirectly) made outside the EU is outside the territorial scope of EU competition law and cannot be pursued. Although the legal argument that allowed that conclusion to be reached was complex, the conclusion itself, once stated, is perhaps not unsurprising.

CPI COMPETITION POLICY INTERNATIONAL