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Message From The Editor

Kim Van Winkle

Welcome to Monopoly Matters, the bi-annual newsletter of the Unilateral Conduct Committee. As you can see, we have adopted a new moniker for the newsletter to better reflect the subject matter covered in these pages, and its importance. This issue begins with a recap of the insightful discussion that took place in a recent committee program on Remedies in Monopolization Cases. Following that is a feature article by Yan Luo on the availability of compulsory licensing remedies in China. She describes uncertainties surrounding the procedures and grounds for compulsory licensing, and the potential interaction of different statutory and regulatory provisions governing compulsory licensing remedies.

The second half of this issue is devoted to enforcement updates from around the world. From North America, we have a report the first Section 2 case brought by the U.S. Department of Justice since 1999; and the Canadian Competition Bureau's challenge to Toronto Real Estate Board restrictions on the provision of MLS information to customers. The European update covers a variety of cases spanning telecommunications, pharmaceuticals, energy, mainframe computer hardware, internet search, and finance. An update from Asia includes recent developments in China, Korea and Japan. And last but not least, developments from emerging Latin American enforcement regimes are covered, including reports from Argentina, Brazil, Chile and Colombia, Peru and Uruguay. I hope you enjoy these contributions and find them informative. Feedback is welcome. You can reach me at kim.vanwinkle@texasattorneygeneral.gov.

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(continued)

Thanks to our Volunteers

The Committee leadership owes a great debt to the many volunteers who assist us in undertaking the work of the Committee. There is always the danger in naming volunteers who deserve thanks that others who have been of great assistance are overlooked. We hope no serious injustices are done in that regard, but we do want to recognize the assistance of a number of the Committee's key volunteers.

With respect to the Committee's use of Social Media and ListServ, Kate Wallace has taken the lead in this area and has recruited a number of terrific volunteers. We wish to mention just three: Pallavi Guniganti assisting with Twitter; Warren Rosborough assisting with the ListServ; and Saami Zain assisting with LinkedIn. If you have a proposed posting for any of these media – please contact one of our key volunteers, or Kate Wallace.

With regard to the Committee's website, you will have seen that it has been updated from its prior state, and is a superior product to the old website. This is due almost entirely to the efforts of Devin Anderson, who has committed to keeping this up to date. Any suggestions for further improvement would be very welcome.

Finally, with respect to our work on Antitrust Law Developments 7th, Tom Collin led the Committee's efforts here and he had a team assisting him which included Alexander Okuliar, Christina Brown, Courtney Dyer, Ryan Thomas, Danica Noble, and Martin Mackowski. The work on ALD 7th is complete, but our work on the annual update will start reasonably soon, so those of you who would be interested in working on the update should be in touch with Tom Collin, or with Kim Van Winkle.

With sincere thanks to all of our volunteers

James Musgrove and Anthony Swisher

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Remedies in Monopolization Cases – Committee Program Report

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On January 11, 2012, the Unilateral Conduct Committee presented a program, entitled *Remedies in Monopolization Cases*, considering the difficult issue of crafting appropriate remedies in cases in which there had been a finding of unilateral anticompetitive conduct. Chaired by Sean Gates, with a panel including Professors Herbert Hovenkamp and Eleanor Fox as well as Dr. Robert Crandall of the Brookings Institution, the program shed light on the challenges of designing and implementing effective solutions to anticompetitive unilateral conduct.

The Goals of Remedies in Unilateral Conduct Cases

Professor Spencer Waller has observed that a well-understood theory of remedies in monopolization and abuse of dominance cases does not exist at present, in either the case law or the academic literature, and may not even be possible. The panel largely agreed with the proposal, noting that the seminal U.S. Supreme Court law governing remedies in this area (e.g., *United States v. United Shoe Machinery Corporation*[1] and *United States v. Grinnell Corp.*[2]) is almost 50 years old, from an era when structural remedies served as the go-to response, and is therefore of limited applicability. The challenge of applying vintage antitrust principles to modern monopoly cases was demonstrated in *United States v. Microsoft Corp.*[3]

The panel indicated that the purpose of remedies in monopolization cases, under both the *Sherman Act* and EC Regulation 1/2003 is, ideally, to bring the infringing activity to an end and to undo any resulting anticompetitive effects. There is also the desire to deter similar future conduct. While easily stated, designing and implementing remedies that satisfy these goals poses enormous challenges. A key difficulty is that, before an effective remedial theory can be developed, there must be a well-defined understanding of what led to the anticompetitive behaviour in the first place. This makes determining a general theory very difficult, as the underlying causes vary from case to case. Compounding the problem is the fact that remedies to other antitrust problems, such as those which arise in conspiracy and merger cases, do not necessarily translate well to the unilateral conduct realm.

An additional challenge that authorities face in determining which cases to bring and which remedies to implement is the view, articulated by commentators such as Tom Barnett, that a remedy that harms consumers is worse than no remedy at all. Given this view, Robert Crandall suggested that finding a violation should not automatically dictate that a remedy is required. Eleanor Fox disagreed, noting that monopolists are generally afforded two opportunities to defend allegations of anticompetitive conduct: first, when the allegation is made; and second, when making submissions as to the appropriate remedy. In her view, if a violation is found, a remedy is appropriate.

Conduct Remedies vs. Structural Remedies

Outside of the merger context, structural remedies are controversial, owing primarily to the risk of eroding efficiencies and incentives to innovate, and to the reality that they are harder to implement when firms have integrated business units. However, Dr. Fox argued that the use of a structural remedy in the *AT&T* case,[4] which broke AT&T into seven operating companies and a long-distance/manufacturing company, was effective in that it provided incentives to entry. Dr. Crandall argued conversely, that the break-up simply created a number of local monopolies – as was the case in *Grinnell*. He noted that consumers in other countries arrived at competitive long distance rates as fast or faster than those in the US without those countries resorting to structural remedies. Given this outcome and the belief that the divestiture resulted in approximately $5-6 billion in associated expenses, he argued that the success of the structural remedy warrants consideration.

The panel noted that over the course of the past half century there has been a shift to the use of behavioural rather than structural remedies. This has been at least in part, according to Robert Crandall, because breaking up monopolists has generally proven to be unsuccessful. However, conduct remedies, while more flexible, carry many of their own practical and theoretical challenges. While members of the academic community such as Professor Bill Kovacic have observed that conduct remedies do not enjoy a sturdy reputation in the antitrust literature, Dr. Fox noted that an analysis of remedies, particularly in Europe, suggests that antitrust authorities are not reluctant to employ such remedies, and that their use is growing on both sides of the Atlantic. For example, it was noted that specific, targeted injunctive relief,

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1 391 U.S. 244 (1968).

2 384 U.S. 563 (1966).

3 87 F. Supp. 2d 30 (D.D.C. 2000).

4 552 F.Supp. 131 (DDC 1982).

such as that secured in *United States v. Dentsply International, Inc.*,[5] can serve as a simple yet effective way to remedy well defined antitrust concerns while limiting the risk of unanticipated collateral harm to consumers.

If a clean, simple injunctive remedy is not relevant or available, however, conduct remedies often pose challenges. In addition to the well understood need for monitoring, the panel noted that it is very difficult to change behaviour which is economically rational and which does not involve agreements. The deterrent value of conduct remedies is also unclear, given that each case has its own idiosyncratic elements. Stated differently, tomorrow's unilateral conduct problem often has very different facts from the one at issue today.

Notwithstanding these challenges, mandatory access conduct remedies were certainly championed by the EC following investigation of Microsoft's server and media player businesses.[6] There, Microsoft was found to have violated European Union competition law by leveraging its alleged near monopoly in the market for PC operating systems onto the markets for work group server operating systems and for media players. In addition to fining Microsoft for abusing its market power in the EU, the EC ordered Microsoft to disclose to competitors the interfaces required for their server products to be able to interact with the ubiquitous Windows OS, and ordered it to offer a version of the Windows OS without Windows Media Player.

With regard to the media player remedy, the panel noted that there was almost no take-up of the non-bundled version, and that remedy was not successful. By contrast, however, the view was that providing access to interface information was a more successful remedy, albeit one that required ongoing monitoring.

The panel was divided in their assessment of the efficacy of the mandatory access conduct remedy in the *Intel* rebates cases,[7] with Professor Hovenkamp suggesting that the remedy of granting access to AMD resulted in a tighter oligopoly. Conversely, Professor Fox argued that the remedy should be seen as encouraging innovation. From an economic perspective, Dr. Crandall noted that the issue of high development costs and low marginal costs, which is central to the chip marketplace, amongst others, can make contracts which commit customers to significant purchases very efficient and can result in lower prices.

The panel was of the view that as a "quasi" structural remedy, access to IP rights, may work particularly well when dominant firms elect to hold onto IP for the primary purpose of excluding competitors, rather than actually using the IP for output purposes. That may be particularly true when the IP was acquired by the dominant firm, not developed by it. Even there, however, the matter is not free of challenges. For one, IP today is now more a matter of patent portfolios than a single key patent. Accordingly, the issue of how much access should be granted as a remedy becomes a key question. Also, firms are increasingly acquiring patent portfolios to defend against "patent trolls" and to leverage during patent litigation, as evidenced in Google's acquisition of the Motorola patents and the recent consortium purchase of the Nortel portfolio. Accordingly, the facts of each case should dictate the appropriateness of mandatory licensing/granting access. In all circumstances, courts should exercise caution when determining the scope of access so as to balance any negative impact on incentives for innovation.

The recent spotlight on conduct remedies may appear to suggest that the use of structural solutions to address monopoly cases is a tool of the past. However, the ability to swiftly dissipate market power by introducing new competitors and the absence of the need for much regulatory oversight has meant that structural remedies have retained a place in the authorities' toolbox.

Concluding Thoughts – Advice for Enforcement Agencies

When pressed for suggestions on how they would run an antitrust agency, the panel offered the following guidance. Perhaps most importantly, agencies should ensure that they understand the circumstances that led to the unilateral conduct before bringing a case. If a proposed remedy carries a notable risk of unanticipated consequences, particularly to consumers, agencies should refrain from intervening in the market. When it is clear that intervention is the appropriate course of action, the use of structural remedies should be limited to extraordinarily rare cases owing to the demonstrated challenges in using them effectively. The better approach, where practical, is to pursue 'clean' injunction remedies that address the alleged anticompetitive conduct without requiring significant ongoing oversight. In all circumstances, the simplest remedy to resolve the established anticompetitive conduct should be implemented.

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5 No. 03-4097 (3d Cir.).

6 European Commission, *Commission concludes on Microsoft investigation, imposes conduct remedies and a fine* (March 24, 2004), available online: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/04/382&format=HTML&aged=1&language=EN&guiLanguage=en.

7 European Commission, *Commission Decision of 13 May 2009, COMP/37-990 Intel*, available online: http://ec.europa.eu/competition/sectors/ict/intel.html.

Feature Article: *Compulsory Licensing in China: An Antitrust Assessment*

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Introduction

On October 12, 2011, China's State Intellectual Property Office ("SIPO") issued, for public comment, the draft *Measures for the Compulsory Licensing of Patents* ("2011 draft Measures" or the "draft measures").[8] If adopted, the 2011 draft Measures are expected to provide greater clarity on the issuance of compulsory licenses in China.

This article first examines how the mechanism of compulsory licensing evolved in China's patent law over the past two decades, and discusses the new procedural requirements set forth in the 2011 draft Measures.

The next section focuses on the anti-competitive ground for compulsory licensing in the 2008 *Patent Law*. It explores the origins of this provision and discusses legal uncertainties created by gaps between the *Patent Law* and the *Anti-monopoly Law* (AML) on the issue of patent misuse.[9] The ambiguities in the 2011 draft measures suggest the absence of a coordinated approach among Chinese agencies to address the inter-relationship of competition and intellectual property laws.

Finally, this article provides an overview of a 2009 draft regulation issued by China's Standardization Administration of China (SAC), concerning patents involved in national standards.[10] In this draft regulation, compulsory licensing was specifically mentioned as a potential remedy in situations involving abuse of such patents. However, standard-setting misconduct is not a ground identified by the *Patent Law* or the draft Measures for compulsory licensing. Again, the disconnection between these regulations suggests lack of coordination between SIPO, AML agencies, and standard-setting agencies.

Compulsory Licensing Under the Patent Law

Legislative History

The first *Patent Law of the People's Republic of China* was promulgated in 1984 and came into force in 1985, supplemented by an implementing regulation that year. China subsequently amended its *Patent Law* on three separate occasions, in 1992, 2000 and 2008.[11] Each amendment was followed by a revised implementing regulation.

The 1984 *Patent Law* provided that compulsory licensing could be granted on two grounds: (1) non-exploitation until a lapse of a specified period of time (non-exploitation) and (2) where a technically more advanced patent is dependent on an earlier patent (dependence). The 1992 *Patent Law* replaced the non-exploitation rule with a "refusal to license" provision, allowing the SIPO to grant compulsory licensing if any entity qualifies to exploit the patent in question has requested a license on "reasonable terms", but has not been able to obtain a license within a reasonable period of time.

The 2000 *Patent Law*, in addition to "refusal to license" and "dependence" grounds, identified national emergency and/or public interest as a ground for compulsory licensing. In 2006, another ground for compulsory licensing was added after the World Trade Organization (WTO) allowed its members to issue compulsory licenses to export generic versions of patented drugs to countries with insufficient or no manufacturing capacity.[12]

The latest version of the *Patent Law* has taken several years to develop, in part due to China's desire to bring its patent law in compliance with the WTO *Agreement on Trade-related Aspect of Intellectual Properties* (TRIPs). The final version of the 2008 *Patent Law* provided five grounds for compulsory licensing: non-exploitation (Article 48.1); anticompetitive behavior (Article 48.2); national emergency/public interest (Article 49); public health (Article 50) and dependent patent (Article 51).

It is important to note that, although compulsory licensing has been available under the *Patent Law* since 1985, no compulsory license has been granted to date. Moreover, the Chinese government has been very cautious about giving any

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[8] *See* the draft Measures here.

[9] China's Anti-monopoly Law (AML) establishes a two-tier enforcement structure under the State Council, the chief executive body. Pursuant to this structure, an Anti-Monopoly Commission (AMC) coordinates the AML-related work of three agencies, Ministry of Commerce (MOFCOM), National Development and Reform Commission (NDRC) and State Administration of Industry and Commerce (SAIC). Each of the three agencies is allocated enforcement responsibility in relation to one or more key prohibitions in the AML (or specific categories of business activity that may be challenged under those prohibitions).

[10] See draft Regulation for the Administration of the Formulation and Revision of Patent involving National Standards here.

[11] The 1984 *Patent Law* was amended in 1992, 2000 and 2008. The revised versions of the *Patent Law* are referred to as the 1992 *Patent Law*, 2001 *Patent Law* and 2008 *Patent Law* respectively in this article.

[12] *See Measures for the Compulsory Licensing for Patent Implementation concerning Public Health* here

official comments that would suggest when or on what ground the first compulsory license may be granted.

The Draft Measures

The 2011 draft Measures specify conditions under which compulsory licenses may be granted or terminated, rules and procedures at SIPO for compulsory licensing, and the calculation of licensing fees if a compulsory license is granted.

Articles 5 through 8 of the draft Measures restate the five grounds described in the 2008 *Patent Law*. Article 11 requires private parties applying for compulsory licensing to first obtain a legal determination, from a court or an AML agency, that the patent owner's exercise of the patent was anti-competitive "under the law." This procedural requirement connects the *Patent Law* and the AML to the extent that it implicitly confirms the jurisdiction of courts and AML agencies to determine the existence of anti-competitive conduct. However, as to be discussed in the next section, this procedural requirement does not adequately address substantive antitrust concerns that could arise in the context of patent misuse.

Articles 9 to 20 of the draft Measures set out the process for pursuing compulsory licensing. An applicant, either a private entity or a department under the State Council, should submit a request to SIPO stating the grounds for compulsory licensing. In response, the patent holder can make written submissions and is entitled to request a hearing before SIPO. In the event that, following the hearing, a compulsory license is granted, the patent holder can appeal SIPO's decision in court.

Even if SIPO makes an initial decision to grant a compulsory license, such a decision will not set a reasonable royalty. Articles 24 and 25 provide that in the first instance, the royalty should be negotiated between the parties. If the beneficiary of the compulsory license is unable to come to terms with the patent holder, it may apply a second time to SIPO to set a reasonable rate. This second application, like the first, is subject to a hearing, and the decision subject to court appeal.

Compulsory licensing as an AML remedy

The legislative history of the 2008 *Patent Law* indicates that the inclusion of an anticompetitive ground in the *Patent Law* was primarily driven by the desire to bring China's patent law in line with the TRIPs. The newly-inserted text of Article 48.2 attempts to incorporate TRIPs Article 31(k) into the Chinese law, which provides that compulsory licensing could be granted "where such use is permitted to remedy a practice determined after judicial or administrative process to be anti-competitive."[13]

The 2011 draft Measures make a connection between the *Patent Law* and the AML by requesting private parties to obtain a legal determination on antitrust violation before making an application for compulsory licensing. Nevertheless, the 2011 draft Measure did not shed any light on the second component of Article 48(2) of the 2008 *Patent Law*, which requires compulsory licensing to be granted for the purpose of "reducing or eliminating negative effects of anti-competition effects" of the alleged patent misuse. This article identifies three major gaps between the draft Measure and the existing AML enforcement structure.

What Behavior?

The draft Measures only refer to a patentee's exercise of its patent right being considered as anticompetitive, without specifying whether the "anti-competitive" conduct should be linked to particular behavior prohibited by the AML.

In particular, Article 17 of the AML identifies conduct of dominant firms that can be viewed as abuse of dominance. In the context of patent misuse, Article 17(1) may impose liability to a "dominant" patentee if it seeks to charge a "monopoly price" to would-be licensees or refuse to license a particular patent to them. Under Article 17 (5), which sets forth the rule against tying, certain kinds of conditional licensing may be subject to antitrust liability. Finally, Article 17(6) proscribes unjustified price discrimination, which can be translated into an outright ban of "non-reasonable and non-discriminatory" licensing terms to any would-be licensee.

It is unclear whether compulsory licensing may be used to remedy all of the "anti-competitive" conduct mentioned above. In practice, depending on how the draft Measures are applied, these provisions could be used to force reductions in royalty requests deemed "unreasonable," or force an entity to deal with a competitor which offers minimal royalties.

Thus far, the two AML agencies that have jurisdiction over abuse of dominance, the National Development and Reform Committee (NDRC) and State Administration of Industry and Commerce (SAIC), have neither taken action against patent misuse nor issued any guidance on when the implementation of patents may give rise to an antitrust violation. There is also no indication that patent misuse will become their enforcement priority in the near future.

Who Determines?

Under the AML and under the *Patent Law*, there are three agencies that share concurrent statutory rights in situations where a patentee's exercise of its patent rights was anticompetitive. Each agency, based on different laws, can take action to impose remedies against the same conduct.

After the existence of anti-competitive patent misuse is confirmed, it is unclear whether SIPO is obligated to make its

[13] In 2006, before the enactment of the AML in 2008, a provision was already inserted into the draft, which allowed compulsory licensing in situations "where it is determined through the judicial or administrative procedure that the act that patentee exercises the patent right thereof is an act intended to eliminate or restrict competition." The final language of Article 48 added "eliminating or reducing the negative impact on competition" as the purpose of any compulsory license granted on this ground.

own antitrust assessment before concluding that compulsory licensing is the appropriate remedy for such conduct. The draft Measures also did not clarify whether SIPO can and should defer to the antitrust assessment done by AML agencies or courts and grant compulsory licensing only as part of a bigger remedy package.

Under Article 47 of the AML, companies that are found to be abusing their dominant positions are subject to cease and desist orders and/or fines. The 2011 draft Measures could be viewed as empowering the SIPO, the only agency that is competent to grant compulsory licensing under the *Patent Law,* to make a decision on whether a compulsory license should be granted to remedy an AML violation. However, the SIPO is not an agency designated by the AML to impose remedies concerning abuse of dominance. Moreover, AML agencies and courts may be left to wonder whether the draft Measures preclude them from granting compulsory licenses to remedy violations of the AML.

As the SIPO, NDRC and SAIC are developing their regulations/practices independently, it is too early to conclude how the three agencies will share their concurrent statutory authority. However, there is no requirement in the *Patent Law* or the 2011 draft Measures stating that compulsory licensing cannot be duplicative to any remedy that has already been imposed on the patentee for the same AML violation. There is also no requirement that agencies should take steps to coordinate and avoid an inconsistent application of the AML and the *Patent Law*.

What Scope?

Article 5 of the draft Measures, consistent with other provisions in the *Patent Law*, allow any person or entity with the capacity to exploit the patent to request a compulsory license. There is no requirement that a party seeking compulsory licensing must establish that the proposed scope and terms of license are necessary to remedy the anticompetitive conduct. The loose language of the *Patent Law* and the draft Measures can potentially result in an unjustified imposition of compulsory licensing in the event of a minor AML violation This is sharply different from the U.S. system, where injunctive relief such as compulsory licensing needs to be "narrowly tailored" to remedy the violation.

Compulsory Licensing of Patents in National Standards

Although not mentioned as a ground for compulsory licensing in the *Patent Law*, recent developments on the standard-setting front raised the possibility that abuse of standards essential patent may be added as another ground for compulsory licensing.

On November 2, 2009, China's Standardization Administration of China (SAC) issued for public comment the draft *Regulation for the Administration of the Formulation and Revision of Patent involving National Standards* (the "draft Regulation"). The draft Regulation propose a set of rules and procedures governing the relationship between patent right and national standard.

Chapter 4 of the draft Regulation specify licensing commitments on patents in mandatory national standards. It states that, in principle, mandatory national standards should not include patented technologies. If there is a need to involve a patent in a mandatory standard, the relevant government agency developing the standard should negotiate licensing terms with the patent holder. If the negotiation fails, the agency will either not approve the standard as it stands, or require compulsory licensing of the patent.

Given that "patent holdup" in the context of standard setting - arising from the alleged non-disclosure or violation of "reasonable and non-discriminatory" commitments - is frequently treated as an antitrust violation in the United States or Europe, provisions in the draft Measures may allow private parties to file applications for compulsory licensing based on alleged standardization misconduct. Again, it is uncertain how the draft Measures, which are based on the *Patent Law*, might interact with regulations issued by the SAC, which will be based on the *Standardization Law*.

Conclusion

The 2011 draft Measures add further refinements to the mechanism for obtaining compulsory licensing in China. They provide useful guidance with respect to procedural steps for compulsory licensing, and will be important for patent owners.

However, there are significant gaps between the *Patent Law,* the draft Measures, the *Standardization Law* and the AML with respect to appropriate remedies to patent misuse or standardization misconduct and the agencies that can impose such remedies. This reflects a lack of consensus among Chinese agencies on how to deal with the complex relationship between IP, standards and antitrust. For this reason, patent holders who have significant exposure in China should closely follow developments in this area and carefully design their licensing policy in China.

U.S. Enforcement Update

Federal Judge Approves Settlement in DOJ's First Section 2 Challenge Since 1999

On February 25, 2011, the Antitrust Division of the United States Department of Justice ("DOJ") and the Texas Attorney General's Office ("Texas AG") filed a civil lawsuit against the United Regional Health Care System ("United Regional") in Wichita Falls, Texas, alleging that United Regional unlawfully maintained its monopoly in the market for hospital services by inhibiting commercial health insurers from contracting with its competitors. The DOJ and the Texas AG argued that the contracts improperly raised the price of health care services to consumers. A proposed consent decree was filed simultaneously with the complaint, requiring United Regional—among other provisions—to refrain from again using similarly unlawful contracts for a period of seven years.

The case was filed in the United States District Court for the Northern District of Texas. Pursuant to the Tunney Act, a public comment period of 60 days followed the filing, during which the American Medical Association filed the only comment—one supporting the lawsuit—and to which the DOJ responded. On September 29th, 2011, Judge Reed O'Connor approved the DOJ's proposed final judgment after finding that its entry and the agencies' recommended settlement is in the public interest. This case is especially significant because it is the first lawsuit brought by the DOJ in over 12 years challenging a monopolist with engaging in what the DOJ called "traditional anticompetitive unilateral conduct" in violation of Section 2 of the Sherman Act.

Since United Regional was formed in 1998, it has been the dominant hospital in Wichita Falls and the only provider in the area of several critical medical services. The government agencies alleged that United Regional exploited its "must have" status by requiring commercial health insurers that contracted with it to enter into agreements that penalized them with significantly higher prices if they contracted with any of United Regional's competitors. Because these penalties were so significant, insurers were effectively prohibited from contracting with any other hospitals except United Regional—indeed, for more than a decade, none of the insurers under exclusionary contracts chose to be non-exclusive. United Regional was thus able to maintain its monopoly in the region and charge average prices that were about 70% higher than its closest competitors for the same services, harming consumers through higher premiums. The settlement prohibits United Regional from conditioning any prices or discounts given to insurers on exclusivity, inhibiting insurers from contracting with United Regional's rivals, and retaliating against any insurers that contract with a rival hospital.

This case is significant for many reasons, three of which will be briefly discussed here. First, it signals that the DOJ will take an active approach towards antitrust enforcement, bringing to bear novel legal and economic approaches informed by its experience. For example, although several courts have used various formulae for determining whether a discount can be anticompetitive, the DOJ took a novel approach that refines existing iterations of the so-called "price-cost test": rather than asking whether the defendant's price for all its competing products or services is below their incremental cost after attributing the full amount of the discounts given to all those products, the DOJ argued that the proper question is whether price is below cost if the full discount is attributed to the *contestable volume*—the portion of sales that the defendant might actually lose to competitors without the discounts—rather than all overlap sales.

Second, the case suggests that the DOJ will look beyond simple foreclosure calculations when determining whether exclusive contracts are anticompetitive. Here, Medicare and Medicaid contracts comprise a bulk of the health insurance business in Wichita Falls. However, the DOJ excluded such contracts because it argued that their profits are inadequate substitutes for profits lost from *commercial* insurance contracts, rejecting the contention that governmental and commercial insurance contracts are interchangeable. Although the DOJ did take account of foreclosure rates, foreclosure rates served more as a starting point for the DOJ's analysis, but ultimately, the anticompetitive effects caused by the contracts' foreclosure remained the DOJ's central focus.

Third, the DOJ appears to have adopted *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001), as a general test for Section 2. *Microsoft* reaffirmed the unlawfulness of maintaining monopoly power through exclusionary conduct. The test it articulated requires a plaintiff to first show that a monopolist's conduct resulted in anticompetitive effects. If that burden is met, then the alleged monopolist may offer a non-pretextual "precompetitive justification" for its conduct. *Id.* at 59. The plaintiff must then "demonstrate that the anticompetitive harm of the conduct outweighs the precompetitive benefit." *Id.* This analysis was central to the DOJ's analysis and may remain so in any future Section 2 cases.

As Acting Assistant Attorney General for Antitrust, Sharis Pozen, said in remarks to the House Judiciary Subcommittee

on Intellectual Property, Competition and the Internet on December 7, 2011, cases like *United Regional* "demonstrate that the division is carefully monitoring business conduct across a range of critical industries", and when the DOJ discovers anticompetitive conduct, it is "ready and willing to go to court to put a stop to it."

DOJ Probing Electronic Books Industry

In the same hearing before the House Judiciary Subcommittee, Acting Assistant Attorney General Pozen confirmed that the DOJ, along with the European Commission and some state attorneys general, is looking into possible anticompetitive practices in the electronic book industry. The European Commission, in particular, has announced that it initiated formal antitrust proceedings to see if Apple Inc. and five publishers are engaging in activity that restricted competition in electronic book sales. The DOJ's and European Commission's investigations follow investigations begun in 2010 by the attorneys general of Texas and Connecticut into allegations that publishers and sellers of electronic books agreed to keep competing retailers from offering their products at lower prices through the use of most-favored-nation contracts in which the investigated publishers agreed to give certain sellers the best prices for their products, thereby raising the prices of other sellers. The use of so-called "MFN" clauses in contracts is also the subject of an ongoing challenge by the DOJ and the State of Michigan against Blue Cross Blue Shield of Michigan.

Canada Enforcement Update

Update by Mark Opashinov and Devin Anderson
McMillan LLP, Toronto

Active Pursuit of Abuse of Dominance Cases Continues in Canada

On May 27, 2011, Canada's Commissioner of Competition filed an application with the Competition Tribunal in response to allegedly anticompetitive practices by the Toronto Real Estate Board ("TREB"). 14 This case is a sequel to the Canadian Real Estate Association ("CREA") case reported in the Winter 2011 edition of the Newsletter and represents a counterpart to the U.S. Department of Justice's case against the National Association of Realtors.

The Commissioner alleges that the rules to which TREB member brokers are subject deny consumers choice and prevent real estate agents from offering innovative real estate brokerage services through the use of virtual office websites ("**VOWs**"), which would allow consumers to search Multiple Listing Service ("**MLS**") properties online themselves, thus largely disintermediating brokers from basic search activities. In the Commissioner's view, TREB's restrictive rules perpetrate inefficient intermediary activities by brokers and result in higher search costs for consumers. As a test case, it is likely to determine the fate of similar restrictions used by real estate boards across Canada.

The Commissioner's application was brought pursuant to the abuse of dominance provision of Canada's *Competition Act*. Under this provision, the Tribunal may order a prohibition or other order to remedy the impugned conduct in circumstances

where one or more firms that dominate a market engage in anticompetitive acts that prevent or lessen competition substantially. The Tribunal may also impose "administrative monetary penalties" (that is, fines) of up to $10 million. The Commissioner's application argues that TREB has a dominant position in the market for the supply of residential real estate brokerage services to home buyers and the supply of residential real estate brokerage services to home sellers. Moreover, TREB's VOW restrictions are "a practice of anti-competitive acts" because they are exclusionary - *i.e*. they protect traditional brokers against competition from brokers who want to adopt this innovative form of business model. This, alleges the Commissioner, results in a substantial lessening or prevention of competition by keeping real estate commissions high.

The Commissioner's application seeks an order from the Tribunal that would, among other things:

- prohibit TREB from directly or indirectly enacting, interpreting or enforcing any rules that prevent or discriminate against TREB member brokers who wish to use the information in the Toronto MLS system to offer novel brokerage services such as VOWs; and
- direct TREB to implement such resources and facilities as the Tribunal deems necessary to ensure the operation of VOWs or similar services by, or on behalf of, member brokers.

The application is being vigorously defended by TREB. First, TREB argues that its rules governing VOWs are consistent with the exercise of the copyright it holds over the Toronto MLS system. Under the *Competition Act*, "an act engaged in pursuant only to the exercise of any right or enjoyment of any interest derived under the *Copyright Act*" (among other intellectual property statutes) is "not an anti-competitive act", one of the three necessary elements of any abuse finding. TREB also observes that, as a trade association, it does not offer real estate brokerage services (rather, its members do) and accordingly cannot be said to "substantially or completely control" the market as is required for a finding of abuse of dominance. Finally, TREB takes the position that allowing brokers to disseminate detailed property-specific information on VOWs accessible to the public largely without the intermediation of brokers would give rise to serious privacy concerns in violation of Canada's federal privacy laws.

With leave to intervene granted to both CREA (in support of TREB's position) and Realty Sellers Real Estate Inc. (self-described as TREB's largest non-traditional brokerage and a proponent of VOWs, in support of the Commissioner's position), the case promises to be an interesting one. The hearing is expected to start in the second quarter of 2012.

[14] Industry Canada, *Competition Bureau Sues Canada's Largest Real Estate Board for Denying Services Over the Internet* (May 27, 2011), available online: http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03379.html. Full details of this case are available on the Competition Tribunal's website at: http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=347.

European Union Enforcement Update

Update by Frances Murphy and Lynette Zahn
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2011: Developments in the Enforcement of Art 102 TFEU

Background

Article 102 of the Treaty on the Functioning of the European Union ("**TFEU**") states that "any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited." Article 102 has existed, unchanged, since the Treaty of Rome was signed in 1957 and similar provisions exist in competition laws of all Member States of the European Union ("**EU**").

According to Article 5 of Regulation 1/2003, Article 102 TFEU can be enforced by the national competition authorities ("**NCAs**") as well as the European Commission ("**Commission**"). In 2011, the European Court of Justice ("**ECJ**") had the opportunity to clarify the application of Article 5. Although Article 5 allows NCAs to make a number of decisions in relation to an infringement of Article 102 TFEU, it does not confer a power to make a decision that there has been no infringement. Where a NCA finds that the conditions for the application of Article 102 TFEU are not met, its power is limited to taking a decision that there are "no grounds for action".[15]

The main sanction for infringing Article 102 TFEU is a fine of up to 10% of global turnover in the preceding business year. Some of the highest fines for breach of EU law have involved infringements of Article 102 TFEU for example in 2011, the Commission fined Telekomunikacja Polska S.A. ("**TP**") nearly €128 million (3.24% of total turnover for 2010) for abusing its dominant position in Poland by limiting competition on the broadband markets.

The Commission may also impose structural and behavioural remedies under Article 7 of Regulation 1/2003 when it finds a breach of Article 102 TFEU. In some cases, parties offer to enter into binding commitments to change their behaviour, or even to divest assets. In 2011, behavioural commitments were offered in two cases, namely IBM and Standard & Poor's.

Ultimately, a Commission decision finding an infringement gives persons or firms affected directly by such anti-competitive behaviour the right to bring the matter before national courts and seek damages.

[15] Case C-375/09, Prezes Urzędu Ochrony Konkurencji i Konsumentów v Tele2 Polska (now Netia SA w Warszawie), 3 May 2011.

Policy and Procedure

Best Practices and Revised Hearing Officer Mandate

In 2011 the Commission adopted a package of antitrust procedural reforms comprising (i) a Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU; (ii) Revision of the Hearing Officer's mandate; and (iii) Best Practices on the submission of economic evidence and data collection in cases concerning the application of Articles 101 and 102 TFEU and in merger cases. Article 101 TFEU prohibits anti-competitive arrangements.

The Notice on Best Practices for the conduct of proceedings concerning Articles 101 and 102 TFEU covers the main proceedings followed by the Commission relative to suspected infringements of Articles 101 and 102 TFEU. The Notice provides for:

- The public announcement of key stages in antitrust proceedings, namely the opening of cases, the sending of a Statement of Objections (**"SO"**), the closure of proceedings and the adoption of a decision.
- State of play meetings at key points of the proceedings.
- An opening of formal proceedings as soon as the initial assessment phase has been concluded in order to identify the scope of the investigation and the identity of the parties at an early stage.
- Guidance on how the commitment procedure is used in practice.
- Informing parties in the SO of the main parameters for the possible imposition of fines in order for parties to better prepare their arguments and present them in the oral hearing.
- Disclosure of key submissions of complainants or third parties, prior to issuing a SO.
- Publishing rejections of complaints, either in full or as a summary.

When claims for inability to pay a fine may be made and how and when the Commission will assess such claims.

Damages and Collective Redress

In 2011 the Commission issued a draft guidance paper on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU. The Commission closed a consultation on collective redress in 2011 and will present a framework later this year. It has also been suggested that the Commission will publish a Directive on the interaction between public and private enforcement towards the middle of 2012. The Directive may have been inspired by an ECJ judgment in 2011 regarding the interaction between national leniency programmes and the right of individuals to claim damages for losses in EU cartel cases. It is to be noted that in 2011 the ECJ held that documents submitted under national leniency programmes are not protected from third party access in damages claims.[16]

Negative Decisions by National Competition Authorities

As mentioned above, the ECJ has ruled that only the Commission has the power to make decisions finding that there has been no breach of Article 102 TFEU; an NCA may not do so, an NCA may only adopt a decision stating that there are “no grounds for action.” The case in point concerned a request for a preliminary ruling referred by the Polish Supreme Court to the ECJ in a competition case where the Polish Competition Authority had concluded that certain conduct did not meet the conditions for prohibition under Article 102 TFEU.[17] Article 5 of Regulation 1/2003 sets out the powers of national competition authorities when enforcing EU competition rules. It provides that NCAs shall have the power to apply Articles 102 TFEU and is directly applicable in all Member States". The ECJ concluded that giving NCAs the power to make decisions stating that there has been no breach of Article 102 TFEU would undermine the power of the Commission and risk undermining the uniform application of Articles 102 TFEU as it might prevent the Commission from finding subsequently a breach of Article 102 TFEU.

European Commission

Infringement Decisions: Telekomunikacja Polska

In 2011, the European Commission adopted one infringement decision concerning Article 102. Telekomunikacja Polska ("**TP**") was fined €127.5 million for refusing and obstructing access to its network and wholesale broadband services in Poland. The decision required TP to put an end to such conduct and not to engage in the same or equivalent practices in the future. Article 102 TFEU has been used on several occasions in the telecom sector for example against Wanadoo, in a predatory pricing case, against Telefonica for unfair prices in the Spanish broadband sector and against Deutsche Telekom for charging unfair prices to the provision of local access to its fixed network and market.

In the TP decision the Commission stated that, as a dominant company, TP is under an obligation to allow remunerated access to its network and wholesale broadband services in order to allow the effective entry of alternative operators in downstream telecom markets. However, TP consistently refused to do so or made it difficult during a period of more than four years. The abusive pattern of TP's behaviour included the following elements:

- Proposing unreasonable conditions governing access to the wholesale broadband products.
- Delaying the negotiation process.
- Limiting access to its network.
- Limiting access to subscriber lines by *inter alia* rejecting alternative operators' orders to activate subscriber lines on unreasonable grounds.
- Refusing to provide reliable and complete general information on TP's network. This information was indispensable to allow alternative operators to make business decisions.

The Commission's intervention did not relate to the specific infringements of regulations, but to TP's pattern of abusive behaviour. In the TP case, despite the regulatory mechanisms put in place by the Polish National Regulatory Authority obliging TP to give access to its network, competition was restricted due to TP's abusive behaviour. The decision confirms that the existence of national, sector specific regulation does not prevent the application of EU competition rules.

TP has appealed the Commission Decision to the General Court.[18]

Following the TP infringement decision, Commissioner Almunia stated that "the Commission cannot allow the development of the Internet and of the digital economy to be put at risk by anticompetitive practices. This case shows our determination to ensure that dominant telecom operators do not systematically hinder competitors who can make a real difference in the market to the benefit of consumers and businesses".

16 Case C-360/09, Pfleiderer AG v Bundeskartellamt, 14 June 2011.

17 Tele2 Polska *supra* note 1

18 Case T-486/11

Investigations Closed and Commitments

Pharmaceutical Industry

As a result of the pharmaceutical sector inquiry, the Commission identified a number of concerns about the use by pharmaceutical companies of the patent system to prevent the entry of new (generic) drugs and consequently initiated a number of investigations into potential breaches of Articles 101 and/or 102 TFEU, several of which are still ongoing for example the investigation into Lundbeck and Servier. In 2011, the Commission closed its investigation into German pharmaceutical company Boehringer Ingelheim (Boehringer) over an alleged misuse of patent applications to block or delay market entry of competing medicines after the parties reached a settlement agreement. The settlement agreement provides for the removal of the alleged blocking positions in Europe, a licence to be granted for two countries outside the EU and an end to pending litigation between the parties.

Energy Sector

Similarly, the findings of the energy sector inquiry enabled the Commission to identify areas where competition was not operating effectively in the energy markets. As a result, the Commission started investigations into long term supply agreements by EDF and Electrabel in 2007. The European Commission was concerned about long term exclusive purchase obligations in contracts with industrial electricity customers. It feared that these obligations could make it difficult for new entrants in these markets to win customers, thus hindering the development of a more competitive electricity market in France and Belgium. EDF offered commitments to the Commission, which were accepted. Electrabel did not offer any commitments and on 28 January 2011, the Commission announced that it is closing its investigation into Electrabel.

The Commission has the power to accept legally binding commitments from companies that are being investigated for a suspected breach of Article 102 TFEU and subsequently to close its investigation without reaching a final, formal conclusion on whether the undertaking has, in fact, infringed Article 102 TFEU. In 2011, the Commission closed two cases by accepting binding commitments, those cases involved IBM and Standard & Poor's respectively.

IBM Mainframes

The Commission opened a formal investigation into two suspected breaches of Article 102 by IBM, first, that IBM had engaged in illegal tying of its mainframe hardware to its dominant mainframe operating system. This investigation was closed after the complaints were withdrawn. The second case resulted from an own-initiative investigation into possible discrimination by IBM against competing suppliers of mainframe maintenance services. In order to address the Commission's competition concerns IBM offered the following commitments with a duration of five years:

- IBM would ensure the expeditious availability of certain spare parts and technical information to third party maintainers (TPMs) under reasonable and non-discriminatory terms and conditions.
- IBM would enter into a framework contract with any TPMs interested in providing maintenance services for IBM system servers in the EEA.
- IBM would create the position of an EU-wide TPM relationship manager in order to facilitate dealings with TPMs.
- IBM would submit a yearly report to the Commission on the implementation of the commitments and the commitments will apply to all of the relevant mainframe models and types that have not been withdrawn from service by IBM.

Standard & Poor's

The Commission's investigation of Standard & Poor's concerned a suspected breach of Article 102 by Standard & Poor's in relation to its behaviour towards end users of International Securities Identification Numbers (ISINs). In consideration for the Commission closing its investigation S&P offered the following commitments with a five year duration:

- The abolishment of all charges to indirect users for the use of US ISINs within the EEA.
- The distribution of US ISIN records separately from other added value information on a daily basis.
- Users will have to conclude an agreement with S&P that prohibits the extraction of CUSIPs (the equivalent of ISINs for national use) from the US ISIN data and they will be prohibited from redistributing in bulk US ISINs to companies other than their group companies located in the US.
- ISPs and outsourced data management service providers will be allowed to redistribute US ISIN records in bulk format but not to extract CUISPs from the US ISIN data.
- Customers currently in a contractual relationship with S&P for the use and/or distribution of US ISINs, will

have a right to early termination of their existing contracts.

New Investigations

Credit Default Swaps

Commissioner Almunia has stressed the Commission's determination to pursue competition enforcement in the financial services markets.[19] In 2011, the Commission dealt with four cases in this sector: two cases involved financial data or market infrastructure that may be important for the operation of markets (Standard & Poor’s, Thomson Reuters) and two related to investigations into the market for derivatives (Credit Default Swaps). In the first case concerning the Credit Default Swaps market, the Commission is examining whether 16 investment banks and Markit, the leading provider of financial information in the CDS market, have colluded and/or may hold and abuse a dominant position in order to control the financial information on CDS. In the second case, the Commission is investigating whether the preferential tariffs granted by ICE to the nine banks have the effect of locking them in the ICE Clear Europe system to the detriment of competitors.

Google

The Commission is currently investigating whether Google is abusing a dominant market position in online search by allegedly lowering the ranking of unpaid search results of competing services which are specialised in providing users with specific online content and by according preferential placement to the results of its own vertical search services in order to shut out competing services. Throughout 2011, the Commission received complaints (most recently from Twenga) bringing the total complaints to ten. The Commission has indicated that they will decide by March 2012 whether to start a formal investigation or not. The Commission is looking into allegations that Google lowered the "Quality Score" for sponsored links of competing vertical search services. The Quality Score is one of the factors that determine the price paid to Google by advertisers. The Commission is also focusing on allegations that Google imposes exclusivity obligations on advertising partners, preventing them from placing certain types of competing ads on their web sites, as well as on computer and software vendors, with the aim of shutting out competing search tools. Finally, the Commission is investigating suspected restrictions on the portability of online advertising campaign data to competing online advertising platforms.

Deutsche Bahn

The Commission is investigating Deutsche Bahn AG and some of its subsidiaries following complaints that Deutsche Bahn Energie, the company's subsidiary supplying electricity to the German railway network, has been giving preferential treatment to the group's rail freight arm.

ARA

The Commission opened formal antitrust proceedings against ARA because of concerns that the Austrian waste management company may hinder its competitors to enter or expand their positions on the markets for the management of household and commercial packaging waste. The investigation is focusing on whether ARA may have abused its dominant position in the market, in particular by hindering access to its collection infrastructure, which is necessary to operate in the market, and by putting pressure on customers and collection service providers not to contract with ARA's competitors. If established, such behaviour could lead to higher waste management costs and consequently higher prices for packaged goods.

Luxury Watch Makers

The Commission opened formal proceedings to investigate the alleged refusal by several luxury watch manufacturers to supply spare parts to independent repairers. In 2004, the European Confederation of Watch & Clock Repairers' Associations (CEAHR) complained that, from 2002, watch manufacturers began to refuse to supply spare parts to repairers that did not belong to their selective systems for repair and maintenance, whereas luxury watches had previously traditionally been repaired by independent multi-brand repairers. CEAHR's complaint alleged that since there were no alternative sources for most of these spare parts, the practice threatened to drive independent repairers out of business. The Commission decided to reject this complaint for lack of community interest but in 2010, the General Court annulled the Commission's decision to reject CEAHR's complaint, mainly because the Commission did not sufficiently explain why it concluded that there was not enough Community interest to pursue the investigation. The Commission will now further investigate the allegations, in order to take account of the General Court ruling.

Electricity

The Commission opened formal proceedings to investigate whether CEZ, the incumbent electricity producer in the Czech Republic may have abused its dominant position in the Czech electricity market, in particular by hindering the entry of competitors. The Commission has investigated several

[19] Competition policy issues in financial markets, Joaquin Almunia, 16 May 2011.

incumbent energy operators for possible abuses of dominance in the past including E.ON , ENI Group, Electrabel and RWE.

Agreements between Honeywell and DuPont

The Commission opened formal proceedings to investigate whether agreements between Honeywell and DuPont breach Article 101 TFEU and whether Honeywell has abused a dominant position in breach of Article 102 TFEU. The investigation relates to a new refrigerant known as 1234yf, intended for use in future car air conditioning systems. It is replacing a previous refrigerant R134a, which does not meet new EU rules as regards its global warming potential. The Article 102 investigation is focusing on whether Honeywell engaged in deceptive conduct during the evaluation of 1234yf between 2007 and 2009. It is claimed that Honeywell did not disclose its patents and patent applications while the refrigerant was being assessed and then failed to grant licences on fair and reasonable terms. Such behaviour may infringe Article 102 TFEU.

European Court Judgments

Concept of Abuse

The ECJ confirmed that Article 102 TFEU covers not only practices which may cause damage to consumers directly, but also those which are detrimental to them through their impact on competition.[20] Article 102 TFEU does not prohibit an undertaking from acquiring a dominant position in a market, and a finding that an undertaking has a dominant position is not in itself a ground of criticism of the undertaking concerned, but an undertaking which holds a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition in the internal market.

Margin Squeeze

Margin squeeze arises when the difference between wholesale and retail prices is either negative or insufficient to cover the wholesale costs incurred by a dominant operator supplying its own retail services to end users. In the 2011 *TeliaSonera* case[21], the ECJ confirmed again (in line with *Deutsche Telekom*[22]) that margin squeeze is a separate form of abuse (a so-called “stand alone” abuse) as opposed to a form of refusal to supply. The ECJ also confirmed that the list of abusive practices in Article 102 TFEU is not exhaustive.

The ABA Winter 2011 Newsletter reported in detail on the *TeliaSonera* and *Deutsche Telekom* judgments. In summary the ECJ, in *TeliaSonera,* provided the following guidance on the assessment of margin squeeze abuses:

Regulatory Obligation

The absence of a regulatory obligation is not a relevant factor for determining whether the pricing practice is abusive. Article 102 TFEU applies only to anti-competitive conduct engaged in by undertakings on their own initiative. If anti-competitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Article 102 TFEU does not apply. The Court stated that if a dominant, vertically integrated undertaking has scope to adjust its retail prices alone, the margin squeeze may on that ground alone be attributable to it.

Anti-Competitive Effect

To be abusive, a margin squeeze (like other pricing practices) must have anti-competitive effect, but the effect does not necessarily have to be concrete. It is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking. Where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze on its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 102 TFEU.

Indispensable Input

Where input is indispensable for retail business, it may be a strong indication of anti-competitive effect, but it is only a factor in assessing effect.

Costs

The dominant undertaking's own costs should be taken into account in the first place when assessing whether a pricing practice, which causes a margin squeeze, is abusive. Only where this it is not possible should prices and costs of its competitors on the same market be examined.

Market of Dominance

It is sufficient to establish that the allegedly infringing company has a dominant position only in the relevant upstream/wholesale market – there is no need for dominance in the downstream market (in addition to the upstream market) for there to be a margin squeeze. The ECJ stressed that Article 102 TFEU gives no explicit guidance as to what is required in relation to where on the product markets the abuse took place.

[20] Case c-52/09, Konkurrensverket v TeliaSonera Sverige AB, 17 February 2011.

[21] Telia Sonera *supra* note 6

[22] Case C-280/08, Deutsche Telekom AG v European Commission, 14 October 2010.

Customers

Whether the customers are new or existing is not relevant to an assessment of margin squeeze.

New Technology

The fact that the markets concerned are growing rapidly and involve new technology requiring high levels of investment is not, as a general rule, relevant to establishing whether the pricing practice constitutes an abuse.

Inability to Recoup Any Losses

A margin squeeze is the result of the spread between the prices for wholesale services and those for retail services and not of the level of those prices as such. In particular, that squeeze may be the result not only of an abnormally low price in the retail market, but also of an abnormally high price in the wholesale market. Consequently, an undertaking which engages in a pricing practice which results in a margin squeeze on its competitors does not necessarily suffer losses. The possibility that competitors may be driven from the market does not depend on either the fact that the dominant undertaking suffers losses or the fact that that undertaking may be capable of recouping its losses, but depends solely on the spread between the prices applied by the dominant undertaking on the markets concerned, the result of which may be that it is not the dominant undertaking itself which suffer losses but its competitors. Therefore, whether the dominant undertaking is able to recoup any losses suffered as a result of applying the pricing practice at issue has no relevance to the matter of establishing whether that pricing practice is abusive.

Conclusion

2011 saw a steady year of regulatory development and Article 102 enforcement by the European Commission but it did not witness any groundbreaking regulatory developments or infringement findings.

Asia Enforcement Update

Update by Yan Luo
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China: National Development and Reform Commission (NDRC) Fined Two Pharmaceutical Companies for Monopoly Pricing (November 15, 2011)

The NDRC, one of the three antitrust enforcement agencies in China, has imposed fines of almost RMB 7 million, confiscated illegal gains, and imposed a cease-and-desist order on two pharmaceutical companies for monopolizing bulk sales of promethazine hydrochloride.[23] The decisions the first time that the NDRC has imposed significant penalties for violations of the Anti-Monopoly Law (AML) since the law became effective on August 1, 2008.

The NDRC's announcement confirmed that Weifang Shuntong Pharmaceuticals (Shuntong) and Weifang Huaxin Pharmaceuticals (Huaxin) had engaged in monopoly pricing for promethazine hydrochloride. The product is a key ingredient in the production of compound reserpine tablets, a type of affordable blood pressure drug listed in China's essential medicines. The NDRC found that, in June 2011, Shuntong and Huaxin had signed an exclusive distribution agreement with the only two manufacturers of promethazine hydrochloride in China. The agreement prohibits the manufacturers from selling the compound to any third party without Shuntong and Huaxin's permission, effectively making the companies the only source of promethazine hydrochloride in China.

As a result of the exclusive arrangement, Shuntong and Huaxin were able to raise the price of promethazine hydrochloride from RMB 200 per kilogram to as much as RMB 1350 per kilogram, according to the NDRC. A number of reserpine producers were forced to halt their productions in July 2011 due to the rising costs and reserpine supply shortages were worsened because producers can only supplied medical institutions from their remaining inventories.

In addition to fining Shuntong and Huaxin and confiscating their illegal gains, the NDRC has ordered the companies to terminate their exclusive agreement with the promethazine hydrochloride producers.

[23] NDRC's statement (in Chinese) can be found here: http://jjs.ndrc.gov.cn/gzdt/t20111115_444599.htm.

China: Pending Unilateral Conduct Cases In Courts

Dongfeng Nissan Abuse of Dominance Case Heard by the Court (May 2011)

On May 4, 2011, the Changsha Intermediate People's Court (Changsha Court) heard the case of Liu Dahua v Dongfeng Nissan Passenger Vehicle Company (Dongfeng Nissan) and Hunan Huayuan Industry Corporation Ltd (Hunan Huayuan).[24] This is the first case in the automobile sector that was brought by a private plaintiff based on the abuse of dominance provisions in the AML.

Mr. Liu, the plaintiff, initially brought the case to the Changsha Yuelu District People's Court, which accepted the case on November 1, 2010 and later referred the case to the Changsha Court.

In the court hearing, the plaintiff alleged that Dongfeng Nissan and Hunan Huayuan had abused their dominant position in the market for the supply of spare parts of Nissan passenger cars, by engaging in exclusionary conduct, together with Hunan Huayan's 4S service shops, to eliminate competition and harm consumers.

The plaintiff purchased a Dongfeng Nissan passenger car in 2009 and sent his car to one of Hunan Huayuan's 4S service shops to replace two small parts in 2010. The 4S shop insisted bundling its service with the sale of spare parts, citing the exclusive dealing policy of Dongfeng Nissan (i.e. no supply of spare parts through other channels), when the plaintiff questioned the high price of 4S shop's maintenance service. The plaintiff had to pay 607 RMB for the replacement of two small parts, which, according to him, was several times higher than the market price.

The defendant, Dongfeng Nissan claimed that its market share in the passenger car market is less than 50% and therefore it did not enjoy dominance in the relevant market. Also, it is an industry practice that 4S shops do not engage in the retail sale of spare parts. Thus, the original service contract between the plaintiff and the service shop was legal and should be protected by contract law.

The co-defendant, Hunan Huayuan, insisted that there are many 4S shops that the plaintiff could have chosen and the

[24] See Legal Daily, "The Court heard Dongfeng Nissan antitrust suit", May 4 2011, available at http://www.legaldaily.com.cn/index/content/2011-05/04/content_2636817.htm?node=20908

quality of the service provided by the 4S shop matched it price.

In rebuttal, the plaintiff claimed that the relevant market should be defined as the sale of spare parts for Dongfeng Nissan passenger cars, instead of the passenger car market. The defendant's market share in this narrowly defined market was much higher than 50%, close to 100%.

On December 15, 2011, the Court dismissed the plaintiff's complaint. It held that the plaintiff had failed to produce sufficient evidence to establish that the defendants held a dominant position and had abused that position. Moreover, the Court is of the view that the plaintiff had failed to sufficiently investigate the relevant market for the supply of car parts and repair services and that the defendants' management of the car aftermarket did not necessarily have a restrictive effect on competition. The plaintiff is currently appealing the ruling.

Omega Sues Taobao for Selling Counterfeit Watches; Taobao Challenged Omega for Price Monopoly (July 2011)

On July 20, 2011, the Beijing No 2 Intermediate People's Court heard a case brought by Omega SA, the Swiss luxury watchmaker, against Taobao, a subsidiary of Alibaba which runs the largest Chinese online shopping platform, for listing vendors that sell counterfeit Omega watches. Taobao rejected the claim and argued that the price filter proposed by Omega (to prevent new Omega watches being sold at a price below RMB 7,500) would result in a price monopoly of Omega products.

In its complaint, Omega claimed that Taobao sold counterfeit Omega watches 5% less than the price of original Omega watches sold by authorized dealers. The plaintiff found 28369 Omega products listed in Taobao for significantly less than the price of original Omega watches sold by authorized dealers. Omega maintains that it is impossible for an original Omega watch to be sold at those prices.

Omega therefore concluded that Taobao was actively assisting the sellers of counterfeit products by allowing them to advertise on its platform. It claimed damages of RMB 2 million and has applied for an injunctive relief for Taobao to cease the conduct and to impose a filter mechanism to prevent the sale of new Omega watches for less than 7,500 RMB.

Among other arguments, Taobao rebutted Omega's price filtering proposal by stating that the price of a product should be set by market forces, rather than "assigned" by anyone. The plaintiff has no evidence to state that all Omega watches that are sold under 7,500 RMB in Taobao are counterfeit and thus violate Omega's right. Taobao contends that the price filtering mechanism requested by the plaintiff would in fact create a price monopoly for Omega watches.

The court has yet to render a judgment.

Taiyuan Railway Bureau Sued for Monopoly (September 2011)[25]

On September 7, 2011, the Shanxi Joint Transport Group Co., Ltd. brought an administrative lawsuit in the Taiyuan Xinghualing District People's Court against the Taiyuan Railway Bureau for breaches of the AML and the Anti-Unfair Competition Law (AUCL). The Court accepted the case on September 13, 2011.

The defendant, the Taiyuan Railway Bureau, is a local authority of China's Ministry of Railway in Taiyuan, the capital city of Shanxi Province. As the sector regulator, the defendant (as the local office of Ministry of Railway) is responsible for passenger and freight services, regulating the rail industry, and developing rail infrastructures. It is also authorized to approve the setting up of railway ticket outlets within its jurisdiction.

Prior to May 2006, there were 40 approved railway ticket outlets in Tiayuan city, and the plaintiff owned 13 of these ticket outlets. Since then, the defendant has approved the establishment of 61 new ticket outlets, which are all operated by the defendant's commercial subsidiaries. Since 2007, the plaintiff has, on a yearly basis, submitted applications to the defendant to obtain approval to establish new ticket outlets, but without success. On January 25, 2011, the plaintiff again submitted two applications to establish new ticket outlets and telephone booking services, but has yet to receive any response from the defendant.

The plaintiff claimed that the defendant, as the regulator as well as the operator of the railway service, has abused its dominant position and breached the AML and the AUCL, because it favored its own commercial units in the administrative process. The plaintiff also claimed that the defendant's failure to reply to the plaintiff's applications is a type of illegal administrative inaction.

This case relates to the abuse of administrative powers to restrict or eliminate competition, commonly referred to as "administrative monopoly". Article 50 of the AML entitles individuals and entities to bring civil actions on private

[25] *See* Ping Wu, "Taiyuan Railway Bureau Sued for Unfair Competition, Hao Jingsong again Challenged Railway Monopoly", September 7, 2011 http://news.jcrb.com/jxsw/201109/t20110907_714811.html (in Chinese); Jing Wan, "Private Company Sued Taiyuan Railway Bureau for Administrative Inaction and Monopoly", September 8, 2011 http://www.legaldaily.com.cn/legal_case/content/2011-09/08/content_2936202.htm?node=30191 (in Chinese)

monopoly conduct and claim damages. In contrast, where there is an abuse of administrative monopoly by a public authority, Article 51 of the AML provides that it is up to that public authority's superior authority to order it to rectify its conduct and impose administrative punishment on liable persons. The AML is silent on whether civil litigation can be brought to challenge public authorities engaging in administrative monopoly. Both the public and private enforcement mechanisms of the AML vis-à-vis administrative monopoly seem to be weak and ambiguous.

The court is yet to render a judgment.

China: Regulation Updates

Ministry of Industry and Information Technology Opines on University Telecommunications Conduct (June 2011) [26]

The Ministry of Industry and Information Technology (MIIT), China's telecom regulator, issued the *Opinions on Regulating Business Activities of Basic Telecommunication Enterprises in the On-Campus Telecom Services Market* (Opinions) on June 30 2011.

The Opinions have six articles and prohibit basic telecom enterprises from engaging anti-competitive conduct. The prohibition includes reaching exclusive agreements (both written and oral) with universities and colleges to eliminate competitors, defaming competitors, including SIM or UIM cards and promotional materials with students' admission letters without their permission, acquiring telecom terminal equipment (including mobile phone batteries and SIM cards) from competitors' customers, or forcing universities and colleges to use designated telecom services and terminal equipment.

The Opinions also stipulate that enterprises engaging in the prohibited activities and infringing the Telecommunications Regulations shall be investigated and handled by the relevant telecommunications regulators at the provincial level.

Korea: Enforcement Updates

Korean Fair Trade Commission raided Google[27]

The KFTC raided Google's Seoul offices on September 7,2011, following complaints earlier that it did not allow rival search engines access to its Android smartphone operating system and thus harmed competition in the mobile search market.

[26] The regulation is available at http://www.miit.gov.cn/n11293472/n11293832/n12843926/13933220.html (in Chinese)

[27] See Rachel Bull, Counsel update: Korea raids Google, available at http://www.globalcompetitionreview.com/news/article/30595/counsel-update-korea-raids-google/

In April, Korean search engines Naver and Daum complained to the commission that Google was abusing its dominant position by blocking them from the mobile search market. They allege that Google has made its own search engine the default setting on its Android phones, and that it doesn't allow manufacturers to install the rival search providers' software on the phones.

Google rebuffed this claim later, saying the company did not require carriers or manufacturers to include Google Search or Google applications on Android-powered devices.

The KFTC's investigation is still ongoing.

Japan: Enforcement Updates

JFTC issued a cease and desist order against DeNA Co., Ltd[28]

Japan's Fair Trade Commission (JFTC) has issued a cease and desist order to social gaming platform DeNA for asking "specified social game developers" not to provide games to the mobile social networking service operated by a rival, GREE, Inc.

Both GREE and DeNA offer social gaming, allowing users to play games interactively on their mobile phones. According to the JFTC, DeNA threatened to remove links to software providers on its website, Mobage-Town, if these developers provided games through GREE. Such practice leads more than half of the developers to terminate relations with the smaller website.

The JFTC applied article 19 of Japan's Competition Act in issuing the notice, which governs unfair trade practices. The JFTC requested DeNA to adopt a resolution at its Board of Directors to reassure that it has terminated the anticompetitive practice and will never take similar actions, either against GREE or other mobile social networking services.

[28] See JFTC's press release, available at http://www.jftc.go.jp/en/pressreleases/archives/individual-000427.html; also see Rosalind Donald, Japan moves to quash social gaming abuse, available at http://www.globalcompetitionreview.com/news/article/30207/japan-moves-quash-social-gaming-abuse/

Latin America Enforcement Updates: Argentina

Update by Marcelo den Toom
M. & M. Bomchil, Buenos Aires

Medical Associations Fined for Exclusivity

On October 4, 2011, the Secretariat of Domestic Trade (SDT), the adjudicatory authority under Argentina's competition law, fined a medical association in the amount of AR$ 575,000 (approx. $133,000) for exclusionary practices against a group of physicians that decided to provide services to a hospital that had been excluded from the association's network. The SDT also mandated the association to eliminate from their by-laws the imposition of exclusivity as a condition to membership (*Asociación Médica Bahía (caso Diba c. 687) s/ infracción ley 25.156*). The association –which according to the Antitrust Commission (CNDC), the investigatory authority under Argentina's competition law, included between 60% and 90% of all physicians within the alleged relevant markets- decided to temporarily exclude the physicians from its listings and change their status of affiliation so that an increased processing fee applied to them (the association charged a "processing fee" to all physicians as a percentage of the physicians' own professional fees). The alleged violations were well documented in the minutes of the association, which even publicized them in its journal. A smaller association was fined in the amount of AR$ 100,000 for helping discourage the physicians to pursue their direct dealings with the hospital, although the decision –which, although not expressly, considers the conduct of both associations as a type of exclusionary abuse of dominance- did not examine whether the conduct of the two associations could instead be considered of a collusive type.

Television Programming Contract Scutinized

On August 18, 2011, the SDT issued an injunction aimed at suspending for 90 days the termination of a contract for the supply of a high-definition sports channel, which presumably had been tied with another new, unwanted channel, to allow the parties to reach a negotiated result (*Fox Sports Latin America S.A. s/ infracción ley Nº 25.156*). The case highlighted the importance of soccer rights for competition in the pay-TV distribution market.

Newspaper Distribution Practice Enjoined

On June 10, 2011, the SDT issued an injunction ordering an association handling the entire distribution of newspapers and periodicals to amend its policy of withdrawing plaintiff's unsold issues of its weekly newspaper two days after their appearance at points of sale (*Editorial Sarmiento S.A. s/ solicitud de intervención CNDC (c. 1387)*). Said practice is common in the industry (editors buy back unsold issues from POS); however, plaintiff had claimed that due to the weekly nature of its newspaper it had to be done once the new issue was published and not before, and that competition was impaired by doing the latter, particularly due to the allegation that the association disadvantaged plaintiff against competing weekly publications.

Bus Terminal Operator Fined for Monopoly Leveraging

On February 7, 2011 the SDT fined the operator of the sole bus terminal of the city of Salta and its vertically integrated bus company in the amount of AR$ 2 million (approximately $ 462,000) for discriminating against competing bus companies (*La Veloz del Norte S.A. (Ciudad de Salta) s/ infracción a la ley 25.156 (c. 714)*). Plaintiffs alleged that defendant's bus company was the only one which, at the commencement of the new concession of the terminal, had kept a ticket office in the main building. All others had to vacate the building and operate in small offices by the bus platform, until they agreed to enter into subconcession agreements with defendant on allegedly abusive terms. The CNDC considered that defendant had participated in "monopoly leveraging" (as its terminal was the only one legally authorized to operate in Salta, which granted defendant considerable market power in the bus transportation market) and that the terminal in itself was an essential facility.

Latin America Enforcement Updates: Brazil

Update by Marcio Soares and Paula Camara Baptista de Oliveira
Mattos Filho, Veiga Filho, Marrey Jr. e Quiroga Advogados, Sao Paulo

In 2011, the spotlights were mainly focused on the long-expected changes in the Brazilian antitrust legislation, in particular during the second half of the year when the Brazilian Congress passed the bill introducing the New Brazilian Antitrust Law and the suspensory pre-merger control system. In parallel to the legislative discussions, the Brazilian antitrust authorities also had a rather active year as concerns both mergers and cartels, with important merger cases coming to an end (*e.g.* the BRF case) and some innovative approaches taken by the Secretariat for Economic Law of the Ministry of Justice (SDE) in the cartels area (*e.g.* the proposal of structural remedies in the cement case). Although no high-level dominance case was decided by the Brazilian antitrust authorities last year, there have been interesting discussions in the unilateral conduct field that deserve comments.

In August, the Administrative Council for Economic Defense (CADE) suspended the effects of the exclusivity clauses used by the Brazilian state-owned bank Banco do Brasil S.A. (BB) in its contracts with certain public bodies and agencies for the purposes of granting loans to civil servants that are automatically offset over a particular term against the payroll. CADE also decided to initiate a formal investigation for potential abusive behavior on the part of BB (*see* Case No. 08700.003070/2010-14). SDE, the chief investigative body under the current Brazilian antitrust system, had originally recommended to CADE that the case should not go forward due to the prior formal opinion issued by Brazil's Federal Attorney's Office stating that the Brazilian Central Bank has exclusive regulatory jurisdiction over the financial market. CADE did not follow SDE's recommendation and decided to investigate BB's alleged abusive conduct.

Two other investigations were concluded by SDE in 2011, and in both cases the agency recommended the defendants to be fined by CADE for alleged abusive conducts.

SDE's investigation into the tobacco industry was concluded in September.The agency found both Souza Cruz (the Brazilian subsidiary of British American Tobacco) and Philip Morris to have violated the Brazilian antitrust rules by means of unilateral exclusivity clauses concerning merchandising that were inserted in their contracts with wholesalers and retailers across the country (*see* Case No. 08012.003921/2005-10). According to SDE, Souza Cruz's contracts also included product display exclusivity clauses that would give rise to competition concerns. The investigation originated from another administrative procedure (Case No. 08012.003303/1998-25) launched by SDE into an exclusive sale agreement entered into by and between Souza Cruz and retailers. Although this procedure was closed due to a settlement under which Souza Cruz committed to cease the use of such exclusivity clauses, SDE decided to open a second investigation related to the use of exclusivity clauses for merchandising and product display. SDE argues in its opinion that the unilateral conduct of each of Souza Cruz and Philip Morris would create barriers to entry, in particular by preventing access of competitors to their distribution channels. The case is expected to be reviewed and decided by CADE later this year.

SDE also concluded its investigation and recommended that the Central Bureau of Collection and Distribution (*Escritório Central de Arrecadação e Distribuição – ECAD*) be fined for alleged abuse of dominant position (*see* Case No. 08012.003745/2010-83). Pursuant to the Copyrights Act, the ECAD is a private body in charge of collecting and distributing royalties to copyrights' holders resulting from the public exhibition of national and foreign music. SDE argues in its opinion that ECAD would have been using its dominant position to create barriers for the creation and development of alternative associations of copyrights owners, thereby facilitating concerted practices in the market. CADE is also expected to rule upon this case in 2012.

Latin America Enforcement Updates: Chile

Update by Ignacio Baron
Urenda, Rencoret, Orrego y Dörr, Santiago

Chile's Legal Framework Against Abuse of Dominant Position, Policy Goals and Legal Standard

The main legislation applying to antitrust and competition matters in Chile is Decree Law No. 211 of 1973 (DL 211), which is referred to as the Free Competition Act (the "Competition Act"). Article 3 of the Competition Act establishes a single, general provision that applies to general anticompetitive behavior or conduct contravening competition. As such, this is the legal basis for the prohibition of abuse of dominant position in Chile. Subsections of the referred provision include illustrations of usual anticompetitive conduct and, among them, exemplifications of abuse of dominant position. Particularly, Article 3 (b) of the Competition Act refers to abusive exploitation of a dominant position, including single and collective dominance, and regards as abuse of dominance conduct such as abusive prices, tying and market division. Case law has clarified the meaning of this general provision, specially, through the jurisprudence of the Chilean Competition Tribunal (TDLC) and the Supreme Court.

The purpose of the Chilean Competition Law is, by and large, *"the promotion and protection of free competition in the markets"* (Article 1, DL 211). Notwithstanding the lack of a clear policy definition at the statute level, the TDLC has been granted the power to define the final objective of the competition law on a case by case basis. TDLC's decisions have considered, as policy views, the notions of economic efficiency, the protection of consumer surplus, the potential harm to consumer welfare and the effects of dynamic efficiency and innovation, among others. Generally speaking, Chilean competition authorities consider economic efficiency and the protection of consumer welfare as the main goals to pursue.[29]

With respect to the legal standard applied, abuse of dominant position in Chile is analyzed or found by the TDLC on a case by case basis, in consideration to several elements and characteristics of the relevant market, under a rule of reason analysis, and with particular attention to market power and actual or potential anticompetitive effects (i.e. if the conduct prevents, restricts or hinders competition, or if it tends to produce such effects). The TDLC may sanction a dominant position in two scenarios: *i)* when it is illegally obtained through collusion, predation or unfair competition; and *ii)* in case of abusing a dominant position through exploitation or exclusion.

Enforcement Record

Abuse of Dominant Position has represented the most important area of competition law enforcement in the era of the TDLC.[30] Indeed, 46% of all adversarial cases initiated before the TDLC in 2011 corresponded to conduct described as abuse of dominant position (7 out of 15). This number is consistent with the tendency shown in previous years.

On the side of the FNE (enforcement in Chile is allocated in two separate bodies, the TDLC and the Chilean Competition Agency or "FNE"), the records show that cases concerning abuse of dominant position are frequent. In fact, during the period January-July 2011 the FNE initiated 6 investigations concerning abuse of dominant position (in 2010 the FNE opened 9 investigations regarding dominance).[31] On the other hand, in the period comprehended between January 2010 and December 2011 the FNE brought 2 enforcement cases before the TDLC. Currently, approximately 55% of the workload at the FNE consists of cases concerning abuse of dominant position (dockets under litigation, investigations in course and admissibility review processes).[32]

The fact that Chile does not contemplate a mandatory pre-merger notification program may be one of the reasons that explain the relative significance of abuse of dominance in competition cases (mergers are voluntarily submitted to the TDLC under a consultative, non-adversarial procedure established in the Competition Act). However, the executive branch has recently expressed its willingness to review the Chilean merger review system, with the idea of moving toward a mandatory pre-merger notification program, a decision that, if approved by Congress, will possibly have an

[29] In turn, Chilean government regards the principal goal of its competition law as being *"to promote economic efficiency, with the expectation that in the long run this maximizes consumer welfare"* (OECD's Accession Report on Competition Law and Policy regarding Chile, 2010). By the same token, the Free Trade Agreement subscribed between Chile and the United States establishes that *"each party shall adopt or maintain competition laws that proscribe anticompetitive business conduct, with the objective of promoting economic efficiency and consumer welfare"*.

[30] The TDLC replaced the former Competition Commissions in 2004.

[31] Information regarding investigations opened by the FNE during the period July-December 2011 is not publicly available yet.

[32] FNE´s Annual Report 2010-2011.

impact in this significance of abuse of dominant position in competition cases.

Recent Enforcement Action

1. In April 2011, the FNE and several small beverage companies initiated an adversarial proceeding against two Coca-Cola bottling companies claiming abuse of dominant position. In its claim, the FNE asserted that the bottling companies violated the Competition Act by establishing in the traditional channel of distribution of carbonated beverages a system of incentives subject to the recipients' obligation not to advertise, display or commercialize, in any way, the so-called "Brand B" or alternative carbonated beverages.

In the FNE´s view, these actions had the purpose and effect of preventing, delaying and obstructing the entry and growth of carbonated beverages of alternative brand, decreasing competition in the relevant market artificially and systematically.

Nevertheless, on November 2011, the TDLC approved an agreement reached by the FNE, the Coca-Cola bottling companies and the small beverage companies in the conciliation phase of the trail.

2. In November 2011, in a case initiated by the FNE and Philip Morris Chile, the TDLC partially ruled against British American Tobacco Chile (BAT), determining that the subscription by the dominant firm of contractual clauses regarding the lease of advertising rights and space, in its practical application, restricted and hindered competition, or at least tended to produce such effects.

The TDLC established two conditions for BAT: i) in case BAT´s competitors do not have a cigarette display in an equally visible place (in the so-called "high trade" channel of distribution), BAT shall reserve and give its competitors the 20% of the "facing" of the cigarette displays in the corresponding points of sale (without restricting the exhibition of the competitors´ products by any means); and ii) to refrain from executing acts or agreements intended to prevent any lawful promotional activity by its competitors.

Latin America Enforcement Updates: Colombia

Update by Martín Carrizosa and Diego Cardona
PrietoCarrizosa, Bogotá

Colombian Competition Authority Dismisses Beer Exclusive Dealing Case, Opines on Foreclosure Standard

On June 22, 2011, the Colombian competition authority, Superintendence of Industry and Trade (SIT), issued its long-awaited decision on the administrative investigation against Bavaria S.A. ("Bavaria"), a wholly owned subsidiary of SABMiller and Colombia's major and oldest brewing company, for alleged abuse of its dominant position in the beer market by means of exclusionary practices and tying arrangements. The SIT dismissed the charges brought against Bavaria holding that, although there was evidence of an exclusionary strategy, the conduct did not have an actual foreclosure effect on competition.

The investigation initiated early in 2007, following a complaint filed by the Colombian subsidiary of international beer company Heineken ("Heineken"). According to the complaint, Bavaria's strategy to position its recently launched *Peroni* brand in the premium beer segment hindered its competitors' access to the on premise outlets. Heineken alleged that Bavaria provided economic compensation to several well recognized businesses in the *HORECA* channel (hotels, bars, and restaurants), in exchange for dealing exclusively with Bavaria's beers.

After the evidentiary stage of the proceedings was completed, the Deputy Superintendent for Competition Protection ("Deputy Superintendent") presented the findings of the investigation in the Motivated Report. The Report held that Bavaria had a dominant position in the Colombian highly concentrated beer market, which allowed it to unilaterally determine market conditions. According to the Report, the evidence supported that Bavaria developed a strategy to increase its dominance in the market, by foreclosing competitors' access to the on premise outlets. Particularly, the Deputy Superintendent found that Bavaria entered into "endorsement agreements" with various restaurants and bars, whereby said businesses received economic compensation in exchange for agreeing to (i) advertise exclusively Bavaria's beer brands; (ii) purchase and retail exclusively Bavaria's beers; and (iii) purchase minimum monthly quantities of Bavaria's beers. Consequently, the Motivated Report recommended imposing fines to Bavaria for abuse of dominant position by foreclosing competitor's access to the market.

Notwithstanding the findings of the Motivated Report, the SIT's final decision held that Bavaria had not abused its dominant position, since the conduct under investigation had not actually foreclosed competition in the relevant market, which was defined as the Colombian retail market for Premium beers.

The decision endorsed an effect-based approach to the analysis of abuse of dominance in connection to exclusionary practices, and applied the following three step test to study the illegality of the investigated conduct: (i) whether the investigated party was dominant in the relevant market; (ii) whether the conduct entailed exclusionary effects; and (iii) whether the exclusion was substantial enough as to foreclose competitors form the relevant market.

As regards to dominance, the SIT held that Bavaria was indeed dominant in the relevant market, because the company's extremely high market share enabled it to determine the distribution conditions, as well as the retail conditions in the HORECA channel.

The SIT then delved in the analysis of exclusivity agreements and their potential exclusionary effects. In this regard, the SIT began by affirming that exclusivity clauses essentially entail barriers of entry to actual or potential competitors, since the mere fact that the parties agree not to deal with others necessarily hinders access to the market. Nevertheless, the decision held that exclusivity clauses are not *per se* illegal, and that for such provisions to be considered unlawful they must produce an actual effect in the market by (i) substantially restricting competition within the relevant market[33]; or (ii) enabling monopolization[34]. Thus, the SIT held that even where exclusivity agreements are instrumental to exclusionary practices, it is fundamental to analyze the material effects of the conduct and whether they are indeed substantial enough to foreclose the market.

According to the decision, the evidence supported that Bavaria indeed executed a strategy involving exclusivity agreements aimed at positioning the Peroni brand in the market, and that such strategy excluded competitors from certain outlets in the HORECA channel. Nonetheless, the SIT found that the

[33] Constitutional Court of Colombia. Judgment C-535 de 1997. M.P. Eduardo Cifuentes Muñoz.

[34] Administrative Court (Consejo de Estado). Fifth Section. 24 of August 2001. MP. Dario Quiñonez Pinilla.

evidence collected was not enough to support that Bavaria had foreclosed the market, because it showed that only 35 businesses in Bogota and Medellin had agreed to the exclusivities encompassed by the "endorsement agreements." Hence, the SIT held that the conduct under investigation did not reach enough outlets to foreclose actual or potential competitors from entering the market.

As regards to tying arrangements, the SIT affirmed that such conduct only occurs where (i) the seller has dominance in the market for the tying product; and (ii) the buyer is forced to purchase or acquire the tied product. The latter, according to the decision, takes place where (x) the buyer does not have the option to buy the tying product by itself; (y) there are financial incentives that coerce the buyer to acquire the secondary product; or (z) the design of the primary product necessarily implies that the buyer has to acquire the secondary product.

In Bavaria's case, the SIT held that the evidence did not support that the company was indeed forcing the businesses involved in the strategy to accept the exclusivity clauses as a requirement for selling its beers. To the contrary, the SIT found that all the exclusivity agreements were celebrated under the free will of both parties. In conclusion, SIT held that the conduct under investigation did not imply a tie-in to the businesses that agreed to the exclusivity provisions of the "endorsement contracts."

This was the only investigation on dominance that was decided in 2011 in Colombia. The SIT's decision has been subject to extensive debate in the academic circles, particularly since it fundamentally diverged from the findings of the Motivated Report. Some believe that the SIT passed on a valuable opportunity to develop a precedent for a higher responsibility and commitment for actors holding significant monopoly power in the market, in line with certain precedents from the European Court of Justice in which the concept of "Super Dominance" [35] has been applied.

[35] Compaigne Maritime Belge Transports S.A vs. The European Commission / Irish Sugar plc vs. The European Commission/ Microsoft vs. The European Commission

Latin America Enforcement Updates: Peru

Update by Alfredo Bullard G. and Alejandro Falla J.
Bullard Falla Ezcurra +, San Isidro, Lima

Competition law and policy was formally introduced to Peru in 1991 with the enactment of Legislative Decree N° 701, and consolidated in 1993 with the opening of INDECOPI, a governmental agency with technical, administrative, economic and budgetary autonomy, which is in charge of both enforcing the laws and regulations that promote competition and protecting intellectual property. Legislative Decree N° 701 was in force until June, 2008, when government enacted the new Law of Repression of Anticompetitive Conducts (LRCA) by Legislative Decree N° 1034. Nowadays, this is the main legal source for antitrust regulations in Peru.

INDECOPI's Tribunal dismissed AGALEP and FONGAL complaint against GLORIA for "abusive prices"[36]

On March 16, 2011, in a case involving the milk market, the Competition Tribunal confirmed a decision of the Commission which dismissed AGALEP and FONGAL complaint against GLORIA, the most important milk seller in Peru. The plaintiffs considered that Gloria had abused its dominant position in the market for the acquisition of fresh milk to producers. As they argued, Gloria was paying them "abusive prices" and had generated a discriminatory incentives scheme, as well as manipulated the milk quality analysis system.

With its decision, the Tribunal closed a long term debate about the viability of sanction not only of conduct with exclusionary effects, but also with exploitative ones. According to the Competition Tribunal decision, the alleged conduct could not produce any real or potential exclusion of Gloria's competitors, but only had an exploitative effect. In that vein, considering that the aforementioned conduct was not able to affect the competitive process, this could not be considered an abuse of dominant position [37].

[36] Resolution N° 0708-2011/SC1-INDECOPI.

[37] According to the LRCA, there could be an abuse of dominant position if the conduct has exclusionary effects.
"*Article 10.- Abuse of Dominant Position.-*
10.1. It is considered that there is abuse when an economic agent being in a dominant position within the relevant market uses such position to restrict inappropriately the competition, obtaining benefits in detriment of real or potential, direct or indirect, competitors, which would not have been possible without being in such dominant position.
10.2. The abuse of dominant position in the market may consist on conducts of exclusionary effects such as (...)."

INDECOPI's Tribunal dismissed APOFER complaint against PERU RAIL and others for "sham litigation"[38]

On July 27, 2011, the Competition Tribunal revoked a Commission decision which sanctioned an economic group formed by Perú Rail S.A., Ferrocarril Transandino S.A., Peruval Corp. S.A. and Peruvian Trains & Railways S.A. for abuse of its dominant position in the passenger transportation market service in the railway route between Ollantaytambo-Machupicchu-Hidroeléctrica. The Commission had fined Peru Rail with approximately US$ 1,000,000.00.

In this case, APOFER (an association of trains' operators) alleged that Peru Rail, directly or through its related companies, initiated several procedures before different governmental entities in order to prevent third companies to operate in the relevant market[39]. Nonetheless, the Competition Tribunal considered that Peru Rail and the other companies' conducts did not infringe Competition Law, but they were objectively justified.

In its decision, the Tribunal established a guideline (not a precedent, but relevant because of its specificity) in order to analyze sham litigation cases. As the resolution states, the authority must evaluate if the procedures initiated by the defendant have no objective foundation; otherwise (if there is an expectation of obtaining a favorable decision from the authority) the procedures must be considered as part of the regular exercise of the petition and action constitutional rights.

[38] Resolution N° 1351-2011/SC1-INDECOPI.

[39] Sham litigation is banned by the LRCA:
"10.2. The abuse of dominant position in the market may consist on conducts of exclusionary effects such as (...):
f) To abuse and reiterate legal or administrative procedure, whose effect is to restrict the competition."

Latin America Enforcement Updates: Uruguay

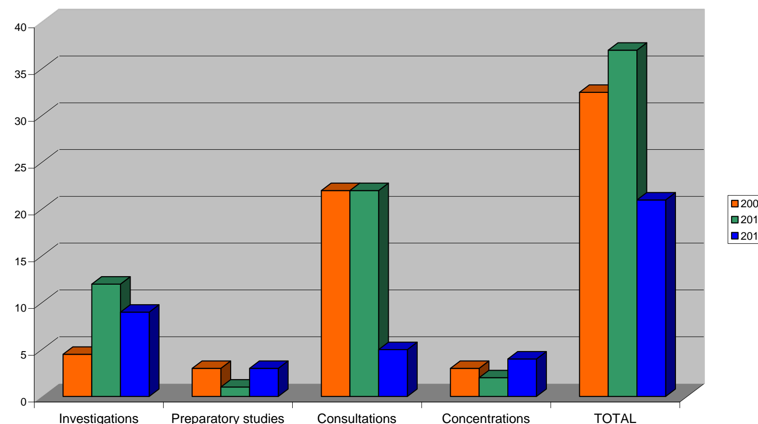
Update by Juan Manuel Mercant and Yael Ribco
Guyer & Regule, Montevideo

The Commission for the Promotion and Protection of Competition

The Commission for the Promotion and Protection of Competition, created in March 2009, plays a fundamental role in the Uruguayan market. In addition to its semi-contentious tasks, it was entrusted with competition advocacy functions. Since its creation, the Commission has successfully worked towards a more transparent market, governed by the principles of free competition.

The Commission for the Promotion and Protection of Competition (hereinafter, the "Commission") was first conceived by the Antitrust Law No. 18.159 of July 2007 and finally created on March 2009. As the agency in charge of the enforcement of the Antitrust Law (and further regulations) in Uruguay, it has become one of the main backbones of the Uruguayan antitrust structure.

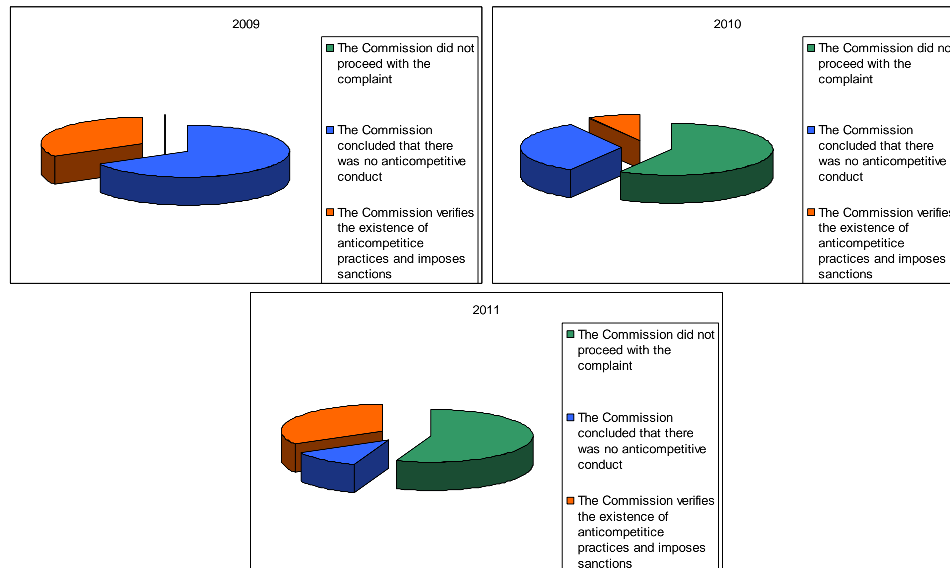
Among others, the Commission is entrusted with the following tasks: (i) perform investigations, either ex officio or pursuant to a claim; (ii) conduct studies in order to analyze the competition in different markets; (iii) provide advice to public entities and privates (both formal and informal) in its field of expertise; and (iv) control of concentrations. The following chart shows how the work of the Commission is distributed among these main tasks.



Source: Annual Report 2009, Annual Report 2010 and Resolutions published by the Commission in 2011.

The chart above shows how much the work of the Commission has increased since its launch in 2009. The Commission has not only become more efficient but also it has earned the trust of the market participants and final consumers. The drastic fall in the number of consultations in 2011 (and, as a consequence, of the total work of the Commission) owes to the fact that the largest number of consultations are made informally by particulars, and those do not give place to resolutions by the Commission. The exact number of consultations made in 2011 will only be available once the Annual Report 2011 is released. However, it is expected to continue the upward trend.

Notwithstanding the increasing activity of the Commission, when it comes to investigations of anticompetitive conduct it has more often than not dismissed the complaint, either because it decided not to proceed with the complaint (because it lacked fundamental elements, it was irrelevant or the Commission lacked jurisdiction to handle the procedure) or because after the investigation it concluded that there was no anticompetitive conduct. On the next page, please find charts that show that conclusion in the last three years.



Competition Advocacy

Besides the aforementioned semi-contentious tasks, the Commission was empowered to foster, facilitate and promote the actions and regulations leading to a more competitive market. These activities, usually known as "competition advocacy," are aimed at interacting with different market actors in order to spread and train on the rules governing a free and transparent market.

In particular, the following advocacy policies are provided by the Antitrust Law: (i) issuance of general rules and specific instructions for better compliance with the purposes of the Antitrust Law; (ii) advising the Executive Branch on policies for the promotion of competition; (iii) issuance of non-binding recommendations related to the protection, regulation, restriction and promotion of competition; (iv) keeping relationships with other national or international antitrust bodies; (v) attending international forum where issues related to competition are discussed and/or negotiated.

The Commission has made great efforts to comply with its tasks in this regard. Among others, it has launched a website where all the regulations, recommendations, reports, resolutions and other information of general interest are published. The website (accessible through http://www.mef.gub.uy/competencia.php) is updated regularly. In addition, it has gained recognition in the national media, having been mentioned in several press releases.

The Commission has also successfully worked towards the inclusion of antitrust in the academic curricula. So far, several courses have been included in the curricula at several well-known universities. In addition, the Commission has organized several events aimed at divulging the existence and scope of competition regulations.

In the international sphere, the Commission has participated in meetings organized by the MERCOSUR and the European Union, as well as in several seminars held in Latin America and Europe.

Notwithstanding the great efforts made by the Commission, a recent survey showed that most businessmen are unaware of the rules governing competition and of the work of the Commission, although the results have slightly improved since a prior survey conducted in 2005. In our opinion, although competition regulations are starting to have a real impact in the Uruguayan market, the Commission still has a lot of work ahead. However, we are confident that, if its performance continues as of today, it will succeed in achieving a more transparent market, governed by the rules of free competition.