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Sport and State Aid—Reining in the Populist Gesture

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Ken Daly[1]

I. INTRODUCTION

Sport's ability to capture public attention and generate intense loyalties and rivalries is not overlooked by public representatives with budgets to spend. A recent focus by the European Commission on State Aid in sport has sought to reduce the risk of populist gestures causing controversy between Member States by clarifying how they may channel public money into their national sports teams and infrastructure without causing important distortions in economic (and ultimately sporting) competition.

However, at the very same time, as if to remind law-makers of sport's uniquely political nature, an unprecedented controversy has erupted in which the European Ombudsman has accused the EU's (Spanish) Commissioner for competition of maladministration for failing to initiate investigations into public support for some notable Spanish football clubs, including the club that the Commissioner is said to support.

II. EU STATE AID LAW AND SPORT

In light of sport's social, public health, and political dimensions, public spending plans across the European Union rightly allow for investment in sports facilities, teams, training, and infrastructure. EU law and policy not only recognize the value of this investment, but a special legal status has been afforded to sporting issues in the Treaty on the Functioning of the European Union (at Article 165), alongside other major public priorities.

EU State Aid law, on the other hand, is designed to serve another major EU priority: that of ensuring a level playing field among economic actors within the EU's internal market by limiting the ability of Member States to distort competition by selectively offering public money or any other support (including tax breaks, regulatory concessions, or anything which creates a more favorable trading environment), to particular undertakings.

Investment in purely public projects (such as building a motorway) will generally be exempt, but where a Member State wishes to invest public money or give any other benefit or support over certain thresholds that will give rise to purely private benefits, the Member State must notify the Commission. It can then block, approve, or add conditions to the aid, depending on the benefit's potential to distort competition within the European Union. The Commission has extensive powers to investigate complaints or conduct its own enquiries regarding potentially distortive aid. Aid that is not notified and approved is deemed invalid, and the Member State may be ordered to recover it.

The EU State Aid rules have always applied to sport, but the precise scope for public authorities to invest in and support sport-related activities without violating EU State Aid rules

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has not been entirely clear. However, a series of recent cases, policy initiatives, and controversies have begun to shed (and will shed more) light on the Commission's policies in this area.

III. DEVELOPMENT OF SPORTS INFRASTRUCTURE

The Commission has recently approved aid providing funding and support to a number of sporting infrastructure projects. These have involved public funding for projects such as modernization works to football stadiums in Belgium, and the construction of multisport arenas in Sweden and Germany. On December 18, 2013, the Commission approved financial support of more than EUR 1 billion by France for the construction and renovation of nine stadiums in order to host the UEFA EURO Championship in 2016.

As an illustration of the analysis required, in the French case the Commission found that the public financing would indeed provide a (private) advantage to the companies involved in the construction and renovation of the stadiums, as well as to the operators and users of the stadiums. And it found that this would indeed have the potential to distort competition among those constructors/operators and their competitors within the European Union. As with all such public financing cases, the task of the Commission was therefore to assess whether the aid could be found compatible on the grounds that it furthered a common EU objective without unduly distorting competition.

The Commission concluded that the project would not have been viable without public support and that the aid granted was limited to the minimum necessary to ensure it would conform to the UEFA requirements in time for the Euro 2016 championship. Crucially, the Commission found that, after the championship, the stadiums would continue to be available for the resident clubs and would also serve as multifunctional arenas for the public for sporting, cultural, and social events. France also committed to set up a system of permanent control of the prices paid by the resident clubs, in order to ensure that the stadiums would be used at market conditions. This, the Commission found in its approval decision, would limit the risk of distorting competition through granting undue advantages to the resident football clubs, compared to the conditions available to competing clubs.

In 2011 the Commission considered and approved the aid aspects of Hungary's multi-year national sport development strategy, which included both building infrastructure and financing youth training. Hungary argued, and the Commission accepted, that the existing infrastructure was significantly underdeveloped and that private investors could not economically fill the gap. Hungary therefore planned to incentivize commercial investments through tax benefits involving potential aid up to EUR 455m by 2017. Football, handball, water polo, basketball, and ice hockey were all to benefit.

The Commission found that the plan was clearly state aid (in that it had a significant potential to distort competition notably between the beneficiaries and their competitors). They then weighed the potential distortion of competition against the goal of increasing the participation of the general public in sporting activities and events, while considering various safeguards that had been proposed to maintain competition. These safeguards included: (i) requiring operators to pay market prices for using the facilities constructed, (ii) setting minimum rental prices, (iii) requiring beneficiary sports clubs to ensure the widest possible benefits to the general public, (iv) ensuring that the infrastructure constructed had a multifunctional character (and was not for the benefit of the main tenant club only), etc. On balance, the Commission accepted the competition safeguards proposed and approved the scheme.

Thus, where cases are notified to the Commission, approval is usually the result, potentially after a period of negotiation of conditions to ensure the maintenance of undistorted competition.

IV. AID TO PROFESSION FOOTBALL CLUBS

However, the more controversial cases have arisen not from the notification process (like the infrastructure cases above) but, instead, from complaints submitted to the Commission that certain Member States have been distorting competition by offering clandestine financial support to clubs—particularly football clubs—in their territories.

In 2012, UEFA and the Commission issued a joint statement in which the Commission blessed certain rules imposing minimum solvency requirements upon professional clubs within UEFA's competitions. The purpose of these rules is, in part, to ensure stability and avoid potential distortions in the sport arising from the tendency of some clubs to over-borrow and risk insolvency (e.g. to purchase new players). With iconic national clubs in financial danger, the Commission noted that a temptation might arise for Member States to grant a lifeline, whether in the form of a "bail-out," tax breaks, loans on favorable terms, or other forms of support—which would risk violating State Aid rules.

This risk was not merely hypothetical. In October 2012, the Commission addressed a request for information to all Member States concerning potential State Aid given to national football clubs, as it was concerned about un-notified aid. The Commission is said to be still pursuing the leads generated by this inquiry.

Following a complaint from a retired Dutch civil servant in 2010, the Commission opened, in March 2013, an investigation into alleged measures of five Dutch municipalities to support five well-known Dutch football clubs. This investigation is ongoing and relates to waivers of financial claims, lowering rents with retroactive effect, purchase of land at favorable prices, and the purchase of facilities for the benefit of clubs.

In November 2009 the Commission also received a complaint from a representative of investors in a number of European football clubs, alleging that certain Spanish football clubs have benefitted significantly from arrangements that confer exemptions and other advantages in relation to corporation tax, capital gains tax, and income tax. According to the complaint, these advantages have been provided for in Spanish legislation, benefit a small number of clubs, and amount to several billion Euros in value.

In response to what it perceived to be Commission inaction regarding the complaint, the complainant argued that the Commission was delaying a proper investigation because the Commissioner for competition was a Spaniard, made no secret of his support for one of the football clubs in question, and had been a Minister in the Spanish government which had approved certain of the tax advantages in question. By December 2011 the Commission had not opened a formal investigation and the complainant took the matter up with the European Ombudsman, responsible for identifying incidents of maladministration on the part of the EU's institutions.

In an unprecedented decision of December 16, 2013, the Ombudsman found after investigation (a) that the Commission had failed to take a timely decision on whether infringement proceedings against Spain should be initiated; and (b) that:

> the Commission has failed to allay suspicions that the relevant Commissioner has a conflict of interests and that its inaction reflects an unwillingness by that Commissioner to start infringement proceedings which might impact negatively on a football club with which it is acknowledged that he has close links.

On December 17, 2013 the Ombudsman issued a press release calling on the Commission to act immediately to open an investigation against Spain, or justify its refusal to do so. The next day the Commissioner's spokesman called the allegations of conflict of interests "unacceptable" and the Commission has refused any suggestion of bias. Nonetheless, the Commission opened three investigations concerning public support in favor of seven Spanish professional football clubs.

According to the Commission, Real Madrid FC, Barcelona FC, Athletic Club Bilboa, and Club Atlético Osasuna all are said to have availed of a preferential corporate tax rate by enjoying an exemption from an obligation to convert into "sport limited companies," as would normally have been required under Spanish law. Other forms of support (including to an additional three clubs) involved an allegedly advantageous land transfer based on an inflated evaluation and various sophisticated loan guarantee arrangements.

The reaction in Spain was severe. The Spanish authorities responded with promises to defend the reputation of the clubs as integral to "the Spanish brand." Real Madrid president, Florentino Perez, labeled the investigation as a "campaign against Spanish football." Secretary of state, Miguel Cardenal, categorized it as a concerted effort by the Commission to damage Spain's image. The investigations were also dismissed as amounting to mere competitor jealousy of Spain's success on the field (though skeptics might argue that if aid has been paid, this might have contributed to that same success).

Such responses testify to the strong national and local allegiances that are often associated with major sporting teams, and the political nature of decisions to grant aid in the first instance. Assuming there is substance to the allegations, they also illustrate that aid is certainly not always notified by Member States, whether because it is not obvious that it qualified as notifiable aid, or because Member States hope that the aid will remain free from scrutiny.

V. WHAT'S NEXT?

The above cases have only recently opened and will take some time to conclude. In the meantime, the Commission will also be focusing on State Aid policy. In 2008 the Commission adopted its General Block Exemption Regulation ("GBER") creating a "safe harbor" mechanism for certain categories of aid deemed compatible with the internal market, meaning Member States could grant qualifying aid without having to notify the Commission.

In the context of the recent "modernization" of State Aid, the Commission's focus has been on renewing the GBER with a view to expanding it to cover additional types of aid, including aid to the sporting sector. The enabling provisions (allowing sport to be included in the upcoming revised GBER) provide:

> … State aid measures for sport, in particular those in the field of amateur sport or those that are small-scale, often have limited effects on trade between Member States and do not create serious distortions of competition. The amounts granted are typically also limited. Clear compatibility conditions can be defined on the basis of the experience acquired so as to ensure that aid to sports does not give rise to any significant distortion.

The Commission is therefore busy preparing and consulting on draft measures to enlarge the safe harbor mechanism to include certain categories of aid to sports. To the disappointment of many, the latest drafts would, if adopted, limit the block exemption to sporting infrastructure projects and not other types of aid; for example, concessions such as tax relief to a sporting club in poor financial health. Also, the conditions attached to the infrastructure aid being block exempted mean they will apply to a relatively narrow category of aid: (i) the facilities must be used by more than one professional sports user, (ii) they must provide for non-sports related functions, (iii) access must be given to all users, and (iv) use must be granted on a transparent and non-discriminatory basis. Pricing conditions must be objective and the amount of aid shall not exceed 75 percent of the total cost of the project.

Of course being outside the safe harbor of a block exemption does not mean that aid is illegal, it simply means it must be notified and individually justified, though this certainly adds to the burden all around.

The narrow scope of the sporting "safe harbor" (if adopted as is) would represent a missed opportunity for the Commission. As recent cases have shown, there is an appetite for more concrete statements, guidelines, and, where appropriate, block exemptions to ease the enforcement burden on the Commission. These would allow the Commission the resources to react more quickly, reduce the compliance burden on Member States, and, crucially, provide legal certainty for the clubs and other sporting interests that might be the recipients of aid.

What is at stake for clubs and their supporters is that any aid ultimately found to be incompatible with EU State Aid law would likely have to be repaid. In the football cases mentioned above, this has the potential to drive some of Europe's best known sporting teams and brands into bankruptcy. Although the law might require such an outcome, and although it might be justifiable under State Aid and economic principles, at a time of rising Euro-skepticism and financial hardship across the European Union, it could represent a spectacular political "own goal" for European enforcement policy.

This risk represents an illustration of the political danger that attends the application of EU law to sport. It should also encourage the Commission to be more ambitious in its policy development, as advance certainty regarding which types of aid are permitted will help to avert calamitous developments in an area that holds public attention like few others.

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Regulating the Credit Rating Agencies? Less Would Be More

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Regulating the Credit Rating Agencies? Less Would Be More

Lawrence J. White[1]

I. INTRODUCTION

The three major credit rating agencies ("CRAs")—Moody's, Standard & Poor's ("S&P"), and Fitch—continue to receive widespread media and policy attention. Since 2008 the Securities and Exchange Commission ("SEC") has expanded its regulation of the CRAs—partly on its own initiative and partly as mandated by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. Injured investors—primarily pension funds—have sued the CRAs. In early 2013 the U.S. Department of Justice sued S&P for fraud. All of these events have attracted substantial media attention, as do proposals for new CRAs.

The major CRAs surely wish that all of this attention would evaporate; but it is likely to persist. Their excessive optimism with respect to mortgage-related securities in the middle years of the decade of the 2000s made them important for the housing bubble of that era and then in the financial crisis that followed.

However, as many disgruntled commentators have noted, despite the heightened attention little has changed: The same three CRAs still dominate the ratings business. Their ratings—and especially downward changes in their ratings—still attract media attention and often move markets. And the same troubling business model that seemed to encourage that excessive optimism—they are paid by the issuers of the bonds that the CRAs rate—still prevails among the major CRAs and even among most of the smaller ones.

So, what needs to change? Is more regulation needed? Better regulation? Maybe less regulation? Is there a role for antitrust? After all, there are only three CRAs that dominate the ratings business—and have done so for decades. Is more competition needed? If so, how might it be created?

This essay will argue that public policy should remove the pedestal on which past policy has placed the major CRAs. Their deification should be revoked, which should allow less (but better focused) regulation and more competition.

II. WHAT DO THEY DO?

At the heart of any lending/borrowing relationship is the following question: Will the borrower repay the lender? To try to determine the answer, lenders usually gather and assess information about the borrower: before deciding whether to make the loan, and then (if the loan is made) during the time that the loan is outstanding. Some lenders are able to do this themselves; others turn to third parties for help.

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With respect to bonds—which are loan instruments between the companies or governments that borrow by issuing (selling) bonds and the investors that lend by buying the bonds—many issuers and investors have traditionally looked to CRAs for help. John Moody was the first to offer publicly available assessments—"ratings"—of railroad bonds in 1909. Other information companies—notably, Standard, Poor's,[2] and Fitch—entered the ratings business over the following 15 years. They earned their revenues by selling their ratings to investors. In modern parlance, they had an "investor-pays" business model.

The major CRAs never were and still are not the only source of creditworthiness information about bonds. Large institutional investors[3]—such as banks, insurance companies, pension funds, and various kinds of investment funds – often have the scale to support skilled in-house personnel to make the assessments. There are also smaller creditworthiness advisory firms—which may or may not describe themselves as CRAs but perform similar assessments—to which bond investors may turn. Large securities firms employ "fixed-income analysts," who provide creditworthiness assessments of bonds for their firm's investor clients, as well as for the firm's securities traders.

But, still, the three major CRAs continue to dominate the ratings area. How and why is this so?

III. SOME HISTORY

For the first few decades of the major CRAs' existence the use of ratings by investors was wholly voluntary. However, starting in the 1930s important categories of institutional investors—initially banks, and then insurance companies, pension funds, broker-dealers (securities firms), and money market mutual funds—were required by their prudential regulators to pay attention to the major CRAs' ratings of the bonds in which those institutions might invest. Thus, from the 1930s onward, the major CRAs had a guaranteed audience among prudentially regulated institutional investors for their ratings. Concomitantly, smaller creditworthiness advisory firms were at a substantial disadvantage vis-à-vis the major CRAs, since the former's views/opinions/ratings would carry less weight with those regulated institutional investors.

This arrangement was formalized in 1975, when the SEC created the category of "nationally recognized statistical rating organization" ("NRSRO"), for the purposes of designating exactly which CRAs' ratings should be heeded by the prudentially regulated financial institutions. The SEC immediately designated Moody's, S&P, and Fitch as NRSROs—which then became a barrier to entry: During the following 25 years the SEC designated only four additional CRAs as NRSROs; but mergers among the new designees and with Fitch caused the number of NRSROs to shrink back to only the original three by year-end 2000.

In the aftermath of Enron's November 2001 bankruptcy, the media discovered that the three major CRAs had maintained "investment grade" ratings on Enron's bonds until five days before that company's bankruptcy filing. In the Congressional hearings that followed, the

[2] The two companies merged in 1941.

[3] The bond markets are overwhelmingly institutional: Of all bonds that are held by U.S. entities, over 85 percent (by value) are held by financial institutions. Thus, the typical bond "investor" is (or ought to be) a professional manager of a financial institution's bond fund.

NRSRO system and the SEC's opaque administration[4] of it was aired. In response to Congressional pressures, the SEC designated a fourth NRSRO in 2003 and a fifth in 2005 but retained its opaque administration.

Unsatisfied with the SEC's response, the Congress enacted the Credit Rating Agency Reform Act ("CRARA") of 2006, which requires the SEC to establish a clear application process for firms that want to become NRSROs and a set of criteria for the SEC to use in assessing those applications.[5] Since 2006 the SEC has approved six additional NRSROs; one subsequently requested decertification, so there currently are ten NRSROs. Nevertheless, the three major CRAs have continued to dominate: As of 2012, of all of the outstanding bond ratings that were reported by the ten NRSROs to the SEC, the three major CRAs accounted for 96.5 percent of the total.[6]

One other historical event is noteworthy: In the late 1960s/early 1970s the three major CRAs changed from John Moody's "investor-pays" business model to the "issuer-pays" model that prevails today. The CRAs feared that unauthorized high-speed photocopying (which was just coming into widespread use at the time) would limit their ability to expand their revenues (similar to what digital reproduction would do to the recorded music business in the early 2000s).

IV. THE HOUSING BUBBLE, THE DEBACLE, THE ROLE OF THE CRAS, AND THE DODD-FRANK RESPONSE.

Starting in the late 1990s, the U.S. economy experienced a major housing boom—which is now recognized to have been a bubble. Helping fuel the housing bubble was the technology of mortgage securitization: the pooling of hundreds (and sometimes thousands) of residential mortgages into residential mortgage-backed securities ("RMBS")—bonds—that could be sold to investors. And helping fuel the mortgage securitization process were the favorable ratings that the major CRAs assigned to these securities.[7] As is now well known, the CRAs initially gave favorable (high) ratings to hundreds of billions of dollars of these RMBS that subsequently required substantial downgrades.

The Dodd-Frank Act included important sections that applied to ratings and the NRSROs. Recognizing that the regulatory use of NRSRO ratings was an artificial enhancer of the importance of the NRSROs, and especially of the three major CRAs, the Act eliminated all references to NRSROs in federal statutes and instructed federal financial regulators to examine and, wherever possible, remove from their regulations references to NRSROs' ratings (and concomitantly find alternative ways to achieve their regulatory goals without the use of NRSRO ratings).[8] The Act also instructed the SEC to toughen its regulation of the NRSROs themselves:

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[4] For example, the SEC had never established a formal application process or formal criteria for becoming a NRSRO.

[5] In addition, by requiring annual recertification of all NRSROs, the CRARA effectively established SEC regulatory powers over the NRSROs.

[6] However, this was down from 98.8 percent of the total in 2007. Also, in one category—the ratings of insurance companies—the three major CRAs accounted for "only" 75.5 percent of the total.

[7] More specifically, the CRAs' favorable ratings were important for the sale of "private-label" RMBS—i.e., those that were not issued by Ginnie Mae, Fannie Mae, or Freddie Mac.

[8] However, the Act was silent with respect to one major category of the use of NRSROs' ratings: the prudential regulation of insurance companies by the 50 states.

specifically, to force the NRSROs to pay greater attention to their conflict-of-interest issues (e.g., as embedded in the issuer-pays business model) and to the transparency of their rating methodologies.

V. WHAT WENT WRONG?

Why did the CRAs give such favorable initial ratings to such large amounts of RMBS? Many commentators have pointed to the issuer-pays business model of the CRAs and its obvious potential conflict of interest: Issuers can "shop around" and thereby pressure each CRA for a more favorable rating.

However, just pointing to the issuer-pays model is not sufficient. *All* of the major CRAs' ratings have been issued under this model since the early 1970s. But the CRAs' ratings in their traditional areas (corporate, municipal, and sovereign debt) didn't deteriorate in the three decades that followed, and still have not deteriorated[9] in the way that the MBS ratings clearly did. Why the difference?

Let's start with how the issuer-pays model—despite the potential conflict—could be robust: A CRA's concern for its long-run reputation should serve as a counterbalance to issuers' requests for more favorable ratings, since bond investors' eventual discovery that the CRA had acceded to issuers' pressures will cause the investors to reduce or cease their trust in the reliability of that CRA's future ratings. In turn, future issuers will cease (or be more reluctant) to engage that CRA for future bond ratings. Accordingly, if the expected gains from maintaining a reputation for accuracy exceed the expected gains from acceding to issuers' requests for favoritism, the CRA will resist those pressures.

This appears to have been the case for the major CRAs' traditional corporate, municipal, and sovereign ratings business.

However, the concerns about any organization's long-run reputation can be overwhelmed by the prospects of sufficient short-run gain. And it appears that these long-run concerns were overwhelmed in the area of RMBS ratings. Strong anecdotal evidence indicates that "rating shopping" and pressures by issuers on the CRAs occurred during the 2005-2007 period; and academic statistical studies indicate that issuers did shop for favorable ratings and also that this shopping did induce more favorable ratings.

So, why did the reputation model melt down in the latter area but not the former?

For the former: The traditional bond rating areas have thousands of issuers; no single issuer represents a significant portion of the revenue of a major CRA. This makes it easier for the CRA to resist an issuer's shopping-around threats. Further, an abundance of publicly available information is available about these issuers' finances (e.g., SEC-mandated corporate disclosures, and annual budgets and related documents for municipalities and sovereigns), so that outside analysts (e.g., those fixed-income analysts at securities firms and the smaller CRAs) could readily spot and trumpet any apparent rating deviation that would unduly favor an issuer. A CRA's

[9] Instances of sluggish downward adjustments in ratings—as for Enron—are indicative of a long-standing "cultural" tendency to adjust ratings slowly, which was present in the credit rating industry long before the change to the issuer-pays business model.

awareness of this external scrutiny and its consequences would strengthen the CRA's resistance to issuers' pressures.

By contrast, the numbers of issuers/packagers of RMBS were far fewer: Approximately a dozen issuers accounted for about 80-90 percent of the RMBS that were being issued and rated. The flows of new RMBS issuances were large, and were expected to continue to be large, and the major CRAs' margins on these RMBS ratings were considerably wider than for their traditional business. Thus, the temptations to accede to RMBS issuers' requests (and the fears of the consequences of not acceding) were substantially greater.

Reinforcing this temptation was a far more opaque information setting: Although the issuer would provide to the CRA detailed "loan-level" information about the characteristics of the underlying mortgage loans for the RMBS, the general public was provided only with summary statistics (e.g., means and ranges) for those same characteristics.[10] Accordingly, any "favors" that a CRA might do for RMBS issuers would be less likely to be discovered (as compared with the CRAs' traditional ratings), which would make a CRA more likely to accede to RMBS issuers' requests.

In sum, the market characteristics of the traditional rating areas of corporate, municipal, and sovereign bonds were (and are) such that the potential conflicts of the issuer-pays model were (and are) unlikely to be converted into actual conflicts that would undermine the CRAs' long-run reputations. But the market characteristics of the newer RMBS bonds were substantially different and more conducive to a breach of that reputation-maintenance model.

VI. WHAT IS TO BE DONE?

It is easy to understand the desire by legislators and regulators to want (figuratively) to grab the major CRAs by the lapels and shout, "Do a better job!" And the portion of the Dodd-Frank Act that instructs the SEC to regulate the NRSROs more tightly reflects that desire.

"Do a better job!" is a call for better outcomes: more accurate ratings. But the SEC doesn't try to assess the accuracy of the NRSROs' ratings; indeed, the CRARA forbids the SEC from directly influencing the content of the NRSROs' ratings as well as their methodologies and their business models. Instead, the SEC's regulation has focused on "inputs:" the transparency of a NRSRO's methodology and rating results, and efforts to address any conflicts of interest. This focus on inputs rather than outputs is, at best, an indirect way of achieving the goal of improved accuracy of ratings.

Further, regulation of this sort will bear more heavily on the smaller NRSROs, since there are substantial fixed costs of compliance. This could make it harder for smaller NRSROs to compete and discourage other creditworthiness advisory firms (which tend to be small) from applying to become NRSROs. A potential irony of such regulation is that *the relative importance of the three major CRAs could increase* as a consequence of the SEC regulation.

In addition, such regulation is likely to discourage innovation: in rating methodologies, technologies, and possibly even business models. This would be true for at least three reasons:

[10] To make the setting even more opaque: The "shopping-around" by issuers focused on the fraction of a RMBS's tranches that would be rated "AAA."

First, such regulation often has difficulties in dealing with firms that have new ideas; they often don't fit the "boxes" that regulation usually creates. Second, entry is often the vehicle for innovative ideas, and entrants are often small; but, as discussed above, the SEC regulation bears relatively more heavily on smaller firms. Finally, the Dodd-Frank Act's required transparency may discourage the development of new methodologies if their development is costly but their proprietary advantage is lost because of that required transparency.

There is a better way: That way should emphasize more competition.[11] It thus has the spirit of antitrust, although direct antitrust measures aren't needed.

It starts with the other part of the Dodd-Frank Act that dealt with CRAs: the elimination of financial regulators' blind reliance on the NRSROs' ratings. This elimination would open the field to more creditworthiness advisory firms that can attract the attention of more issuers and institutional investors.[12]

In this respect, the Dodd-Frank Act was a good start but too timid. Although some regulators have made the transition, others have been tardy. The Congress needs to prod the tardy agencies to speed their efforts—and also to convince state insurance regulators that they too must cease blindly relying on the NRSROs.

Next, if regulatory reliance by financial regulators on NRSROs is eliminated, then the NRSRO category and the SEC's regulation of the NRSROs can be eliminated. Recall that the bond market is dominated by institutional investors. Professional bond managers should be able either to gather their own creditworthiness information about bonds or to be able to make informed decisions as to who is a reliable third-party provider of such information.

With regulatory reliance and the NRSRO system eliminated, *competition* among creditworthiness advisory firms would be freed in a way that surely has not been true for almost 40 years—or, arguably, almost 80 years. And, in addition to the current inventory of such firms, some of the fixed-income analysts at securities firms that have established reputations for themselves might feel more encouraged to "hang out their own shingles" and provide more competition as freestanding entities.

A more competitive environment is unlikely to lead to large changes in market shares quickly. A reputation-based market is likely to move slowly—especially since the major CRAs' reputations in their traditional ratings areas are largely intact. Nevertheless, it would be an important start.

Finally, the issue of the ratings of RMBS does deserve more attention: Following (and because of) the debacle of 2007-2008, "private-label" RMBS issuances have been largely absent from the bond market. If and when such RMBS do re-enter the market, the structural features that encouraged the meltdown of the reputation model for the CRAs—notably, the fewness of

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[11] Some commentators have noted that more CRA competitors would give issuers more opportunities to shop around for favorable ratings. However, this negative view overlooks the positive role of competition, including entry, in encouraging innovation. Also, in the more open context that is discussed below, professional bond managers and prudential regulators can be expected to be more wary of the shopping-around phenomenon.

[12] Financial regulators will still want to ensure that their regulated institutions can justify their sources of information and aren't relying on flim-flam entities.

issuers, and the opaqueness of information—require some attention. With respect to the former, professional bond managers (after the debacle) will surely be more wary of CRAs that employ the issuer-pays business model for these types of bonds; similarly, prudential regulators should definitely be reminding their financial institutions of the potential dangers.

With respect to the opaqueness of RMBS information, the SEC partially addressed the issue in 2009 by requiring that any NRSRO that has been hired for a RMBS rating must make the detailed loan-level information available to any other NRSRO that requests it. However, the SEC was too timid and placed too many restrictions on this process. Instead, the SEC should mandate that all such information should be available to the general public and not just to a category of CRAs. By doing so, the SEC would bring RMBS information disclosures into harmony with the SEC's general regime of widespread dissemination of material information for publicly traded companies. And this would add more potential critics who could "look over the shoulders" of any RMBS raters, which should help reinforce the reputation-maintenance model.

VII. CONCLUSION.

The question of how to deal with the major credit rating agencies is important and complex—and is not going away soon. Neither of the "easy" answers—"more regulation" or "no regulation"—is satisfactory.

Instead, more—and more effective—competition, along with less (but better focused) regulation would provide a better policy route.

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Too Much of a Good Thing?: Is Heavy Reliance on Leniency Eroding Cartel Enforcement in the United States?

Megan Dixon, Ethan Kate, & Janet McDavid

Hogan Lovells LLP

Too Much of a Good Thing?: Is Heavy Reliance on Leniency Eroding Cartel Enforcement in the United States?

Megan Dixon, Ethan Kate, & Janet McDavid[1]

I. INTRODUCTION

The United States Department of Justice Antitrust Division's leniency program has seen unparalleled success over the past two decades as one of the most effective law enforcement tools available to identify and prosecute international cartels. Leniency has been the key driver in facilitating the Division's takedown of cartels of a magnitude and longevity previously not contemplated by most in the competition field.

Twenty years into its regular use of this powerful tool, however, questions have begun to emerge about whether the Division is relying too heavily on the leniency program, to the detriment of some of its overall enforcement goals. Does dependence on leniency as the cornerstone of one's regime have unforeseen or, at least, undesirable consequences? Should leniency programs play different roles in emerging, established, and sophisticated regimes? Has the success of the leniency program become a bit of crutch? Has the Division's seeming obsession with ever-increasing statistics on the number of dollars fined or of foreign nationals jailed caused it to lose sight of some other important goals? Is it time for the Division to assess critically whether a larger percentage of its resources should be devoted to attempting to detect and prosecute violations that come to its attention via other avenues such as targeted community outreach and econometric market analysis?

Answers to these questions may depend, to some extent, on what you believe makes a cartel enforcement program successful. It seems fair to say that the Antitrust Division has taken the position that Big Is Good. And we wholeheartedly agree that it is in large part the shocking size—in every respect—of some of the cartels prosecuted as a result of the leniency program that have made the U.S. enforcers world leaders in competition policy, and that significantly changed the face of global cartel enforcement just as the "global economy" became a reality.

It is hardly surprising that combining an extremely successful and highly visible program with dwindling resources has led the division to rely heavily on the leniency program over the past couple of decades, and thus its focus on massive international cartels brought in through the leniency program has also made sense. That focus brought significant attention to the harms caused by cartels, thereby propelling cartel enforcement into a previously unknown world spotlight. And, unquestionably, in a gross economic sense blockbuster cartels do more harm than smaller, domestic cartels do.

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But we are not convinced that at this point in the U.S. regime's development, the Division should continue to focus the vast majority of its resources on these blockbuster cartels. We are not unaware of, or unsympathetic to, the severe resource constraints the Division currently faces, nor do we suggest that the Division has not pursued and had impressive success outside the leniency-generated blockbuster cartel space. We are simply suggesting that it may be time to take a fresh look and potentially reallocate some scarce resources to other components of the U.S. competition enforcement program.

II. THE RISE OF THE LENIENCY MODEL

According to the Antitrust Division's own statistics, 20 years ago more than 90 percent of the Division's cases were generated through old-fashioned investigation techniques like community outreach; customer, competitor, or employee complaints; economic analysis of markets, bidding, or pricing patterns (often referred to as "screens"); or other forms of proactive investigation. And although the Division has had a leniency program since 1978, prior to the mid-90's it was, according to former Deputy Assistant Attorney General Scott Hammond, "rarely utilized," and responsible for zero detections of an international or even a large domestic cartel.[2]

What changed in the early to mid-90s? The Division overhauled its leniency policy, making it more accessible and increasing incentives for companies considering self-reporting. Between then and now, the 90/10 numbers have flipped completely, and then some. Again according to Hammond, by 2010 the leniency program was responsible for more than 90 percent of the criminal fines imposed in antitrust cases.[3]

Key components of the Division's modern leniency program are the "Amnesty Plus" and "Penalty Plus" provisions. Amnesty Plus applies when a company implicated in a cartel investigation discloses previously undetected antitrust offenses involving a different cartel. This disclosure affords the company significant benefits as to its penalty in the first offense, and amnesty as to the second. Amnesty Plus induces companies to clean house, and for those who fail to do so, there is Penalty Plus, under which the Division may recommend sentences above the Sentencing Guidelines range for those same offenses. Amnesty Plus is responsible for at least half of the Division's cases over the past decade.

The Division has created other incentives for potential leniency applicants as well. In 1996, a Memorandum of Understanding ("MoU") between the DOJ and immigration authorities was implemented that makes Sherman Act violations "crimes of moral turpitude" and thereby subjects foreign nationals convicted of antitrust crimes to a 15-year ban from the United States. But the MoU provides for a waiver of the ban for individuals who forego jurisdictional arguments and come to the United States voluntarily and plead guilty. This naturally creates a strong incentive to cooperate for individuals who want, or need, for their employment to continue to travel to the United States. And because the ban does apply to individuals who voluntarily come to the United States to stand trial, some have argued that this agreement

[2] Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, *The Evolution of Criminal Antitrust Enforcement Over the Last Two Decades*, Remarks Presented at the 24th Annual National Institute on White Collar Crime 2 (Feb. 25, 2010), *available at* http://www.justice.gov/atr/public/speeches/255515.htm.

[3] *Id.* at 3.

unfairly pressures foreign defendants to plead guilty rather than exercise their right to challenge the Division's evidence at trial.

In 2004, the Division won another victory on the leniency front with the passing of the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA"), which was intended to increase the criminal penalties for antitrust violations as well as the incentives for participating in the leniency program. Under ACPERA, maximum fines for corporations increased from $10 million to $100 million, while fines for individuals increased from $350 thousand to $1 million. Additionally, maximum prison sentences for individuals were increased from three to ten years.

ACPERA also further incentivized leniency applicants by reducing potential damages owed to civil claimants and eliminating both treble damages and joint and several liability for successful applicants. Extended for an additional ten years in 2010, ACPERA now also includes a "timeliness" requirement for leniency applicants to assist civil claimants.

III. DOWNSIZING THE DIVISION

While it could fairly be argued that the Division has always been under-resourced relative to the value it creates and the importance of its mission in a free market economy, its resources problem has only become more acute in the past few years, despite its investigations increasing in both frequency and scale. Post-2008 budgets have shrunk, Division employees have been furloughed, and hiring has been frozen. And after the Division closed four field offices in January 2013, its cartel enforcement team was slimmed down by more than 30 percent.

IV. EMERGING CRITIQUE

There is widespread agreement that an effective competition enforcement program should both detect and deter cartel behavior. The principal criticism of leniency as the most heavily relied upon tool in such a program is that its detection component is almost purely reactive, and, standing alone, its deterrent potential may be lower than many forms of proactive investigation, such as market monitoring and outreach and training programs.

The Division has long held, a "prerequisite to building an effective amnesty program is instilling a genuine fear of detection."[4] True. But some would argue that a regime wherein cartelists may fear being exposed by their co-conspirators in exchange for leniency, but where they face no real danger of otherwise being detected, is lopsided and thus less effective both as a detector of and a deterrent to bad behavior than if resources were more evenly allocated between deterrence and detection.

The reactive approach to enforcement exemplified by a very heavy reliance on leniency and a bias toward blockbuster cartels may be leaving a wide gap where cartel behavior is likely to continue unabated by those who review the statistics and decide they are at low risk of detection. This may be especially true as to smaller or domestic cartels. If cartel enforcement is simply all about huge numbers, perhaps this is acceptable. But in these difficult economic times, those smaller cartels—while undisputedly having a lesser impact on the global economy—may have

[4] Scott D. Hammond, Director of Criminal Enforcement, Antitrust Div., U.S. Dep't of Justice, *Cornerstones of an Effective Leniency Program*, presented before the ICN Workshop on Leniency Programs (Nov. 22-23, 2004), *available at* http://www.justice.gov/atr/public/speeches/206611.pdf.

more harmful direct effects on their victims. Take as an example a comparison between the following: a global automobile cartel fixes the price of a part that increases the cost of every car sold over a 5-year period by ten dollars. Let's say for simplicity there are 100 million cars sold during the period. That's a lot of cumulative overcharge! But does paying $10 more for a car have much effect on the individual victims, who would likely purchase only one car in that period? Probably not.

Take, on the other hand, a domestic dairy products cartel wherein the cartelists agree to increase the prices of milk, yogurt, ice cream, and cheese by 40 percent at all military PXs in the western United States. Regardless of how much those military families in Idaho and Colorado may like cheddar, undoubtedly the volume of commerce—and the effect on the global economy—would be exponentially lower. But the effect on those military families is likely to be significantly more acutely felt than would be paying $10 more for a new car every five years.

Even participants in a blockbuster cartel may decide that they are unlikely to be detected because, for example, their cartel is so profitable that none of the conspirators is likely to self-report. In a leniency-dependent system, this cartel may not surface until it becomes less profitable and falls apart, such that many of the cartels that are "detected" in this fashion may actually be old news.

A focus on historic cartels also poses a risk that the Division will be too late to prosecute culpable parties. Following the Second Circuit's recent decision in *Grimm*,[5] courts may require very specific kinds of overt acts in furtherance of a conspiracy to toll the statute of limitations. Payments received merely as a result of a conspiracy may be insufficient to extend the duration of the conspiracy for statute of limitations purposes. In a reactive regime, participants may be unlikely to come forward—even where a previously successful cartel is no longer profitable—when they can instead wait it out for the statute of limitations to pass, thereby avoiding a costly investigation related to a leniency application. While the Division has worked to incentivize leniency applications, *Grimm* may at least give prospective applicants pause before coming forward.

Overreliance on leniency also has the potential to seriously over-punish those who operate in an industry that is currently on the Antitrust Division's "hot list," especially where many of the conspirators are incentivized by Amnesty Plus to continue to try to offer more and more information on other alleged cartels to curry favor with the Division and collect cooperation credit, and perhaps also to harm their competitors in the process. Not infrequently, much of the "additional" conduct that is offered up, even if technically a violation, is fairly old, fairly marginal, has weak evidence, or has some combination of those problems. Should the Division be spending its scarce resources on those kinds of cases? We would argue no, but the current leniency-dependent model encourages this result.

In Congressional hearings held in November and December 2013, the United States Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights questioned whether the Division has become overly reliant on its leniency program to generate cases. In particular, the Senators expressed concern as to whether the leniency program and the big dollar,

[5] *United States v. Grimm*, No. 12-4310 (2d Cir. 2013).

low-hanging fruit cases have been unfairly diverting attention from other enforcement tools and goals, leaving the smaller, less sexy cases unaddressed.

In January of this year, Frédéric Jenny, the chairman of the OECD's Competition Law and Policy Committee, and a judge at the Supreme Court of France, stated that there is no evidence that increased enforcement or more leniency applications have decreased cartel behavior. Jenny acknowledged that more enforcement has resulted in a larger number of cartels being detected, but noted that some of the latest investigations concern recently active cartels, which he believes shows that the methods competition authorities have been employing to detect and prosecute are not effectively deterring cartel behavior.

In support of his conclusion, Jenny and others[6] have pointed to the investigations into LIBOR, Euribor, and auto parts, all of which are recent, massive, and widespread cartels, but which were identified through self-reporting by leniency applicants—not through enforcers' independent investigative efforts. Jenny concluded that given their size and reach, and the fact that industry analysts had questioned the operation of some of these markets long before the investigations began, it was "quite extraordinary that the[se cartels] went unnoticed, which probably shows that the screening of markets is not sufficiently used."[7]

V. CONCLUSION

The Antitrust Division's leniency program is by all accounts a model for others around the world. It has served the Division supremely well in its cartel-cracking mission for twenty years. But too much of this good thing may be bad for the Division's long-term health. Over-reliance on leniency to prevent and detect arrangements that are axiomatically tight knit and secret is particularly dangerous because it relies on characteristics that are anathema to the wrongdoing that it seeks to address.

Cartels may be among the least obvious examples of conduct likely to be deterred solely by relying on someone coming clean in the hope of leniency, which is why enforcers also need to be out there actively employing other tools to look for violations at the same time. Therefore, the Division should be mindful that relying too heavily on leniency may be detrimental to its overall goal of decreasing harmful cartel activity in the United States and across the globe. Thoughtful consideration of the program in light of the current global economic situation and the Division's own enforcement goals may suggest that some reallocation of resources and/or careful prioritization of pursuits is warranted.

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[6] *See*, e.g., Rosa M. Abrantes-Metz & D. Daniel Sokol, *The Lessons from LIBOR for Detection and Deterrence of Cartel Wrongdoing*, 3 HARV. BUS. L. REV. 10 (2012).

[7] *See Cartel activity worldwide has not dropped despite harsher enforcement – OECD Competition Committee chairman*, 6 January 2014, Policy and Regulatory Report.

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On the Relationship Between Media Plurality Legislation and Competition Law

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On the Relationship Between Media Plurality Legislation and Competition Law

Martin Cave[1]

I. INTRODUCTION

Recent events in the United Kingdom, including the furor surrounding the newspaper "phone hacking" scandal which led to the Leveson report,[2] have focused attention on possible new legislation concerning media plurality. These events follow an inquiry in the European Union that is longer lasting but less likely to bear legislative fruit.[3] Broad questions are raised in these debates, but the focus here is upon the relationship between legal provisions for media plurality and competition law and, in particular, upon such questions as:

- To what degree does competition law include consideration of media plurality issues?
- To what degree can competition law be expected to promote the goals of media plurality?
- Are measurement approaches used in competition law likely to be of help in measuring plurality?
- To what degree are there similarities between remedies applicable under competition law and remedies applicable under actual or prospective plurality legislation?
- Does the process by which competition law has been enacted and grown to maturity have any lessons for a similar development in the area of the case of media plurality?

Although some of these questions are of general application, others can only be answered within the context of a particular country's legal system. In the present article, that country is chosen as the United Kingdom.

II. CURRENT U.K. COMPETITION LAW AND MEDIA PLURALISM RULES

Until recently, the general test applied by U.K. competition authorities in implementing the law was a public interest one. This went back to the original Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, which left the task of defining that public interest to the relevant authority. This practice was followed in the Fair Trading Act 1973, although in 1984 the then government enunciated the so-called Tebbit doctrine, which stipulated that henceforth merger references to the competition authorities would primarily be made on competition grounds.[4]

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[1] Imperial College Business School and the U.K. Competition Commission. The views expressed here belong to the author alone, but he is grateful to Richard Collins for advice and comment.

[2] LORD JUSTICE LEVESON, REPORT INTO THE CULTURE, PRACTICES AND ETHICS OF THE PRESS (November 2012).

[3] *See* R. Collins & M. Cave, *Media pluralism and the over-lapping instruments needed to achieve it*, 37 TELECOMMUNICATIONS POL'Y 311-320 (2013).

[4] http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/our_role/speeches/pdf/freeman_singapore_15010, p. 3.

The focus on competition was embodied formally in the Enterprise Act 2002, which defined public interest cases as an exception to the general rule of determining cases on competition grounds, expressly identifying national security as a public interest issue—to which media plurality and financial stability were subsequently added. In such cases (and only in such cases), the final decision would rest with the Secretary of State and not the competition authority.[5]

The principal media plurality case carried to a conclusion under the Enterprise Act arose when BSkyB, the satellite pay-TV company, bought 17.9 percent of ITV, the U.K.'s main free-to-air advertiser-financed station. The U.K. Competition Commission found that the proposed acquisition did not trigger plurality concerns but did raise competition concerns.[6] The Secretary of State supported these decisions and endorsed the remedy, which was that BSkyB should be required to sell down its stake to 7.5 percent.[7] Then, in 2010, News Corporation sought to acquire the remaining shares in BSkyB. But the offer was withdrawn in 2011 before a reference to the Competition Commission could get under way.

The Employment and Regulatory Reform Act 2013 made certain minor changes to these arrangements, but left them largely intact.

Several decades before these events, the U.K. Parliament enacted a great deal of separate legislation limiting ownership or cross-ownership of broadcasting and other media. These have now shrunk to a restriction on the combined ownership of more than 20 percent of an ITV license and of national newspapers with a more than 20 percent market share.

Since 2011, radical proposals have been put forward for additional legislation to preserve or enhance media pluralism. These have included, from the U.K. Labour party, a proposal for a limit on a single firm controlling more than 30 percent of newspaper circulation or more than 15 percent of ownership of the media as a whole.[8] Rather than evaluating these proposals, the present article focuses on the relationship between media plurality and UK competition law.

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[5] The EU Merger Regulation ((139/2004/EC) also contains a provision for media mergers with a community dimension to be considered in Brussels for the competition test; it also permits Member States to take measures to protect "legitimate interests" including media plurality.

[6] Competition Commission, Acquisition by British Sky Broadcasting Group plc of 17.9 percent of the Shares of ITV PLC, 2007. The test in the Act is to satisfy "the need, in relation to every different audience in the United Kingdom or in a particular area or locality of the United Kingdom, for there to be a sufficient plurality of persons with control of the media enterprises serving that audience."

[7] *See,* Final decisions by the Secretary of State for Business, Enterprise & Regulatory Reform on British Sky Broadcasting Group's acquisition of a 17.9% shareholding in ITV plc (29 January 2008), *available at* http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/inquiry/ref2007/itv/pdf/sky_berr_decision.pdf .

[8] http://www.theguardian.com/media/2013/jun/13/harriet-harman-media-ownership. An interesting account of the operation in the Netherlands of a rule of this kind based on newspaper circulation can be found in A. W. Hins, *Plurality of Political Opinions and the Concentration of Media*, accessed on SSRN. A report on media plurality (to which the present author gave evidence on which this article is based) has also recently been published by the House of Lords Communications Committee, Media Plurality, 2014, *available at* http://www.publications.parliament.uk/pa/ld201314/ldselect/ldcomm/120/120.pdf

III. DIFFERENCES BETWEEN COMPETITION LAW AND MEDIA PLURALITY RULES

Both the main terms in the above heading ("competition" and "plurality") are subject to multiple interpretations: especially the latter. For the present purposes, a definition of plurality borrowed from Ofcom is useful: plurality entails i) a diversity of viewpoints, and ii) the prevention of one media owner having too much influence.[9] These are not the same, of course. It is possible to conceive cases of "internal pluralism," in which a single media outlet or a group of co-owned outlets espouses radically different points of view—though this would carry the obvious risk that the firm might adopt a new business policy that would lead to ideological uniformity. As the discussion below shows, it becomes important to decide how to handle such cases—in other words to decide whether the two requirements noted above are alternatives or are cumulative.

The three conventional dimensions of media plurality are: the availability of, consumption of, and impact of, media outlets.[10] Of these the first, though important as a precondition, does not seem related closely enough to either of the above-noted notions of pluralism, for the obvious reason that available media which few consumers choose to consume are unlikely to add to diversity or to impinge upon a dominant owner's influence. Equally, the impact or influence of a firm's media outlets on consumers, though an excellent yardstick in theory, is exceptionally difficult to measure.

It is a problem with consumption measures of pluralism that, usually, they are made only in aggregate terms, neglecting the structure of an individual's consumption. Half the population being exposed to A and the other half to -A is less "pluralistic" than the whole population being exposed on a smaller scale to both A and -A. But taking individual multi-sourcing into account is complex.

Competition law, by contrast, is concerned with the presence or absence of constraints on a firm's capacity to exploit its customers or exclude its competitors in a market. In some circumstances, an important constraint can be provided by the presence of successful rivals for customers' spending; in others, exploitation can be deterred by the mere potential availability of substitutes. The focus is less on consumption than on availability of products on level terms. If the bulk of customers faced with an unconstrained choice opt for one option, this is not a problem in itself, although it may become so if the supplier attains and abuses a dominant position. While many people believe that high market shares are automatically a major competition problem, modern competition law does not take this view, even as it recognizes that large market shares can create opportunities for abuse.

In competition law, what determines the set of alternatives to which priority is given in the analysis is, broadly, consumers' behavior in the face of the options available. It is substitution between options by the totality of individual consumers which defines the market within which most of the analysis is conducted. This bottom-up method sits in contrast with pluralism discussions, where it is normally the assessor (e.g. the relevant regulatory authority) that decides top-down which media products to "count." In future, some method of induction from

[9] Ofcom, *Measuring Media Plurality*, 8 (June 2012).

[10] *Id.* at 17.

consumer behavior might take over from this top-down approach, but since the currency of pluralism is not dollars of expenditure but consumption of opinions, developing such a process would prove difficult.

The relationships among quantities, quality, and impact operate differently in the market place for goods and the marketplace for ideas. A high quality product can have an impact disproportionate to its level of consumption, with volume measures failing to capture its effects (think of the iPhone). In competition law quality differences can partly be captured in market shares by value. To adopt a similar approach in relation to plurality, quality/enhanced impact effects would have to taken into account in some way.

In short, the discussion so far suggests the presence of two mechanisms which operate with different goals and yardsticks: a consumer welfare standard in the case of competition law, and a variegated consumption standard in the case of pluralism. We return to the question of the congruence of these concerns after a digression into measurement of media pluralism.

IV. ARE THERE ANALOGIES IN MEASUREMENT?

Two key competition law concepts are "dominance" (the ability to behave to an appreciable extent independently of customers and competitors) and "substantial loss of competition" or "SLC" (used to appraise mergers). The indicators underlying a judgement of dominance are many, including market share of the candidate dominant firm(s), changes in share, countervailing buyer power, etc.

There is no generally accepted percentage threshold that establishes dominance. This reflects the more general proposition that competition law analysis focuses not on share but on absence of constraint; and, in some circumstances, firms in highly concentrated markets can constrain one another most effectively. Hence, as noted above, competition law does not look unfavorably on a large market share won "on the merits." It is the process by which such market shares are gained or protected which usually comes under scrutiny.

In Ofcom's view, plurality focuses both on the conduct of rivalry and on the outcome, as it requires i) the prevention of one media owner having too much influence and ii) a diversity of viewpoints. If it were the case that influence is a zero sum game, so that proprietors are competing for a fixed quantum of influence, then plurality would depend upon different firms' **shares** of relevant impressions, and be independent of the absolute level of media consumption.

It is hardly surprising that it is impossible to capture in a single number the multi-dimensional complexity of the structural conditions and behavioral factors inherent either in a competitive market or in a pluralistic media universe. Merger policy in some jurisdictions sometimes uses the Hirschman-Herfindahl index ("HHI") as a summary statistic describing the distribution of firm size in the relevant market. This is calculated by taking the square of each firm's market share and adding up the sum of the squares. It ranges for 0 in perfect competition to 10,000 (100 squared) in a monopoly. As the index can be calculated over a series of years, comparison over time is possible.

In purely economic terms, under certain not very plausible conditions, it can be shown that the profit margin (more exactly, the mark-up over marginal cost) varies in direct proportion with the HHI.[11] It should be recognized that the HHI gives (by its "market share squaring" procedure) an enhanced weight to large firms and to increases in the share of large firms. However, the HHI (or changes in the HHI) is used in competition analysis at most as a screen to decide whether further analysis of a merger is needed, not to settle the question of whether the merger should be cleared, which requires consideration of a multitude of indicators.

Because it captures the overall spread of consumption, the HHI may seem more useful as a plurality measure.[12] However, it does not capture the range of views available. In a market, product homogeneity can sharpen competition. In small numbers markets, there may also be tendencies towards either convergence of rivals' product characteristics or the proliferation of brands by a single firm seeking to deter entry by a competitor. [13]

Casual observation suggests that while commercial media companies differentiate their products by the age, affluence, and gender of the consumer, even when (like newspapers in the United Kingdom and broadcasters and newspapers in the United States) they are free of impartiality rules, they do not seem to pursue a general policy of proliferating viewpoints on the same issue—that is, they do not generally display internal plurality. It is not clear what is the purely commercial motive for this absence of full internal diversity, nor whether its origin lies with the demand or the supply side.

In summary, there seems to be some role for the HHI as a measure of plurality, even if its use in the enforcement of competition law—for which it was designed—is now limited. However, a separate check would have to be made on whether the various media firms are, individually or collectively, promulgating different viewpoints.

V. THE CONGRUENCE BETWEEN COMPETITION LAW AND PLURALITY GOALS

It was noted above that competition law and media plurality rules have different objectives. At the broadest level, they are both concerned with monopoly but in different senses of the word—the one with control of the commercial market place, the other with control content.

It may be helpful to visualize the relationship in terms of a simple Venn diagram. The left hand circle in Figure 1 contains the universe of media activities captured by a chosen pluralism measure in which competition problems may be detected. The right hand circle contains those media activities in which plurality issues may be considered to arise. Firms in areas A and C can

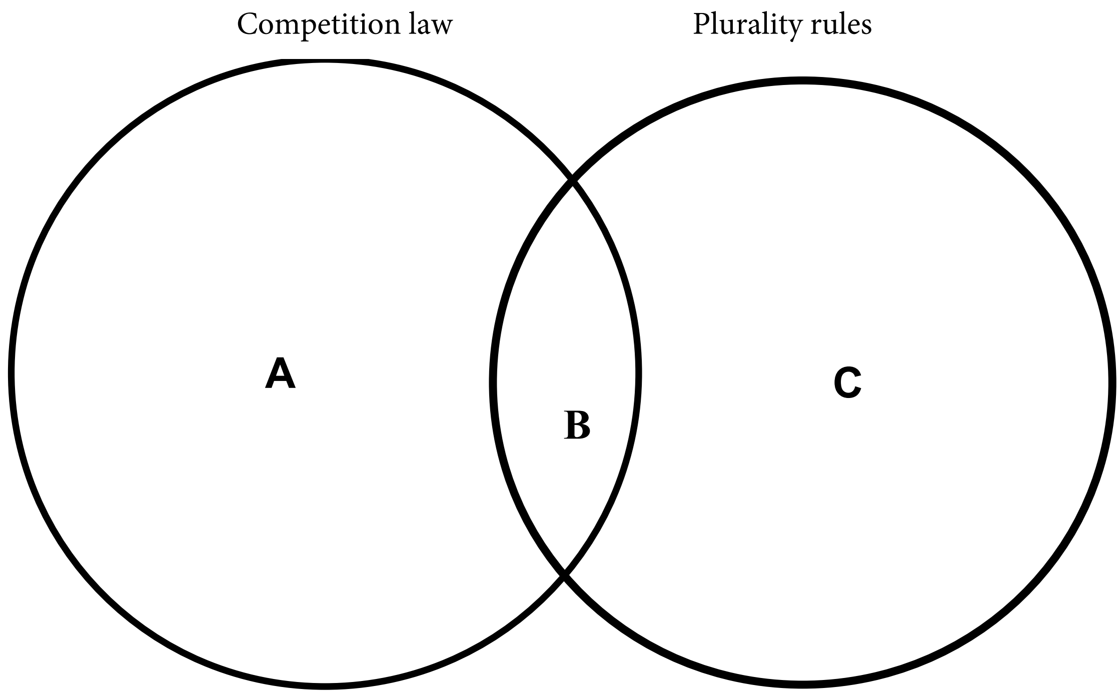
[11] This provides a weak economic justification of the formula. *See* P. BELLEFLAMME & M. PEITZ, INDUSTRIAL ORGANIZATION: MARKETS AND STRATEGY 58-59 (2010).

[12] As discussed in op. cit., *supra* note 3.

[13] As a famous illustration of the tendency for (spatial) convergence, consider two ice cream sellers offering the identical product to a group of customers sun-bathing on a beach, with each person buying one ice cream from the nearest seller. The two competitors will end up back to back in the middle of the beach. (This is the only stable outcome as otherwise one of the sellers could take business from the other by moving to face the majority of bathers.) Similar arguments are used to explain why two political parties may both end up in the middle ground. Proliferation of offerings in the product space seems to be popular in some context, such as detergents, pet food, and mobile phone tariffs.

comfortably be investigated under their relevant statutes. But what about area B, where both arise?

Figure 1:



The general principle governing policy interventions is that if there are two objectives—the maintenance of competition and of plurality—then two instruments are needed;[14] only by a fluke, where the same intervention happened to work with equal success on both objectives, would one instrument be enough. Is that situation likely to arise?

Consider the following possibilities:

1. A media firm dominates the sector and behaves in an anticompetitive fashion to exploit consumers and exclude rivals; its proprietor enforces a single ideology on all outlets: this case sits in area B in figure 1;
2. As in 1) above, but the strong position of the successful firm has been won "on the merits": area C in figure 1;
3. As in 1) above, but the firm does not impose a uniform ideology, practicing internal pluralism: this case sits in area B in figure 1, unless internal as well as external pluralism is counted in the pluralism assessment;
4. There are two media firms, each enforcing the identical ideology on its outlets, but they compete vigorously in commercial terms: area C in figure 1, unless separate ownership is considered enough by itself to avoid the charge of lack of pluralism.[15]

[14] J. TINBERGEN, ON THE THEORY OF ECONOMIC POLICY (1952).

[15] To simplify, this situation characterized the U.K. newspaper industry in 1931, leading the then Conservative leader, Stanley Baldwin, to rail against the two proprietors of the leading newspapers in the following way: "The

Outcome #1 fails under both heads, leading to a situation in which correction of both defects may be amenable to the same divesture remedy (discussed below). In Outcome #2 the competition test is passed but the plurality test is failed. Moreover, a divestment measure to achieve pluralism would deprive the firm in question of rewards to which, under the competition regime, it would be entitled. In Outcomes #3 and #4, the key question is whether the two limbs of the plurality test (diversity of viewpoints and no excessive control by one firm) are both required, or whether the first or the second alone will suffice to satisfy the plurality rule. The same issues arises in Outcome # 4; there is no excessive control but also uniformity of viewpoint.

It is thus clear that competition law goals and plurality rules can be congruent, but can equally be opposed. Thus there is no single silver bullet that can, in all cases, solve both problems.

VI. ARE THERE ANALOGIES IN REMEDIES?

In the United Kingdom, the repertoire of competition law interventions has three components.[16] The first, antitrust, deals with anticompetitive conduct, such as abuse of dominance or illegal agreements. The second deals with mergers, using the standard of whether a proposed merger will lead to a substantial lessening of competition.

The third, which is confined to the United Kingdom and a small number of other countries, permits market investigations, which seek to establish if there are features in a market that have an adverse effect on competition. If so, the authority can remedy them. Here the focus is not on the behavior of one firm but on the overall functioning of the market under investigation. This mechanism gives the authority a purchase on a situation where there may be no merger and no abuse under antitrust law, but a situation in which the market is not operating to the benefit of end users.

Antitrust remedies include fines. In the case of mergers, remedies range from prohibition to acceptance of undertakings. These remedies quite often involve divestment and may also include behavioral commitments. The firms involved presumably want the deal to go ahead, so tend to co-operate once their other legal options have been exhausted. Remedies available in market investigations can also be either behavioral or structural, including divestments.

A key issue for plurality legislation (not considered here) is whether it kicks in only in the case of a merger, or whether an examination of plurality, with application of possible remedies, can occur even in the absence of a proposed combination—say at regular intervals, or triggered by another event.

In either case, it is not fanciful to imagine a similar range of remedies being employed in pursuit of plurality goals as are now employed in the case of competition law. In the case of

newspapers attacking me are not newspapers in the ordinary sense," Baldwin said. "They are engines of propaganda for the constantly changing policies, desires, personal vices, personal likes and dislikes of the two men. What are their methods? Their methods are direct falsehoods, misrepresentation, half-truths, the alteration of the speaker's meaning by publishing a sentence apart from the context...What the proprietorship of these papers is aiming at is power, and **power without responsibility – the prerogative of the harlot throughout the ages."** (emphasis added).

[16] There is a fourth, enforced by the European Commission—State aids. It is worth noting that public subsidy or enforced cross-subsidy is an additional measure which can promote plurality. This is discussed in Collins & Cave, *supra* note 3.

mergers, this might include an outright prohibition of the merger, or the acceptance of undertakings to maintain plurality in the place of prohibition—both of which have been used in the U.K. media pluralism context.

Such undertakings might include partial divestment or a behavioral remedy. While in competition law such a behavioral remedy sometimes includes control over prices, in a plurality context it might involve arrangements to prevent the owner from imposing a particular editorial policy on the media outlet. Thus, in 1981, as a condition for not referring the acquisition by Mr. Murdoch's News International of the *Times* and the *Sunday Times* to the then U.K. competition authority (the Monopolies and Mergers Commission), the Government imposed conditions on the acquirer relating to the maintenance of editorial independence by the newspapers' editors.[17] (It is a separate question whether such measures are effective.)

The divestment remedy is quite widely utilized in U.K. competition law, and guidelines have been prepared for its use.[18] These identify various risks to the attainment of the divestiture objectives that should be avoided—notably (i) the risk of choosing a divestiture package that would not create an effective competitor, (ii) the risk of sale to a weak or ineffective purchaser, and (iii) the risk of deterioration of the assets to be divested before the sale. In relation to the purchaser, broad criteria are set out: the purchaser should be independent of the seller, be capable and committed to the relevant market, and not be subject to competitive or regulatory concerns.

These concerns are likely to be as pertinent in the case of divestment imposed as a remedy to maintain plurality as they are in the case of a remedy to restore or enhance competition.

VII. WHAT IS THE RELATIONSHIP BETWEEN COMPETITION AND PLURALITY LEGISLATION AND ENFORCEMENT?

Competition law developed gradually in the United Kingdom in the post-war period. There are legislative landmarks such as the U.K. Monopolies and Restrictive Practices (Inquiry and Control) Act 1948, the Fair Trading Act 1973, the U.K. Competition Act 1998, the Enterprise Act 2002, and the Employment and Regulatory Reform Act 2013. Membership of the European Union from 1973 brought with it the competition articles of the Treaty of Rome. There have also been vital U.K. and European Court judgments such as the 1977 definition of dominance by the European Court of Justice, and important changes in administrative practice. A recent development applicable to plurality discussions is using behavioral economics to better understand customer choice and craft remedies.[19]

There have also been innovation failures, including attempts to define a "bright line" market share standard for dominance. The development process is Darwinian in nature, with

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[17] HAROLD EVANS, GOOD TIMES, BAD TIMES Chs. 7-10 (1983).

[18] Merger Remedies: Competition Commission Guidelines, 17-23 (November 2008); Competition Commission, Guidelines for market investigations: their role, procedures, assessment and remedies, 91-97 (April 2013).

[19] *See* BEHAVIOURAL ECONOMICS IN COMPETITION AND CONSUMER POLICY, (Judith Mehta, ed., 2013) *available at* http://competitionpolicy.ac.uk/documents/107435/4503876/CCP+economics+book+Final+digital+version+-+colour.pdf/fca104c5-1248-4e7f-87b7-c9ac57f575b0. It is worth noting, however, that some of the concepts envisaged in such analyses (such as "nudging" consumers) may have a worryingly Orwellian ring in application to media consumption.

powerful interests (firms involved in competition law proceedings, their advisers, competition authorities themselves) seeking to test or displace certain precedents and practices or to change legislation. Despite this, there is a fair degree of consensus among practitioners as to how competition law should be constructed at a high level, co-existing with disagreement as to how it should be applied in an individual case.

There seems ground for hope that a similar process can begin, and that a similar outcome can be achieved, in relation to plurality. It is reasonable to assume that any major conclusion or remedy would be subject to appeal in the courts or judicial review, so that precedents would be established. Ideally the process would take account of concurrent international work. For this process of "learning by doing" to take effect, there would need to be persistent interest in monitoring and promoting plurality.

In relation to substance rather than process, the above-noted difference in the objectives of competition and plurality policy (respectively, consumer welfare and the consumption of different viewpoints) defines the different arenas within which the analyses take place (respectively, a set of goods which are close substitutes and a range of media services determined by the investigator) as well as the different desirable outcomes. This limits the usefulness of applying one mode of analysis for both situations. Thus, the difference between objectives of the two activities produces an unavoidable disjunction between the design and application of the relevant instruments. The notion that one legal instrument can generally substitute for the absence of another seems illusory.

It has become apparent from the previous discussion, however, that at the level of measurement, and, particularly, in the choice of remedies, there are lessons to be learned from competition law which can be applied to the regulation of plurality.

Equally, the processes of birth, infancy, and increasing maturity of competition law—which has involved learning from experience, trial and error, and an expanding area of application and growing prestige (despite the occasional waning of influence)—plot a course which exponents of pluralism legislation may wish to copy.

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State Aid Modernisation—Trying To Do More With Less

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State Aid Modernisation—Trying To Do More With Less

Hilary Jennings[1]

I. INTRODUCTION

On May 8, 2012 the European Commission launched the State Aid Modernisation ("SAM"), a reform of the whole of the EU's State aid policy.[2] These reforms aim to streamline a complex system of rules, increase dialog with Member States, and focus on those cases with the most significant impact on economic growth. The bulk of these new rules are due to come into force by July 1, 2014. This article provides an overview of the objectives of the reforms and the extent to which four key pillars of the reforms are likely to meet these aims and provide a future-proof set of criteria for the enforcement of State aid rules.

The financial crisis changed the State aid landscape. State aid has risen from less than 1 percent of EU GDP in 2007 to around 13 percent in the period 2007-2011 and there are around 900 to 1,000 new State aid cases every year.[3] The onset of the financial crisis led to a need to co-ordinate interventions across Member States, speed up those interventions, and co-ordinate policy responses across Member States. The objectives of State aid shifted to include support for sustainable public budgets as well as promoting economic growth. Consequently, the enlargement to 27 member states and the fall-out from the financial crisis left the system overwhelmed with small-scale notifications, with almost 1,000 cases pending at any one time.

This sea change in the volume and purpose of State aid no longer fit with a system which limited the prioritization of cases and involved a complex framework of some 39 regulations, guidelines, and communications. Coupled with a lack of legally binding timescales in many instances, and the fact that the flow of information is typically between the Commission and the relevant Member State, it was time to change the ground rules.

The Commission's modernization program has three main objectives:

1. To foster growth in a strengthened, dynamic, and competitive internal market;
2. To prioritize enforcement cases on those cases with the biggest impact on the internal market; and
3. To streamline the Commission decision-making process and enable faster decisions.

Vice President Almunia has made State aid reform a cornerstone of his term as European Competition Commissioner. The reforms are intended to align State aid control to the Europe

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[2] European Commission (2012), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – State Aid Modernisation, COM/2012/0209 final.

[3] Oxera, *A brave new world? Implications of State aid modernisation*, OXERA AGENDA 1 (March 2013).

2020 strategy for growth and jobs and to the policies designed to promote growth. They are also intended to help Europe's governments improve the quality of their expenditures.[4] The Commission's task is therefore "... to allow 'good aid' and block 'bad aid'. This requires rules that are well-designed and easy to apply across 28 Member States."[5]

According to Almunia, examples of good aid include aid that promotes innovation, green technologies, and the development of human capital as well as aid that targets market failures, has a real incentive effect, and does not distort competition. The reforms are intended to steer EU governments away from inefficient or "bad aid," including aid that pays for activities that the beneficiary would have undertaken anyway, or aid that keeps unviable companies on indefinite life support.

However, these reforms have not been without their critics. Doubts have been raised, questioning Almunia's claims that Member States will be helped to fund projects that generate sustainable growth, while unproductive aid will be constrained. Amaud Montborg, the French Minister for Industrial Renewal, loudly criticized Almunia, calling his State aid policy "obsolete, autistic and fundamentalist."[6] And Commission State aid decisions have drawn sharp criticism from countries in central and Eastern Europe, Spain, and an assortment of airlines, banks, and energy firms.

Nevertheless, the SAM reforms mark a shift in approach. The new and revised regulations and guidelines seek to provide wider exemptions and focus on the most distortive aid. The focus has also shifted from *ex-ante* to *ex-post* control, with greater emphasis on more detailed and comprehensive analysis for the larger, more complex, and "most dangerous" cases.[7] The new framework also envisages a much stronger partnership with Member States to promote compliance with the State aid rules. Common horizontal principles have been defined that are applicable to the assessment of the compatibility of all State aid measures with the internal market. These have been included in every newly adopted Guideline under the SAM, which makes the soft law instruments more coherent and consistent and avoids any confusion as to which document applies in each case.

The modernization program includes a novel document, the Commission's draft notice on the notion of State aid.[8] This sets out the Commission's interpretation of the various elements that make up State aid within the meaning of Article 107(1) in line with EU case law.[9] It fulfils both a pedagogical function, by offering an explanation of Article 107 (1) case law, and it

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[4] Joaquin Almunia, *Developments in EU competition policy*, speech at European Competition Day, 10 (April 2014).

[5] Joaquin Almunia, *Competition policy for the post-crisis world: A perspective*, speech celebrating ten years of the GCLC Bruges, (17 January 2014).

[6] *French Industry Ministry assails Brussels on State aid for industry*, FINANCIAL TIMES (22 January 2014).

[7] Gert Jan Koopman, *Modernising EU State aid policy*, presentation to the Autumn conference on European State Aid Law (30 November 2012).

[8] Draft Commission Notice on the notion of State aid pursuant to Article 107 (1) TFEU, *available at* http://ec.europa.eu/competition/consultations/2014_state_aid_notion/draft_guidance_en.pdf

[9] Article 107(1) of the TFEU defines State aid as any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods in so far as it affects trade between Member States.

streamlines policy developments in the sector. This contrasts with normal Commission practice of publishing communications and guidelines on the compatibility criteria, setting out the conditions under which State aid is allowed.

The concept of State aid has evolved with time, which is reflected by the varied and complex case law that has shaped the application of the rules. Therefore it is perhaps unsurprising that the draft notice does not settle matters definitively; instead, its approach is more akin to a fact sheet for stakeholders. However, the draft notice lacks a clear definition of the four conditions laid down in Article 107(1) at the qualification stage. This leaves in place the existing broad interpretation of the State aid prohibition, whereby it is generally assumed that the criteria of distortion of competition and the effect on trade between EU Member States within the meaning of Article 107(1) TFEU are fulfilled. Therefore the focus of the State aid law continues to rest on the compatibility assessment.

The reform of the General Block Exemption ("GBER") is key to the Commission's achievement of its SAM objectives, notably simplification. This, over and beyond the changes to the horizontal and sector-specific guidelines, has been at the heart of the Commission's reform efforts. The scope of the GBER was extended on the basis of the Enabling Regulation adopted by the Council of the European Union in July 2013.

The revised GBER, adopted on May 21, 2014,[10] increases the notification and aid intensity thresholds and includes new types and categories of aid; for example, innovation aid to large enterprises, broadband, and audio-visual. There are also new forms of exempted aid within existing categories, such as a wider concept of risk finance aid, investment aid for research infrastructures, and new possibilities for energy and environmental aid. Higher notification thresholds and larger aid intensities are in place, including doubling the R&D notification threshold, and risk finance has increased from EUR 1.5 million to 15 million. The Commission estimates that about three-quarters of all new State aid measures, and about two-thirds of the total amount of aid expected to be granted, will be exempted under the revised GBER.[11]

The previous GBER had been extensively used by EU Member States but was criticized for being overly complex and difficult for authorities to apply in practice. The focus of the revisions to the GBER has been on simplification of the rules, with some relaxation for aid that promotes growth and does not have a distortive effect on competition within the EU. But while the GBER provides some legal certainty for important aid measures, it risks being overly complicated and difficult to apply in practice, certainly with respect to individual aid measures. A measure may be in line with the general scope of the GBER, but the notification thresholds may still not be in line with the State aid rules, meaning the aid may not be covered by the GBER. The substantive requirements of the GBER also have to be fulfilled for the aid to be authorized.

And although the scope of the GBER has been extended, stricter substantive compatibility criteria have also been introduced. For example, aid directed at regional

[10] Commission Regulation declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, C(2014) 3292/3.

[11] European Commission (2014), *State aid: Commission exempts more aid measures from prior notification*, Press release IP/14/587, 21 May 2014.

development may, in the future, be granted to large companies in more developed (but still disadvantaged) regions only for investments into new activities. State aid for investments into the extension of existing activities will no longer be allowed.

Enforcing this lighter-touch regime will require the Commission to rely more heavily on Member States for the *ex ante* assessment, which will require much more co-operation than has previously existed between the two in terms of enforcement. Changes are required to ensure that responsibilities for ensuring compliance are taken more seriously. To date the Commission's main remedy against unlawful State aid that had already been paid is that it has to be refunded to the Member State concerned. However, not only does the Commission have a poor track record of enforcing refunds, but the design of remedies lacks strong incentive and deterrent measures.[12]

Consequently, the new GBER also includes transparency measures in an attempt to assist in the monitoring of compliance. Under the new transparency requirements Member States will have to make public the granting of un-notified aid if the amount exceeds EUR 500,000. EU Member States will, for the first time, be required to establish a dedicated website on which they publish the identity of the beneficiary, the amount and objective of the aid, and its legal basis within six months of the granting of the aid.[13] As a consequence, even if a measure fulfils the conditions of the GBER and is therefore exempted from the notification requirement, it will still have to be made publicly known that the company received aid above the threshold. Furthermore, the Commission will have to be informed directly about aid granted to certain projects. The measures will give greater capacity to other Member States and companies to monitor compliance with State aid rules. Increased transparency is the exchange for fewer notifications of State aid.

The revised *de minimis* Regulation came into force on January 1, 2014.[14] Despite calls during the consultation to increase the financial threshold, the Commission has maintained the limit at EUR 200,000 to a single undertaking over three years, a limit which has attracted considerable criticism.[15] This limit is also out of step with the revised rules for Services of General Economic Interest, which includes a threshold set at EUR 500,000 over three years. A common *de minimis* threshold for all kinds of State aid rules would have been helpful, given the objective of simplifying the existing rules.

It also remains the case that not all sectors are treated in the same way. Some such as fishing, aquaculture, and primary agricultural production are excluded, as are export-related businesses. However, the definition of "single undertaking" has been clarified and the rules

[12] Oxera, *supra* note 3 at 3.

[13] European Commission (2014), *Communication amending the Communications from the Commission on EU Guidelines for the application of State aid rules in relation to the rapid deployment of broadband networks, on Guidelines on regional State aid for 2014-2020, on State aid for films and other audiovisual works, on Guidelines on State aid to promote risk finance investments and on Guidelines on State aid to airports and airlines*, C(2014) 3349/2.

[14] Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de* minimis aid, OJ L352/1.

[15] *See*, for example, Sir Jeremy Lever QC (2012), *EU State aid law – not a pretty sight*, lecture delivered at King's College London, 15 November 2012.

applying to loans have been simplified, creating a safe harbor where the loan meets various conditions.

The revision of the Procedural Regulation,[16] which dated back to 1999, was targeted at addressing the problem of lengthy State aid proceedings. The reforms strengthen complaint handling with the requirement for a complainant to provide certain key information before a complaint can be lodged. Furthermore, the introduction of an "interested party" rule limits those that can make a complaint. Finally, the introduction of a refined procedure looks to ease the ongoing regulatory red tape burden.

However, the Regulation has reinforced the bilateral character of State aid assessments between the Commission and the Member State involved. Other interested parties can only intervene in the formal investigation stage and are restricted to submitting comments. The SAM reforms have not included expanded participation rights similar to antitrust rules.[17] Instead they introduce additional obligations and sanctions for third parties (inspired by the EU competition rules), but exclude sanctions for Member States.

The new Procedural Regulation provides for market investigation tools to be used by the Commission once a formal state aid investigation has been initiated. The Commission will now have the ability to request targeted information from specific people, undertakings, or associations if the Member State information provided is insufficient. The introduction of fines for failure to comply or negligent information further strengthens the Commission's position.

The powers to request information are almost identical to the powers under the Commission's competition powers in Article 18 of Regulation 1/2013.[18] This is coupled with the introduction of sector inquiry powers, similar to the power to investigate sectors under Article 17 of Regulation 1/2013, even though the powers to carry out inspections and dawn raids are not available to the Commission in State aid context. However, there is an important limitation to these extended powers in that the Commission can request information only if the formal investigation procedures have been ineffective. Therefore, the Commission must first request information from the granting Member State before using its power to request information from others.

The new powers to request information from sources other than Member States, coupled with the power to impose penalties, is a significant development in the EU State aid regime. The extended powers allow the Commission to request information from aid beneficiaries and others under threat of a fine. This can appear unbalanced given that aid beneficiaries have few, if any, procedural rights in State aid investigations.

The SAM presents opportunities and challenges. It is certainly too soon to pass judgement on how the reforms will play out in practice. What is clear is that the evaluation of

[16] Council Regulation (EU) No 734/2013 of 22 July 2013 amending Regulation (EC) No 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty Text with EEA relevance, OJ L 204, 31/07/2013.

[17] Georgios Kamaris, *A critical analysis of the European Union's State aid analysis*, PhD thesis Brunel University, p. 368 (2013).

[18] Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 83 of the Treaty [2003] OJ L1/1.

success will not be based on the amount of documents that have been revised since the reforms were launched, but on whether the envisaged benefits of tighter timescales, simplified rules, and greater information-gathering powers result in more robust decisions on the cases that are likely to have the greatest impact on the internal market. This will also need to be balanced against the cost of removing scrutiny from smaller cases and the need for the Commission to rely more heavily on *ex ante* monitoring by Member States. Time will tell if the SAM initiative is fit for purpose in the current regulatory climate.

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The EU Courts Play a Crucial Role in Ensuring Compliance of the EU's System of Competition Law Enforcement With Due Process Rights

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The EU Courts Play a Crucial Role in Ensuring Compliance of the EU's System of Competition Law Enforcement With Due Process Rights

Georg M. Berrisch[1]

I. INTRODUCTION

In its *Menarini* ruling, the European Court of Human Rights ("ECtHR") held that fines imposed by the Italian antitrust authority for the violation of competition law are criminal charges and that, consequently, the requirements of Article 6 of the European Convention of Human Rights ("ECHR") apply. However, ECtHR did not consider it incompatible with Article ECHR that these fines were adopted by an administrative authority and not an "independent and impartial tribunal established by law," because, in the view of the ECtHR, it was sufficient that the Italian courts exercised a full review—and not just a legality control—of the fining decisions.

In *Schindler*, the Court of Justice of the EU ("CJEU"), referring to the *Menarini* ruling, used essentially the same reasoning in finding that the EU's system of antitrust enforcement is not contrary to Article 47 of the Charter—and hence Article 6 ECHR. Referring to its earlier ruling in *Chalkor*, the CJEU observed that the EU courts review both the facts and the law and have the powers to assess the evidence, to annul the contested decisions, and to alter the fine. It further held that, when reviewing the legality of a Commission decision imposing fines for violation of the EU's competition rules, the EU courts cannot use the Commission's discretion, either as regards the choice or the assessment of the factors used to set the fine, as a ground for not conducting of an in-depth review of the facts and the law.

Much has—and can be—said about the merits of both *Menarini* and *Schindler*. The purpose of this short note, however, is not to enter into that debate but rather to comment on some specific issues related to the judicial control by the EU courts of the European Commission's decisions imposing fines for infringements of Articles 101 and 102 TFEU. Indeed, it seems fair to say that, as a result of *Menarini* and *Schindler*, the compatibility of the EU system of antitrust enforcement with Article 6 ECHR and Article 47 of the Charter depends on the degree of judicial control exercised by the EU courts. In this respect, the work of the General Court is of particular importance because it is the sole "independent and impartial tribunal" assessing the evidence relied on by the Commission in establishing an antitrust infringement and setting a fine.

II. THE CHAHIER DES CHARGES FOR THE GENERAL COURT

First, one could characterize the CJEU's findings in *Schindler* and *Chalkor* as an *ex-post* justification of a system that has failed to ensure adequate judicial review, or as instructions by the CJEU to the General Court to increase the level of judicial review, or as both. In any event, what matters is that, in the future, the General Court does indeed carry out an in-depth review of

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the facts and the law and, in particular, of whether the evidence put forward by the Commission does indeed prove the alleged competition infringement. Also, in appeal judgments, the CJEU must ensure that the judicial review carried out by the General Court meets the requirements of *Schindler* and *Chalkor* and rigorously quashes any judgment where the General Court failed in its task; for example, by referring to the Commission's discretion as a reason for only pursuing a limited review.

As regards the latter point, both in *Schindler* and in *Chalkor*, the CJEU considered it as irrelevant that the General Court, when reviewing the Commission's fine calculation, started from the incorrect assumption that the Commission enjoyed wide discretion when deciding on whether to grant a company a reduction of the fine for cooperating with the Commission and that, therefore, the General Court's assessment of the Commission's decision was limited to establishing whether the Commission had manifestly gone beyond the boundaries of its discretion. According to the CJEU, the application of an incorrect standard of review was irrelevant because, in the CJEU's view, the General Court had, in fact, carried out an in-depth review.

While it is correct, in principle, that the degree of judicial review actually carried out is more important than the label given to it, the findings of the CJEU are highly problematic. If the General Court explicitly states that its review is limited to assessing whether the Commission had manifestly exceeded a wide margin of discretion, it must be assumed that this affects the degree of judicial review actually exercised. Therefore, a finding that the General Court exercised a strict in-depth review of the Commission's evidence—even though it stated that the Commission enjoys wide discretion—would require a detailed assessment of all arguments put forward by the applicant and the Court's response to them. The CJEU failed to do that but simply asserted that the General Court did carry out a full review.

III. THE END OF THE COMMISSION'S DISCRETION?

Both *Schindler* and *Chalkor*, but also *KME*, were cases where the applicants had challenged "only" the determination of the amount of the fines but not the finding of an infringement. The finding by the CJEU that the EU judiciary cannot use the Commission's discretion as a ground for not conducting of an in-depth review of the facts and the law explicitly referred to the choice and assessment of the factors used to set the fine. But what about the finding of the infringement itself which, after all, is the very prerequisite for the imposition of a fine?

The Courts, traditionally, have granted the Commission a wide latitude as regards the assessment of complex economic or technical matters. I would submit that following *Menarini* and *Schindler*, the EU courts must also carry out a full review of the Commission's assessment of complex economic matters, if this assessment forms the basis of a finding of an infringement for which the Commission has imposed a fine. The EU's system of antitrust enforcement could not be considered compatible with Article 6 ECHR or Article 47 of the Charter if the Courts were to (continue to) allow the Commission wide discretion in this regard. The discretion then would not be exercised by an independent and impartial tribunal and would not be subject to a sufficient degree of judicial control.

It is true that in many hard-core cartel cases the issue of discretion does not arise, because the only question is whether or not there was an agreement. However, the Commission increasingly looks beyond hard-core cartels into cases where, in order to show the existence of an agreement or concerted practice, so-called plus factors, including the actual effects of the investigated conduct on the market, are relevant. These analyses typically concern complex economic matters.

Importantly, full judicial review in this context does not mean that the Courts can decide instead of the Commission or alter the Commission's decisions. Outside of the assessment of the fine, the Courts cannot do this—they can only fully (or partially) annul the decision. However, this limitation does not mean that they cannot undertake an in-depth review of the Commission's findings, nor that they must—or should—allow the Commission wide discretion.

IV. HAVING TO BREAK SERVE

Despite all the rhetoric about full judicial review, a company challenging a Commission decision before the General Court remains at a fundamental disadvantage. In fact, challenging such a decision is akin to playing a tennis match with the opponent, the Commission, having serve all the time.

To begin with, the first thing that the judges read in a case is the Commission's decision. Of course, a decision by a public authority finding an infringement and imposing a fine carries significant weight and inevitably directs the thinking of the judges. The applicant must then prove to the Court that the Commission got it wrong; for example, because the evidence relied on by the Commission is insufficient to support its allegations. To make matters more difficult, the Commission not only has the first word, but also the last word, both during the written procedure and the oral hearing. Compare that to a system where an enforcement authority goes to court with an indictment, then has to prove its case to the judges, with the accursed having the last word.

Moreover, because the Court does not redo the investigation carried out by the Commission, it will only hear those arguments and evidence that the applicant has put forward or has asked the Commission to produce. Also, in principle, the applicant may not supplement the pleas and evidence submitted in the initial application at a later stage. The fact that the initial application must be submitted within a relatively short period of a little over two months puts the applicant at a further disadvantage. Indeed, in several cases the courts refused to hear an argument on the ground that it had not been properly set out in the initial application. And to make things worse, the courts also try to limit the number of pages that an applicant can submit.

Particularly troubling is the General Court's general reluctance to hear witnesses. In many cartel cases, the Commission relies to a great extent on the evidence provided by amnesty or leniency applicants. While in some cases there is a significant body of documentary evidence, in others statements by witnesses play a key role. However, neither at the Commission nor before the Court is there an opportunity for the company's lawyers to cross examine such witnesses; in fact, it is not even assured that the Commission itself will question the witness.

In the recent *Duravit* judgment, the General Court stated it is within its sole discretion to decide whether or not to hear a witness and that the parties have no right to examine a specific witness (although they can, and should, formally request that a specific witness is heard). While it is not possible to opine on the basis of the information contained in the *Duravit* judgment whether, in that particular case, there was indeed no need to hear the witnesses, I would submit that in order to ensure compliance of the EU's antitrust enforcement system with Article 6 ECHR and Article 47 of the Charter, the General Court should err on the side of caution and, if there is the slightest indication that hearing a witness may help the applicant, call the witness.

V. CONCLUSION

It needs to be seen, whether, and how, the EU Courts, and in particular the General Court, will intensify the judicial control of the Commission competition law decisions, in particular those imposing fines. It is only a matter of time before an aggrieved company will bring a case before the ECtHR challenging the EU's competition enforcement regime as being incompatible with Article 6 ECHR. The outcome of that case will likely depend on the depth of the judicial review actually exercised by the European Union—provided, of course, the ECtHR confirms *Menarini* and does not hold that a system where fines of several hundreds of millions of Euros are imposed by an administrative authority and not by an independent and impartial tribunal is generally incompatible with Article 6 ECHR.

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Can False Advertising Give Rise to Antitrust Liability?

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Can False Advertising Give Rise to Antitrust Liability?

Christopher A. Cole[1]

I. INTRODUCTION

In late 2013, a jury in the Eastern District of Texas, Marshall Division, which had been considering whether Becton-Dickinson should be held liable for attempted monopolization of the market for retractable safety syringes, concluded that Becton had engaged in exclusionary conduct against Retractable Technologies by means of deceptive advertising and awarded the plaintiff over $113 million in "Deception Damages."[2] It was a remarkable milestone in a long-running battle between the two competitors, which had been litigating patent infringement and antitrust allegations for several years as they battled for contracts in a rapidly consolidating medical provider market.

The case raises important questions regarding the relationship between false advertising and antitrust law, some of which will be litigated in post-trial motions and inevitable appeals. Most importantly, when can false advertising give rise to violations of the Sherman Act? Is the theory, while rarely invoked, gaining traction? Will *Rectractable Technologies* be a harbinger of more such litigation?

II. *RETRACTABLE TECHNOLOGIES V. BECTON-DICKINSON*

Retractable syringes are used in hospital settings to deliver injections while reducing the incidence of needle sticks to medical workers. Becton and Retractable compete in the market for such syringes and related injection devices, dealing with both medical providers and with a small number of large Group Purchasing Organizations ("GPOs"), which act as a sort of broker between providers and suppliers of medical products.

The main theme of Retractable's complaint against Becton was that Becton had either monopolized or attempted to monopolize the market for safety syringes, conventional syringes, and safety VI catheters. Tacked on to its lengthy complaint detailing the alleged anticompetitive conduct was a count for false advertising in violation of Section 43(A) of the Lanham Act. The advertising falsehoods, it was alleged, contributed to and were part of the defendant's alleged scheme to monopolize those markets. Specifically, Retractable claimed that Becton had made false claims that its needles were the thinnest and sharpest, and that they had the least "waste space," which is the dead space containing left over medication after the injection has been given.

Becton's exclusionary conduct manifested itself in several ways, according to the evidence presented by Retractable at trial. First, Becton allegedly entered into standard form contracts with providers that penalized providers with higher prices if they purchased competing products.

[1] Christopher Cole is the co-chair of Crowell & Moring's Advertising & Product Risk Management Group in the Washington, D.C. office.

[2] *Rectractable Techn., Inc. v. Becton Dickinson and Company, Inc.*, No. 2-08-CV-16 (E.D. Tx. 2013) (Davis, J.).

Second, Becton allegedly had obtained high market shares, ranging from 50-69 percent in markets with high barriers to entry, which were two to three times the sizes of their next largest rivals in those markets. Third, Becton allegedly charged prices ranging from 20-40 percent higher for certain syringe products than its rivals.

At trial, Retractable presented extensive evidence attempted to tie the alleged false claims to exclusionary conduct and anticompetitive effects. For example, it elicited testimony from Harvard Professor Einer Elhauge, who opined that the false advertising claims contributed to Becton's illegal attempted monopolization of the retractable syringe market in a few ways. First, said Professor Elhauge, false claims can directly harm competitors by reducing their market share relative to that of the false advertiser. Second, reducing market share tends to drive up costs for the smaller rival, because the smaller rival cannot achieve the same economies of scale as its monopolistic competitor. Third, false ad claims harm purchasers, because if they act on incorrect information, they make less efficient choices and pay higher prices due to weakened competition.

Retractable's trial strategy worked, because the jury form reveals the jury's finding that although Retractable had not proven its monopolization claims, contractual restraint of trade claims, or exclusive dealing claims, it had proven its case on attempted monopolization of the safety syringe market due to "deception" and should therefore be awarded damages. The verdict is peculiar, because the jury was not asked to assess damages for the Lanham Act violation, but solely for the attempted monopolization. Thus, a reasonable interpretation of the jury's actions is that the jury concluded that Becton had attempted to monopolize the market for these syringes by means of false advertising, and in so doing had injured its rival.

Becton's motion for judgment as a matter of law, or new trial poses a straightforward question: Can false advertising ever be so severe as to give rise to a violation of antitrust law? Its motion argues as follows:

> The claim that false advertising and product disparagement "would be sufficient to turn a nonmonopolist [like BD] into a monopolist" cannot succeed, except perhaps "in rare and gross cases."[3] Misleading ads and product comparisons are prevalent—indeed, they most often are found—in highly competitive markets. Exaggerating the virtues of one's own product or misrepresenting the features of a rival's may be unfair, but they do not indicate a lack of competition and do not threaten to "destroy competition itself."[4] That is why the Fifth Circuit has held that "the purposes of antitrust law and unfair competition law generally conflict."[5] An act of "unfair competition" like false advertising "is still competition" and, therefore, raises no antitrust issue unless used in an extreme case to gain monopoly power "by eliminating a rival concern from the market.[6]"[7]

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[3] 3B Areeda & Hovenkamp, Antitrust Law, ¶ 782a at 321-22 (3d ed. 2008).

[4] *Id.*

[5] *Nw. Power Prods, Inc. v. Omark Indus., Inc.*, 576 F.2d 83, 88 (5th Cir. 1978).

[6] *Id.* at 88-89 (emphasis added).

[7] Defendant Becton Dickinson and Company's Renewed Motion for Judgment as a Matter of Law, or Alternatively For New Trial or Remittitur, *Rectractable Techn., Inc. v. Becton Dickinson and Company, Inc.*, No. 02:08-cv-16, p. __

Stated differently, in a market lacking competition, Becton would have no incentive to advertise at all—much less to make false claims. Becton goes on to argue that even if it had engaged in false advertising, its conduct did not fall within the exceedingly narrow category of cases in which false advertising can be said to "destroy competition itself."

III. IMPLICATIONS

Becton's motion is certainly correct that false advertising very rarely gives rise to liability for antitrust violations under Sections 1 or 2 of the Sherman Act. However, this does not mean that the theory is altogether untenable. Although some Circuits are more hostile to these kinds of claims than others, there are a few cases stating that false advertising can cause antitrust injury—over and above the typical advertising injury that is remediable under the Lanham Act. These courts have recognized that, under certain conditions, false advertising campaigns can contribute to a defendant's anticompetitive conduct.

One published case provides a vivid illustration of the kind of false advertising allegation that might plausibly support a Sherman Act claim. In *Caribbean Broadcasting System,*[8] the D.C. Circuit partially reversed and remanded a decision of the District Court that had dismissed the plaintiff's antitrust claims, which were partly based on allegations that the defendant had engaged in pernicious false advertising. Although the decision primarily deals with the extraterritorial application of U.S. antitrust law and jurisdiction over foreign defendants, the Court did suggest that the underlying false advertising allegations could plausibly support a claim of antitrust injury.

The plaintiff and defendant owned competing FM radio stations in the eastern Caribbean, which includes Puerto Rico and the Virgin Islands. The defendant was the incumbent broadcaster. The plaintiff was a new entrant to the market, and having based its station in the British Virgin Islands, quickly realized that it was having great difficulty selling advertising. Plaintiff alleged that the defendant had prevented it from fairly competing for advertising dollars by falsely claiming that only the defendant's signal could reach the entire Eastern Caribbean, which would lead advertisers to believe that they could fulfill their advertising needs by contracting only with the defendant. The Court concluded that these allegations (along with other evidence of anticompetitive conduct) could contribute to an attempt to monopolize the market for English-language radio broadcast in the eastern Caribbean region.

A 1997 decision from the Ninth Circuit also injects a glimmer of hope for the false advertising-as-antitrust theory, but emphasizes its limited application. In *American Prof. Testing Serv.,*[9] the Court considered whether the defendant, sponsor of the market-dominant BAR/BRI bar review course, violated the Sherman Act through conduct that included distributing disparaging fliers about the plaintiff's competing course offering. The plaintiff alleged that Harcourt distributed anonymous fliers on campuses across the country alleging that the plaintiff's company was being investigated by the SEC and might not be able to sustain its review

[8] *Caribbean Broadcasting System, Ltd. V. Cable & Wireless PLC*, 148 F.3d 1080 (D.C. Cir. 1998).

[9] *American Prof. Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal and Prof. Pubs., Inc.*, 108 F.3d 1147 (9th Cir. 1997).

courses through the summer as a result of the bankruptcy filing of its previous parent company. The allegations were clearly false, but allegedly had a devastating impact on enrollment in the plaintiff's programs.

At trial, a jury rendered a verdict for American on its §2 Sherman Act claims, the Lanham Act, tortious interference, and unfair competition, and assessed nearly $1 million in damages, before trebling. After trial, however, the district court granted Harcourt's motion for Judgment as a Matter of Law on the Sherman Act claim, concluding that there was insufficient evidence that Harcourt engaged in exclusionary conduct or possessed monopoly power in any market. American then appealed.

On appeal, the Ninth Circuit considered whether the district court erred by overturning the jury's finding that Harcourt's disparagement of American constituted exclusionary conduct under the Sherman Act. The Court began by noting that "[w]hile the disparagement of a rival or compromising a rival's employee may be unethical and even impair the opportunities of a rival, its harmful effects on competitors are *ordinarily* not significant enough to warrant recognition under §2 of the Sherman Act."[10] It reasoned that the competitor's actions must be so severe as to "destroy competition itself." After citing a passage from *Areeda & Hovenkamp* for the proposition that false advertising should "presumptively be ignored" under the Sherman Act, the Court went on to adopt a Second Circuit test for overcoming a presumption that false advertising has a *de minimis* effect on competition:

> [A] plaintiff may overcome the de minimis presumption 'by cumulative proof that the representations were [1] clearly false; [2] clearly material, [3] clearly likely to induce reasonable reliance, [4] made to buyers without knowledge of the subject matter, [5] continued for prolonged periods, and [6] not readily susceptible of neutralization or other offset by rivals.'"[11]

The Court concluded that the record did not demonstrate students were clearly likely to rely on the false fliers or that the false claims were not readily susceptible to neutralization through counter advertising. It thus affirmed the court's judgment.

The Seventh Circuit, by contrast, appears to have completely shut the door to these kinds of false advertising/antitrust claims. For example, the Court stated in *Sanderson*[12] "[s]ome other law may require judicial intervention in order to increase the portion of truth in advertising; the Sherman Act does not." This is because "antitrust law condemns practices that drive up prices by curtailing output . . . . False statements about a rival's goods do not curtail output in either the short or the long run. They just set the stage for competition in a different venue: the advertising market."[13]

[10] *Id.* at 1151 (emphasis added).

[11] *Id.* (citing *National Assn. of Pharmaceutical Mfrs. v. Ayerst Labs.*, 850 F.2d 904, 904, 916 (2d Cir. 1988)).

[12] *Sanderson v., Culligan Int'l Co.*, 415 F.3d 620, 624 (7th Cir. 2005).

[13] *Id.* at 623.

Similarly, *Schachar,*[14] another antitrust case based on a supposed commercial falsehood, observed:

> Warfare among suppliers and their different products is competition. Antitrust law does not compel your competitor to praise your product or sponsor your work. To require cooperation or friendliness among rivals is to undercut the intellectual foundations of antitrust law. Unless one group of suppliers diminishes another's ability to peddle its wares (technically, reduces rivals' elasticity of supply), there is not even the beginning of an antitrust case, no reason to investigate further to determine whether the restraint is "reasonable."

IV. IS THE FALSE ADVERTISING = ANTITRUST THEORY VIABLE?

It is well-established that the free flow of truthful advertising is important to the proper functioning of markets. For example, courts have intervened repeatedly to enjoin advertising restrictions that are deemed to unduly chill or prevent dissemination of non-deceptive pricing information.[15] The FTC has also acted under Section 5 to enjoin competitors that have attempted to settle litigation disputes by covenanting to refrain from comparative advertising about each other's products and services.[16]

The cases teach that allegations of false advertising are highly unlikely, in isolation, to carry the day on a claim of monopolization or attempted monopolization. However, such allegations can provide compelling ammunition in an otherwise well-grounded complaint alleging that they were part of a broader pattern of monopolistic, exclusionary conduct.

The circumstances giving rise to these possibilities generally involve markets with very few competitors (as is the case generally in almost all antitrust cases), high barriers to entry, allegations of attempts by an incumbent to exclude newer market entrants through an ongoing campaign of falsehoods, little ability for the smaller rival to fight back on equal terms in order to provide corrective advertising (perhaps due to superior access by the incumbent to purchasers), and false statements that go right to the heart of the suitability or performance of the newly introduced product. The verdict in *Retractable Technologies*, if it stands, may breathe new life into such claims—at least in the Fifth Circuit.

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[14] *Schachar v. American Academy of Ophthalmology, Inc*., 870 F.2d 397 (7th Cir.1989).

[15] *See, e.g., National Society of Professional Engr's*., 435 U.S. 679 (1978) (concluding that engineering group's prohibition on advertising of fee schedules to prospective customers could constitute unreasonable restraint of competition under the Sherman Act under Rule of Reason analysis because the ban on competitive bidding prevents all customers from making price comparisons in the selection of engineers); *California Dental Association v. FTC*, 526 U.S. 756 (1999) (remanding decision enjoining a dental association's ban on advertising of discounts for a fuller analysis of whether the ban had pro-competitive or anticompetitive effects).

[16] *See, e.g., In the Matter of Sensormatic Electronics Corp*., File No. 951-0083 (FTC 1983).

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Greater Cooperation Among Competition Agencies in Latin America

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Greater Cooperation Among Competition Agencies in Latin America

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I. INTRODUCTION

The past decade has shown an increasingly greater level of cooperation among competition agencies in Latin America. This increase in the level of interactivity among Latin American enforcers has played a key role in the fostering of competition law in the region and the strong network developed will certainly be a relevant tool for the competition agencies to overcome the different challenges they face in the enforcement of their laws. Such growing interconnection should be followed closely by those doing business in the region since there are already different sectors that have received a similar treatment in various Latin American countries because of the cooperation among competition enforcers of the region.[2]

The increase in the levels of cooperation among Latin American competition agencies in the past decade has been true in at least three levels: i) intense regional fora, ii) within the framework of trade agreements, and iii) through a growing number of bilateral agreements. The purpose of this paper is to reflect how these three levels have developed and continue to do so.

II. REGIONAL FORA

Besides the existence of international institutions such as the International Competition Network, OECD (where Chile and Mexico are members and Brazil, Colombia, and Peru are Observers to the OECD Competition Committee), and UNCTAD, where different Latin American countries participate in one way or another, there are a number of regional fora that focus more specifically on the agenda of the Latin American competition agencies.

In the past decade, new initiatives such as the "Ibero-American Competition Forum" (*Foro Iberoamericano de la Competencia*), launched in Spain in 2002; the "Latin American Competition Forum," created by the Inter-American Development Bank and the OECD in 2003; UNCTAD's COMPAL Program of 2003; and, more recently, both the "Inter-American Competition Alliance" and the "Centro Regional de Competencia para América Latina" created in 2011, among others, have greatly helped the different agencies exchange experiences on a wide variety of competition-related issues. In June 2013, Peru called for the creation of a South American Competition Forum of Competition.[3]

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[2] For a deeper analysis on the matter please *see* Julián Peña, *The Role of International Cooperation in the Development of Competition Law in Latin America*, WILLIAM E. KOVACIC: AN ANTITRUST TRIBUTE—VOL. II, (Nicolas Charbit et al. eds., 2014)

[3] OECD, *Latin American Competition Forum, Contribution from Peru to Session 2*, DAF/COMP/LACF(2013)20, 3 (August 19, 2013).

A. COMPAL

The Competition and Consumer Protection for Latin America ("COMPAL") program is an UNCTAD-led technical assistance program on competition and consumer protection policies for Latin America supported by SECO (Switzerland). The COMPAL program assists Bolivia, Colombia, Costa Rica, Ecuador, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, Peru, and Uruguay in strengthening their capacities and institutions in the areas of competition and consumer protection laws and policies.[4] In other words, the only Latin American countries with competition laws that are not included in the program are Argentina, Brazil, Chile, and Mexico.

Through this program, UNCTAD is assisting different Latin American countries in relation to: a) promotion of cross-country experiences, b) preparation of sectoral studies, c) preparation of policy recommendations, and d) training activities.

Phase I of the COMPAL program started in 2003 and involved the assessment of the needs and priorities of the countries of the region in the areas of competition and consumer protection. In order to avoid duplication of international efforts, this phase also comprised a review of the status of technical assistance in the region. Phase II, which started in 2005 and renewed in 2009, involves the implementation of the objectivities and activities in these areas.

The COMPAL program has a regional component that includes the exchange of experiences and cooperation: "incorporating the three pillars of UNCTAD's approach, these being activities, analytical content of capacity building and technical assistance and consensus building."[5]

The different activities organized by COMPAL on competition law and policy deal with: a) programs on competition advocacy, b) preparation of sectoral studies used as reference for the design of public policies, c) support for the elaboration of competition laws, d) training for judges, e) training for officers in case analysis, f) advice on the establishment and strengthening of competition authorities, and g) implementing the recommendations of the Peer Review.

Within the framework of a COMPAL regional meeting held in June 2013, INDECOPI proposed to the other competition agencies from different South American countries the idea of creating a network of South American agencies in order to strengthen the cooperation to fight anticompetitive behaviors, especially transnational cartels.[6]

B. Latin American Competition Forum

The Latin American Competition Forum ("LACF") was a joint OECD-IADB initiative launched in 2003 "to foster effective competition law and policy in Latin America and the Caribbean" and over the years has become a concrete means "to promote dialogue, consensus building and networking among policy makers and enforcers."[7]

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[4] WELCOME TO THE COMPAL PROGRAMME 1, *available at* http://www.programacompal.org/e_welcome.html.

[5] WHAT IS COMPAL—COMPAL II 1, *available at* http://www.programacompal.org/e_COMPAL_II.html.

[6] Enrique Delgado, *Peru proposes cooperation against cartels*, GLOBAL COMP. REV. 203 (2013).

[7] LATIN AMERICAN COMPETITION FORUM 1, *available at* http://www.oecd.org/competition/latinamerica/aboutthelatinamericancompetitionforum.htm.

The main activities of the LACF have been their annual meetings and Peer Reviews.

The annual meetings were first held in Paris in 2003. Since then, they have taken place in Spain, El Salvador, Panama, Chile, Costa Rica, Colombia, the Dominican Republic, and Peru. These meetings have been attended by representatives from Argentina, Barbados, Bolivia, Brazil, Chile, Canada, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, EU member states, Guatemala, Italy, Jamaica, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Trinidad and Tobago, Uruguay, the United States, Venezuela, Andean Community, CARICOM, ECLAC, UNCTAD, the World Bank, and WTO.

The topics discussed in the meetings cover a broad variety of issues and in most of the meetings the agenda has included an in-depth Peer Review of a Latin American country. As Daniel Sokol states, "these meetings encourage norm diffusion to Latin American agencies, and also provide a learning opportunity through discussions with both similarly situated and developed world agencies that have enforcement experience. The annual forum also provides an opportunity for agencies to learn about each other's institutional structures and larger political-economic concerns."[8] The Forum, as Ignacio de León says, "promotes dialogue, consensus-building, and networking between competition policymakers and law enforcers, as well as the identification and dissemination of best practices in competition law and policy."[9]

The Peer Reviews have been done on Chile (2003), Peru (2004), Brazil (2005 and 2010), Argentina (2006), El Salvador (2008), Colombia (2009), Panama (2010), Honduras (2011), and updates and follow-ups of these reviews in 2007 (also updating the reviews made by the OECD Competition Committee on Mexico in 1998 and 2004) and 2012. These Peer Reviews include a very detailed report made by a competition expert that includes a set of recommendations on different aspects of competition law and policy. In a recent follow-up to the nine Peer Reviews made in 2012 and published in 2013, the survey showed that different recommendations were made to Chile, Argentina, Honduras, Panama, and Mexico, and "in all of these cases, the authority in question has taken steps to implement and put the recommendations into practice."[10]

Other OECD activities in the region include the Project to Reduce Bid Rigging in Latin America, with projects in Brazil and Chile, and a report on Mexico's Institute for Social Security's procurement regulations and practices in 2012.

Since 2009, the host agency of the LACF meetings also organizes their National Competition Day events.

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[8] Daniel D. Sokol, *The development of human capital in Latin American competition policy,* COMPETITION LAW AND POLICY IN LATIN AMERICA 18 (Eleanor Fox & Daniel D. Sokol eds., 2009).

[9] IGNACIO DE LEÓN, AN INSTITUTIONAL ASSESSMENT OF ANTITRUST POLICY: THE LATIN AMERICAN EXPERIENCE 87 (2009).

[10] Symposium OECD-IDB, Dominican Republic, July 15, 2013, *Follow-up to the Nine Peer Reviews of Competition Law and Policy of Latin American Countries—2012, available at* http://www.oecd.org/competition/follow-up-of-nine-latin-american-competition-reviews-2012.htm.

C. Ibero-American Competition Forum

In 2002, the competition agencies of Argentina, Brazil, Chile, Peru, Spain, and Portugal launched the Ibero-American Competition Forum in order "to promote debate and reflection on competition issues on a regional level"[11] among the Ibero-American competition agencies. This Forum organizes annual meetings of the competition agencies and an annual competition course that is held in Madrid. The Ibero-American Competition School is organized both by the Spanish competition authority and the IADB with the aim of training Latin American agencies' staff members.[12] As Maher Dabbah recognizes, "notable work has also been achieved"[13] with this school.

In their 2007 meeting in Puebla, Mexico, the authorities of the Ibero-American Competition Forum launched the Ibero-American Competition Network ("RIAC" or *Red Iberioamericana de Competencia*) with the idea of concentrating and promoting the information on competition cases in the region and exchanging information and experience among the participating agencies, helping to foster their capacity building by creating a knowledge network on competition law and economics issues.[14]

D. Inter-American Alliance

The Inter-American Alliance (*Alianza Interamericana)* is an initiative launched in 2011 by Mexico's Comisión Federal de Competencia. The alliance is a network of competition agencies in the Americas dedicated to "facilitate the discussion of antitrust related matters in the region and to foster cooperation among its members."[15]

The alliance members meet monthly through telephone conferences where the agencies discuss a pre-arranged topic that is presented by a representative of one of the member agencies. The topics cover a wide range of issues from general issues to specific sectoral problems. The first of these meetings took place in February 2011 and representatives from Argentina, Brazil, Canada, Chile, Colombia, Costa Rica, Ecuador, El Salvador, Honduras, Mexico, Nicaragua, Panama, Paraguay, Uruguay, and Venezuela participated. In various occasions representatives from the U.S. Federal Trade Commission ("FTC") or the U.S. Department of Justice ("DOJ") have also participated.

E. Regional Competition Center for Latin America

The Regional Competition Center for Latin America ("CRCAL" or *Centro Regional de Competencia para América Latina*) was launched at the IX Latin American Forum Meeting held in Bogotá, Colombia, in September 2011.[16] The original members of the CRCAL were the

[11] INTERNATIONAL COMPETITION SYSTEM, 1, *available at* http://www.concorrencia.pt/vEN/Sistemas_da_Concorrencia/International_Competition_System/ Ibero-American_Competition_Network/Pages/Ibero-American_Competition_Network.aspx.

[12] X EDICÍON DE LA ESCUELA IBEROAMERICANA DE COMPETENCIA (2012), *available at* http://events.iadb.org/calendar/eventDetail.aspx?lang=Es&id=3485.

[13] MAHER DABBAH, INTERNATIONAL AND COMPARATIVE COMPETITION LAW, 407 (2010).

[14] RIAC, *available at* http://www.redeiac.org/quemsomos.asp.

[15] CRCAL, WHO ARE WE? (2013), *available at* http://www.crcal.org/alianza-interamericana/quienes-somos.

[16] *Id.*

competition agencies of Argentina, Chile, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, and Peru. Brazil, Ecuador, Panama, and the FTC joined the CRCAL afterwards; however, as of July 2014, Bolivia, Paraguay, Uruguay, and Venezuela have yet to become members.

The goal of the CRCAL is to "assist to the competition authorities in their capacity building and in the enforcement of their competition laws and policies."[17]

The different activities performed by the CRCAL since its recent creation include organizing a seminar next to the annual LARF Meetings, seminars dedicated to train judges from the region on competition law and economics, and the preparation of a series of guidelines and sectoral studies. The CRCAL is also working on setting up a regional database containing rulings from national competition authorities.[18]

F. South American Forum of Competition Agencies

In a June 2013 OECD meeting held in Lima, the Peruvian competition authority called for the creation of a South American Forum of Competition Agencies.[19]

The objectives proposed by Peru for the Forum were: a) to hold at least one annual work meeting to create a Virtual Platform for rulings and sanctions of anticompetitive practices with cross-border impact, b) to draft a "Master Co-operation Agreement for the Investigation of Anticompetitive Practices with Cross-border Impact" for the exchange of information and a "Handling of Information Agreement," c) to carry out joint investigations and actions, and d) to facilitate the exchange of officials among the agencies.

The invitation to create the Forum was sent to the agencies of Argentina, Brazil, Chile, Colombia, Ecuador, Uruguay, and Venezuela.

G. Lima Declaration

In September 2013, the competition agencies of Chile, Colombia, and Peru signed the Lima Declaration[20] where they agreed to create a space: (i) to exchange among these agencies experiences and training, (ii) to analyze both legal and economic issues of common interest, and (iii) to work together in improving the level of integration among the agencies.

This initiative was launched with UNCTAD's support, agreeing to facilitate the meetings and offering to share its database of competition case law.

Pursuant to the Declaration, all other Latin American agencies are invited to adhere as long as there is a prior unanimous approval by the existing members.

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[17] CRCAL MISSION VISION (2013), *available at* http://www.crcal.org/inicio/mision-vision.

[18] Aitor Ortiz, *Regional Competition Center for Latin America Presents: Regional Database Containing Rulings from National Competition Authorities*, COMP. POL. INT'L. (2012).

[19] OECD, *Latin American Competition Forum, Contribution from Peru to Session 2*, DAF/COMP/LACF(2013)20, 6 (August 19, 2013).

[20] LIMA DECLARATION (2013), *available at* http://www.fne.gob.cl/wp-content/uploads/2013/09/dec_lima_2013.pdf.

III. REGIONAL AGREEMENTS

A. Trade Agreements

Different trade agreements in Latin America, either regional or bilateral, introduced special competition norms. However, as we will address in the below section, the implementation of these signed agreements has not yet shown any progress.[21]

1. Mercosur (Protocol of Fortaleza)

In December 1996, the Mercosur members (Argentina, Brazil, Paraguay, and Uruguay) signed the Fortaleza Protocol of Fortaleza of Defense of Competition to be applied to anticompetitive conducts affecting trade among its members that had a local effect in one of them. The Protocol established an intergovernmental decision-making process that allowed the government of the infringing party to block the process at any time by just not giving its support.[22]

The Protocol was ratified by the Brazilian and Paraguayan congresses but was never approved by Argentina nor Uruguay. Furthermore, of the four original countries, only Argentina and Brazil had competition law regimes since it was not until 2007 that Uruguay had its own law and not until mid-2013 that Paraguay enacted its competition law. However, by the time Paraguay established its competition law regime, it was suspended from its Mercosur membership. Venezuela joined Mercosur in 2006.

Even though the Fortaleza Protocol was never ratified, the Mercosur working group for competition matters (CT Nº 5) kept meeting at least twice annually. In 2002, Mercosur adopted the Agreement on the Implementation of the Fortaleza Protocol. In 2004, through C.M.C. Decision Nª 4/2004, Mercosur approved the Consensus on the cooperation among competition agencies. In 2006, it approved CMC Decision 15/2006 establishing a system of exchange of information and consultation in the field of merger control. In 2010, Mercosur approved CMC Decision Nº 43/2010 an Agreement for the Defense of Competition in Mercosur which replaced the Fortaleza Protocol. This agreement has been ratified so far only by Argentina (in April 2011) and Uruguay (in January 2014).

2. Andean Community

In March 2005, the Andean Community, then composed of Bolivia, Colombia, Ecuador, Peru, and Venezuela, enacted its Decision 608/2005, creating the "System for the Protection and Promotion of Free Competition in the Andean Common Market" replacing Decision 285/1991 which itself replaced Decision 230/1987.

This legislation is only applicable to cross-border anticompetitive cases that affect Andean Community countries and is to be enforced by the Andean Competition Committee, a supra-national entity.

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[21] *See* Verónica Silva, *Cooperación en política de competencia y acuerdos comerciales en América Latina y el Caribe (ALC),* 49 CEPAL 1 (2005); OECD, *Latin American Competition Forum, Background Note by the IADB Secretariat*, DAF/COMP/LACF(2013)5 (August 28, 2013).

[22] *See* Félix Peña, *Una política de competencia económica en el Mercosur*, 12 BOLETÍN LATINOAMERICANO DE COMPETENCIA 3 (2001).

The members of the Andean Community, similar to the Mercosur case, have very different levels of competition law developments. In fact, Colombia has had a regime since 1959, while Ecuador only enacted its law in 2012. Even more unclear, Bolivia enacted a law in 2008 which might or might not protect competition.

None of Andean Community competition regulations has ever been applied in practice.

3. Sistema de la Integración Centroamericana ("SICA")

In 2006, the Vice-ministers of Economic Integration of Central America created the Central American Working Group on Competition Policy to design a regional competition policy in order to assure a greater transparency and open access to the economic agents that participate in the different inter- and extra-regional trade exchange activities. This group, later named the Central American Competition Network ("RCC" or *Red Centroamericana de Competencia*), has received technical assistance from UNCTAD, the FTC (with U.S. AID funding), ECLAC, the European Commission, and the Inter-American Development bank.

Since 2007, the RCC has organized annual meetings of the Central American Competition Forum, which gathers the competition agencies of different countries of the region. In August 2013, the conference took place in El Salvador. Competition authorities from El Salvador (Superintendencia de Competencia), Costa Rica ("COPROCOM" or *Comisión para Promover la Competencia*), Honduras ("CDPC" or *Comisión para la Defensa y Promoción de la Competencia*), Nicaragua (ProCompetencia, Instituto Nacional de Promoción de la Competencia), and Panama ("ACODECO" or *Autoridad de Protección al Consumidor y Defensa de la Competencia*) were participants, while the Dominican Republic (Pro-Competencia, Comisión Nacional de Defensa de la Competencia) participated as an observer. UNCTAD also participated during these events.

At the 2013 meeting, the authorities discussed the idea of having a regional competition regime authority, a compromise agreed to by the Central American countries in the Association Agreement. This also received signed endorsements from Central America and the European Union, with the support of the IADB.

Before the middle of 2013, there had been no international cooperation between the competition agencies though this platform.[23]

B. Bilateral Cooperation Agreements

In the past decade, a growing number of bilateral cooperation agreements between different Latin American countries, besides the existence of specific competition related chapters in bilateral or regional trade agreements, have developed.

Argentina and Brazil were among the first countries to sign bilateral cooperation agreements in 2003. Although it has been a very limited formal cooperation, there has been some sporadic, informal communication regarding specific matters either through the postal system or

[23] OECD, International Enforcement Cooperation, Paris, 2013, *Secretariat Report on the OECD/ICN Survey on International Enforcement Cooperation*, p. 90.

by telephone.[24] In June 2011, the CNDC requested some information from its Brazilian counterparts using the mechanism established in the bilateral cooperation agreement, and the Brazilian agencies responded in August of the same year, though no information has been given on the content of the request.[25]

Brazil later signed agreements with the competition authorities of Chile (2008), Peru (2012), and Colombia (2014),[26] and it is negotiating an agreement with Ecuador.[27] Chile has also signed cooperation agreements with Costa Rica (2003), Ecuador (2009), and El Salvador (2009).[28] Costa Rica has also signed agreements with Honduras (2009), El Salvador (2007), Nicaragua (2010), and Panama (2008).[29]

Within the region, Mexico has signed the most cooperation agreements. It has signed agreements with Chile (1994), Colombia (2012), the Dominican Republic (2012), Ecuador (2012), El Salvador (2007), and Nicaragua (2011).[30] Mexico also maintains cooperation frameworks in its Free Trade Agreements signed with Chile (1999) and Uruguay (2004). A recent example of collaboration among several agencies includes the agencies of Colombia, Chile, and Mexico. They analyzed the acquisition of Pfizer's infant formula business by Nestlé, which resulted in the divestment of that business in those three countries.[31]

In June 2013, Peru signed a cooperation agreement with the Dominican Republic[32] and Ecuador did so as well with Uruguay in November 2013.

Most of these bilateral agreements include technical assistance provisions as well as provisions about cooperation and information exchanges for enforcement.

Even though many bilateral cooperation agreements have been signed between the different competition agencies throughout the region, actual utilization of these agreements remains low. Though some informal cooperation has occurred, those cases are rare and did necessarily take place between agencies with signed, formal cooperation agreements, but rather took place between officials with good personal, informal ties.[33]

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[24] OECD-IADB, *Competition Law and Policy in Argentina. A Peer Review*. Policy Brief 1, 37 (2006); MARCO BOTTA, MERGER CONTROL REGIMES IN EMERGING ECONOMIES. A CASE STUDY ON BRAZIL AND ARGENTINA, 297-314 (Kluwer 2011).

[25] *See* CNDC NEWS SECTION (2013), *available at* http://www.cndc.gov.ar.

[26] CADE (2013), *available at* http://www.cade.gov.br/Default.aspx?2e0e0e121efc3f1b351e.

[27] Brazil's presentation at the OECD-IADB Latin American Competition Forum, Lima, Peru (Sept. 4, 2013), *available at* http://www.oecd.org/competition/latinamerica/SII-Brazil.pdf.

[28] FNE (2013), *available at* http://www.fne.gob.cl/internacional/participacion-internacional/acuerdos-america/.

[29] COPROCOM (2013), *available at* http://www.coprocom.go.cr/documentos/convenios_acuerdos.html.

[30] CFC, TRATADOS Y ACUERDOS (2013), *available at* http://www.cfc.gob.mx/index.php/cfc-quienes-somos/marco-juridico-cfc/tratados-y-acuerdos-internacionales-de-la-cfc.

[31] OECD, *Latin American Competition Forum, Background Note by the IADB Secretariat*, DAF/COMP/LACF(2013)5, August 28, 2013, p. 32.

[32] *Perú dará asistencia técnica para aplicar ley de defensa de la competencia en RD*, LISTIN DIARIO, June 26, 2013, *available at* http://listindiario.com.do/economia-y-negocios/2013/6/26/282200/print.

[33] OECD, *Competition Law and Policy in Chile,* 1, 37 (2011).

IV. CONCLUSIONS

During the past decade competition law enforcement in Latin America has seen a significant development and the greater cooperation among Latin American agencies have played a relevant role. This is a fact that anyone doing business in the region should be aware of since this new reality will increasingly have a greater influence in the way decisions are taken. The greater cooperation among competition law enforcers is a trend that will continue growing and will thus continue to foster competition enforcement in the region.

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Judicial Evaluations of Minimum Resale Price Maintenance Behavior

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Judicial Evaluations of Minimum Resale Price Maintenance Behavior

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I. INTRODUCTION

On the judicial cognizance of vertical agreements stipulated in Article 14 of China's Anti-Monopoly Law ("AML"), scholars mainly have taken one of two views. One view adopts the dominant principle currently applied in U.S. judicial practice, the "rule of reason" approach, in which the burden of proof lies on the plaintiff to prove both the existence of vertical agreements and that the agreement has the effect of excluding or restricting competition. The second view adopts a dominant principle similar to what is currently used in EU judicial practice, the so-called "rebuttable presumption" approach, which presumes that vertical agreement is illegal. Under this view, the defendant needs to cite Article 15 of the AML and present legal evidence to prove its behavior legitimate.[2]

These views are applicable to antitrust enforcement and judicial practice. For the analysis of the nature of minimum resale-price-maintenance ("RPM") agreements and such acts, there are many differences in legal evaluation principles, analyses, evaluation factors, and the distribution of burden of proof. Regarding these issues, we would propose some preliminary opinions that are combined with the judgment of the second instance of the *Johnson & Johnson* case that was decided by the Shanghai Higher People's Court in August, 2013.[3]

II. LEGAL EVALUATION PRINCIPLES OF MINIMUM RPM BEHAVIOR

A. Three principles in European and American Practice

Antitrust regulations originated in the United States when the world's first antitrust law, the "Sherman Antitrust Act," was passed in 1890. Article I of the "Sherman Act" states that "[e]very contract, in trust form or other forms of alliance, conspiracy, used to restrict interstate trade or commerce with foreign nations, is illegal." This provision is considered to be the legal basis for antitrust intervention of minimum resale price maintenance behavior. In 1911, in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, the U.S. Supreme Court ruled, for the first time, that resale price maintenance was in violation of Article I of the "Sherman Act," and explicitly stipulated that the behavior of resale price maintenance was applicable to the "*per se* illegal" principle. As such, manufacturers' control of dealers' pricing behavior is considered illegal.

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[1] Deputy Chief Judge, Senior Judge of Intellectual Property Tribunal, Shanghai Higher People's Court. The author gratefully acknowledges helpful comments from Vanessa Yanhua Zhang.

[2] Huang Yong, *Enforcement Analysis and Path Discussion of Resale-Price-Maintaining Agreement*, 12 PRICE THEORY AND PRACTICE (2012).

[3] Vertical Monopoly Agreement Disputes among Beijing Ruibang Yonghe Technology Trading Co., Ltd. v. Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd., Johnson & Johnson (China) Medical Ltd., Judgment of Second Instance No. [2012] Hu Gao Min San (Zhi) Zhong Zi No. 63, August 1, 2013.

For nearly 100 years since then, the protocol actions of fixed resale prices and minimum resale price maintenance have always applied to the " *per se* illegal" principle, though the United States Courts posed certain restrictions on the scope of illegal resale pricing activities during that time (e.g., manufacturers' unilateral acts, pricing behavior in agency relationships, and maximum resale price maintenance are excluded). On June 28, 2007, in *Leegin,*[4] the U.S. Supreme Court overthrew *Dr. Miles,* explicitly stipulating that RPM no longer applies to the "*per se* illegal" principle, and took the " rule of reason" principle as an impartial and efficient way to prohibit RPM with anticompetitive effects while protecting those RPMs that have the effect of promoting competition."[5]

The U.S. Supreme Court has given certain legislative powers to states in regards to antitrust law and, after the *Leegin* case, the judicial standpoint of many states regarding RPM diverged. Some states adopted the "rule of reason" principle in state law to follow the *Leegin* case, while some states clearly defined in their antitrust laws that the RPM behavior applied to the "*per se* illegal" principle.

The U.S. Supreme Court's changes in the legal evaluation principles of minimum resale price maintenance behavior not only affected U.S. antitrust law enforcement and judiciary, they also affected antitrust law enforcement and justice in other countries and regions. For example, the European Union, a major jurisdiction of international antitrust enforcement, has also experienced a process of change in its legal regulation of resale price maintenance. The current applicable legal bases include: Articles 101 and 103 of the "Lisbon Treaty," the 2010 European Commission Regulation on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices (referred to as the "2010 Regulations"),[6] and the 2010 European Commission Guidelines on Vertical Restraints (referred to as the "2010 Guidelines").[7] The latter two documents replaced the old regulations from December 1999 and the old guidelines from May 2000.

According to the 2010 Regulations, in the case of maximum resale price maintenance when resale price recommendation behaviors are in line with certain conditions (i.e., the market shares of the seller and the buyer are lower than 30 percent in their relevant markets), a block exemption can be obtained. But minimum resale price maintenance and fixed resale price behaviors are core provisions to restrict competition, regardless of market share of the implementation enterprises, so no block exemption can be obtained. This practice is in line with the 1999 Regulations.

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[4] Leegin Creative Leather Products, INC.v.PSKS, INC., 551.US. (2007).

[5] Between "*per se* illegal" and "rule of reason," a "*per se* legal" legislative tendency also exists. In 1937, the U.S. Congress passed the Miller-Tydings Resale-Price-Maintenance Act, which stipulated that if the state law allows the minimum resale price to be legal, then the minimum resale prices will not be subject to Article 1 of the Sherman Act. Subsequently, in 1952, the McGuire Act passed by Congress expanded the scope of RPM, stating that as long as one distributor signs the RPM contract with the manufacturer the manufacturer can apply RPM to all distributors. However, these two Acts were widely opposed, and were abolished in 1975.

[6] Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. Official Journal L 102, 23.4.2010, p. 1-7.

[7] Commission Notice- Guidelines on Vertical Restraints, Official Journal C 130, 19.05.2010, p.1.

However, possibly due to the influence of the 2007 *Leegin* case in the United States, the 2010 Guidelines are different from the 2000 Guidelines. For minimum resale price maintenance and fixed resale price behavior, individual case exemptions are granted based on the following circumstances: (i) when designed to stimulate the dealers to pay for the extra effort needed to sell products during a new product promotion period, especially when the same results cannot be achieved by other means; (ii) for franchises or similar forms of united sales organizations, a short-term (2-6 weeks for the vast majority of cases) low-price promotional activity is required, with such promotions being equally beneficial for consumers; and (iii) the parties can prove that resale price maintenance is a necessary measure to avoid pre-sale service freeriding.[8]

Elsewhere, some countries such as Australia and Japan are considered to apply the "*per se* illegal" principle. Other countries, however, such as South Korea, are considered to apply the "rule of reason" principle.[9]

In short, in the world's major antitrust jurisdictions, there are actually three legal evaluation principles against resale price maintenance: (1) "*per se* illegal" principle still used by a small number of states in the United States; (2) "rule of reason" principle adopted by the United States Supreme Court and most U.S. states; and (3) the so-called "principle of prohibition + exceptional exemption" principle represented by the European Union. Each of these three principles has their own merits. Whether they are applicable to China is subject to specific analysis.

B. Analysis and Evaluation of the Three Principles

1. The *Per Se* Illegal Principle

First, the "*per se* illegal" principle lacks empirical economic basis, and is in discord with real-world experience. Evaluating an act by the "*per se* illegal" principle means that this behavior is absolutely prohibited, and the legal basis should be that such behavior is: (i) in serious conflict with accepted ethical values, (ii) causes serious damage to private interests, and/or (iii) causes a certain degree of damage to the public interests.

In China, the Anti-Unfair Competition Law was adopted in 1993 to place curbs on certain kinds of anticompetitive excesses, such as deceptive advertising, coercive sales, appropriation of business secrets, and bribery. However, the leadership decided that more comprehensive anti-monopoly legislation was needed and in 2007, the country enacted the Anti-Monopoly Law. The Anti-Monopoly Law is different from the Anti-Unfair Competition Law, although both are designed to promote competition in the market. The evaluation basis of Anti-Unfair Competition Law to market behavior is mainly based on whether the behavior is contrary

[8] Guidelines on Vertical Restraints (2010 / c 103/01). In the Guidelines, preventing free-rides in pre-sale service means that, in some cases, the additional profits arising from resale price maintenance will enable retailers to offer additional pre-service especially for expensive or complex goods. Customers take advantage of this kind of pre-sale service to make purchasing choices, but purchase goods from those retailers who do not offer this pre-sale service, but just sell goods at a lower price. Then the number of retailers who provide pre-sale service will decrease, and even pre-sale service could be completely cancelled by retailers. Resale price maintenance may reduce this "free-riding" phenomenon.

[9] XU Xinyu, *Comparative Analysis of Vertical Price-Fixing Agreements Legal Regulation*, PRICE SUPERVISION AND INSPECTION IN CHINA, VOL. 7 (2012).

to accepted business ethics, while the evaluation basis of Anti-Monopoly Law to market behavior is based primarily on whether the behavior eliminates or restricts competition in the market. Therefore, the Anti-Monopoly Law should not use *a priori* moral law, but rather experienced-based evaluation as its legal basis.

As for whether a market behavior shall be absolutely prohibited, according to the Anti-Monopoly Law, a market behavior shall not be prohibited out of *a priori* moral judgment, but should be based on empirical analysis of the actual competitive effects of the market behavior. So, to take the absolute prohibition stance of the "*per se* illegal" principle on the use of minimum resale price maintenance, there should be empirical arguments to show that minimum resale price maintenance behavior is a behavior imposing serious harm to market efficiency (i.e., the behavior causes pure harm to competition in the market, or has the effect of promoting competition but its effect is far less than the competition harm effect).

However, we still have not seen such empirical economic analysis, and the existing empirical analysis neither supports the conclusion that minimum resale price maintenance does harm to competition, nor does it support the conclusion that minimum resale price maintenance promotes competition. However, empirical studies have shown that resale price maintenance can lead to price increases. But price increases may be caused by increased consumption or quality improvements of product and service, so it is difficult to conclude that minimum resale price maintenance harms market competition simply based on the observation of price increases.[10] Further, real-world experience and economic analysis tell us that, at least in some cases, minimum resale price maintenance does promote competition. For example, for those products that need effective pre-sale services, minimum resale price maintenance is efficient for promoting pre-sale services.

Due to this common understanding, EU legislation has experienced adjustments, as mentioned above, allowing minimum resale price maintenance in certain cases that clearly have the effect of promoting competition. Today, the continued use of the "*per se* illegal" principle for minimum resale prices maintenance not only lacks economic basis, but also goes against real-world experience.

[10] Nathaniel J. Harris, *Leegin's Effect on Prices, An Empirical Analysis*, J. L. ECON. POL'Y (Winter, 2013). This paper used a "Difference in Differences Model" to compare CPI (Consumer Price Index) changes for the same period in U.S. markets with resale price maintenance and without resale price maintenance. The author also compared CPI changes in the areas with absolute prohibition of resale price maintenance (called "*per se* illegal" principle areas) and the areas without absolute prohibition of resale price maintenance (called "rule of reason" principle areas). The author found that CPIs in areas with minimum resale price maintenance and absolute prohibition of minimum resale price maintenance are higher than those in the areas without minimum resale price maintenance and absolute prohibition of minimum resale price maintenance. After considering population composition, changes in income, and multiple other factors, he determined that implementing minimum resale price maintenance and the legal-attitude toward minimum resale price maintenance behavior are highly correlated with CPI, supporting the conclusion that minimum resale price maintenance tends to result in market prices increase. This article is rigorous and reasonable on sample selection and comparison methods, and its conclusions are credible. Nevertheless, this article still believes that there is also consumption increase and other factors that promote competitive effects in the presence of price increase. We shall not deny the principles established in the *Leegin* simply because the resale price maintenance leads to price increase.

2. The Principle of Prohibition + Exception Immunity Principle

Second, the "principle of prohibition + exception immunity" principle also lacks an empirical economics basis. Just like the "*per se* illegal" principle, the application of "principle of prohibition + exception immunity" principle to minimum resale price maintenance action should be based on the following empirical economic basis: in the market, the vast majority—or at least the majority—of minimum resale price maintenance behaviors have the effect of restricting competition. As mentioned earlier, at present there is still no empirical evidence to support such a conclusion. In this case, if we prohibit certain behavior that has unknown competitive effects, competition may either be enhanced due to correct judgment, or be harmed due to misjudgment.

In fact, competition is always dynamic. In the short-term, small-scale restrictions of competition do not often last long, and they will always be overcome by the dynamic development of competition in the market. Any so-called "market failure" will eventually be self-corrected by the market in most cases. Instead, wrongful interventions of the "visible hand" lead to reduced competition in the market and, because the error is institutionalized, it becomes difficult to get corrected by the market itself. Thus, on balance, the loss caused by the wrong judicial intervention will outweigh the benefits brought by the proper administration of justice. And taking the "principle of prohibition + exception immunity" principle for behavior with an unknown effect is a selection of higher risk. Taking the principle of prohibition to minimum resale price maintenance has a higher likelihood to undermine the economy than to improve the economy.

At the same time, we see that China's current market practice of minimum resale price maintenance behavior can be found everywhere, at a time when the Chinese AML practice in its infancy. Applying the "principle of prohibition" to minimum resale price maintenance will lead to a low threshold for minimum resale price maintenance enforcement and litigation, causing a huge impact on the reality of economic life. China, as an emerging market, has a market that is relatively active. New businesses, new products, and new brands come into the market constantly. Since the minimum resale price maintenance is conducive to the promotion of new businesses, new products, and new brands coming into the market, this behavior should not be denied in principle in China.

It should be pointed out that there are views expressing the belief that Articles 13, 14, and 15 of China's Anti-Monopoly Law indicate that the AML applies principles similar to the European Union's "principle of prohibition + exception immunity" to the minimum resale price maintenance behavior. Therefore, judiciary implementation should follow this principle. In this regard, it is necessary to emphasize that during the development of the AML the U.S. *Leegin* case had little influence on the studies of Chinese antitrust legislation. The negative effects of minimum resale price maintenance behavior were more fully understood, and its positive effects were not recognized enough. So even though legislation at that time seems to have taken a relatively stringent stance, today we can still take advantage of the space left in the law as expressed, and explain its position to be more in line with market principles and more in line with market development needs.

3. The Rule of Reason Principle

Third, the "rule of reason" principle has been charged with being too flexible and lacking certainty. Relatively speaking, applying the "rule of reason" principle to minimum resale price maintenance behavior is a choice more in line with the real market situation and has greater accuracy of judicial adjudication. However, if we only apply the abstract "rule of reason" principle and make an exhaustive review of every point in each specific case, the defendant may form a "reasonable cause" defense, making such proceedings too flexible, resulting in a plethora of reviews and considerations in an individual case, and at too great a judicial cost.

A better situation would be if there were relatively clear guidelines on the direction and focus of antitrust analysis of minimum resale price maintenance behavior that are convenient for judges to follow and make it easy to render accurate and efficient analyses and judgments. They would also allow corporate entities to have clearly defined expectations of legality of minimum resale price maintenance behavior, and there would be a relatively clear guide for society.

C. "Real Effects Principle" in the Johnson & Johnson Case

The final judgment in the second trial of the *Johnson & Johnson* case referred to above upheld the view that minimum resale price maintenance agreement is not *per se* illegal, and it explicitly excluded the applicability of the "*per se* illegal" principle. According to the definition of a "monopoly agreement" in Article 13I of the AML, "the effect of excluding and restricting competition" is the constituent element of monopoly agreements. And the Article further defines minimum resale price maintenance behavior as a monopoly agreement only if the behavior produces effects of eliminating or restricting competition that are difficult to avoid or difficult to be offset by its effects of promoting competition. Therefore the Court advocated a practice which is different from the E.U.'s "principle of prohibition + exception exemption" approach, and the U.S. approach of "rule of reason" principle. For the time being, we can name it the "real effect measure" evaluation principle.

As described below, the "real effect measure" principle embodied in the judgment of the second instance of the *Johnson & Johnson* case has intentionally filtered factors not big or important enough to have impact on competition in the market, but just focuses on those factors that have substantial impact on competition in the market that can improve judicial accuracy and also improve litigation efficiency.

III. EVALUATION ELEMENTS OF MINIMUM RESALE PRICE MAINTENANCE BEHAVIOR

The second trial of the *Johnson & Johnson* case upheld that implementing antitrust intervention on a resale price maintenance action must be based on the premise that the resale price maintenance behavior obviously produced the effect of eliminating or restricting competition which is difficult to overcome or to offset. The four aspects most important to consider when evaluating whether minimum resale price maintenance behavior is legal or not are:

A. whether competition in the relevant market is insufficient,

B. whether the defendant's market position is strong,

C. the defendant's motivation in establishing resale price maintenance, and

D. the practical effects from the resale price maintenance arrangement.

A. Relevant Market: Whether Competition is insufficient

On the one hand, in a fully competitive market—such as the clothing market—due to the large number of firms competing with each other, it is difficult to form a tacit understanding on pricing between different brand manufacturers, and even harder to form an explicit or tacit price agreement. Therefore, it is difficult to achieve a so-called vertical restraint agreement on manufacturer cartels or dealer cartels in a fully competitive market. On the other hand, since there is sufficient competition of products in the relevant market, consumers have sufficient alternatives. If a firm agrees to a fixed price or minimum resale price maintenance arrangement for some reason, although the maintenance will reduce some purchasing behavior by consumers who would buy the product below the limit price, consumers can still choose other brands of products at lower prices or of better quality at the same price. Consumer welfare is not damaged, nor is the economic efficiency impaired.

But in an insufficiently competitive market, due to lack of adequate alternatives, consumers rely on a particular brand or a few brands. If price maintenance is implemented on certain brands of products, not only will price competition be absent within the brand, but there will also form a tacit understanding between the different brands on pricing. Or, if no understanding is formed, due to the lack of price competition market prices would rise or remain at a high level, resulting in damages to both consumers and social welfare as a whole.

Thus, insufficient competition in the relevant market is the prerequisite to judge that a minimum resale price maintenance agreement constitutes a monopoly agreement. Only when the lack of full competition in the relevant market situation is affirmed do we need to further determine the competitive effects of the alleged monopoly agreement. As for judgment of sufficient competition in the relevant market, it should be determined in context with the specific circumstances of the case. We should not only consider the concentration ratio of the market, but also consider alternative products involved, the difficulty for potential competitors to enter the relevant market, the competitiveness of downstream markets, and many other factors that affect the degree of competition in the relevant market.

B. Implementation Enterprise: Does the Defendant Have Strong Market Power?

First, it should be clear that the "monopoly agreements" stipulated in Articles 13 and 14 of the AML and the "abuse of dominant market position" stipulated in Article 17 of the AML have different restrictions on market position of the firms. The latter requires companies to have a dominant market position in order to identify illegal behavior, but the former does not have this requirement. The reason for this is that the latter concerns the behavior of an individual firm, but the former concerns behavior jointly implemented by several firms. Although the two behaviors can only be deemed as illegal when they eliminate and/or limit competition as stipulated by the AML, the requirement of determining market power of these two types of companies is different. Therefore, judging minimum resale price maintenance behavior to be illegal does not take into consideration whether the company has a dominant market position.

However, it should be recognized that the market position of a company is the basis for whether a company's pricing behavior can affect market competition. If companies that implement minimum resale price maintenance enjoy strong market positions in the relevant market and therefore can have an impact on competition in the market, this ability should be used as a necessary condition to judge whether the minimum resale price maintenance agreement constitutes a monopoly agreement. A company lacking a strong market position in the relevant market usually can only adapt to market competition, and has little ability to affect competition, let alone lead the competition. If the company does not have an advantage in any market aspects—including market share, supply of raw materials, key technologies, sales channels, or brand image—then the company does not have the power to affect market competition, and its implementation of minimum resale price maintenance would not affect competition in the market. Or, if it affected competition within a short time and a small range, it would soon be corrected by more efficient market competition. In short, the effect of competition that needs to be eliminated or restricted by the AML would not appear.

Therefore, whether the company implementing minimum resale price maintenance has a strong market position should be considered as the foundation to judge whether the conduct of minimum resale price maintenance might have the effect of excluding or restricting competition. That leaves the question: When should a company be considered as having a "strong market position," so that its behavior of minimum resale price maintenance may eliminate or restrict competition?

We argue that a company's market position lies in its pricing power. When other things are equal, if a company has a strong pricing power, it dominates in pricing negotiations with buyers, and it can calmly and freely set the prices rather than being a price taker. Then the pricing of other companies in the relevant market may be affected by the pricing of that company, and that company should be considered to have a strong impact on market competition. In another situation, when other things are equal, if the company implements minimum resale price maintenance, and its market share does not fall but rises, this can also indicate that the company has a strong market position in the relevant market (the reverse is not true—that is, one cannot conclude that a company does not have a strong market position if its market share falls after it implements minimum resale price maintenance.).

It should be pointed out that, among the above four elements, insufficient competition in the relevant market and whether the implementing company has a strong market position are necessary conditions to judge whether minimum resale price maintenance constitutes a monopoly agreement. The decision actually requires the market structure to be a screening condition to judge whether the minimum resale price maintenance constitutes a monopoly agreement. The screening scheme not only draws on the experience of other jurisdictions,[11] but

[11] In the *Leegin* case, when the U.S. Supreme Court judges whether an agreement of price-fixing and RPM is legitimate or not, three factors shall be considered: (1) whether the RPM agreement is driven by the upstream producers or downstream retailers; (2) whether producers or retailers implementing the RPM agreement have market power; and (3) whether the RPM agreement is related to a cartel or potential cartel plan. *Leegin Creative Leather Products Inc. V. PSKS Inc., 551 US877 (2007), p.897-898.* American scholars Phillip E. Areeda and Herbert Hovenkamp proposed that in cases involving resale price maintenance, the following eight market factors can be studied for rule-of-reason analysis: producers concentration, distributors concentration, RPM market coverage, distributors motivation, brand power, distributors dominance, optional RPM, and whether the products are homogeneous. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW, 2ND ED., 328-329 (2004). Quoted from

also takes into account the current status of China's market's economic development, including its immature market development and the prevalence of minimum resale price maintenance in various industries. Taking the market structure as a screening condition helps to stop the conducts that cause actual damage to competition in the market as a whole.[12]

C. Motivation: Whether Inefficient Methods are Used to Cope With Price Competition

Although motivation does not correspond exactly to behavioral effects and motivation is difficult to observe in complicated market activities, if a company with a strong market position implements minimum resale price maintenance to limit competition in the market, due to its dominance in all aspects—including finance, technology, and information—its capacity to control the upstream and downstream markets is often strong and the possibility that its conduct of minimum resale price maintenance will lead to the effect of restricting competition will be greatly enhanced. Therefore, although the motivation to restrict competition cannot be deemed a necessary condition to judge that the minimum resale price maintenance has the effect of eliminating or restricting competition and that RPM constitutes a monopoly agreement, it still can be considered an important reference factor to determine the nature of minimum resale price maintenance behavior.

In a fully competitive market, there are usually two ways for companies to respond to market price competition: one is to reduce prices in order to maintain or expand market share and the other is to not cut the price, but improve the quality of products or services to gain market share. Both methods are conducive to providing better products and services at lower prices in the market. Both are efficient ways to compete.

However, in markets with insufficient competition, companies with dominant market position do not necessarily use these two efficient ways to deal with competition. Fixing resale prices and minimum resale price maintenance may be used to improve service, maintain the brand image, promote new brands, develop new products, etc., which benefit market competition and consumers. But they may also be used to realize price-fixing cartels. Dominant companies may also: (i) use monopoly power to obtain high profits, (ii) use monopoly power to squeeze out competitors, or (iii) use dominant market position to practice price discrimination and other goals that are not conducive to market competition or in consumers' best interests. When evaluating specific cases, specific evidence in the case should be used to analyze and judge the defendant's motivations to take minimum resale price maintenance behavior. For non-efficient ways to cope with price competition, the judiciary should maintain a high degree of vigilance.

Someone may raise the question: If whether the market competition is harmed is the result of completely objective evaluation, why should behavioral motives even be considered a factor in the determination of a monopolistic act? First, since behavioral motivation does not correspond to behavioral effect, this article takes behavioral motivation to harm competition as

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SANDRA MARCO COLINO, VERTICAL AGREEMENTS AND COMPETITION LAW-A COMPARATIVE STUDY OF THE EU AND US REGIMES, 85-87 (2010).

[12] LI JIAN & TANG FEI, ILLEGALITY AND LEGAL REGULATIONS OF RESALE PRICE MAINTAINING, CONTEMPORARY LAW. 6TH ED. (2010).

an important factor for auxiliary judgment—not as a necessary condition to determine whether minimum resale price maintenance constitutes a monopoly agreement, nor are these facts that the plaintiff must prove. Second, it should be recognized that whether determined by principles or not, behavioral motivation investigation has always been an important consideration factor in such cases.[13] Therefore, the plaintiff's failure to prove incorrect motivation does not affect the court's identification of monopolistic behavior based on other facts. But if the plaintiff can prove this fact, it will greatly enhance the judge's inner judgment of monopolistic behavior.

D. Actual Effect: Whether the Effect of Eliminating or Restricting Competition is Observed and is Difficult to Offset

Minimum resale price maintenance may produce a variety of negative anticompetitive effects, but it also may produce a variety of positive effects by promoting competition. On one hand, because the market has certain self-correcting capabilities, some anticompetitive effects will soon be corrected by the market; on the other hand, due to the possible existence of both positive and negative effects at the same time, some anticompetitive effects will be offset by some other pro-competitive effects. Therefore, only those negative effects that are difficult to be corrected by the market, or difficult to be offset by other positive effects, should be eliminated by antitrust intervention. Thus, in the analysis, assessment, and evaluation of the competition effect of the minimum resale price maintenance behavior, we pay special attention to positive and negative effects that have substantial impact on market competition.

1. Negative Effects of Limiting Price Competition

First, consider the negative effects of limiting price competition. In the existing economic literature, minimum resale price maintenance is considered to have some of the following negative effects of restricting competition:

1. it limits price competition within the brand, and reduces consumer welfare;
2. it limits resellers' pricing freedom, and cannot identify efficient distributors;
3. it facilitates manufacturer or distributor cartels, and restricts competition between brands;
4. although it may improve distribution services, some consumers do not need these services and would rather enjoy gains brought by lower prices;

[13] In the *Monsanto* case, the U.S. Supreme Court held that the Court of Appeal applied the wrong standard of proof. One should not determine that agreements or joint actions exist between Monsanto and other distributors just because Monsanto canceled plaintiff's sales qualification based on other distributors' complaints. The reason is that for manufacturers, distributors are important source of information, and distributors' complaints about price reducers are generated in a very normal process of transaction. There must be direct or indirect evidence that can reasonably prove that the manufacturer and others intentionally seek to achieve an illegal purpose, so it can be identified that manufacturer and distributors jointly fixed prices. This opinion can be quoted as an evidence standard issue. Looked at from another angle, it can also be considered to determine the manufacturer's maliciousness by evidence. In fact, in cases adopting "rule of reason," the defendant's interpretation and proof of behavioral motivation have always been an important factor in the court's judgment.

5. when lack of price competition and lack of competing pathways exist it may lead dealers to compete in high advertising investments, excess packaging, and other uneconomical activities; and
6. due to the lack of price competition, dealers may use commercial bribery and other illegal means to compete.

Among the results described above, points (4) and (5) involve excessive service, excessive publicity, excessive packaging, and other uneconomical problems that can be corrected by the market itself, and these do not need to be eliminated by antitrust enforcement. As for the unfair competition issues involved in point (6), there might exist a number of assumptions. For example, the dealer does not have other legitimate means to competition, or after the dealer makes a comprehensive assessment of risks caused by the punishment, he still believes the benefits from unfair competition outweigh the costs, etc. This point needs to be examined carefully in specific cases.

Points (1), (2), and (3) have direct or indirect impacts on price competition within brands and between brands. Because the price mechanism is the most competitive market-based mechanism, price restriction has more obvious effects of limiting competition in the market relative to non-price restrictions. So price restrictions should be of great concern in the effects analysis of whether minimum resale price maintenance agreements limit competition.

2. Positive Effects of Limiting Price Competition

Second, consider the positive effects of promoting the quality of products or services, enhancing new products, or enabling new companies to enter the markets. In the existing economic literature, minimum resale price maintenance is considered to likely have some positive effects of promoting competition, including:

1. it prevents free-riding dealers from not providing distribution services (advertising, products, promotions, etc.) but, instead, using price reductions to win customers from those dealers who provide distribution services, thereby contributing to improved dealer distribution services;
2. it helps maintain the business reputations of manufacturers, distributors, and products, leaving people with the impression of quality assurance;
3. it avoids confusing retail prices and provides a basis for consumers to compare prices;
4. it protects small dealers by safeguarding dealers' profits while limiting the market power of large-scale dealers and dealer concentration, and prevents arbitrage between dealers, thus contributing to the construction of the distribution network;
5. when dealers sell multiple brands of products of different competitors, companies adopting minimum resale price maintenance can motivate distributors to sell their products against competitors' discounts and sales;
6. it reduces risks for dealers when the market is uncertain, and guarantees products inventory and sales volume, which helps new manufacturers and new products enter into market; and

7. it facilitates the promotion of product quality competition among manufacturers and improves product quality.

Among these effects, effect (1) requires the existence of cost competition between dealers for customers and space for arbitrage; effects (2) and (3) involve maintaining product reputation and enable consumers to obtain definite pricing information not worthy of highlighting when the buyers are familiar with the product; effect (4) promotes the so-called distribution network construction, which may not benefit consumers; effect (5) takes as a precondition that dealers sell several brands and other brands reduce their prices; and effects (6) and (7) involve promoting the quality of products or services, and encourage new products or new companies to enter the market effect. The agreement's role of promoting competition in the market is more obvious and prominent compared to other effects.

3. Conducting a Comparative Assessment

Third, it's necessary to conduct a comparative assessment of how much overall consumer welfare has been increased. When minimum resale prices maintenance is showing both positive and negative effects, it is difficult for antitrust analysis to make accurate measures of differences between positive and negative effects. Therefore, there must be a clear value target to make a final evaluation of the balance between the positive and negative effects.

Although Article 1 of the AML stipulates that Chinese AML has multiple legislative purposes of maintaining fair competition, improving economic efficiency, safeguarding consumer interests and public interests, etc., in the specific analysis and evaluation of minimum resale price maintenance behavior, safeguarding consumer interests should be the most important legislative goal. Article 15 of the AML stipulates several circumstances that are not applicable to Articles 13 and 14. But such implementation must still satisfy a condition, i.e. "undertakings should also prove that the agreement reached would not severely restrict competition in the relevant market, and would enable consumers to share the benefits arising from such an arrangement." According to this provision, the final condition determining that an alleged conduct is not applicable to Articles 13 and 14 of the AML is that benefits from such conducts can be shared by consumers. This being said, an important criterion for the evaluation of conducts involved in Articles 13 and 14 of the AML is whether such conducts enhance the overall consumer welfare.

For increasing overall consumer welfare, we should be more concerned about the long-term impact of minimum resale price maintenance behavior on consumer welfare:

1. in the long run, as the core mechanism of market competition—price—provides consumers with the most important right to choose. In an effective competitive market, that is, a market where the price mechanism normally plays its role, the voting right is still ultimately owned by consumers. The consumers should always be able to choose goods of reasonable quality, service, and price, thus promoting multiple competitions of price, quality and service, and allowing consumers to benefit therefrom.
2. In the long run, businesses with significant market power or market dominance will set minimum prices of their products above competitive prices, but this may attract other companies to compete on price. The result may be beneficial to the growth of other

competing companies. In this process the consumers have to endure high prices, so consumers' welfare is sacrificed.

3. In the long run, quality improvements, new products, and new companies can increase choices for consumers, and compensate for the loss of consumers in prices, which is the long-term positive effect that can overcome and offset the short-term negative effect of minimum resale price maintenance.

So the general principle to evaluate the effects of minimum resale price maintenance agreement can be further simplified as follows: If no negative effects of limiting price competition is produced, it can be generally considered to not constitute a monopoly agreement that eliminates or restricts competition. If negative effects of limiting price competition are generated without corresponding positive effects of improving product quality and services or promoting new products or new enterprises to enter the market, the minimum resale price maintenance agreement can generally be considered to constitute a monopoly agreement which eliminates or restricts competition.

IV. BURDEN OF PROOF THAT MINIMUM RESALE PRICE MAINTENANCE BEHAVIOR EXCLUDES OR RESTRICTS COMPETITION

Finally, the evaluation and analysis of minimum resale price maintenance behavior determines the allocation of burden of proof for plaintiffs and defendants involved in such conducts in antitrust civil litigations.

An important focus of controversy in the *Johnson & Johnson's* case was how to allocate the burden of proof in evaluating whether the minimum resale price maintenance agreements excluded or restricted competition. The second trial of the *Johnson & Johnson* case explicitly stated that, in antitrust litigation, the plaintiff bears the burden of proof that the minimum resale price maintenance agreements eliminates or restricts competition. The reason cited in the decision is that the burden of proof could be reversed only when explicitly stipulated by laws. Because there is no law and judicial interpretation that make special provisions for whether a minimum resale price maintenance agreement excludes or restricts competition, following the basic principle "burden of proof borne by claimant" in civil litigation, the appellant Ruibang Company bore the burden of proof that the minimum resale price maintenance agreement eliminated or restricted competition.

Meanwhile, regarding the standard of evidence, the decision did not raise extra requirements for the appellant, but believed that the evidence submitted by appellant must tentatively prove that: 1) the appellee had a strong market position in the relevant market and market competition was not sufficient; 2) the motivation of the appellee's minimum resale price maintenance was to limit competition, and 3) the appellee's behavior had the effect of harming competition. If proved, and if the appellee failed to provide sufficient counterevidence, one could determine that the minimum resale price maintenance agreement limited competition and thus constituted a monopoly agreement.

In the second trial of the *Johnson & Johnson* case, in addition to the legal basis cited in the decision to determine the allocation of the burden of proof in evaluating whether the effect of minimum resale price maintenance agreements restricted competition, there were the following considerations:

First, in line with the aforementioned legal evaluation principles, since the maintenance on minimum resale price agreements does not apply the position of "principle of prohibition," it should not allocate the burden of proof to the defendant, otherwise it would assume the principle of prohibition.

Second, assigning burden of proof to the defendant in such antitrust litigation would lower the threshold for such litigation, reduce judicial efficiency, and affect the effective implementation of the AML.

Third, as a given in such proceedings, the plaintiff and the defendant in general have asymmetric information. The plaintiff often doesn't get access to sufficient information. However, the burden of proof is allocated to the plaintiff to prove whether minimum resale price maintenance agreements eliminate or restrict competition. Under the high probability standard of proof in civil action, it is fair for the judge to reduce the requirements of the plaintiff's burden of proof. It also helps realize actual fairness in such litigations.

V. CONCLUSIONS

In summary, in the absence of sufficient empirical evidence indicating that most minimum resale price maintenance behaviors harm competition, for China—an emerging market—it is not a wise choice to adopt either a "*per se* illegal" or "principle of prohibition + exceptions exemption" for minimum resale price maintenance behavior. "Rule of Reason principle" fits the actual needs of the market, but should not be applied in a manner that is too flexible or at too high a cost.

In the second trial of the *Johnson & Johnson* case, the court tried to identify some of the most basic and important analysis elements, so as to provide a simple analytical framework for judges, and also to help enterprises establish clear behavioral expectations. In this analytical framework, the structure of relevant markets, the market position of implementing companies, motives to establish minimum resale price maintenance, and actual competitive effects of minimum resale price maintenance are the most important four factors for judgments. And judges should focus on the effects of market competition that have a substantial impact on the market, and filter out those results that produce non-substantive impact on competition in the market. As a result, this analytical framework can be named the "substantial effect measurement" principle. In this framework, the plaintiff bears the burden of proof with respect to the defendant's substantial damage to competition, but the judge will set the standard of proof based on the specific case.

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Repeal the FTAIA!
(Or At Least Consider It as Coextensive with *Hartford Fire*)

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Repeal the FTAIA! (Or At Least Consider It as Coextensive with *Hartford Fire*)

Robert E. Connolly[1]

I. INTRODUCTION

The goal of this article is to advance two propositions: 1) that the Foreign Trade Improvements Act ("FTAIA") should be repealed; and 2) that *Motorola Mobility*[2] can be decided through the principles set forth in *Hartford Fire*[3] and *Illinois Brick*.[4]

The FTAIA was passed in 1982. A primary motivation behind the FTAIA was to give immunity to American exporters to engage in anticompetitive conduct—as long as it negatively affected only foreign consumers. With a purpose like that, what could go wrong? The FTAIA did not establish the extraterritorial reach of the Sherman Act and its repeal would not remove it.

Deciding *Motorola Mobility* through the application of *Hartford Fire* and *Illinois Brick* would preserve the ability of the U.S. Department of Justice's Antitrust Division ("DOJ") to prosecute international cartels that harm American consumers but, at the same time, give weight to foreign governments that seek to limit the reach of antitrust treble damage actions for sales made abroad.

II. THE FTAIA IS UNNECESSARY AND HAS HARMFUL SIDE EFFECTS

The FTAIA was passed when the world's landscape of antitrust enforcement was dramatically different. The Supreme Court explained "[t]he FTAIA seeks to make clear to American exporters (and to firms doing business abroad) that the Sherman Act does not prevent them from entering into business arrangements (say, joint selling arrangements), however anticompetitive, as long as these arrangements adversely affect only foreign markets."[5]

In 1982 there wasn't much in the way of antitrust enforcement outside of the United States and Canada. To the contrary, many foreign governments encouraged cooperation or "harmonization." But today there are over 100 robust competition enforcement agencies worldwide. This growth in international enforcement, particularly against cartels, is largely due to the leadership of the United States. It seems impolite for the United States to provide immunity to executives to fix prices for export while at the same time seeking extradition of foreign executives to face a maximum of 10 years in jail for price-fixing.

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[2] Motorola Mobility LLC v. AU Optronics Corp, 746 F.3d 842 (2014), reh'g granted and opinion vacated by Motorola Mobility LLC v. AU Optronics Corp., 2014 U.S. App. LEXIS 12704 (7th Cir. July 1, 2014).

[3] Hartford Fire Ins. Co. v. Cal., 509 U.S. 764 (1993).

[4] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[5] F. Hoffmann-LaRoche LTD v. Empagran S.A. 542 U.S. 155, 161 (2004).

Moreover, in a global economy, it's hard to believe that allowing domestic companies to fix export prices would not have some adverse effect on domestic prices. At a minimum, immunity for export price-fixing can also provide cover for domestic price-fixing. Finally, even if a U.S. exporter is doing business in a country where price-fixing is rampant, American law should encourage that firm to compete and expand output, not artificially raise prices.

Besides having some unpleasant side effects, the FTAIA is simply unneeded. The FTAIA did not create the extraterritorial reach of the Sherman Act. Judge Hand long ago established in *Alcoa*[6] that "the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States."[7] The FTAIA makes the Sherman Act inapplicable to conduct involving export or wholly foreign commerce except when that conduct has a "direct, substantial and reasonably foreseeable effect" on U.S. commerce and that effect "gives rise to a claim." The FTAIA can be read, as some courts have, as consistent with *Hartford Fire*. The FTAIA is simply not needed, and if the aim was to clarify the extraterritorial reach of the Sherman Act, the statute has fallen short.

III. UPON REHEARING, *MOTOROLA MOBILITY V. AU OPTRONICS* SHOULD BE RESOLVED THROUGH THE LENS OF *HARTFORD FIRE* AND *ILLINOIS BRICK*

The Seventh Circuit issued an opinion, now vacated, in *Motorola Mobility* and the matter is scheduled for rehearing. Motorola seeks treble damages for LCD panel purchases made abroad by its foreign subsidiaries where those LCD panels were assembled into cell phones that were then sold in the United States. In order for this foreign commerce to be brought back within the Sherman Act under the FTAIA, Motorola had to show that defendant's actions had "a direct, substantial, and reasonably foreseeable effect" on commerce within the United States.

In the vacated opinion the court found the effect was not direct because the defendants sold the price-fixed panels to foreign companies, i.e. Motorola's subsidiaries. While the panels were a component of a finished product that was then sold in the United States, the court found that the effect on domestic commerce was indirect and barred by the FTAIA.

IV. THE ANTITRUST DIVISION SHOULD HAVE JURISDICTION TO PROSECUTE COMPONENT PRICE-FIXING

The United States is not a party in *Motorola Mobility* but has filed several amicus briefs. The interpretation of the FTAIA could substantially impinge the DOJ's ability to prosecute foreign cartels that adversely affect domestic consumers. As the government notes in its amicus filings, there is a difference between actions brought by the DOJ and private class action damages. *Motorola Mobility* can be decided in such way as to recognize these differences. The court can find jurisdiction under the FTAIA for DOJ prosecutions while addressing the concerns raised by China, Japan, Korea, and Taiwan about an unduly expansive application of U.S. law they claim would undermine principles of international comity.

The FTAIA by its terms does not apply to domestic commerce or import trade or commerce. There is, therefore, no dispute that price-fixed panels sold directly to customers in the

[6] United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

[7] *Hartford Fire*, at 796.

United States are within the reach of the Sherman Act. But, the FTAIA covers foreign commerce where (1) the foreign conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. domestic, import, or certain export commerce, and (2) that effect "gives rise to a claim under" the Sherman Act.

This section must have some meaning besides direct imports because direct imports are already excluded from the FTAIA. As the government argues, the effect on domestic commerce of the LCD panel price-fixing on sales to Motorola's subsidiaries was direct. The rigged/inflated prices were passed directly on to domestic consumers of the imported cell phones. The effect was substantial; LCD panels constitute a large portion of the price of cell phones and millions of dollars of panels were imported into the United States in cell phones. Finally, it was reasonably foreseeable that raising the price of a major component of cellphones would raise the price of cellphones sold in import and domestic commerce.

The United States requested that the panel "hold that a conspiracy to fix the price of a component can directly affect import commerce in finished products incorporating that component and that the conspiracy in this case did directly affect that commerce."[8] Several circuits have agreed with the reasoning of the government. The Second Circuit recently adopted a "reasonably proximate causal nexus test." In *Lotes,*[9] the court rejected the interpretation advanced by the Ninth Circuit in *LSL Biotechnologies,*[10] whereby an effect is "direct" if it follows as an immediate consequence. Instead, the court wrote, "We agree with Lotes and amici [the United States] that this less stringent approach (reasonably proximate causal nexus) approach reflects the better reading of the statute."

Finding jurisdiction for the United States to prosecute component price-fixing need not ignore the international comity concerns of foreign governments. No nation has objected to the DOJ's successful prosecution of foreign companies and even citizens of that country in the LCD panel investigation. As the United States notes in its brief, the DOJ seriously considers the views of foreign nations before bringing cases. And, as the world's leading competition agency, consumers everywhere benefit when the DOJ breaks up international cartels. In fact, with the DOJ leading the way, many foreign competition enforcement agencies have also brought governmental enforcement actions against cartel members. Significant cooperation among enforcement agencies in prosecuting international cartels is a high priority for each government that filed an amicus brief. As a prosecuting entity, the DOJ has "skin in the game" to preserve strong relations with its foreign counterparts.

As discussed below, the comity considerations with private plaintiffs are quite different. "[P]rivate plaintiffs," in contrast, "often are unwilling to exercise the degree of self-restraint and consideration of foreign governmental sensibilities generally exercised by the U.S.

[8] *See* Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party, September 5, 2014, p. 7, *available at* http://www.justice.gov/atr/cases/f308400/308451.pdf.

[9] Lotes Co. v. Hon Hai Precision Industry Co., 753 F.3d 395, 410 (2d Cir. 2014).

[10] United States v. LSL Biotechnologies, 379 F.3d 672 (9th Cir. 2004). The Ninth Circuit's holding was based on the view that the FTAIA limited the common law extraterritorial reach of the Sherman Act. Repeal of the FTAIA would remove this conflict.

Government."[11] This helps explains why foreign government amici briefs were filed in *Motorola Mobility* [Japan, China, Taiwan, and Korea] but not in any DOJ criminal prosecutions.

V. COMITY CONSIDERATIONS WARRANT APPLICATION OF THE *ILLINOIS BRICK* RULE TO COMPONENT PRICE-FIXING.

It is an open question whether the *Illinois Brick* bar exists when direct purchasers cannot bring Sherman Act claims because they cannot satisfy FTAIA requirements. The United States argues that the *Illinois Brick* doctrine should be construed to permit damage claims for the first purchaser in affected domestic commerce when the FTAIA bars direct purchasers' claims because, otherwise, it is possible no private plaintiff could recover damages under the federal antitrust laws.[12]

Some of the arguments the DOJ has made to support plaintiffs' needs to bring component treble damage cases are questionable. For example, in one amicus filing the United States noted "that price fixers' host countries often have no incentive to enforce their antitrust laws" and "would logically be pleased to reap economic rents from other countries"[13] (citing *Minn-Chem*[14]). The same brief, however, points out that a global effort against hard-core cartels has emerged partly due to the work of the Organization for Economic Cooperation and Development ("OECD") and the International Competition Network.

The world, led by the DOJ, has changed dramatically since the FTAIA was passed. It is no longer accurate to suggest that other nations would be pleased to reap the economic rents gained by price-fixing component goods that eventually end up being sold in finished products in the United States. After all, Chinese and Taiwanese citizens also buy products with LCD screens as a component. It is notable that DOJ international cartel investigations are typically conducted with the cooperation of many nations, which then bring their own enforcement actions.

The United States has argued that some of the foreign governments that have filed amicus briefs urging the court to limit the reach of the FTAIA have themselves brought cases against foreign sellers. But, in one example, i.e. Korea bringing an action against graphite electrode manufacturers, the product was shipped directly into Korea—commerce that would not fall under the FTAIA. Even in other given examples, e.g. actions by Japan and the European Union, these were governmental enforcement actions arising from investigations coordinated with the DOJ. The United States' position, perhaps in an effort to not unduly undercut private plaintiffs, does not appreciate or minimizes the different comity considerations between government enforcement of the antitrust laws and the rights of private parties to seek class action treble damages. But, there is a world of difference.

The United States wrote in its amicus brief: "Anticompetitive conduct involving components in wholly foreign commerce often would have no practical effect on U.S. commerce,

[11] *Empagran,* 542 U.S. at 171 (quoting Joseph P. Griffin, *Extraterritoriality in U.S. and EU Antitrust Enforcement*, 67 ANTITRUST L.J. 159, 194).

[12] *See* Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Neither Party, September 5, 2014, p. 6, *available at* http://www.justice.gov/atr/cases/f308400/308451.pdf.

[13] Motorola Mobility v. AU Optronics, Case No. 09-cv-6610 (N.D. Ill.), Supplemental Brief For the United States as Amicus Curiae, June 27th, 2014, *available at* http://www.justice.gov/atr/cases/f306700/306783.pdf. P.6-7.

[14] *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845 (7th Cir. 2012) (*en banc*).

in which case the Sherman Act would not apply."[15] This is the heart of the problem: In today's global economy it is common for products bought by American consumers to contain components manufactured and sold overseas. The United States government and the private plaintiffs bar are likely to make significantly different calls on when the conduct has a "direct, substantial, and reasonably foreseeable effect" on U.S. commerce. From a comity point of view, foreign governments may well, and seemingly do, have a different view of the positions of the U.S. government and the private plaintiffs bar.

The *Motorola Mobility* case itself is on its fifth year. *Animal Science*, a Third Circuit case involving foreign commerce and FTAIA issues was first filed in 2005 and certain plaintiffs have just been granted to amend the complaint. Since the FTAIA requirements are not a jurisdictional requirement, but a substantive element of the offense, it can take an enormous amount of expensive litigation to determine the applicability of the FTAIA on a case-by-case basis in component cases. The ubiquity of foreign-made components in products sold in the United States is likely what led the Seventh Circuit in the vacated opinion to state: "The position for which Motorola contends would if adopted enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and 'resent[ment at] the apparent effort of the United States to act as the world's competition police officer,' a primary concern motivating the foreign trades act."[16]

In *Empagran* the Supreme Court observed "even where nations agree about primary conduct, say price fixing, they disagree dramatically about appropriate remedies." The Court also remarked that the application of American private treble damage remedies has generated controversy. Several countries (including Canada, Japan, and Germany) filed amicus briefs in *Empagran*. These countries argued "to apply our remedies would unjustifiably permit their citizens to bypass their own less generous remedial schemes, thereby upsetting a balance of competing considerations that their own domestic antitrust laws embody."[17] The Seventh Circuit has said: "U.S. antitrust laws are not to be used for injury to foreign customers."[18] The fact is that when Motorola operates subsidiaries in foreign countries it is a "citizen" of the country it has chosen.

VI. APPLYING *ILLINOIS BRICK* TO COMPONENT PRICE-FIXING IS FAIR TO COMPANIES WITH OVERSEAS SUBSIDIARIES

It is fair to require foreign subsidiaries of American companies to seek remedy in the courts of the country in which they choose to incorporate. Companies operate overseas facilities to take advantage of many legal provisions of that country: labor law, environmental law, and tax law. In non-legal terms: "You take the good with the bad." By contrast, American consumers have no realistic choice but to buy finished goods that are assembled from components sold and assembled around the world.

Therefore, the antitrust laws should be read—where possible—to allow governmental enforcement against international cartels that were meant to have, and have had, a substantial

[15] *Motorola Mobility*, September 5, 2014 amicus filing of the United States, p. 18.
[16] *Motorola Mobility*, 746 F.3d at 845.
[17] *Empagran*, at 167.
[18] *Minn Chem*, at 858.

effects on domestic commerce, whether that commerce is a direct import, sold through a trading company, or a component destined for shipment to the United States. The DOJ even has the authority to seek disgorgement of profits if it believes it necessary for adequate punishment and deterrence. A foreign subsidiaries position is more akin to an American citizen living overseas who buys price-fixed goods but then must seek any remedies under the laws country she has chosen to live in.

VII. U.S. PARENT CORPORATE PURCHASERS ARE NOT WITHOUT REMEDY

Domestic corporate purchasers are not without remedy when buying component parts from foreign vendors. First, the U.S. parent could buy directly from the foreign vendor and preserve the right to sue as a direct purchaser (while trading off the benefits the company gained from operating through a foreign subsidiary). Or, if a U.S. parent doesn't think that antitrust laws are sufficiently, or fairly, enforced in a given country, they certainly don't have to set up a subsidiary there.

A U.S. parent also could, by contract, try to negotiate an assignment of rights from their subsidiary. The subsidiary, of course, can seek a remedy in the country where it has located. While beyond the scope of this article it is worth noting that the right of private action is expanding around the globe, although American-style class actions regimes have not met a warm reception.[19] So, an adverse ruling in *Motorola* would not eliminate every avenue of damage redress for component price-fixing.

VIII. CONCLUSION

There is overwhelming evidence that the LCD cartel members meant to and did produce substantial anticompetitive effects on commerce in the United States. The *Motorola Mobility* court should reach a decision that preserves the ability of the DOJ to protect American consumers and continue to lead the way in prosecuting international cartels—including appropriate component cartels. The court could also acknowledge the comity concerns of foreign nations and find application of *Illinois Brick* a bar to foreign component civil damage cases. This of course would not address every legal and policy question (for example there are exclusions to *Illinois Brick* such as state actions) but it would be a start.

[19] Also, many states have *Illinois Brick* repealer statutes. Component class action suits may be feasible in these states.

COMPETITION POLICY INTERNATIONAL

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Is the Affordable Care Act the Catalyst to Merger Efficiency Reform?

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Is the Affordable Care Act the Catalyst to Merger Efficiency Reform?

George L. Paul & Andrew K. Mann[1]

I. INTRODUCTION

Recently, the Obama Administration has reshaped the healthcare industry and encouraged collaborations among competitors as a way to drive skyrocketing costs down and improve the efficiency of the delivery of healthcare to Americans. But are the Administration's own competition watchdogs standing in the way of these efficiencies?

Tensions between reducing costs and protecting competition are increasingly ramping up for companies seeking to adjust to a constantly shifting competitive landscape created under new federal healthcare reform legislation—the Patient Protection and Affordable Care Act ("ACA")[2]—increasing deal uncertainty for parties attempting new collaborations. Going forward, parties will continue to face uncertainty about how the industry will respond to collaborations, including how competition will be affected, and a lack of clarity about how the agencies will weigh the potentially substantial benefits of proposed collaborations against the potential effect such collaborations will have on a constantly shifting competitive landscape.

This is occurring as the healthcare industry remains one of the largest and fastest-growing sectors in the U.S. economy. It makes up approximately one-fifth of the U.S. GDP, which makes it almost the size of the entire economy of the United Kingdom. According to economists in the Office of the Actuary at the Centers for Medicare and Medicaid Services ("CMS"), healthcare spending is projected to grow at an annual average rate of 5.8 percent through 2020, which is just over 1.0 percent higher than the projected growth rate of U.S. GDP. By 2020, healthcare spending is projected to exceed $4.5 trillion.

II. THE ACA, COLLABORATION, AND ANTITRUST

On March 23, 2010, President Obama signed the ACA into law. The purpose of the ACA was to: (i) increase the quality and affordability of health insurance, (ii) lower the uninsured rate by expanding public and private insurance coverage, and (iii) reduce the costs of healthcare for individuals and the government by shifting the system towards quality over quantity through increased competition, regulation, and incentives to streamline the delivery of healthcare. The ACA introduced a number of provisions and tools to achieve these purposes. The Act's primary tool to reduce costs and improve healthcare outcomes, however, is the promotion of collaboration among hospitals, doctors, and other healthcare professionals.

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[2] Pub. L. No. 11-48, 124 Stat. 119 (2010).

Accordingly, at an unprecedented pace, healthcare organizations—both hospitals and physicians—are consolidating to create larger hospital systems with broader service reach and greater efficiencies. This consolidation is manifesting itself on two fronts: Individual hospitals are merging with other local hospitals or larger regional or national hospital systems, and physician groups are joining the payroll of hospitals. From 2009 to 2012, there were 314 hospital mergers in the United States.

In general, the purpose of the federal antitrust laws is "to protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down and keep quality up."[3]

At first blush, the stated purpose of the ACA and the federal antitrust laws appear consistent and at least are directionally pointed the same way. Yet there is a tension between the two. On one hand, the clear directive of the ACA is to reduce costs and collaborate more. On the other hand, the Federal Trade Commission ("FTC") is charged with ensuring that such collaborations do not substantially lessen competition among hospitals and physician groups. So, reducing costs should reduce price and increase access to health care. However, reducing competition could encourage hospitals or physicians to pocket the cost savings and not pass them on. As a result, while collaborations have increased, so has FTC enforcement in healthcare. Indeed, the greatest area of competition enforcement from 2009 to 2012 for the FTC was in healthcare (32 percent), and healthcare and pharmaceuticals combined (46 percent) amounted to almost half of all FTC enforcement activity.[4]

Multiple senior leaders at the FTC have tried to assuage this tension. Commissioner Julie Brill recently stated, "the FTC's work and the ACA share the common goals of promoting high-quality and cost-effective health care."[5] FTC Bureau of Competition Director, Deborah Feinstein, stated that it is "critical to recognize that the integration of care provided to patients is fully compatible with core antitrust principles. . . . [and] there is no tension between rigorous antitrust enforcement and bona fide efforts to coordinate care, so long as those efforts do not result in the accumulation of market power."[6] Chairwoman Edith Ramirez explained that "[a]ntitrust enforcers recognized that provider collaboration represents an innovative way to seek to lower healthcare costs and improve the quality of care. We, of course, do not want to stand in the way of those goals. At the same time, we want to ensure that the financial savings and improved

[3] Fed. Trade Comm'n, The Antitrust Laws, http://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws.

[4] Fed. Trade Comm'n, Annual Highlights: Stats & Data, http://www.ftc.gov/reports/annual-highlights-2013 (2013).

[5] Julie Brill, Commissioner, Fed. Trade Comm'n, Keynote Address at the Hal White Antitrust Conference, *Competition in Health Care Markets*, at 6 (June 9, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/314861/140609halwhite.pdf.

[6] Deborah L. Feinstein, Director Bureau of Competition, Fed. Trade Comm'n, Fifth National Accountable Care Organization Summit, *Antitrust Enforcement in Health Care: Proscription, not Prescription*, at 2 (June 19, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/409481/140619_aco_speech.pdf.

patient outcomes that could result from these collaborative efforts are not lost because of increased provider concentration and coordination."[7]

Unfortunately, many antitrust practitioners believe that the antitrust laws and antitrust enforcers continue to "stand in the way" of innovative collaborations that likely will lower healthcare costs and improve the quality of care. But why?

III. THE IMPORTANCE OF CONSIDERING EFFICIENCES IN MERGER REVIEWS

Perhaps the largest reason for this skepticism is the current way efficiencies are considered in the merger review process. Not unique to healthcare merger analysis, but for merger analysis generally, the FTC and the Department of Justice Antitrust Division (the "Agencies") typically consider efficiencies in a silo, placing whatever weight the efficiencies are given on a scale towards the end of the overall review to see which way the balance tips. The Agencies pay close attention to cost savings and, where parties are able to demonstrate substantial merger-specific cost savings, it may help address concerns over concentration levels or a potential lessening of competition.

However, for the most part, the Agencies are skeptical of efficiency claims in a merger. Indeed, the *2010 Horizontal Merger Guidelines* ("*HMG*") clearly acknowledge this cynicism: "Projections of efficiencies may be viewed with skepticism, particularly when generated outside the usual business planning process."[8] Furthermore, parties have a high burden when presenting cost saving and efficiency claims:

> [I]t is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific.[9]

Additionally, the Agencies currently only consider efficiencies specific to the narrowly defined relevant antitrust markets. Part of the tension that manifests itself in the healthcare context, but in other contexts as well (such as airlines), is that consumers in these industries are part of much larger markets than the narrowly defined antitrust markets.

At least two senior leaders at the FTC have recently provided support for increased attention regarding the scope of efficiencies in merger analysis.

Commissioner Joshua Wright believes that the FTC "should advocate that courts adopt an approach to efficiencies analysis that considers the competitive benefits from a merger that are outside the relevant product market."[10] Interestingly, this notion is not necessarily novel. Buried

[7] Edith Ramirez, Chairwoman, Fed. Trade Comm'n, Keynote Address at 11th Annual Loyola Antitrust Colloquium, *Antitrust, Accountable Care Organizations, and the Promise of Health Care Reform*, at 2 (April 29, 2011), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/antitrust-accountable-care-organizations-and-promise-health-care-reform/110429loyolaspeech.pdf.

[8] U.S. Dept. of Justice & Fed. Trade Comm'n, *Horizontal Merger Guidelines* (Aug. 19, 2010) § 10 [hereinafter 2010 Horizontal Merger Guidelines].

[9] *Id.*

[10] Joshua D. Wright, Commissioner, Fed. Trade Comm'n, 2013 Georgetown Global Antitrust Symposium Dinner: *The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets*, at 18 (Sept. 24, 2013),

in a footnote in the *HMG*, for the first time Agencies appear to recognize that there are instances where a transaction could cause anticompetitive effects in one market that would be offset by substantial efficiencies in another:

> The Agencies normally assess competition in each relevant market affected by a merger independently and normally will challenge the merger if it is likely to be anticompetitive in any relevant market. In some cases, however, the Agencies in their prosecutorial discretion will consider efficiencies not strictly in the relevant market, but so inextricably linked with it that a partial divestiture or other remedy could not feasibly eliminate the anticompetitive effect in the relevant market without sacrificing the efficiencies in the other market(s). Inextricably linked efficiencies are most likely to make a difference when they are great and the likely anticompetitive effect in the relevant market(s) is small, so the merger is likely to benefit customers overall.[11]

Commissioner Wright supports this direction and points out that "doing so would take the important step of updating current merger doctrine with respect to efficiencies analysis so that it is consistent with the modern trend in favor of analyzing actual competitive effects rather than adopting simplified and potentially misleading proxies for harm."[12]

Including out-of-market efficiencies in the merger review analysis makes sense, particularly since included in the 2010 *HMG* was an endorsement to an approach that generally will result in narrowly defined relevant product markets. Unfortunately, as Commissioner Wright points out, narrowly defined product markets "inevitably lead to the atomization of classes of consumers whereby a market may be defined by picking a harmed consumer and defining a relevant market around that individual."[13] Merging companies seeking government antitrust clearance have consistently included out-of-network efficiencies in their arguments.

In the St. Luke's Health System/Saltzer Medical Group merger (which the FTC, the Idaho Attorney General, and a handful of private party participants successfully challenged in the Federal District Court for the District of Idaho), St. Luke's argued out-of-market efficiencies:

- "St. Luke's is in the process of transforming the delivery of healthcare by offering the population of southern Idaho clinically integrated, risk-based care."[14]
- St. Luke's "transaction with Saltzer will permit the affiliated entities to achieve integrated care—particularly in Canyon County—faster and more effectively than could happen if the transaction had not happened or were unwound."[15]

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available at http://www.ftc.gov/sites/default/files/documents/public_statements/ftc%E2%80%99s-role-shaping-antitrust-doctrine-recent-successes-and-future-targets/130924globalantitrustsymposium.pdf.

[11] 2010 *Horizontal Merger Guidelines* § 10, n.14.

[12] Joshua D. Wright, Commissioner, Fed. Trade Comm'n, 2013 Georgetown Global Antitrust Symposium Dinner: *The FTC's Role in Shaping Antitrust Doctrine: Recent Successes and Future Targets*, at 18 (Sept. 24, 2013), *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/ftc%E2%80%99s-role-shaping-antitrust-doctrine-recent-successes-and-future-targets/130924globalantitrustsymposium.pdf.

[13] *Id.* at 19-20.

[14] Pretrial Memorandum, Federal Trade Commission v. St. Luke's Health System, Ltd., Case No. 1:12-CV-00560-BLW-REB, at 12 (D. Idaho Sept. 10, 2013).

In the American Airlines/US Airways merger challenged by the U.S. Department of Justice in the Federal District Court for the District of Columbia, the airlines also claimed out-of-market efficiencies:

- The merged airlines "would generate enormous direct consumer benefit, most significantly by creating a unified network affording a vastly expanded array of flight options for travelers—taking more passengers where they want to go when they want to go there."[16]
- The models "routinely used by the airlines in their businesses demonstrate that these positive network effects" of "a unified network" would "attract millions of additional passengers to the merged airline" and that methods used by the government "conservatively demonstrate that the value of these consumer benefits would exceed $500,000,000 every year, net of any fare effects."[17]

Unfortunately, neither the St. Luke's/Saltzer merger (appeal pending) nor the American/US Airways merger (deal settled) provided any movement in terms of out-of-market efficiency analysis. Nevertheless, there is still hope for efficiency reform.

On top of the support from Commissioner Wright for updating current merger doctrine with respect to efficiencies analysis, FTC Bureau of Economics Director, Martin Gaynor, recently encouraged economists to "devote more attention to the modeling of efficiencies." As part of this encouragement, Mr. Gaynor asked economists to "step back . . . and consider what the goal of economic analysis of an antitrust matter is. The question that we're really asking is whether a merger or some type of conduct makes consumers better off."[18]

IV. CONCLUSION

Due to the large number of merger transactions that have occurred, the healthcare industry is teed up to provide enough data points to really move the needle in terms of analyzing out-of-market efficiencies. Any developments in this arena, however, will have implications outside the healthcare context.

Uniquely, the healthcare industry is in a period of tremendous and constant flux. Under the ACA, we see a period of unprecedented innovation and reform—providers are repositioning themselves in the marketplace, and healthcare providers and plans are consolidating, all in an effort to walk a fine line between improving access to high-quality care and containing costs. As pioneers in navigating this new landscape, both companies and the Agencies are attempting to adjust.

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[15] *Id.* at 17.

[16] Answer to Amended Complaint, *United States v. US Airways Group*, Case No. 1:13-CV-01236-CKK, at 2 (D.D.C. Sept. 10, 2013).

[17] *Id.*

[18] Martin Gaynor, Director Bureau of Economics, Fed. Trade Comm'n, 2014 Annual Conference of the American Antitrust Institute, *Efficiencies Analysis: False Dichotomies, Modeling, and Applications to Health Care*, at 1 (Aug. 3, 2014), *available at* http://www.ftc.gov/system/files/documents/public_statements/574751/140619efficienciesanalysis.pdf.

For the Agencies, it will mean closely examining their traditional view of efficiencies and likely broadening both the scope of efficiencies considered and the ability of claimed efficiencies to overcome perceived threats to competition. For companies, these shifts mean unfortunate deal uncertainty and the need for both careful analysis of strategic options and understanding of the competitive responses likely to occur going forward.

COMPETITION POLICY INTERNATIONAL

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Competition Law in Asia—Protecting (Against) Competition?

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Competition Law in Asia—Protecting (Against) Competition?

Kala Anandarajah & Tanya Tang[1]

I. INTRODUCTION

Competition laws across Asia have gone beyond infancy and nascent stages and have become laws to be reckoned with. The sheer numbers of Asian countries with competition laws, and the seeming diversity as regards enforcement patterns and application of principles, naturally leads one to question whether the implementation of the laws are truly motivated by competitive forces or whether some other hidden agendas drive the same.

China's recent probes into Microsoft Corp. and foreign car companies such as Audi and Chrysler, for example, have prompted observers to question if China is using its competition laws to support domestic firms at the expense of foreign companies. According to a recent Reuters article, legal experts point out that the Chinese authorities appear to have wielded the law against more foreign multinationals than local companies; firms targeted include Mead Johnson Nutrition Co. and Danone SA which have been slapped with heavy fines, as well as U.S. chipmaker Qualcomm Inc., which faces the prospect of a U.S. $1 billion fine.

The same article noted that this had prompted the U.S. Chamber of Commerce to send a private letter to the U.S Secretaries of State and Treasury to highlight concerns that China's enforcement of the anti-monopoly law was being used to pursue "China's industrial policy goals" and promote Chinese producer welfare and advance industries policies that nurture domestic enterprises, instead of the internationally accepted norm of using competition law to protect consumer welfare and competition.

Similar concerns have also been raised regarding the Indonesian competition authority, which had in the mid-2000s issued a string of infringement decisions against the likes of Chevron, Carrefour, Mitsubishi, Pfizer, and Temasek, the Singapore sovereign wealth fund.

Amidst such concerns, this article looks at the track record of competition authorities in Asia—namely China, India, and the more active jurisdictions within Southeast Asia, some of which had implemented competition law at the behest of international organizations or pursuant to their obligations under free trade agreements with Western nations—to assess whether economic nationalism or protectionism may be at play. Has competition law in Asia been enforced in line with their stated objectives of protecting the competitive process and encouraging market entry and efficiency for the benefit of consumers, or has it been used as a tool to unfairly target foreign companies and protect domestic companies against foreign competition?

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II. QUICK SURVEY OF SOME ASIAN COUNTRIES

A quick survey of the landscape in several countries shows that the competition authorities in Asia have pursued both local and foreign-owned firms. Even state-owned enterprises or government-linked companies have not been spared. Indeed, there is no clear evidence that foreign firms have been unfairly and more heavily targeted. In fact, with many of the relatively young competition authorities in Asia focusing on cartel activities in their initial years of operation—as these tend to be low-hanging fruits—their targets have predominantly been the local firms or local trade associations that engage in such cartel behavior.

Some may argue that it is perhaps with merger control that competition authorities can wield their power to achieve nationalistic aims. Yet, as the country-specific discussions below show, save for the one or two instances, there is no consistent discerning pattern that surfaces to dictate a position one way or the other.

A. China

Cartel cases pursued by the Chinese authorities have involved a mixture of foreign firms and local firms; state-owned companies are also not exempted. In February 2013, the NDRC's local offices in Guizhou province and Sichuan province imposed substantial sanctions on Maotai and Wuliangye, two state-owned liquor companies, of 247 million renminbi (about U.S. $40 million) and 202 million renminbi (about U.S. $33 million) respectively, for their resale price maintenance practices. The NDRC's decision in August 2013 to fine six milk powder manufacturers a total of 670 million renminbi (about U.S. $109 million) for imposing an RPM restriction on distributors involved a mixture of Chinese and international firms.

However, China's recent merger decisions, such as its four conditional clearance decisions published in 2013, suggest that the Chinese Ministry of Commerce ("MOFCOM") does impose requirements on foreign firms to supply key products to the Chinese market on favorable terms as a condition for merger clearance. Industry observers have noted that certain aspects of MOFCOM's merger decisions appear driven by industrial policy considerations and indicate that transactions involving key industries such as food and agriculture and minerals, as well as industrial inputs, will be regulated with an eye towards broader strategic interests.

An example is MOFCOM's assessment of the *Marubeni/Gavilon* merger in which MOFCOM chose to define the relevant market as the market for imports of soybeans into China (which effectively excludes domestic supplies of soybeans from its analysis) and eventually imposed extensive hold-separate remedies on the parties. In another merger, *MediaTek/Mstar* involving Taiwanese chipmakers, one of the remedies imposed was that MediaTek and Morningstar must comply with certain price control arrangements, including ensuring that prices in China of LCD TV control chips must not be higher than the prices of similar products sold by MediaTek and Morningstar outside China—again suggesting wider national interest considerations at play.

Yet, in response to the allegations that China's anti-monopoly law has been used as an excuse for protectionism, the Chinese authorities have emphasized that China's anti-monopoly law applies to both domestic and foreign firms, with the aim of protecting consumers. The National Development and Reform Commission ("NDRC"), one of the country's competition authorities, pointed out that it has targeted local telecommunications companies, including

China Unicom and China Telecom Corp. and local financial institutions for anti-competition practices. "Those who have been penalised include state-owned enterprises, private companies, and foreign-owned enterprises, and industry associations," the NDRC's Director-General told Reuters, adding that the law was "to protect market order and fair competition."

B. India

The Competition Commission of India ("CCI") has expressed that India's competition law is competitively neutral and is enforced in the same spirit on private and government enterprises alike. Indeed, it appears that the CCI does not hesitate in taking public entities to task for anticompetitive conduct. The recent penalty in December 2013 of about 17.73 billion rupees (U.S. $289 million) imposed on Coal India, a state-owned monolith, for abuse of dominance, sends a clear message that public entities cannot escape their responsibility under India's competition law. Other recent penalties imposed include: (i) 63 billion rupees (U.S. $1 billion) in June 2013 on 11 cement manufacturers of the Cement Manufacturer's Association for amounting to a cartel, (ii) a combined penalty of 3.17 billion rupees (U.S. $52 million) on United Phosphorus Limited, Excel Crop Care Limited, and Sandhya Organic Chemicals Private Limited for collusive bidding in tenders and for collectively refraining from a particular bid, as well as (iii) a penalty of 520 million rupees (U.S. $8.5 million) on the Board for Control of Cricket in India for abusing its dominant position by denying market access to potential competitors. Many of these involve local companies.

The CCI has, in a short span of four years, imposed several headline penalties in abuse of dominance investigations. This includes imposing a penalty of 6.3 billion rupees (U.S. $103 million) on DLF Limited, the largest locally established real estate company in India, for abuse of dominance in relation to the ostensibly unilateral terms and conditions of the apartment purchase contracts that it has entered into.

C. Indonesia

The Indonesian competition authority, the KPPU, has historically taken an active stance against cartels. Bid-rigging cases have formed the bulk of the KPPU's decided cases, making up 77 out of the 84 decisions issued by the KPPU over the last four years. Many of these have involved local companies. One of the highest fines in recent times of U.S. $2 million was imposed on Konsorsium PNRI for collusive tendering in the scheme to implement electronic national identity cards. The KPPU has also been investigating cartels in numerous food markets, from garlic to soybean, again involving mostly local companies and importers. In its decision on the garlic cartel, KPPU adopted an infringement against 19 local garlic importers and imposed fines on each of them of IDR 11 million (about U.S. $920) to IDR 921 million (about U.S. $76,700).

In the area of merger control, the KPPU has assessed 138 mandatory post-merger notifications since the implementation of the merger regulations in 2010, of which 19 were foreign mergers. The KPPU has approved all the mergers unconditionally, except for one. While this was a foreign-to-foreign merger involving Nestle and Wyeth in relation to infant formula milk, the condition imposed by KPPU was a behavioral one of requiring the merged entity to submit its monthly selling price and sales volume of the products in the two markets of concerns. Given that the condition was not unduly onerous and did not require any restructuring or divestment of the merged entity, it does not appear that the KPPU's intent was to impede the foreign firms involved.

Although there have been concerns that the KPPU had in its earlier decisions unfairly targeted foreign firms such as Chevron, Carrefour, and Pfizer, as mentioned above, it is evident that local firms themselves have also been hauled in by the KPPU on dubious grounds. This included the KPPU's allegation that Indonesia's national airline, Garuda, and other airlines had formed a cartel to fix fuel surcharges—although this might in reality have been due to common fuel input costs rather than cartel activity.

D. Malaysia

In its relatively short history of enforcement since the Malaysian Competition Act came into effect on January 1, 2012, all the published cases by the Malaysian Competition Commission ("MyCC") have predominantly involved local enterprises. Indeed, its first big case involved an infringement decision against Malaysia Airlines and AirAsia, both of which are Malaysian enterprises, for entering into what the authority assessed to be a market-sharing agreement and for which it proposed a financial penalty of 10 million ringgit (about U.S. $3 million) each. Notably, Malaysian Airlines is the national airlines carrier and a government-linked company, and the infringement decision was intended to send a clear signal that the objective of competition law in Malaysia is to promote the process of competition rather than any specific players in the market.

The MyCC has since issued interim measures against the Pan-Malaysian Lorry Owners Association (for which the MyCC eventually accepted an undertaking in lieu of any financial penalties), issued proposed infringement measures to 26 ice manufacturers for price-fixing, and began investigations into alleged cartel behavior following announcement of price hikes in stationery supplies, all of which targeted mostly domestic players.

The most recent price-fixing case was the facilitation by the Sibu Confectionery and Bakery Association to collectively raise the prices of confectionery and bakery products, for which the MyCC issued a total proposed fine of close to half a million ringgit (about U.S. $150,000) to 24 of the association members. In its only abuse of dominance case thus far, the MyCC proposed a 4.5 million ringgit (about U.S. $1.4 million) financial penalty on Megasteel Steel Sdn Bhd, the only domestic manufacturer of hot rolled coil in Malaysia, for engaging in an alleged margin squeeze.

E. Singapore

The Competition Commission of Singapore ("CCS") has, in its close to ten years of existence, pursued a mixture of local and foreign companies. In the cartels area, the CCS's targets have mostly been local companies, with the CCS issuing infringement decisions against coach operators for price-fixing of coach tickets for travel between Singapore and Malaysia, electrical and building works companies for bid-rigging, modeling agencies for price-fixing, ferry operators for unlawful sharing of price information, and the Singapore Medical Association for its fee guidelines.

However, in mid-2014, the CCS issued its first international cartel infringement decision and financial penalties totaling S$9.3 million (about U.S. $7.4 million) against four Japanese ball and roller bearings manufacturers and their Singapore subsidiaries. This is the first time that the CCS has exercised the extraterritorial reach of its powers and signals the CCS's growing intent to act against international cartels as it also issued a proposed infringement decision against another international cartel involving freight forwarding companies earlier this year.

The CCS's only abuse of dominance infringement decision thus far involved a local ticketing agent, SISTIC. While the CCS had commenced an abuse of dominance investigation against Coca-Cola Singapore, the CCS ceased its investigation without an infringement decision being taken after Coca-Cola voluntarily amended its supply agreements and provided undertakings.

Under its voluntary merger regime, the CCS has assessed close to 40 merger notifications, most of which involve foreign firms, given Singapore's open economy. The CCS has cleared virtually all of these notified mergers without requiring any commitments from the parties, although it is now publicly consulting on remedies offered by the merger parties in an ongoing merger assessment involving online recruitment advertising. Given that the merger notifications to CCS predominantly involve foreign firms, this suggests that the CCS has not unfairly targeted or imposed unusually strict requirements on mergers involving foreign firms.

III. EVIDENCE POINTS AGAINST PROTECTIONISM

The review thus far suggests a seemingly balanced approach that the competition authorities have been taking with the implementation of competition laws across the region.

Reasons Giving Rise To Possible Misconceptions

Why then is there a genuine concern and misperception that foreign companies are being unfairly targeted by competition authorities in Asia? Why have there been so many competition cases involving foreign firms, with seemingly disproportionate penalties imposed on them?

There may be objective reasons as to why foreign firms have frequently found themselves the subject of antitrust investigations and infringement decisions in Asia:

1. Many foreign firms, by virtue of having been successful enough to expand beyond their home countries, tend to be large and influential in their respective markets. They may be able to leverage their global networks and global customer base to be more efficient and garner a higher market share. Together, these factors make foreign firms—although this could vary, depending on the industry and the nature of their goods—more likely to be dominant in the relevant market or at least possess enough market power (even if short of dominance) and for their actions to have a significant impact on competition.
2. Because of their larger size and revenues, and because the financial penalties for competition infringements are commonly calculated as a percentage of the firm's relevant turnover or even global turnovers, an infringement decision against a foreign firm tends to attract a much higher financial penalty.
3. Infringement decisions involving foreign firms are more likely to be widely publicized and grab headlines, since such firms tend to be globally well-known household names, as opposed to decisions involving lesser-known local firms for which publicity is generally limited to the affected jurisdictions and industry.

4. Foreign firms are more likely to be involved in anticompetitive or merger activities on a larger or even global scale. As such, where there has been a negative decision against the firm in one country, it may have a knock-on effect on other jurisdictions as other competition authorities are more likely to pursue them and find the firm in breach of their respective competition laws. With more and more global cartel cases coming to light, foreign firms may find themselves more likely to be prosecuted and targeted in multiple jurisdictions.

In addition, misconceptions about foreign firms being unfairly targeted may stem from the lack of information and transparency surrounding the decisions of many competition authorities in Asia, where competition law is relatively new and the authorities are less experienced and sophisticated than their western counterparts. As such, it is not always possible to analyze the authorities' decisions and assess whether any discriminatory treatment was rendered in respect of foreign firms as compared to local firms. The decisions of the Chinese competition authorities, in particular, are often criticized for not being accompanied by sufficient information regarding their assessment, although this is seen to be improving.

However, as competition authorities in this region grow in maturity and experience, and as evidenced by the increasingly detailed and sophisticated decisions published by the competition authorities in Asia, misunderstandings regarding the wrongful targeting of foreign firms where the competition assessments were based on genuine objective justifications should lessen over time.

IV. CONCLUSION

It is very likely that given that competition law in Asia is now fairly pervasive, and with ASEAN Economic Community 2015 looming, the likely increased implementation and enforcement of competition laws across Asia will continue to fuel the perception of protectionism.

Yet, contrary to allegations that competition law in Asia has been used as a veil for protectionism against foreign firms, there is no clear evidence that foreign firms have been unfairly and more heavily targeted by competition authorities in Asia. As postulated above, there could be objective justifications as to why foreign firms are more likely to find themselves the subject of antitrust investigations and infringement decisions. In addition, any misperceptions about foreign firms being unfairly targeted—if they truly stem from a lack of understanding about the basis of the authority's decision—should lessen over time as competition authorities in Asia grow in experience and transparency.

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"Good Luck" Post-*Actavis*: Current State of Play on "Pay-for-Delay" Settlements

Seth Silber, Jonathan Lutinski, & Ryan Maddock

Wilson Sonsini Goodrich & Rosati

"Good Luck" Post-*Actavis*: Current State of Play on "Pay-for-Delay" Settlements

Seth Silber, Jonathan Lutinski, & Ryan Maddock [1]

I. INTRODUCTION

Chief Justice Roberts' statement "good luck to the district courts" in his dissent in *FTC v. Actavis* was certainly prophetic.[2] Since the Court's issuance of that decision in June 2013, the district courts have been dragged into numerous additional cases—more than a dozen cases are currently pending—and more than a half dozen decisions have come down with rulings providing a broad spectrum of interpretations as to what the Court meant by a "large and unexplained" payment.

The U.S. Federal Trade Commission ("FTC"), which brought the *Actavis* case, has added further layers of complexity to pharmaceutical companies trying to understand the post-*Actavis* landscape. On September 8, 2014, the FTC brought its first "pay-for-delay" case since it filed the *Actavis* case back in January 2009—a case against AbbVie that also includes sham litigation claims—and has launched at least three significant investigations during 2014. The FTC also, changing tack after more than a decade, is now pursuing disgorgement in "pay-for-delay" cases, although the dissenting votes of the two Republican Commissioners in the *AbbVie* case may indicate a lack of uniformity on this issue, and perhaps indicate some break in the lock-step bipartisan support "pay-for-delay" cases have enjoyed at the FTC since the late 1990's.

This article examines the current quagmire in the courts, the FTC's recent activities, and finally explores growing interest outside the United States in getting into the "pay-for-delay" fray.

II. WHAT IS A "LARGE" AND "UNEXPLAINED" PAYMENT AND HOW DOES ONE PLEAD IT?

This fall, Judge Peter Sheridan in the District of New Jersey issued two significant opinions in the "pay-for-delay" arena.[3] Up until this point, district courts had split on whether *Actavis* applies only to reverse payments of cash.[4] Judge Sheridan offered a third approach to the

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[2] *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, at 2245 (U.S. 2013) (Roberts, J., Dissenting).

[3] *In re Lipitor Antitrust Litig.*, 2014 U.S. Dist. LEXIS 127877 (D.N.J. 2014); *In re Effexor XR Antitrust Litig.*, 2014 U.S. Dist. LEXIS 142206 (D.N.J. 2014).

[4] *Compare In re Nexium Esomeprazole Antitrust Litig.*, 2014 U.S. Dist. LEXIS 126954, at *75 (D. Mass. Sept. 4, 2014) ("unlawful reverse payments are not limited to monetary payments") *with In re Lamictal Direct Purchaser Antitrust Litig.,* 2014 U.S. Dist. LEXIS 9257, at *22 (D.N.J. Jan. 24, 2014) ("the Supreme Court considered a reverse payment to involve an exchange of money").

binary framework set forth in previous decisions. Specifically, he concluded that while non-monetary payments could constitute reverse payments under *Actavis*, a complaint must demonstrate a "reliable cash value of the non-monetary payment"[5] and dismissed the *Lipitor* and *Effexor* complaints for failing to do so. These decisions and their implications are discussed in more detail below.

A. Lipitor

In *Lipitor*, direct purchaser plaintiffs filed suit against Pfizer and Ranbaxy for allegedly entering into a "pay-for-delay" settlement with respect to Pfizer's blockbuster cholesterol drug, Lipitor (atorvastatin).[6] According to plaintiffs, Ranbaxy agreed to take a later entry date under the settlement in exchange for the following payments from Pfizer to Ranbaxy: (1) a "sweetheart" agreement to dismiss Pfizer's damages claims against Ranbaxy (likely worth hundreds of millions of dollars) in unrelated patent litigation (the Accupril II litigation) for a token payment of $1 million; and (2) foreign patent litigation settlements permitting Ranbaxy to launch generic Lipitor in at least 11 non-U.S. markets prior to patent expiration.

On September 12, 2014, Judge Sheridan dismissed direct purchasers' complaint with prejudice. The court found that Actavis was not restricted to cash payments, but that any non-monetary payment alleged "must be converted to a reliable estimate of its monetary value so that it may be analyzed against the *Actavis* factors such as whether it is 'large' once the subtraction of legal fees and other services provided by generics occurs."[7]

For the payment alleged through Pfizer's agreement to dismiss damages in the *Accupril II* litigation, plaintiffs generally argued that the non-monetary payment could be the same amount as the bond posted in the patent litigation ($200 million) or it could be the difference in the brand's gross sales ($525 million to $70 million) with and without a generic competitor. However, the court found that these estimates were insufficient, as plaintiffs never attempted to value this non-monetary payment to a reliable measure of damages through a risk-adjusted lost profits analysis. Similarly, for foreign market licenses, the court determined that the complaint "lack[ed] any foundation to estimate the cash value of the alleged licenses granted in other countries."[8] Because the complaint failed to provide a reliable foundation showing a cash value of the non-monetary payment, its reverse payment allegations were implausible.

The court also noted that plaintiffs failed to consider, or even address, the fact that the payments (even if clearly pled) could have constituted "saved litigation costs." According to the court, the agreement settled three U.S. patent infringement litigations and 23 foreign legal actions, so the saved litigation costs could have been in the hundreds of millions of dollars. Plaintiffs' failure to attempt to properly value the alleged reverse payments, including the subtraction of any saved litigation costs, made any analysis of whether such payments were "large" impossible.

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[5] *In re Lipitor Antitrust Litig.*, 2014 U.S. Dist. LEXIS 127877, at *65.

[6] Indirect purchaser plaintiffs also filed suit and, in a separate, later-issued opinion, Judge Sheridan dispatched their claims for similar reasons.

[7] *Id.* at 64.

[8] *Id.* at 72.

In response to Judge Sheridan's decision, direct purchaser plaintiffs filed a motion to amend the judgment to permit them leave to file an amended complaint.[9]

B. Effexor

In *Effexor*, direct purchaser plaintiffs filed suit against Wyeth and Teva for allegedly entering into a "pay-for-delay" settlement with respect to Effexor XR (venlafaxine hydrochloride), an anti-depressant drug. According to plaintiffs, Teva agreed to accept a later generic entry date under the settlement in exchange for Wyeth's promise to refrain from marketing an authorized generic product during Teva's first 180-days on the market (a "no-AG agreement").

On October 7, 2014, similar to his *Lipitor* decision, Judge Sheridan dismissed plaintiffs' "pay-for-delay" allegations with prejudice.[10] While Judge Sheridan found that the no-AG agreement alleged in *Effexor* did have value, plaintiffs did not convert it to a specific value using a reliable method. Specifically, plaintiffs asserted that the no-AG payment was worth over $500 million by: (1) claiming that "Teva would realize about double the volume of generic sales at significantly higher, supra-competitive prices,"[11] and (2) that, for Paxil (a similarly sized drug), another generic firm told the FDA that the presence of an authorized generic cost the company approximately $400 million during its 180-day exclusivity period. The court, however, found that plaintiffs' $500 million calculation based on these facts to be "vague and amorphous."[12]

In addition, the court noted that the question of whether there is a "reverse payment" involved more than just an analysis of the no-AG agreement. To analyze a payment, one must: (1) value any consideration flowing from the patentee to the claimed infringer, which may take forms other than cash; (2) deduct from that payment the patent holder's avoided litigation costs; and (3) deduct from that payment the value of goods, services, or other consideration provided by the claimed infringer to the patent holder as part of the same transaction (or linked transactions). The resulting net payment is "otherwise unexplained" and hence an unlawful reverse payment.

Here, in addition to failing to reliably calculate the value of the no-AG promise, plaintiffs failed to set forth a reliable foundation for valuing Wyeth's saved litigation costs or the royalty payments paid by Teva to Wyeth. Because plaintiffs did not reliably value the "payment" under the court's three-step analysis, the court could not determine whether it was reverse (i.e., whether the resulting net payment flowed from alleged infringer to patent holder), whether it was "large," or whether it was "unexplained."

On October 21, 2014, direct purchasers filed a motion asking Judge Sheridan to reconsider his decision to dismiss plaintiffs' complaint in *Effexor*, and allow them to re-plead.[13] The crux of plaintiffs' motion for reconsideration is that it was a clear error of law for Judge Sheridan to dismiss plaintiffs' complaint—under a "novel" pleading standard that the judge

[9] Motion to Amend Judgment, *In re Lipitor Antitrust Litig.*, 2014 U.S. Dist. LEXIS 127877 (D.N.J. 2014).
[10] Judge Sheridan, however, allowed plaintiffs' *Walker-Process* claim to proceed.
[11] *In re Effexor XR Antitrust Litig.*, 2014 U.S. Dist. LEXIS 142206, at *67.
[12] *Id.* at *69.
[13] Motion to Reconsider, *In re Effexor XR Antitrust Litig.*, 2014 U.S. Dist. LEXIS 142206 (D.N.J. 2014).

announced after the complaint was filed—with prejudice. Plaintiffs asserted that they could set forth specific allegations valuing the no-AG agreement even under the court's heightened pleading standard, and claimed to do so in their proposed amended complaint, which was attached to their motion for reconsideration.

C. Implications

As a result of Judge Sheridan's decisions in *Lipitor* and *Effexor*, we expect that plaintiffs, in the future, will include significant detail in their complaints regarding the method by which they are calculating the cash value of any non-monetary payment. For example, in their motion for reconsideration in *Effexor*, plaintiffs spent over 20 paragraphs in their proposed amended complaint on valuing the alleged non-monetary reverse payment—the no-AG clause—in an attempt to calculate the cash value of the non-monetary payment using an industry-reliable method.[14] In particular, if other district courts adopt Judge Sheridan's pleading standard, plaintiffs may even be inclined to engage economists or other experts in preparing their complaints to help bolster key valuation allegations on alleged payments through non-monetary settlement provisions.

Moreover, given that on November 19, 2014 the Third Circuit heard the oral argument on the *Lamictal* appeal—concerning whether a no-AG agreement can be a reverse payment under *Actavis*—it will also be interesting to see whether the panel will rule on Judge Sheridan's proposed pleading standard in its forthcoming opinion. While the issue is not directly before the Third Circuit, it could opine more broadly on what is required to properly allege a payment under *Actavis*, as it will be the first Circuit court to issue a decision on this issue. Clients and practitioners alike should stay apprised on continued developments in the direct purchaser plaintiffs' motions for leave to re-plead in *Lipitor* and *Effexor* as well as the Third Circuit's forthcoming decision in *Lamictal*.

III. FTC HAS BEEN INVIGORATED POST-*ACTAVIS*

After years of waiting for the Supreme Court to weigh in on the "pay-for-delay" debate, the Court's decision in *FTC v. Actavis* has invigorated the FTC's enforcement efforts. The *Actavis* ruling certainly did not give the FTC everything it wanted, as the Court rejected the FTC's preferred "presumption of illegality" standard that had been set forth by the Third Circuit in *K-Dur*.[15] However, the Court's rejection of the "scope of the patent" test favored by several circuits, and expression of concern about patent settlements that contained "large and unexplained" payments, certainly left the FTC feeling emboldened post-*Actavis* to investigate and challenge settlements.

The FTC's foray back into the federal courts in the *AbbVie* suit reflects the FTC's continued skepticism regarding "side-deal" arrangements. The FTC filed its September 8, 2014 complaint against AbbVie, Abbott, Unimed, Besins, and Teva in the Eastern District of

[14] *Id.* at ¶ 284-305.

[15] *In re K-Dur Antitrust Litig.*, 686 F.3d 197, at 218 (3d Cir. 2012) ("the finder of fact must treat any payment from a patent holder to a generic patent challenger who agrees to delay entry into the market as *prima facie* evidence of an unreasonable restraint of trade").

Pennsylvania. The decision to file the complaint was a 3-2 decision, with Commissioners Wright and Ohlhausen dissenting. The case involves the same drug (Androgel) as in the *Actavis* case.

The complaint alleges that, as trial approached in the AbbVie/Teva Androgel patent litigation, AbbVie entered into a "pay-for-delay" settlement with Teva to prevent Teva from winning the patent litigation and opening up the generic market. While the complaint's "pay-for-delay" allegations are heavily redacted, it appears that the compensation was in the form of a side deal—namely a "product supply" agreement for Teva to serve as the authorized generic for AbbVie's TriCor product.[16] The complaint alleges that the authorized generic agreement enabled Teva to compete "before independent generic entry is expected,"[17] and suggests that Teva got a far higher split of profits than is typical in these sorts of deals.

The complaint is also novel in that it alleges that AbbVie pursued sham litigation against Teva and Perrigo, asserting infringement of its '894 patent even though Teva and Perrigo's formulations were clearly outside of the literal scope of the '894 patent and did not infringe. Nearly 14 pages of the total 40 pages in the complaint focus on sham litigation—which indicates that the sham claims are of significant importance to the FTC. This case marks the first ever FTC challenge to Hatch-Waxman litigation on sham grounds, although this is an area that the FTC has previously probed.

Focusing back on the "pay-for-delay" allegations, the agreement at issue does not raise any particularly novel issues. The FTC—and private plaintiffs—have challenged numerous "side-deal" arrangements over the past decade and a half. What is of note in *AbbVie* is a new standard set forth by the FTC that is novel, and not reflected in the Court's *Actavis* decision. The new standard is as follows: If the generic receives anything from the brand that it could not obtain as a result of winning the patent litigation, it is a reverse payment under *Actavis*.[18] While this standard has appeared in other private suits and some academic works, the Court in *Actavis* certainly did not set forth a standard along these lines and no district court since then has endorsed or offered an opinion on whether this standard is consistent with *Actavis*.

It is also quite noteworthy that the Commission vote in the *AbbVie* suit was 3-2 with Republican Commissioners Ohlhausen and Wright voting against filing the complaint. All prior FTC "pay-for-delay" consents and suits since the late 1990s were brought on a bi-partisan basis, and Ohlhausen and Wright have supported various recent FTC amicus briefs stating that no-AG agreements constitute compensation. It is unclear why they dissented in this instance as they did not issue dissenting statements when the complaint issued. One potential area of divergence, which could be at least part of the rationale for the dissenting votes, is that the *AbbVie* complaint seeks disgorgement. Prior FTC "pay-for-delay" complaints did not seek disgorgement,[19] and

[16] Complaint at ¶120, *FTC v. AbbVie, Inc.*, 2:14-cv-05151, (E.D. Pa. 2014).

[17] *Id.* at ¶126.

[18] *See Id.* at ¶124 ("The TriCor authorized generic deal was something Teva could not have obtained had it won the AndroGel patent infringement litigation. Even if Teva had prevailed in the AndroGel litigation, it would not have secured a right to sell an authorized generic version of TriCor.").

[19] The FTC complaint in its Cephalon litigation did not seek disgorgement, although the FTC did later amend its position in that case. Complaint, *FTC v. Cephalon, Inc.,* 551 F. Supp. 2d 21 (D.D.C. 2008).

Commissioners Ohlhausen and Wright have expressed concern over the use of this tool except in a few narrow circumstances.[20]

As far as the pipeline for new FTC challenges following the *AbbVie* suit, the Commission appears to be dedicating significant resources to investigating settlements. Following the *Actavis* decision, Chairwoman Ramirez testified before the Senate Judiciary Committee in July 2013 stating: "The Supreme Court's decision in *Actavis* confirms that [reverse payment] settlements harm consumers and competition, and the Commission will continue to aggressively prosecute these anticompetitive settlements."[21] Additional statements from FTC officials at the time further indicated that the FTC would be reviewing prior patent settlement filings to find appropriate cases for challenge.

In the wake of these statements, there are a number of publicly disclosed FTC investigations that have emerged over the last year.[22] As part of these investigations, the FTC has issued broad subpoenas, sought investigational hearings of numerous party witnesses, and taken an aggressive position on subpoena compliance in particular with regard to privilege claims.

It remains to be seen whether any of these investigations will ripen into litigation. The FTC is busy with three ongoing federal court litigations. In addition to the *AbbVie* case, the FTC is back in discovery in the *Actavis* case following remand to the district court in Georgia, and the ongoing *Cephalon* case in federal court in Philadelphia could end up in trial following the court's oral argument on summary judgment that took place on November 6, 2014.

Thus, while the FTC waited for years for a Circuit split to emerge, which ultimately resulted in the *Actavis* decision, it now is proceeding post-*Actavis* with a significant number of litigations and investigations. Companies thus need to remain cognizant about whether their settlements could lead them into an investigation and the courts, while at the same time keeping their eye on private plaintiffs, as discussed above, who likewise remain very active in challenging patent settlements.

IV. PATENT SETTLEMENT INVESTIGATIONS GO GLOBAL

While the focus on "pay-for-delay" settlements began in the United States, interest in such agreements has gone global in recent years as international antitrust enforcers have increasingly focused on pharmaceutical patent settlements—a trend that undoubtedly will

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[20] *See* Statement of Commissioner Maureen K. Ohlhausen – Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Relief in Competition Cases, FTC File No. P859910 (July 31, 2012) *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-commissioner-maureen-k.ohlhausen/120731ohlhausenstatement.pdf; Joshua D. Wright, "The Federal Trade Commission and Monetary Remedies," Remarks at the 18th Annual Competition Law and Policy Workshop, (July 19, 2013) *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/federal-trade-commission-monetary-remedies/130719monetaryremedies.pdf.

[21] *Pay-for-Delay Deals: Limiting Competition and Costing Consumers Before the S. Judiciary Comm*, 113th Cong. 1 (July 23, 2013) (statement of Edith Ramirez) *available at* http://www.ftc.gov/sites/default/files/documents/public_statements/statement-chairwoman-edith-ramirez-pay-delay-settlements/130923pfdopeningstatement_0.pdf.

[22] Press reports have noted certain of these investigations. *See, e.g.*, David McLaughlin, *U.S. Steps Up Probes of Deals to Block Generic Drugs*, BLOOMBERG (June 23, 2014) *available at* http://www.bloomberg.com/news/2014-06-23/u-s-steps-up-probes-of-deals-to-block-generic-drugs.html.

continue. Global pharmaceutical companies need to be mindful of antitrust risk, both in and outside the United States, as they negotiate and enter into these agreements.

A. European Commission

Since 2009, the European Commission ("EC") has closely monitored pharmaceutical patent settlements. In July 2014, the EC handed down its largest penalty related to a "pay-for-delay" settlement when it imposed a U.S $449 million fine on Servier for "abusing its dominance" by entering into settlements that the EC believed kept generic versions of Perindopril, a blood pressure medication, off the market.[23] The EC also imposed U.S. $120.2 million worth of fines on the five generic firms involved in the agreements.

The *Servier* case is not the first time the EC has investigated patent settlements. In 2013 it fined Lundbeck and various generic firms $195.5 million[24] and Johnson & Johnson and Novartis $22.4 million[25] because of "pay-for-delay" agreements; however, the *Perindopril* case was the EC's most aggressive case yet. Not only did the EC impose its largest "pay-for-delay" fine to date, *Servier* was also the first time the EC investigated a pharmaceutical patent settlement under a dominance standard. The *Johnson & Johnson* and *Lundbeck* cases, on the other hand, were brought under the EC's authority to regulate restrictive agreements. By using both the restrictive agreement and dominance standards, which is akin to bringing a claim under both Sections 1 and 2 of the Sherman Act, the EC has signaled that it will continue to challenge pharmaceutical patent settlements.

B. Canada

Until recently, Canada was not viewed as a country that was playing a role in investigating or challenging pharmaceutical patent settlements. However, at a recent conference on global pharmaceutical antitrust issues, John Pecman, Canada's Commissioner of Competition, indicated that Canada will pursue criminal cases predicated on "reverse-payment settlements" in certain circumstances.[26] No other country to date has indicated that they view such settlements as raising criminal antitrust implications.

Pecman explained that the Competition Bureau, Canada's antitrust enforcers, "would be more inclined to commence an inquiry under [Canada's] criminal provision" in three circumstances: (1) patent settlements that include "conduct with respect to markets or products that are not the focus of the patent litigation," (2) patent settlements that include conduct "beyond the scope of the patent," or (3) patent settlements where there is "direct or circumstantial evidence that indicates that the settlement is a vehicle for a 'naked restraint' on competition."

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[23] Melissa Lipman, *3 Key Facts from the EU's Latest Pay-For-Delay Case*, LAW360, (July 15, 2014) *available at* http://www.law360.com/articles/557308/3-key-facts-from-the-eu-s-latest-pay-for-delay-case.

[24] Kathryn Brenzel, *EU Fines Lundbeck $125.6M in Pay-For-Delay Probe*, LAW360, (June 19, 2013) *available at* http://www.law360.com/articles/451345.

[25] Stewart Bishop, *J&J, Novartis Fined $22.4M over Pay-For-Delay Deal*, LAW360, (Dec. 10, 2013) *available at* http://www.law360.com/articles/494572.

[26] John Pecman, Canadian Commissioner of Competition, Remarks at the Global Antitrust Institute Conference: Global Antitrust Challenges for the Pharmaceutical Industry, (Sept. 23, 2104) *available at* http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03817.html.

He further explained that settlements where "a generic agreed to enter beyond the expected expiry date of the patent in exchange for a payment" or where "the evidence suggest[s] that [the] payment was strictly to delay or prevent entry" would likely lead to criminal investigations.

Pecman also indicated that the Bureau would encourage regulatory changes designed to make it easier to monitor, and ultimately challenge, pharmaceutical patent settlements. He stated that the Bureau would like Canada to adopt a settlement notification system similar to the one in the United States, saying that it would "would furnish the Bureau with substantive information about settlement agreements and enhance [its] ability to address potentially anti-competitive agreements."

C. India

This summer India's competition authority, the Competition Commission of India ("CCI"), began investigating two sets of patent settlements between brand and generic firms.[27] The CCI's analysis of these and other pharmaceutical patent settlements will likely mirror that of the FTC.

In 2012, the CCI entered into a Memorandum of Understanding with the FTC and U.S. Department of Justice ("DOJ") that promised to increase coordination and communication between the agencies; additionally, FTC staff has served as advisors to help the CCI develop its antitrust policy.[28] Considering the FTC's experience with patent settlements, and their history of working closely with the CCI, it is likely that India will apply similar standards as the FTC when investigating patent settlement agreements.

D. Other Countries Likely to Follow Suit

As so-called "pay-for-delay" issues continue to attract more attention, additional countries will invariably begin opening their own investigations. In fact, several countries have already taken actions on agreements that, in antitrust enforcers' minds, were designed to delay generic entry.

Both the Administrative Council for Economic Defense ("CADE")—Brazil's competition authority—and the French Competition Authority ("FCA") have recently issued fines against pharmaceutical companies that offered pharmacies and distributors discounts that allegedly were designed to hinder generic adoption.[29] Additionally, in February 2014, the Australian Competition and Consumer Commission filed an antitrust suit against Pfizer for similar

[27] *India Enters "Pay-for-Delay" Fray: CCI Investigating Pharmaceutical Patent Settlements*, WSGR, (Aug. 12, 2014) *available at* http://www.wsgr.com/WSGR/Display.aspx?SectionName=publications/PDFSearch/wsgralert-CCI.htm; *CCI to Scan Drug Patent Settlements*, LiveMint, (Aug. 3, 2014) *available at* http://www.livemint.com/Companies/RVVDhRh7oTfpqlIphkb6jM/CCI-to-scan-drug-patent-settlements.html.

[28] *FTC and DOJ Sign Memorandum of Understanding With Indian Competition Authorities*, Federal Trade Commission (September 27, 2012) *available at* http://www.ftc.gov/news-events/press-releases/2012/09/ftc-doj-sign-memorandum-understanding-indian-competition.

[29] *Global Convergance on 'Pay-for-Delay' settlements*, BRISTOWS, (Oct. 16, 2014) *available at* http://www.bristows.com/articles/global-convergence-on-pay-for-delay-settlements.

conduct.[30] While the facts of these cases are not analogous to a traditional "pay-for-delay" case, the alleged anticompetitive effect, delayed generic entry, is identical. Companies should expect that France, Brazil, Australia, and many other countries may soon open their own pharmaceutical patent settlement investigations.

[30] Dan Prochilo, *Australia Hits Pfizer with Antitrust Suit Over Lipitor*, LAW360, (Feb. 13, 2014) *available at* http://www.law360.com/articles/509768/australia-hits-pfizer-with-antitrust-suit-over-lipitor.