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So You're Thinking of Opting Out . . .

Considerations for Corporate Plaintiffs in Price-fixing Cases

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In recent years, the U.S. Department of Justice has prosecuted a number of large price-fixing cartels affecting billions of dollars of commerce in the U.S. and around the world. After government investigations are announced, class actions are usually filed by both direct and indirect purchasers, and the cases are consolidated into large, multi-district litigations. With the filing of class actions comes the decision of whether businesses that fall within those classes should stay in the class; opt-out of the classes and file separate lawsuits; or, where they are not included in the certified classes, whether they should bring individual actions alongside the class. Here are some key issues that companies should consider in determining whether to bring individual actions.

I. What is your claim worth?

A key consideration is the amount at stake. Individual actions have the potential to bring higher recoveries. If the alleged cartel fixed prices of a component or a finished good that your company purchased in significant volume, the potential value of the claim could be quite large. Various studies have found the median overcharge from an international cartel to be as high as 25 percent. And expert economists have estimated that the overcharges from recent price-fixing cartels can be as high as 10-20 percent of the total price of the price-fixed product. Individual corporate plaintiffs with large claims have recovered, through settlement or trial, millions to hundreds of millions of dollars.

The value of the claim is important for a number of reasons. First, the chief rationale for opting out is that there is the chance of a greater recovery through an individual action than through remaining in the class. However, that same dynamic means that defendants are incentivized to litigate aggressively against opt-out plaintiffs to limit or eliminate the defendants' exposure. As a result, an individual action can result in significant discovery and prolonged litigation that can be expensive for an opt-out plaintiff. If the claim is not significant, the costs may not justify the risk and expense. Companies must factor into their opt-out decision the time and resources that will go into pursuing the case.

By the same token, deciding to stay in the class carries risk. As an unnamed class member, a company has no control over the litigation or settlement negotiations, and its fate is bound by the pre-trial and trial performance of class counsel. Some companies would much rather exert influence over the direction of the litigation and hire counsel that is bound to protect only their interests.

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It is important to remain clear-eyed about the potential risks and rewards of pursuing individual actions. Managing internal expectations is particularly important for in-house counsel. Recent cases demonstrate that even in cases with multiple guilty pleas and significant government fines, defendants will work hard to pare down the size and scope of the individual plaintiff claims. Individual plaintiffs may be subject to multiple rounds of motions to dismiss; robust fact and expert discovery; and summary judgment on procedural, jurisdictional, and substantive grounds. And, in some cases, defendants have been successful in reducing the size and scope of the claims at trial. Understanding the reasonable, likely value of the claim relative to the cost of pursuing it is a key, foundational point.

II. Where should you file?

Before deciding whether to opt-out of a class action, a company should conduct an early case assessment to understand the facts. One of the key considerations is to understand your company's supply chain and how that intersects with the conspiracy allegations. Federal antitrust laws have territorial limitations that may affect your claim. It is important to understand where the alleged anticompetitive activity occurred, where the purchases of the price-fixed goods occurred, whether the goods were imported into the United States and by whom, and other factors demonstrating the degree of connection to the U.S. economy and whether U.S. law applies. Under some circumstances, it may be worth considering bringing the claims in jurisdictions outside the U.S. Private antitrust enforcement in Europe and in other countries may provide a mechanism to pursue recoveries that are not actionable in the U.S. Many companies have a global presence and may need to consider global recovery strategies in response to cartel activity.

"It is important to remain clear-eyed about the potential risks and rewards of pursuing individual actions."

Another important consideration is venue. If the class actions have already been consolidated into an MDL court, you may have to decide whether to bring your claims in the MDL court or in another venue. This decision is important because it affects where your case will be tried if it goes to trial. Under the MDL rules, cases are tried in the courts where they are filed. If you file in the MDL court, your case may be consolidated for trial with other plaintiffs. A joint trial has the advantage of spreading the workload across multiple plaintiffs, but it also means that you may not be 100 percent in control of how your case is presented at trial. On the other hand, cases filed in other courts and transferred to the MDL court for coordinated pre-trial proceedings must be remanded back to the original court at the conclusion of coordinated proceedings. After litigating for years in front of the MDL judge, transferring to a new judge who is unfamiliar with the case, the facts, and the parties can create uncertainty as to pre-trial and trial rulings. In addition, the original choice of venue affects the governing law. Understanding the law of the circuit in which the MDL court sits compared to other potential venues may be an important consideration.

III. What are the facts?

Before opting out, it is also important to know your own record. Generally speaking, unnamed class members are not subject to discovery in a class action. However, once a company opts out, it is subject to discovery by the defendants. Accordingly, opt-out plaintiffs will want to identify early on the key witnesses to testify about your company's procurement practices and purchases, and gather those documents that may be needed to prove your case. Specifically, you will immediately want to:

- Issue a document preservation order for the witnesses and potential witnesses;
- Gather the purchase information and relevant contracts governing your purchases;
- Interview your witnesses; and
- Identify any key witnesses who have since left the company and get their contact information to your outside counsel.

In short, before filing an opt-out case, a company needs to prepare for litigation just as they would for any other major case. The same questions about statutes of limitation, jurisdiction, proof, and damages apply, and the same considerations about whether to engage outside counsel, the relevant information and documents to be gathered, and the potential intrusion and disruption to your business operations should be assessed.

IV. What is the best strategy?

When a cartel is exposed, the participants are suddenly faced with a multi-front war. They face potential government enforcement actions and civil antitrust actions. For opt-out plaintiffs, there are sometimes internal considerations about whether and to what extent the company should be in litigation with major suppliers. As a result, it is important for the stakeholders within the company to help set the goals and establish a strategy for the recovery action.

Smart defense counsel often will advise their clients to settle early and inexpensively with major customers. While it may be tempting to accept those early offers in order to smooth over customer-supplier relationships, companies that have been the victims of price-fixing cartels should do a full assessment of their claims and weigh the various options for redressing their injuries. Those options include:

Staying in the class. There are a number of reasons why a company might choose to stay in the class. As an unnamed class member, the company will likely avoid any discovery and will simply have to submit a claim to the claims administrator at the appropriate time. And, the company does not become adverse to the defendant suppliers in any meaningful sense. If the claims are small, staying in the class may make considerable sense. However, any recovery will be merely a portion of the total class recovery. The burdens of staying in the class are lower but so are the potential rewards.

Individual pre-litigation settlements. An alternative to remaining in the class is to pursue individual pre-litigation settlements with some or all of the cartel members. This strategy enables a company to exert more control over its claims and avoid waiting on lengthy class proceedings, while at the same time avoiding the costs and risks associated with litigation. However, companies should conduct some econometric analysis of their purchases to determine the approximate amount of the overcharge before heading into these negotiations in order to make a credible and supportable demand. This will likely require the assistance of expert economists, but at significantly less cost than full litigation.

Opt-out litigation. This option generally provides for the largest possible recovery, but it is not without its challenges. On one side of the coin, opt out plaintiffs start out with a couple of advantages. Cartel cases often involve defendants that have pled guilty, and they have the added benefit of cooperation from the applicant to the DOJ's amnesty program. In addition, as a result of the government investigation, defendants have already produced significant sets of documents establishing the basic parameters of the conspiracy by the time the individual actions are filed. Moreover, defendants in antitrust cases are subject to joint-and-several liability and automatic trebling of damages, which can provide powerful pressure points for opt-out plaintiffs. On the flip side, opt-out plaintiffs can be appealing discovery targets for defendants that are reluctant to concede liability and hand over large settlements without first testing, often aggressively so, the strength of the claims. As a result, discovery in such cases can often be lengthy and expensive. In short, the rewards for pursuing opt-out litigation can be enormous, but it may be a bumpy ride.

Determining whether to bring an individual action is a big decision, and one that warrants a full evaluation of the options and potential benefits.

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United States v. Bazaarvoice, Inc.: What In-House Counsel Need to Know

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Bazaarvoice is the market leader in the product ratings & review platform business. On June 12, 2012, Bazaarvoice acquired a competitor, PowerReviews. No Hart-Scott-Rodino pre-merger notification was required. But shortly after the deal closed, the Department of Justice started an investigation—and ultimately filed a lawsuit challenging the legality of the acquisition. The case went to trial, and in January 2014, the Court found that Bazaarvoice violated the Clayton Act by "purchasing its closest and only serious competitor, creating the likelihood of anticompetitive effect in the" ratings & review platform market.[1] The Court ordered Bazaarvoice to divest the PowerReviews assets and license related intellectual property. Just under two years after acquiring PowerReviews for $168.2 million, Bazaarvoice announced a definitive agreement to sell the company for $30 million.

This article addresses the practical implications of the case: what can you learn from Bazaarvoice's experience that might help avoid a similar outcome for a future transaction? This is an increasingly important issue, because *Bazaarvoice* is just the most recent in a long string of DOJ and FTC challenges to mergers after closing—since 2008, there have been no fewer than eight litigated challenges.

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The Investigation and Trial: Bazaarvoice was Defeated by its Own Documents

The Bazaarvoice and PowerReviews internal documents made DOJ's burden of showing anticompetitive effects easy—and made it commensurately difficult for Bazaarvoice to rebut DOJ's case. Bazaarvoice's internal documents repeatedly stated that PowerReviews was its main—if not only—competitor. The competition was not friendly. Bazaarvoice documents took a warlike tone—complete with military themes and graphics—and spoke of plans to destroy PowerReviews. Bazaarvoice implemented pricing guidelines aimed specifically at PowerReviews, and sought to "squeeze PowerReviews at every point." Phrases like "Let's crush these MFs" and "Take their top customers . . . take their data . . . Shake their confidence" were characteristic of Bazaarvoice's documented attitude toward PowerReviews before the merger. One Bazaarvoice executive put it this way: "The Bazaarvoice battleship . . . and its guns have kicked in and lead rain is starting to drop on PowerReviews." Bazaarvoice's competitive tactics were successful to a degree. Another executive wrote that there were "no major [customer] defections to [PowerReviews]" recently and that Bazaarvoice's competitive advantages "build defensive barriers to entry."[2]

Both parties' internal documents from the start of negotiations identified anticompetitive reasons as the primary motivation for the transaction. Bazaarvoice's deal-related documents predicted "pricing accretion." Bazaarvoice indicated that it sought to acquire PowerReviews as a means of displacing it from major accounts that Bazaarvoice could not otherwise win. A Bazaarvoice executive wrote that buying PowerReviews "changes everything for our model . . . because 10-20% of price erosion will disappear . . . this is competitively HUGE." PowerReviews executives discussed the merger in similar terms, highlighting the absence of other competition and the anticipated establishment of a "monopoly in the market."[3]

Not surprisingly, Bazaarvoice struggled at trial to present a different rationale for the acquisition. The Court was unpersuaded by Bazaarvoice's argument that the acquisition was necessary to achieve scale in a quickly commoditizing market, concluding that even if true, this rationale did not change the anticompetitive basis and likely effect of the merger—as shown by the companies' internal documents. The Court cited the substantial evidence in the record that Bazaarvoice made the acquisition to

[1] *United States v. Bazaarvoice, Inc.*, Case No. 13–cv–00133, , 2014 WL 203966, at *76 (N.D. Cal. 2014).
[2] *Id.* at *13-16.
[3] *Id.* at *34.

consolidate its position, avoid competition, and buy time to develop new products.[4] Based on these documents, the Court was persuaded that Bazaarvoice would likely succeed in consolidating a monopolist's, or near-monopolist's, position in the market, and that Bazaarvoice would certainly succeed in eliminating competition. Of course, other evidence—including expert testimony—also supported this finding.

The Court also rejected Bazaarvoice's attempt to rely on post-merger evidence as insufficient to overcome the persuasive value of internal documents that candidly reflected the views of the parties' officers and managers.

Don't be the Next Bazaarvoice: How to Avoid, Identify, and Address Antitrust Risk in Non-Reportable Transactions

Bazaarvoice underscores the critical importance for in-house counsel to know what internal documents say about competition issues in a contemplated transaction. This is especially true in non-reportable transactions, because in-house counsel may be the only ones with the responsibility and opportunity to identify potential antitrust issues—and stop their company from becoming the next Bazaarvoice.

The Bazaarvoice case also offers important guidance about document creation, more generally. The internal documents obviously were harmful in the context of a merger challenge, but these documents could have been equally harmful in other contexts, such as defending a private lawsuit or a government investigation unrelated to the merger. For example, if PowerReviews had sued Bazaarvoice for anticompetitive conduct, Bazaarvoice's documents would have been a plaintiff's dream come true. Accordingly, the Bazaarvoice decision provides a valuable reminder on the importance of maintaining antitrust compliance measures.

Minimizing Antitrust Risk

One lesson from the *Bazaarvoice* case is that preventing antitrust problems is preferable to dealing with them after they arise. Employees should understand that touting monopolies and talking about crushing competitors is not acceptable and that the consequences for doing so are very real and very undesirable. Furthermore, employees should have enough substantive grasp on the principles of antitrust law to know that there are many ways to deal with significant competitors—but eliminating the competitive threat by acquisition is often the wrong choice. Every company—no matter how small the company or how new and dynamic its market—needs an antitrust compliance program that educates its employees on the fundamentals of antitrust law and the risks of violating it.

Identifying Antitrust Risk

No compliance program is perfect. Even if the company has a robust program in place, in-house counsel should take basic steps to identify potential antitrust risk in a contemplated transaction and make sure their company is not the next Bazaarvoice. One useful practice is to look at some of the documents that might be collected as potential 4(c) documents in an HSR filing, such as management presentations and other documents touching on competition, competitors, markets, market share, and growth, such as bid records or competitor analyses. The information that would confirm or allay concerns of an antitrust risk should become apparent quickly by focusing on the following issues:

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(1) Is the other party a competitor?

If so, is it your company's main competitor? Do your company's documents identify other competitors? It was no secret at Bazaarvoice that PowerReviews was its number one competitor and that the acquisition would consolidate the new firm's position in the market to a probable monopoly. However, if the transaction at issue involves companies that do not compete head to head in any business line, then there it is probably safe to conclude that the transaction will not raise significant antitrust issues. If they do compete head to head, but there are at least three other significant

[4] *Id.* at *21. The Court's focus on Bazaarvoice's intentions is striking because the motive of the parties is not directly relevant to the applicable legal standard, which prohibits mergers whose *effect* "may be substantially to lessen competition, or to tend to create a monopoly"—even if the parties do not intend that result. 15 U.S.C. § 18.

competitors, then, depending on the relative market shares, there probably is not a substantive antitrust concern—but you should still proceed cautiously.

(2) Be alert for aggressive language.

Bazaarvoice learned the hard way that language like "dominate the market" or "crush the competition" is never helpful. But at the same time, one should not jump to conclusions based on hyperbole. Business people and investment bankers are inclined to puffery and drama. Thus, isolated incidents of aggressive language may be explained away, and monopolistic aspirations may be nothing but wishful thinking. If that is the case, be thankful that, in a nonreportable transaction, those documents need not be filed and explained to the FTC or DOJ. On the other hand, a pervasive and consistent theme that reflects an underlying competitive reality is cause for legitimate concern.

(3) Consider what the agencies will see when they first learn of transaction.

Formal announcements are something that your company can—and should—review and control. But employees should also be instructed not to send informal announcements that suggest anticompetitive impacts. The email from a Bazaarvoice officer to a Facebook employee announcing that Bazaarvoice would acquire its "primary competitor" is a classic example of what employees should not write.

Headlines—whether business press or mainstream media—are outside your control, but DOJ and FTC are known to monitor the news for indications of anticompetitive conduct. If you have a sense of how the media might characterize the merger, you can anticipate whether it is likely to draw the attention of DOJ or FTC. Also, consider the parties' past experiences with DOJ and FTC. If a company has been investigated for anticompetitive conduct in the past, the agencies are likely to notice—and perhaps look more closely—when the company announces a merger.

Also consider how customers might react to the announcement. It may be a good idea to speak directly with customers to determine their reaction to the deal, and if the customer has legitimate antitrust-related concerns, consider ways to address them.

"If you have identified a serious antitrust risk though, it is advisable to consult with specialist antitrust counsel in determining exactly how to address the risk."

Addressing Antitrust Risk

If a proposed transaction does raise substantive antitrust risk, there are a number of things that can be done to address the risk, depending on the severity. If you have identified a serious antitrust risk though, it is advisable to consult with specialist antitrust counsel in determining exactly how to address the risk. These are some options that might be appropriate:

(1) Guide the formation of internal documents. If strident language in other documents suggests an antitrust concern that is not borne out by the facts, then you can address that in later documents that discuss competition in more factually accurate terms. For example, you might discover a presentation created early in the deal process that emphasizes an increase in market share from the merger. It might be fair for later documents to present the planned merger as a way for the firm to hold its own and compete effectively against growing competitors. If there is an investigation, this will ensure that the agency has the whole story on competition issues related to the transaction. And remember: in-house counsel should *always* vet board and management presentations for antitrust issues.

(2) Consider informal reporting. If you discover significant antitrust issues and an investigation seems inevitable, you may consider addressing it upfront if you have good reason to think that the investigation would be resolved quickly and in a manner acceptable to your client. Voluntary HSR filing is not allowed[5]—but nothing stops a company from informally notifying DOJ or FTC, in as much detail as the company desires, of a proposed transaction—though the agencies may not respond to, or even look at, such a notice. However, remember that informal reporting may be risky, and the best that can be hoped for is that such notice would prompt a brief investigation sooner rather than later, and that any issues could be resolved before closing.

[5] Voluntary HSR filing is frequently suggested as a solution to the problem of non-reportable transactions that are investigated or challenged after closing, but there is no indication that such filings will be allowed any time soon.

(3) Consider feasible fixes to address antitrust concerns—including restructuring the transaction. If you discover antitrust concerns that cannot be explained away—as, for example, the misguided characterizations of an overly enthusiastic business person—then it is time to think about changing the transaction to avoid the antitrust issues. In *Bazaarvoice*, the companies were head-to-head competitors in their core business, so it is hard to imagine a way to restructure that deal to avoid competition issues. But other transactions might be amenable to restructuring. This could be as simple as finding another buyer for certain of the seller's assets or business lines, or it could involve more complex intellectual property licensing arrangements. It is useful to imagine the likely remedies that DOJ or FTC would seek, and consider whether something like that could be built into the transaction. If the antitrust risk is significant, restructuring the deal to avoid a problematic element may be well worth the time and cost.

(4) Negotiate allocation of antitrust risk. If an investigation and litigation are possibilities, try to retain as much control as possible over the decisions that would escalate the process. Committing to a hell-or-high-water clause that requires litigation to the bitter end would deprive the buyer of the ability to walk away and cut costs even if defeat seems certain. On the other hand, the other party may exact a price for ceding any control over the process or allowing the buyer to walk away at any time it chooses.

Remember that the risk of an antitrust investigation is not over when the transaction closes. Unfortunately, there is very little that the new firm can do after closing to help its case in an investigation—but plenty that can certainly hurt. In *Bazaarvoice*, the Court gave little weight to post-transaction conduct—e.g., price cuts for certain customers—because such conduct could be manipulated. On the other hand, post-closing challenges in other cases were prompted at least in part by massive post-closing price increases. The one exception to the value of post-closing evidence would be if the transaction results in demonstrable efficiencies that are not subject to manipulation—for instance an actual reduction in the marginal cost of a product. Integrating the companies may reveal the efficiencies and be a useful persuasive tool if there is a challenge or investigation.

Conclusion

Remember these three lessons from the *Bazaarvoice* case and prevent your company from being the next to face a post-closing challenge to an acquisition:

(1) **Prevention goes further than cure.** Officers and employees should know that anticompetitive transactions (merging to monopoly) are illegal (and can potentially result in costly investigations and litigation).

(2) **Know your documents.** In-house counsel need to spot the warning signs in the company's internal documents to avoid the massive cost of an investigation and litigation.

(3) **Don't underestimate the risk of antitrust scrutiny.** Transactions that do not require HSR notification can still raise antitrust concerns, and the DOJ and FTC will investigate and litigate if necessary. Do not make the mistake of thinking that your industry is too new and dynamic, or your transaction too small, to raise antitrust concerns.

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Key Takeaways from Recent Merger Enforcement Trends

W. Joseph Price

Summer provides a good opportunity to reflect on merger enforcement actions of the Department of Justice, Antitrust Division ("DOJ") and Federal Trade Commission, Bureau of Competition ("FTC") within the last year. This article highlights some notable trends among recent transactions, and summarizes some of the key data points from the agencies' HSR Annual Report released in May.

Agency Statistics & Deal Flow

The FTC and the DOJ recently issued the Hart-Scott-Rodino Annual Report for Fiscal Year 2013 (October 2012 through September 2013), which provides interesting data regarding merger activity involving the agencies.[6] Although the report generally excludes information about non-reportable transactions, it helpfully provides a broad indication of how many investigations and enforcement actions the agencies engaged, Second Requests issued, and transactions reported to the agencies:

- 1,326 transactions were reported to the antitrust agencies, a 7.2 percent decrease from the 1,429 transactions reported in FY 2012.
- Less than 20 percent of reported transactions (217 cases) warranted further inquiry; the remaining transactions either received early termination or were allowed to close at the expiration of the 30 day waiting period (or 15 days for a cash tender offer or bankruptcy sale)).
- Second Requests were issued in less than five percent of reported transactions (47 cases), with more than half occurring in transactions valued at $500 million or above.
- A total of 38 merger enforcement actions occurred during fiscal year 2013.

Additionally, deal flow trends can be an important factor in whether and how a transaction will trigger an investigation. As an example, an acquisition in an industry "deeply embroiled in merger mania" (such as telecommunications) will be reviewed by the agencies in the context of other recent and pending transactions in the broader industry sector.

"Merger enforcement by DOJ and the FTC continued on an aggressive trend, and the agencies appear to have gained confidence with recent wins in and out of court."

Factors Impacting Agency Timing

Timing is critical in mergers and unanticipated delays can threaten the viability of a transaction and trigger costly provisions in the acquisition/merger agreement. As a general matter, the average investigation will delay a closing by approximately six to seven months, but the length of any investigation depends on several case-specific circumstances, including the parties' responsiveness and the complexity of the issues. Additionally, as highlighted in two recent merger challenges, consummation of the merger and involvement of other agencies also can lengthen the process.

Heraeus Electro-Nite/Midwest Instrument. DOJ conducted a post-consummation investigation of Heraeus Electro-Nite Co.'s 2012 acquisition of Midwest Instrument Co., its former competitor in the market for devices used in steelmaking, before requiring the divestment of certain assets to another steel company. The structural settlement the parties reached with DOJ might be considered routine, but Heraeus acquired Minco in September 2012 and the settlement was not announced until January 2014.[7]

GenCorp Inc./United Technologies Corp. FTC conducted an 11-month investigation into GenCorp's proposed acquisition of Pratt & Whitney Rocketdyne from United Technologies, before allowing the

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[6] U.S. Dep't of Justice and the Fed. Trade Comm'n, *Hart-Scott-Rodino Annual Report, Fiscal Year 2013, Section 7A of the Clayton Act, 15 U.S.C. 18a (The Hart-Scott-Rodino Antitrust Improvements Act of 1976)*, *available at* http://www.ftc.gov/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-sco-3.

[7] Dep't of Justice, Office of Public Affairs, *Justice Department Requires Heraeus Electro-Nite LLC to Divest Assets Acquired from Midwest Instrument Company Inc. to Keystone Sensors LLC* (Jan. 2, 2014), *available at* http://www.justice.gov/opa/pr/2014/January/14-at-001.html.

transaction to close.[8] The investigation, which involved input from the Department of Defense, provides a good example of how other governmental agencies can impact timing. Similar extended periods occur often in regulated industries.

Agencies' Increased Confidence from Notable Litigation Wins

Merger enforcement by DOJ and the FTC continued on an aggressive trend, and the agencies appear to have gained confidence with recent wins in and out of court. After years without litigating a merger case in the early 2000s, DOJ had a second significant win. The FTC had a number of wins in a busy year, including a rare, partial reversal of one of its Administrative Law Judge's decisions that likely is positive for the agency in the long run. Notable wins include:

ProMedica/St. Luke's. ProMedica Health Systems and St. Luke's Hospital closed on their merger in September 2010, resulting in the combination of two of the four hospital systems in Lucas County, Ohio. A few months later, the FTC challenged the merger, arguing that the combination gave ProMedica approximately 60 percent market share for general acute-care services and slightly more than 80 percent market share for inpatient obstetrical services. After a lengthy litigation through the FTC administrative law process, the Commission ordered divestment of St. Luke's hospital. On appeal, the Sixth Circuit affirmed the FTC's decision and divestiture order, handing the agency a solid victory.

- The Sixth Circuit's opinion cited the parties' own documents and testimony as evidence that the merger could result in rate increases, cuts to services and a better ability to negotiate for higher rates from insurers. In view of such documents, the court observed that the "Commission's best witnesses were the merging parties themselves."[9]
- The agencies may give little credence to "weakened competitor" or "failing firm" arguments after the Sixth Circuit accepted the FTC's refusal to do so in this case and characterized the argument as the "Hail-Mary pass of presumptively doomed mergers."[10]

"[A] merger in a concentrated market that includes a firm with characteristics of a maverick in pricing or operations will increase the difficulty level of getting through the agencies."

St. Luke's/Saltzer. St. Luke's Health System Ltd.'s acquisition of Saltzer Medical Group PA, a 44-doctor physician practice group that had been Idaho's largest independent multispecialty group, led to a number of challenges. Competitor hospitals challenged the deal immediately, and then six months after the transaction closed, the FTC and Idaho's attorney general filed suit, seeking to unwind it. Following a bench trial, the U.S. District Court for Idaho agreed with the FTC and ordered St. Luke's to fully divest itself of Saltzer's physicians and assets. This is the FTC's first win since enactment of the Affordable Care Act, and serves as another reminder that the agency aggressively pursues potential concerns about cost increases in the health care industry, regardless of transaction size and HSR reportability obligations, and regardless of the potential improvements to treatment quality.

Bazaarvoice/PowerReviews. DOJ sued to block Bazaarvoice's acquisition of PowerReviews soon after the deal closed (the transaction was not reportable under HSR), and won. DOJ's trial victory is only the second litigated opinion applying the 2010 Guidelines framework (the DOJ's 2011 win in H&R Block/TaxAct is the first), and the decision gives DOJ more authority to rely on the Guidelines in seeking concessions from parties both in settlement discussions and in court.

The Ongoing Significance of Maverick Firms

Defined in the Horizontal Merger Guidelines as "a firm that plays a disruptive role in the market to the benefit of customers," maverick firms continue to stimulate particular concerns when they are the target of a potential transaction.[11] Debate continues about specific theories, but a merger in a concentrated market that includes a firm with characteristics of a maverick in pricing or operations will

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[8] Press Release, Fed. Trade Comm'n, *FTC Closes its Investigation into GenCorp's Proposed Purchase of Pratt & Whitney Rocketdyne* (June 10, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/06/ftc-closes-its-investigation-gencorps-proposed-purchase-pratt.
[9] *ProMedica Health System, Inc. v. F.T.C.*, 2014 WL 1584835, *12 (6th Cir. Apr. 22, 2014).
[10] *Id.* at *13
[11] U.S. Dep't of Justice and the Fed. Trade Comm'n, *Horizontal Merger Guidelines*, at § 2.1.5 (Aug. 19, 2010).

increase the difficultly level of getting through the agencies. For example, the potential loss of a maverick competitor factored into the agencies' decisions in the following two recent transactions:

American/US Airways. In August 2013, DOJ and six state attorneys general filed a suit to block the proposed $11 billion merger between US Airways Group and American Airlines' parent corporation, AMR Corp. DOJ's complaint characterized US Airways as a "maverick," and DOJ highlighted in particular the US Airways Advantage Fares program, which offered one-stop flights on certain routes that undercut fares offered by other non-stop carriers: "Advantage Fares have proven highly disruptive to the industry's overall coordinated pricing dynamic."

Anheuser-Busch InBev/Grupo Modelo. In January 2013, the DOJ sued to enjoin the combination of Anheuser-Busch InBev SA/NV and Grupo Modelo S.A.B. de C.V. The transaction ultimately went forward when the parties agreed, among other things, to divest Modelo's entire U.S. business to Constellation Brands Inc. The potential of a maverick in the market was highly relevant:

- Key concerns were maverick firm characteristics that included both pricing and operational elements. Modelo's aggressively marketed products and expanding production capacity included a strategically placed new brewing facility that likely increased both its ability and its incentive to disrupt any price coordination among competitors.
- Grupo Modelo had the characteristics of a maverick firm, but not necessarily because of lower prices alone. Modelo's Corona brand, for example, likely forced AB InBev and MillerCoors to compete in ways they might not have otherwise, other than on price.

Vertical Transactions are Not Immune from Enforcement

Vertical acquisitions are in the minority of cases brought by the agencies. However, the FTC's recent challenge to the vertical transaction between General Electric Company and Avio S.p.A. serves as an important reminder that these cases are still subject to investigation and challenge.

General Electric Company/Avio S.p.A. In December, General Electric sought to acquire the Italian aerospace company Avio S.p.A., a long-time partner in its jet engine business, for $4.3 billion. The FTC challenged the acquisition because of concerns that it would interfere with the development of an engine component designed for rival aircraft engine manufacturer Pratt & Whitney.[12] Key takeaways:

- Although it is not always the case, competitor input can be valuable to the agencies, particularly in vertical mergers. Here, Pratt & Whitney had no viable alternatives to Avio for development of a key part for an Airbus engine – a fact that had to be established.
- The remedy was behavioral. It builds on a commercial agreement GE, Avio, and Pratt & Whitney recently negotiated, as well as Pratt & Whitney's original contract with Avio, and also includes a firewall to prevent GE from accessing Pratt & Whitney's proprietary information.

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[12] Press Release, Fed. Trade Comm'n, *General Electric Agrees to Settlement with FTC That Allows the Purchase of Avio's Aviation Business* (July 19, 2013), *available at* http://www.ftc.gov/news-events/press-releases/2013/07/general-electric-agrees-settlement-ftc-allows-purchase-avio%E2%80%99s.

Motorola Mobility LLC v. AU Optronics Corp.: Seventh Circuit Limits Foreign Reach of U.S. Antitrust Laws

A team of attorneys from Reed Smith LLP presented the May Monthly Update for In-House Counsel on Antitrust Developments. The following is a short article summarizing one of the recent developments discussed during their program.

Gavin Eastgate, Michelle Mantine, Will Sheridan, and Conor Shaffer

On March 27, 2014, the Seventh Circuit handed down a decision authored by Judge Posner that could significantly limit U.S. antitrust law's reach to defendants conducting business abroad. In *Motorola Mobility LLC v. AU Optronics Corp.*, No. 14-8003, 2014 WL 1243797 (7th Cir. Mar. 28, 2014), a Seventh Circuit panel narrowly construed the Foreign Trade Antitrust Improvements Act's (FTAIA's) domestic effects exception, holding that the FTAIA barred Motorola's price-fixing claims based on its foreign affiliates' overseas purchases of liquid crystal display (LCD) panels that were incorporated into cell phones abroad and sold in the United States.

This article sets forth a brief summary of the FTAIA followed by a closer look at the Seventh Circuit's decision in *Motorola* and its potential impact on the interpretation of the Sherman Act and the FTAIA.

What is the FTAIA?

The FTAIA, enacted in 1982, generally makes the Sherman Act inapplicable to foreign anticompetitive conduct unless certain exceptions are satisfied. One of those exceptions, the "domestic injury" or "domestic effects" exception, allows for the application of U.S. antitrust law if the conduct at issue (1) "has a direct, substantial, and reasonably foreseeable effect" on U.S. commerce, and (2) "such effect gives rise" to the plaintiff's claim.

Courts are split on what constitutes a "direct" effect under the FTAIA. The Ninth Circuit has considered an effect "direct" if it followed as an "immediate consequence" of the anti-competitive conduct, meaning "without deviation or interruption." Before *Motorola*, the Seventh Circuit had adopted a broader interpretation of directness, holding that anti-competitive conduct that occurs abroad must have only a "reasonably proximate causal nexus" with the alleged U.S. domestic effects of that conduct in order to be direct. In *Motorola*, the Seventh Circuit takes a more pragmatic approach to the FTAIA's application discussed below.

The Seventh Circuit's Decision in *Motorola*

In 2009, Motorola brought antitrust claims against major LCD manufacturers for allegedly fixing the prices of LCD panels used as a component in Motorola's mobile phones. The district court dismissed a substantial majority of Motorola's claims, and Motorola appealed to the Seventh Circuit. The Seventh Circuit panel affirmed the district court's decision, finding that nearly all of Motorola's purchases fell beyond the scope of U.S. antitrust scrutiny.

Specifically, Motorola sought to recover for three categories of purchases: (1) LCD panels imported into the United States (1 percent of purchases), (2) LCD panels purchased outside the United States by Motorola's foreign subsidiaries that were used as inputs in finished products that Motorola later imported into the United States (42 percent of purchases), and (3) LCD panels purchased outside the United States that were used as components in finished products that were sold outside the United States (57 percent of purchases).

Consistent with the district court's opinion, the Seventh Circuit held that the FTAIA barred the second and third categories of claims, leaving Motorola with only one percent of its claimed purchases of LCD panels. The court summarily dispensed with the "frivolous" category of claims (the third category) seeking damages based on panels incorporated into cellphones sold in foreign countries because those panels never entered the United States.

The court's finding as to the second category—that the panels purchased abroad by Motorola's foreign subsidiaries and then incorporated into phones sold in the United States, did not meet the requirements of the domestic effects exception to the FTAIA—has created significant controversy. While acknowledging that there was "doubtless some effect" the defendants could have foreseen on U.S. trade, the court concluded that the effect on U.S. commerce was too remote, as the "effect of component price fixing on the price of the product of which it is a component is indirect."

The court also held that this category of purchases failed the other prong of the domestic effects exception to the FTAIA—that the effect on U.S. commerce "give rise" to the plaintiff's antitrust claim. The court concluded that Motorola's claim was based "on the effect of the alleged price fixing on Motorola's foreign subsidiaries"—subsidiaries that could seek their own remedies in the countries in which they operate, and if those countries do not offer adequate remedies, that was a risk Motorola, as the parent company, knowingly and voluntarily assumed.

The court expressed particular concern with the practical implications of Motorola's expansive interpretation of the domestic effects exception, which would, according to the court, "enormously increase the global reach of the Sherman Act, creating friction with many foreign countries and resentment at the apparent effort of the United States to act as the world's competition police officer"—a primary concern of the FTAIA.

The Potential Impact of *Motorola*

The Seventh Circuit's limited view of the domestic effects exception to the FTAIA could have substantial impact on future civil and criminal cases alleging price fixing of component parts in foreign markets, a growing area of litigation activity. As the Seventh Circuit noted, "[n]othing is more common nowadays than for products imported to the United States to include components that the producers had bought from foreign manufacturers."

Undoubtedly, there will be more developments in this area of the law. Both the U.S. Department of Justice and the Federal Trade Commission have already weighed in on the *Motorola* decision, urging the Seventh Circuit to rehear the case *en banc* because they claim it threatens the government's enforcement efforts related to foreign cartels.

Although *Motorola* is likely to be a key precedent cited by counsel defending businesses and their executives against foreign-based civil and criminal cartel allegations, the opinion could raise some concern for in-house counsel of companies with supply chains or subsidiaries abroad. The U.S. antitrust laws may not protect companies that participate in foreign markets from anticompetitive conduct that takes place abroad, and foreign competition laws are often much less strict. According to the Seventh Circuit, that may be the case even if the anticompetitive actor knows that a final product will be eventually sold in the United States.

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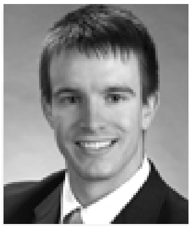

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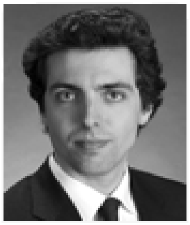

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Patent Troll Bill Fails in Senate, However the House Refuses to Give Up

A team of attorneys from Morgan, Lewis & Bockius LLP presented the June Monthly Update for In-House Counsel on Antitrust Developments. The following are short articles summarizing two of the recent developments discussed during their program.

Will Tom and R. J. Carey

Patent Assertion Entities (PAEs)—often derided as "patent trolls"—are companies that acquire patents and obtain licensing revenue by threatening infringement litigation. Advocates of patent litigation reform claim PAEs are stifling innovation and extorting companies through deceptive practices. Defenders of PAEs assert that they serve a useful function by acting as a secondary market for inventors ill-equipped to monetize their patents.

Congressional legislation intended to discourage frivolous patent litigation by PAEs has come up short, however. On December 5, 2013, the U.S. House of Representatives overwhelmingly passed the Innovation Act, with White House support, to address the PAE behavior viewed as most egregious. The Senate companion bill, the Patent Transparency and Improvements Act, was a more comprehensive effort aimed at stopping PAE tactics through a variety of means, including requiring greater transparency on patent ownership and a "fee-shifting" provision that would require losing parties to pay their adversaries' legal fees. The content of the bill was the subject of repeated and difficult negotiations, including over the fee-shifting provision. On this subject, the U.S. Supreme Court recently issued two decisions relaxing fee-shifting rules in the Federal Circuit, *Octane Fitness v. Icon Health* and *Highmark, Inc. v. Allcare.*

Although the disputes had seemingly been resolved earlier this month, Senate Judiciary Committee Chairman Patrick Leahy (D-VT) cited a lack of consensus and pulled the bill from the Senate agenda on May 21. He expressed concerns that the bill had the potential to cause "severe unintended consequences" for those holding legitimate patents. The biotechnology industry, pharmaceutical companies, and universities have all previously expressed similar concerns. Additionally, the Supreme Court rulings may have reduced the urgent call for Congressional reform.

The House, however, is working on narrower legislation targeted at reducing deceptive patent demand letters by requiring them to include more information, while also giving the FTC more authority to levy fines on letters that make fraudulent claims. Such legislation is designed to deal with the problem of mass mailings of demand letters to small businesses who could be induced to pay licensing fees simply because they are too small to investigate the infringement claims or defend against them. While Congress may well pass the narrowly tailored bills later this year, with the Patent Transparency and Improvements Act off the table and an upcoming election, major legislative efforts are unlikely to come to fruition anytime soon.

Pending action by Congress, the Federal Trade Commission (FTC) will be conducting a study examining the costs and benefits of PAEs on competition, consumers, and innovation. The study would require selected PAEs to disclose detailed information dating back to 2009 on corporate structure and patent acquisition and valuation. It will proceed in two phases, the first a broad inquiry into the PAE business model, and the second a deeper dive into how the activities of PAEs have affected the wireless communications industry.

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European Commission Publishes Annual Report on Competition Policy

Eva Rayle and Michael Masling

On May 6, 2014, the European Commission ("Commission") published its annual report on competition policy to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions for the year 2013 ("Report"). The Report lays out the Commission's enforcement activities to promote competition in the European Union. For a competition law practitioner, the developments in the area of the Commission's cartel and merger control enforcement actions are of particular interest.

Cartel Enforcement

Cartel enforcement actions remain a top priority on the Commission's agenda. In 2013, the Commission concluded four cartel investigations issuing total fines of about €1.88 billion. These decisions include: (1) the first ever agreed fine in the auto part sector against five manufacturers of automotive wire harnesses (about €141 million); (2) a €28 million fine against four shrimp manufacturers; and (3) €1.7 billion in agreed fines against several financial institutions for their participation in cartels relating to interest rates derivatives denominated in Euro and Japanese Yen. As not all the financial institution parties have agreed to settle with the Commission, those proceedings will continue, and the Commission issued a statement of objections against three banks in May 2014.

Although three of the four Commission cartel proceedings have been concluded by a negotiated fine, the Commission will not enter into settlements "at any costs." For example, the settlement discussions in the smart card chip case ended without agreement.

According to the Commission, companies rely heavily on leniency applications. The Commission reported that it received on average two leniency applications per month during 2013.

The Commission's emphasis on cartel enforcement has continued in the first five months of 2014. In that short period, the Commission issued fines of about €1.4 billion in four investigations.

Merger Control

With respect to merger control enforcement, the Commission handled 300 notifications in 2013. The Commission cleared 252 in the first phase, *i.e.*, within 25 days upon the formal submission of the filing without requiring any commitments (166 cases concerned the simplified, 86 concerned the non-simplified procedure); rendered eleven decisions with commitments in the first phase and two second phase commitment decisions; and blocked two notified transactions (UPS/TNT Express (Jan. 2013) and Ryanair / Aer Lingus III (Feb. 2013). Both decisions are on appeal at the European General Court.

These statistics show that the overwhelming majority of cases do not raise any competitive concerns. Where the parties identify possible competitive concerns, it may be useful to engage early on in proposing a viable remedy strategy to possibly avoid often complex and time consuming second phase investigations. In this respect, the Commission confirmed the recent trend that many second phase investigations require complex quantitative and qualitative economic analyses requiring the parties to provide a large amount of data.

The Commission's merger case numbers may further increase in the future if the acquisition of minority shareholdings becomes a reportable concentration expanding the current concept of "control." The Commission launched a public consultation process in 2013 and is expected to come up with a more specific proposal in a White Paper in the course of this year.

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Highlights from the Spring Meeting

For those who were unable to attend the Corporate Counseling Committee's extensive programming at the Spring Meeting, we are publishing summaries of two of the panel discussions.

Assessing and Managing Antitrust Risks in Competitor Collaborations

While most antitrust counselors would agree that establishing guidelines to help clients avoid naked price coordination is fairly simple, typically guidance concerning competitor collaborations is far more nuanced. If thoughtfully designed and managed, many competitor collaborations are permissible under the antitrust laws. The challenge, however, is to make sure that the guidance is specifically tailored to the type of collaboration contemplated by the parties. There are a variety of forms of competitor collaborations, including for example joint bidding, teaming and marketing arrangements, and full-functioning joint ventures, and formulaic guidance is simply not possible.

At the 2014 Spring Meeting, the Corporate Counseling, International, and Joint Conduct Committees co-sponsored a program to discuss these issues and explore effective tools for identifying and minimizing risk when working with competitors: "Assessing and Managing Antitrust Risks in Competitor Collaborations." The panel included outside counsel, in-house counsel, and government regulators, and each offered a different perspective and helpful observations:

- Fiona A. Schaffer, partner at Jones Day;
- Martin Commons, Senior Competition/Antitrust Counsel, BHP Billiton;
- John Pecman, Commissioner, Competition Bureau Canada;
- William H. Stallings, Chief, Transportation, Energy, and Agriculture Section, U.S. Department of Justice, Antitrust Division; and
- Michaelynn Ware, Assistant General Counsel, United Technologies Corporation.

Despite the fact that the advice provided by antitrust counsel will differ depending on the form of collaboration selected by the transaction participants, the panelists worked to articulate a basic framework in which to review those competitor collaborations where there is at least arguably a procompetitive basis for the contemplated joint conduct. Where the agreement is reasonably necessary to achieve the benefits of integration, the presumption is that these transactions will be reviewed under the rule of reason. In that light, there was general consensus among the panelists that the first question antitrust counselors should ask their clients when analyzing joint conduct is to identify the business purpose of the proposed transaction. Any restraints on competition that arise from the proposed collaboration must be viewed in relation to the impact on this stated business purpose.

To then assess the competitive effects of the proposed transaction, the panelists suggested that counselors should explore a number of questions, including the following:

- Can the parties achieve the goal of the joint venture on their own?
- Will consumers benefit from the proposed joint venture?
- What is the level of integration that will occur through the competitor collocation? Will assets be contributed?
- What is the product market that will be affected?
- Will the participants in the collaboration continue to compete with each other or the joint-venture after the collaboration goes into effect?
- Will the collaboration limit access to an essential facility, input, or distribution channel?
- How long is the collaboration intended to last?

The panelists noted that even when companies believe they are pursuing a procompetitive aim, it is not uncommon for the scope of any restraints on competition encompassed within an agreement to go beyond what is necessary to achieve that aim. As an example, the panelists discussed the Department of Justice's case against Adobe Systems, Inc., Apple Inc., Google Inc., Intel Corporation, Intuit, Inc., and Pixar. These six high-tech firms entered in to a series of bilateral agreements not to "cold-call" each other's employees with solicitations for employment. The firms argued that the practice was necessary to maintain working relationships with technology partners with whom they jointly developed solutions, and therefore fostered collaboration and the development of new or improved products and services. The DOJ rejected this argument, however, and found that the ban on cold calling was not properly ancillary to any collaborative effort. While some collaborations did exist, the agreements were not tied to any specific collaboration and extended to all employees at the firms, including those that had little or nothing to do with the joint projects. In addition, the agreements were not limited by geography, job function, product group, or time period. The parties to the agreements settled with the DOJ and agreed to discontinue the practice, but the affected employees nevertheless initiated civil suits against the defendants.

One additional case raised by William Stallings, and one which the panelists suggested militates in favor of always seeking legal advice when pursuing a collaboration with a competitor, was the DOJ's investigation into Gunnison Energy and SG Interests. Gunnison and SG both develop natural gas in western Colorado and several years ago agreed that SG would bid on leases of mutual interest and then assign a 50 percent interest to Gunnison, thereby removing Gunnison from the bidding process. This agreement not to compete affected four bids for natural gas leases sold at auction by the U.S. Department of Interior's Bureau of Land Management and according to the DOJ, depressed the price the BLM received for these leases. When the DOJ filed a complaint against Gunnison and SG, it debated internally whether to pursue the case criminally or civilly. Notably, because the case represented the DOJ's first look into joint bidding for oil and gas leases and because the companies consulted with lawyers before entering into the agreement, the DOJ decided to pursue the case civilly.

* * *

International Competition Laws: Bridging Differences & Reducing Risks

At the 2014 Spring Meeting, the Corporate Counseling Committee sponsored a program on "International Competition Laws: Bridging Differences & Reducing Risks" moderated by Bill Blumenthal from the Washington, DC office of Sidley Austin LLP and featuring a group of well-respected outside counsel and experienced in-house practitioners. The panelists shared their insights and perspectives on how different jurisdictions approach competition law issues, specifically: vertical arrangements, unilateral firm conduct, joint ventures, and horizontal agreements.

Vertical Arrangements

Gerwin Van Gerven, the Global Head of Competition/Antitrust for Linklaters LLP in Brussels, kicked off the Program by explaining how the competition law on vertical arrangements, including distribution agreements, may be very different in countries other than the U.S. Given that he practices in Europe, he focused on how European competition law differs from that of the U.S. in how it treats vertical restraints. He discussed three prominent examples that have attracted a great deal of recent attention in European enforcement: RPM, parallel trade and online selling.

Van Gerven explained the policy underpinnings of these enforcement actions: the goal to achieve and maintain an integrated market, preventing state-mandated barriers being broken down only to be replaced by barriers erected by companies. That is the underpinning for the strong support for restrictions on parallel trade and the objection to export bans between EU Member States. The insistence that resellers are allowed to use the internet for their sales is a further emanation of this policy. Besides the importance as a new convenient distribution channel, online distribution is seen as a way to integrate selling across borders. In particular, national competition authorities, with the German, English and French authorities in the lead, have recently been active in defending the freedom of online selling and limiting those policies that favor brick and mortar shops.

Finally, Van Gerven examined the continued focus on RPM in European enforcement, again led by national competition authorities. While the EU does not have a per se prohibition of RPM, and theoretically allows for an "exemption" of RPM if sufficient efficiencies can be proven, in practice, RPM is rarely, if ever, condoned, and enforcement is vigorous. In short, only lip service is paid to the efficiency considerations put forward.

Unilateral Firm Conduct

Nikhil Shanbag, Director, Competition Law, Google Inc., Mountain View, CA, then led the panel in a discussion on the different standards governing unilateral firm conduct in the U.S. and other jurisdictions. As a prime example of this apparent divergence, the panel considered the historical and doctrinal differences between Section 2 of the Sherman Act and Article 102 TFEU along several axes.

Nikhil discussed the technical differences between Section 2 and Article 102 when it comes to market shares and a presumption of market power and how in-house counsel may or may not calibrate advice differently across jurisdictions based on these case law differences. The panel also considered various types of exclusionary conduct including excessive pricing, below-cost pricing, and refusals to deal/margin squeeze, observing that U.S. courts have at least facially been more forgiving to a dominant player than European regulators. Finally, the discussion turned to Section 2's prohibition on attempted monopolization and interplay with Article 102's excessive pricing prohibition.

Joint Ventures

On the topic of joint ventures, Susan Jones, Head Corporate Legal Antitrust for Basel, Switzerland-based Novartis International, highlighted some important differences between the U.S. and a number of other jurisdictions. Specifically, Jones warned of some potential traps for the unwary:

- In the EU, as in the U.S., the EU will simply look at most "cooperative" ventures under Article 81 to determine whether they constitute an anticompetitive agreement between competitors. However, a "fully-functioning" joint venture that is jointly controlled by two or more competitors requires notification under the EC Merger Regulation. "Joint control" can be established not only by looking at the simple ownership percentages, but also by way of special minority voting rights.

- Another potential trap for U.S. practitioners is the jurisdictional reach of the Merger Regulation. To the surprise of many non-EU practitioners, notification may be required for the formation of a joint venture, even if it will have no presence in the EU and will make no sales into the continent. If joint venture parents are present in the EU, the turnover from all of their operations in the jurisdiction are looked at to determine if the turnover thresholds are met. As a result, a fully functioning joint venture to conduct business solely in Africa or some Asian country may require notification in the EU if the parents have substantial non-joint venture-related revenues in the EU.

Horizontal Issues

Sandy Walker, a partner with Dentons Canada LLP in Toronto led a discussion of the similarities and differences in the major jurisdictions' approaches to horizontal agreements and the specific issues that often confront in-house counsel. She noted that horizontal agreements between competitors can take a variety of forms and have varying levels of antitrust risk from the classic hard core cartel – agreements between competitors to fix prices, limit production or allocate markets – to efficiency-enhancing strategic alliances to potentially more benign information exchanges.

There are differences between the laws of major jurisdictions in how they treat horizontal agreements although this is one area where similarities (at least in respect to hard core cartels) may outweigh differences.

Sandy offered tips to "bridge the differences":

- For competitor agreements on price fixing, output limitations and market allocation, the prohibition of such conduct should be part of core principles of companies operating globally as most jurisdictions proscribe such behavior and there are harsh consequences including fines and jail terms.
- Beyond hard-core horizontal agreements, there is more variation in the law. Thus, compliance policies should be more tailored to specific jurisdictions; i.e., companies may be able to take advantage of less restrictive laws in some countries.
- Differences in legal frameworks can lead to pitfalls. For example, differences in privilege law mean that giving legal advice can itself be risky; in particular, European law and laws of other countries such as India and Russia do not recognize privilege for communications with in-house counsel.

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