

TOP 10 COMPETITION LAW DEVELOPMENTS OF 2009

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Covington's antitrust practice group, chaired by the two most recent heads of the Department of Justice Antitrust Division (Tom Barnett and Deb Garza), identified the following as key competition law developments in the past year. In no particular order:

1. SUPREME COURT CASES.

In its 2008 term, the Supreme Court decided one antitrust case, *Pacific Bell Telephone Co. v. Linkline Communications, Inc.*, 129 S. Ct. 1109 (2009). Consistent with the views of the United States as amicus (with AAG Tom Barnett on the brief), the Court held that a price squeeze case cannot be brought where there is no antitrust duty to deal. Another case of importance to antitrust practitioners, although not an antitrust case, is *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). *Ashcroft* resolved any doubt about whether *Twombly* was an antitrust-specific case. The Court affirmed dismissal of a complaint where the well-pleaded facts did not permit the Court "to infer more than the mere possibility of misconduct."

The Court recently heard oral argument in *American Needle, Inc. v. NFL*, No. 08-661. Covington's Gregg Levy, who successfully argued *Brown v. Pro-Football, Inc.*, 518 U.S. 231 (1996), represented the NFL. The NFL had joined the petitioner in requesting Supreme Court review of the important issues raised by the Seventh Circuit's upholding summary judgment against a disappointed bidder's challenge to a licensing decision by National Football League Properties. Although the Solicitor General with the FTC opposed granting certiorari, the Court granted the NFL's request.

2. NEW LEADERSHIP AT THE ANTITRUST DIVISION.

Former FTC Commissioner Christine Varney took office as head of the Antitrust Division amidst rhetoric of more aggressive antitrust enforcement. While any turnover in leadership brings change, it remains to be seen how extensive the change will be. In one change, the Division now takes the position that most "reverse payments" are presumptively unlawful. See Brief for the United States, *Arkansas Carpenters Health and Welfare Fund v. Bayer*, AG, No. 05-2851-cv(L) (2d Cir. brief filed July 6, 2009). The Division also withdrew its Section 2 (dominant firm) report. In other actions that were consistent with prior Antitrust Division policy positions, the Division (i) called for the FCC to "promote and enhance broadband competition" while taking care to "avoid stifling the infrastructure investments needed to expand broadband access." *Ex Parte* Submission of the United States Department of Justice, *In re Economic Issues in Broadband Competition*, FCC GN Docket No. 09-51 (Jan. 4, 2010); (ii) unsuccessfully opposed immunity for Continental Airlines' joining of the Star Alliance; (iii) urged imposition of conditions on the American Airlines/British Airlines/One World request for immunity; and (iv) entered into a consent decree in the merger of Ticketmaster and Live Nation to address an horizontal overlap in primary ticketing services for major concert venues. The Division also received attention for calling for changes to the proposed settlement of *The Authors Guild, Inc. v. Google Inc.*, No. 05 Civ. 8136 (DC) (S.D.N.Y.) (commonly known as the Google books settlement). On the trans-Atlantic front, the Antitrust Division, which had closed its investigation of the Oracle-Sun merger, issued a statement that appeared to disagree with the decision of the European Commission to issue a Statement of Objections. As it turned out, the European Commission subsequently cleared the transaction without taking any action.

3. TRANSITIONS AT THE FEDERAL TRADE COMMISSION.

Although the FTC's voting lineup remained unchanged, Chairman Jon Leibowitz traded places with William Kovacic and installed new senior staff. Now Julie Brill and Edith Ramirez have been nominated and voted out of committee to fill an empty seat and replace Commissioner Harbour, whose term has expired. Although the basic approach of the Commission majority may not change, any time two new Commissioners come on board there is the potential for new emphases and initiatives. The larger uncertainty facing the FTC today is legislative: will a new Consumer Financial Protection Agency replace an important part of the FTC's role? Will the FTC receive enhanced rulemaking, civil penalty, and other powers? What do the health care reform battles promise for generic pharmaceutical issues? Without waiting for new Commissioners, the FTC boldly voted 3-0 to file an administrative complaint against Intel Corp. (Commissioner Kovacic was recused; Commissioner Rosch partially dissented), alleging that Intel had engaged in the FTC equivalent of monopolization and attempted monopolization, as well as unfair methods of competition, deceptive acts or practices, and unfair acts or practices. These sweeping allegations are particularly important because they address the legality of incentives for exclusive or restrictive dealing and of product promotion, in which many businesses have an interest. Beyond that, the *Intel* complaint squarely poses the question of the proper role of FTC administrative adjudication and the extent to which Section 5 reaches beyond the antitrust laws.

4. AGGRESSIVE EUROPEAN ENFORCEMENT.

Aggressive European enforcement was perhaps most typified by the €1.06 billion abuse of dominance fine imposed on Intel last June for alleged conditional rebates and loyalty payments. In the cartel arena, the European Commission continued its aggressive fining policy, imposing fines of €553 million on each of E.ON and GDF Suez for a cartel in the gas sector, which are the second-highest fines ever imposed on individual companies in a cartel case after the €896 million fine imposed on Saint Gobain in 2008 for the car glass cartel. More generally, Commissioner Neelie Kroes forcefully defended high fines as necessary to provide a sufficient incentive for companies to abide by the competition rules. There is no reason to expect drastic changes under the new Commissioner for Competition, Joaquín Almunia, as he indicated in his confirmation hearing before the European Parliament that he agreed with Ms Kroes's fining policy. Ms Kroes also signaled that the pharmaceutical sector inquiry is likely to result in additional cases, and the Commission recently opened formal proceedings against Lundbeck for activities allegedly aimed at delaying generic entry. On the merger front, the Commission signaled that it will continue to pursue an aggressive enforcement policy, opening a full-blown Phase II investigation of Oracle/Sun after the transaction had been cleared in the United States (the Commission cleared the transaction in January 2010). While the year was marked by an aggressive enforcement policy, the Commission also settled two long-running cases, Rambus and Microsoft, and closed its investigation of Qualcomm.

In addition, there are increasing challenges at national levels. Most prominently, the UK Competition Commission provisionally ruled that the proposed merger of Ticketmaster and Live Nation "would limit the development of competition in the market for live music ticket retailing" by severely inhibiting market entry. However, it ultimately cleared the transaction, finding that entry could not be foreclosed in the absence of market power. The Belgian competition

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authority imposed a €66.3 million fine on Belgacom for abusing its dominant position, and the French competition authority imposed a €63 million fine on France Telecom for stunting competition through exclusive contracts and pricing plans.

In response to all the activity in Europe, twenty-two members of Congress wrote the U.S. antitrust agencies expressing concern about excessive enforcement and warning of the risk that “DG Comp will become the de facto regulator in competition matters.”

5. U.S. MERGER ENFORCEMENT DEVELOPMENTS.

The new leadership of the antitrust agencies have publicly emphasized that they intend to take a more aggressive approach in reviewing proposed mergers and acquisitions, but several of the important enforcement decisions lie ahead. The FTC won its first preliminary injunction since 2002 in *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009) (which was initiated in 2008), even though the court found the evidence “more complicated and uncertain” than the FTC had asserted. *CCC Holdings* raises questions about just how substantial a showing is needed for the FTC to win a preliminary injunction. Two noteworthy FTC challenges ended with abandoned transactions. Press reports indicated that the parties to the CSL Limited/Talecris Biotherapeutics Holding Corp. merger were caught by surprise when the Commission sought a preliminary injunction in May against a merger that would have created a stronger number two firm and apparently resulted in some cognizable efficiencies (not enough, according to the FTC). The FTC also challenged the \$282 million Thoratec/Heartware International combination, relying only on administrative adjudication (i.e., foregoing a preliminary injunction proceeding in federal district court), where the acquired firm was in no position to compete until 2012 when FDA approval may have been obtained. Similarly, the FTC relied only on administrative adjudication in *Carilion Clinic* (complaint filed July 24, 2009), where the FTC challenged a consummated \$20 million acquisition of two out-patient clinics. The FTC has announced that Carilion Clinic has agreed to divest the acquired assets.

The agencies’ announced that they would hold hearings and consider revising the Horizontal Merger Guidelines. See <http://www2.ftc.gov/bc/workshops/hmg/index.shtml>. Although the two agencies set out five pages of questions, AAG Christine Varney highlighted three topics of special interest: market definition, concentration levels, and competitive effects (in particular, unilateral effects in markets with differentiated products, price discrimination and vulnerable customers, and direct evidence of competitive effects). See <http://www.usdoj.gov/atr/public/speeches/250238.htm> The agencies identified the six individuals who will lead the revision effort. All six are new political appointees: three lawyers, two economists, and one lawyer-economist. Witnesses at the five workshops have included Tom Barnett, Steve Calkins, and Deb Garza.

6. EXPANSION OF COMPETITION ENFORCEMENT IN ASIA.

China’s new anti-monopoly law took effect August 2008 and immediately became one of the world’s more important competition laws. Since then, six transactions have been prohibited or made subject to conditions, including, most recently, Panasonic/Sanyo, Pfizer/Wyeth and General Motors/Delphi Corp. (all of which were conditionally cleared). Also conditionally cleared were InBev/Anheuser and Mitsubishi Rayon/Lucite International, while Coca-Cola/Huiyuan was prohibited. In light of this record, it is obviously essential that major foreign

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companies with a presence in China take well-considered steps to navigate the many challenges created by the new merger review regime.

China also has been active in issuing regulations. Of particular note are the amendments to the Measures on the Acquisition of Domestic Enterprises (July 2009), the final Guidelines on Defining the Relevant Market (July 2009), and the draft Provisions Against Monopolistic Pricing (August 2009).

Other Asian enforcement agencies have also been active. The South Korea Fair Trade Commission has imposed substantial fines in a series of cases, including a record \$208 million fine on Qualcomm for what it viewed as improper use of discounts and rebates. The Japan Fair Trade Commission also has imposed substantial fines.

7. AFTERMATH OF *LEEGIN*.

The resale price maintenance complaint in *Leegin* was dismissed on remand from the Supreme Court decision holding that the rule of reason rather than the per se rule should be applied. See *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, 2009-1 Trade Cas. (CCH) ¶ 76,592 (E.D. Tex. 2009). This lower court decision is now on appeal. Meanwhile, Maryland amended its state antitrust law to make minimum resale price agreements per se illegal, California enforcers take the position that resale price maintenance agreements are still unlawful under the state antitrust law, while other state attorneys general are reviewing their enforcement options. *Leegin* repealer bills (S. 148 and H.R. 3190) have been introduced in the U.S. Senate and House of Representatives (and voted out by the House Judiciary Committee). The Federal Trade Commission has held two workshops, with more planned, on how to distinguish between beneficial and harmful resale price maintenance. See <http://www.ftc.gov/opp/workshops/rpm/> (workshops held May 20-21, 2009).

8. AUSTRALIA CRIMINALIZES CARTEL BEHAVIOR.

New criminal cartel laws took effect in Australia on July 24, 2009, and threaten participants in price fixing, bid rigging, and market division with up to ten years in jail. Commission Chair Graeme Samuel issued a statement in which he said that the Commission “is not interested in prosecuting minor matters under the new criminal offence,” but “wherever possible, serious cartel conduct should be prosecuted criminally.” Australia is also working with New Zealand to develop common competition principles, which could include criminal enforcement. This is an important step in the spreading global commitment to impose serious penalties on cartel behavior.

9. CANADIAN CHANGES.

The Canadian Competition Act was dramatically revised in March 2009. Cartel provisions were strengthened; the special prohibitions of price discrimination and predatory pricing were repealed, resale price maintenance is no longer criminal, and a new merger review procedure was introduced. In addition, the Canadian Competition Bureau published its Merger Review Process Guidelines in September 2009; final Competitor Collaboration Guidelines in December

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2009; and draft updated Enforcement Guidelines on the Abuse of Dominance Provisions in January 2009. Melanie Aitken was appointed Commissioner of Competition on August 5, 2009. On the private litigation front, plaintiffs have enjoyed some unusual success in contested class certification cases.

10. GLOBAL RE-EVALUATION OF THE ROLE OF GOVERNMENT AND COMPETITION POLICY.

During the last year, economies around the world felt the full brunt of the financial and economic crisis. The United States government along with those in many other countries took unprecedented measures to stabilize and stimulate the economy to fend off a global depression. As a consequence of those efforts, the U.S. government is now the majority owner of major corporations, such as General Motors and AIG, which raises issues about the role of the government in operational decisions, how long the government should maintain an ownership interest, and how the government should extricate itself. Further, significant questions have been raised about whether the government needs to expand regulation, particularly in the financial sector. Congressional hearings have been held on whether banks should be prevented from becoming "too big to fail." The Obama administration is considering creation of a new consumer protection agency that would regulate many financial transactions involving consumers. Both the Antitrust Division and the Federal Trade Commission have been active participants in these important competition policy debates.

Overseas, governments have taken similar measures and also are debating further government regulation. The European Commission, for example, has wrestled with unprecedented "state aid" issues arising from its member state governments seeking to bail out key corporations while individual mergers have been encouraged by governments to further macroeconomic policy interests.

The outcome of these debates in 2010 and beyond will have an enormous impact on virtually every sector of our economy.

A LOOK AHEAD

Looking ahead, 2010 should be an important year in competition law. The U.S. antitrust agencies will reveal further how much they have changed in their merger and other enforcement decisions. If passed, pending legislation could prohibit so-called "reverse-payment" settlement of Hatch-Waxman litigation and resale price maintenance and could repeal the plausibility standard established in *Twombly* and *Iqbal*. There is even a possibility of revised Horizontal Merger Guidelines being issued. Internationally, the meaning of the new anti-monopoly law will continue to emerge in China, and cartel enforcement likely will continue to expand both in its geographic scope and the severity of its sanctions.

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