



ABA Section of Antitrust Law

Corporate Counseling Committee
Monthly Antitrust Update Program
September 2015

October 9, 2015

Cooley

Today's Presenters



Jacqueline Grise

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Jackie is a Partner in Cooley's Antitrust & Competition practice group and is resident in the Washington, DC office. Her practice focuses on the defense of corporate clients in connection with domestic and international mergers and acquisitions, as well as antitrust counseling and other non-merger matters.



Tanisha James

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Tanisha is an Senior Associate in the Antitrust & Competition practice group and is resident in Cooley's New York office. Ms. James' practice focuses on mergers and acquisitions, joint ventures, government and private antitrust investigations and litigation, as well as counseling on a wide range of antitrust matters.



Becket McGrath

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Becket is a Partner in the Antitrust & Competition practice group and is resident in Cooley's London office. Mr. McGrath advises clients on all aspects of EU and UK competition law, with an emphasis on defending companies against agency investigations, behavioral counselling, compliance, competition litigation and merger control.



Howard Morse

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Howard is a Washington, DC-based partner and chair of Cooley's Antitrust & Competition practice group. He is a former Assistant Director of the FTC's Bureau of Competition who represents high-tech businesses before the FTC, the DOJ, and state attorneys general in merger, restraint of trade, monopolization and consumer protection investigations and litigation, with a particular focus on issues at the intersection of antitrust and intellectual property law

Today's Topics

- ▶ Mergers and Acquisitions
- ▶ Agency Update
 - ▶ Civil and Criminal Investigation
- ▶ Litigation Developments
- ▶ International

MERGER REVIEW

Presented by Jacqueline Grise

Merger Review

Court sides with Steris in Synergy Health Merger

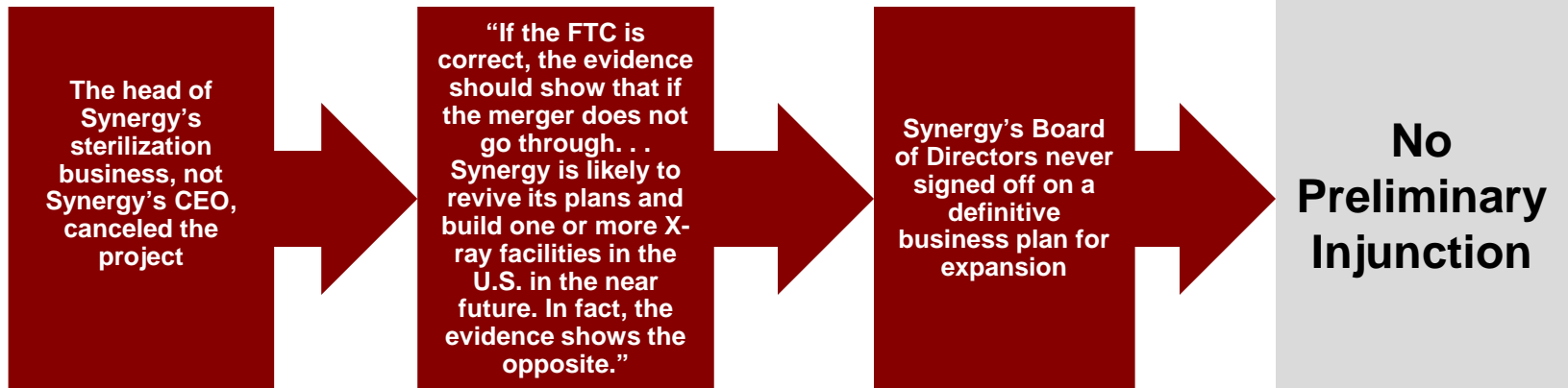
- FTC sued to block Steris's \$1.9B Synergy Health acquisition in May
 - Deal would combine two of the biggest sterilization services companies
- Issue was whether Synergy likely would have introduced a new technology to the U.S. market but for the acquisition
 - Unusual because merger cases generally turn on market definition
 - Instead, the FTC used an “actual potential competition” theory
 - FTC argued U.K.-based Synergy was about to disrupt the U.S. market with a new X-ray technology when rival Steris made its offer
 - FTC alleged Synergy decided to abandon the project based on the merger and would have continued with its plans without the deal

Theory is not easy to prove because it requires actual evidence, not hypotheticals or presumptions

Merger Review

Court sides with Steris in Synergy Health Merger (Cont'd)

- District Court Judge accepted the FTC theory premise but refused to grant a preliminary injunction, finding insufficient evidence that Synergy would have launched its new technology without the acquisition



- Loss is the first in a merger case in several years for the FTC following a series of successful challenges, including the now-abandoned Sysco Corp-U.S. Foods merger

Merger Review

FTC Requires Divestitures in Orthopedic Device Merger

- FTC alleged \$3.3B merger of Wright Medical Group, Inc. and Tornier NV would illegally reduce competition for total ankle and total silastic toe joint replacements
 - FTC alleged the parties are the major suppliers in the relevant markets of ankle and toe joint replacements



Market	Wright Share	Tornier Share
Ankle	44%	19%
Big Toe	60%	38%
Lesser Toe	44%	32%

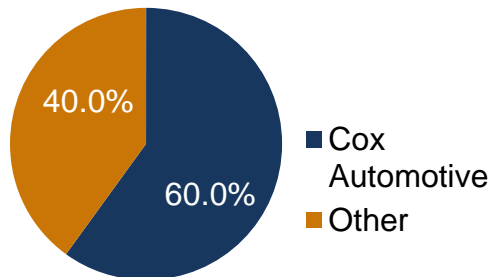
- FTC alleged timely entry was unlikely due to product development times, FDA approval requirements, and market adoption times
- Parties agreed to sell Tornier's U.S. rights and assets in the relevant markets to resolve the FTC's competitive concerns

Merger Review

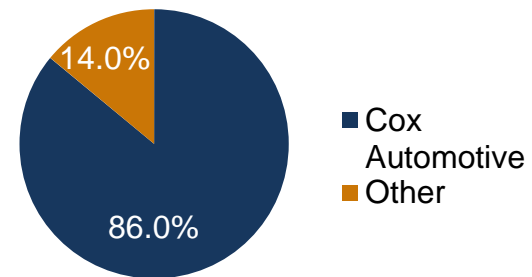
DOJ Requires Divestiture in Cox-Dealertrack

- Cox Automotive Inc., a Cox Enterprises subsidiary, agreed to divest Dealertrack Technologies Inc.'s automobile dealership inventory management solution (IMS) business to complete its \$4B tender offer of Dealertrack
 - IMS is used by auto dealerships to manage their vehicle inventories
- DOJ alleged Cox and Dealertrack are the two leading IMS providers, and the acquisition would result in the following increase in market share for Cox:

IMS Providers – Pre-Acquisition



IMS Providers – Post-Acquisition



- Dealertrack's IMS business will be divested to DealerSocket Inc. to remedy the alleged competitive loss in the IMS market
 - Cox has a \$55M deal with DealerSocket and must act to ensure a smooth transition of the assets

Merger Review

FTC Obtains \$240,000 Civil Penalty from Leucadia National Corp.

- FTC alleged Leucadia violated the HSR laws when it failed to report its ownership interest in Knight Capital Group Inc.
- Company also failed to make a similar filing in 2007, though the FTC did not recommend a civil penalty. Instead Leucadia was required to institute an “effective program to ensure full compliance” with the Act.
- This previous violation played a role in the FTC’s civil penalty recommendation.
- Maximum \$16,000/day fine for HSR violations



Merger Review

FTC Reaches Settlement with Endo International and Par Pharmaceuticals

- Endo International plc proposed to acquire Par Pharmaceutical Holdings, Inc. for \$8B
- FTC alleged acquisition would combine the two most significant suppliers in two generic drug markets, leading to likely increased prices for consumers

Drug	Treatment	Market Effect	Combined Share
Generic glycopyrrolate tablets	Side effects of peptic ulcer medicine	3:2	63%
Generic methimazole tablets	Inhibit the production of excess thyroid hormone	4:3	67%

- To resolve FTC concerns, the parties agreed to divest all of Endo's rights and assets to the two generics to Rising Pharmaceuticals

Merger Review

Health Insurance Mergers Attract Congressional Attention

- House Judiciary subcommittee is investigating competition in the health insurance industry
 - 4 of the 5 biggest U.S. insurers are planning to merge:
 - Aetna (3rd) & Humana (5th)
 - Anthem (2nd) & Cigna (4th)
 - Competitive concerns include higher prices, fewer consumer choices, and the impact on nascent forms of competition
 - Companies argue mergers will result in significant efficiencies and are necessary to counter the “harmful impact of consolidation among hospitals and other health care providers”
- Political divide over ObamaCare’s effect in the insurance and hospital industries

Senator Lee (R-UT): “...we can’t ignore the far-reaching effect that the Affordable Care Act has had on the insurance marketplace. While I would like to emphasize that this is not a hearing on Obamacare...It is important for us to ask how it may be affecting competition in these markets.”

Merger Review

Disgorgement – A Remedy on the Rise?

- The FTC & DOJ have the authority to seek disgorgement of “ill-gotten gains”
- Remedy has been used infrequently, but both agencies have invoked disgorgement powers recently

FTC: Cephalon settlement included a \$1.2B disgorgement penalty (June 2015); Cardinal Health settlement included a \$26.8M disgorgement penalty (April 2015)

FTC Bureau of Competition Director Deborah Feinstein said “absolutely we’re thinking about disgorgement” when there is no other way to remedy harm to consumers

DOJ & NY AG settlement with “hop-on, hop-off” bus tours in NYC included disgorgement of \$7.5M in profits (March 2015)



Key to the FTC is whether the conduct has actually harmed consumers

Merger Review

DOJ OKs Expedia-Orbitz Merger

On Sept. 16, DOJ announced it would not challenge Expedia's \$1.3B acquisition of Orbitz

Rationale

1

Merger is unlikely to result in new charges for consumers for using Expedia or Orbitz

2

Orbitz is only a small source of bookings; Priceline is Expedia's largest online travel agent rival

3

Online travel business is rapidly evolving; new entrants include TripAdvisor's Instant Bookings and Google's Hotel and Flight Finder

Merger Review

International Agency Coordination: GE and Alstom S.A.

“Coordination between the Antitrust Division and the Directorate-General for Competition advanced the investigation, and it enabled each jurisdiction to remedy the threats the acquisition posed for its respective market while allowing the non-problematic aspects of the deal to go forward.” - Assistant Attorney General Bill Baer:

United States

Divestiture

GE agreed to divest Alstom subsidiary (Power Systems Mfg LLC (PSM) that competes to service GE turbines

European Union

Divestiture

Parties agreed to divest certain parts of Alstom’s heavy-duty gas turbine

Coordinated
Enforcement

GOVERNMENT ACTION

Presented by Howard Morse

Government Action

Agency Personnel Changes

Department of Justice



Eric Mahr

**DOJ Director of
Litigation**

**Former Partner at
WilmerHale**



Mark Ryan

**Former DOJ
Director of
Litigation
2012-2015**

**Returned to
Private Practice**

Federal Trade Commission



**Charles
Loughlin**

**FTC Deputy
Chief Trial
Counsel**

**Former Partner
at Baker Botts**



Joshua Wright

**Former FTC
Commissioner
2013-2015**

**Returned to
Academia
George Mason**

Government Action

SEPs and F/RAND

AAG Baer

19th Annual Int'l Bar Assoc.
Competition Conference (Sept 11)

- Focus on harm to licensees
- Problem
 - Patent holders not honoring voluntary F/RAND commitments
 - Not all victims can afford litigation
- Solution
 - SSOs should “fix it first” – implement policies that will reduce the likelihood of “hold-up”
- Acknowledges
 - “Excessive pricing” not barred
 - Over regulation discourages innovation

Commissioner Ohlhausen

2015 IP and Antitrust Forum
China (Sept 12)

- Focus on rights of patent holders
- Problem
 - Antitrust agencies and courts over simplify issues surrounding injunctions; set the bar too low for “willing licensee”
 - “Hold-out” is as big a problem as “hold-up”
- Solution
 - Favor case specific inquires over “per se” type approaches in litigation
- Acknowledges
 - “Hold up” is a potential concern

- ❖ *Microsoft v. Motorola*, (9th Cir. Sept 15) refused to reconsider decision establishing RAND rate
- ❖ *ASUS v. InterDigital*, (N.D Cal. Aug 2015) granted defendant’s request to compel arbitration

Government Action

Continued Enforcement Against Trade Associations

- National Association of Animal Breeders (“NAAB”) (FTC Sept 24)
- Code of ethics prohibited:
 - Members competitors from being named in comparison advertisements
 - Disclosure of purchase prices and price quotes in printed statements
- Settlement: cease and desist, antitrust compliance program, remove or update all offending materials from website, issue announcement re: changes to Code of Ethics, and provide copy of settlement to members



Average Annual Sire Fertility* Rating by A.I. Stud										
	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Genex	1.3	1.0	1.0	0.9	0.9	1.5	2.0	1.9	1.5	1.5
Stud A	0.5	0.1	0.2	0.0	0.1	1.0	1.2	1.1	0.9	1.2
Stud B	0.1	-0.2	-0.1	0.3	0.3	1.2	2.2	NA	NA	NA
Stud C	0.0	-0.5	-0.4	-0.8	-0.8	-0.5	-0.4	0.2	0.4	0.2
Stud D	0.5	0.3	0.4	0.3	0.3	0.7	1.1	0.5	0.5	0.3
Stud E	-0.4	0.2	0.8	0.7	0.9	1.3	1.5	0.7	0.6	0.6

Government Action

More Criminal Auto Parts Settlements

- NGK Insulators to pay \$65.3 million for price fixing and bid rigging for ceramic substrates for catalytic converters (Sept 3)
 - Settlement includes obstruction of justice charge
- KYB to pay \$62 million for pricing fixing for shock absorbers (Sept 16)
 - Fine includes discount for adoption of effective compliance program
- Total: 37 companies and 55 executives have been charged and agreed to pay more than \$2.6 billion in criminal fines

Date	Company	Fine (millions)
Jan-12	Yazaki	\$470
Feb-14	Bridgestone	\$425
Sep-11	Furukawa Electric	\$200
Sep-13	Hitachi Automotive	\$195
Sep-13	Mitsubishi Electric	\$190
Sep-13	Mitsuba Corporation	\$135
Nov-13	Toyo Tire & Rubber	\$120
Sep-13	JTEKT	\$103
Jan-12	Denso	\$78
Sep-13	NSK	\$68.2
Sep-15	NGK Insulators	\$65.3
Sep-15	KYB	\$62
Mar-15	Robert Bosch	\$57.8
Jan-14	Koito	\$56.6
Jan-14	Koito Manufacturing	\$56.6
Aug-14	NGK Spark Plug	\$52

Government Action

Other Criminal Developments

- **Electrolytic Capacitors**

- First guilty plea in ongoing investigation into price fixing of electrolytic capacitors used in electronic products such as computers and televisions
- NEC/Tokin agreed to pay \$13.8 million fine for conduct from 2002-2013 (Sept 2)

- **Real Estate Foreclosure Auctions**

- Another individual pleaded guilty to bid rigging and mail fraud, to lower prices, by agreeing not to bid, bringing total of 11 (Sept 2)

- **Yates Memo**

- DOJ policy to strengthen DOJ efforts to hold corporate executives accountable, exception for Antitrust Division Corporate Leniency Policy (Sept 9)

- 9th Circuit adopts lower standard for disclosure of grand jury evidence to civil plaintiffs in *In re: Optical Disk Drive Antitrust Litigation* (Sept 10)

Government Action

State Developments



Eric Schneiderman, New York AG, speech at NY Tech Meetup Event (Sept 15)

- Goal for evolving state framework: “Responsible Disruption”
 - Nurturing competition and fair markets; Identifying and accounting for the hidden costs of doing business in new ways; Protecting consumers; Supporting workers as new business models evolve



Kamala Harris, California AG, opinion letter in response to request from legislature (Sept 10)

- Requirements for “active state supervision” of a state licensing board for state action immunity post *North Carolina Dental*
 - Regulatory decisions must be reviewed by a state official that is not an active participant in the market
- Analyzed pros and cons of potential actions to increase likelihood of immunity
 - E.g. expanding public membership on state licensing boards, increasing state supervision of boards, and providing antitrust training to board members

North Carolina Dental is also the basis of the complaint in *Wallen v St Louis Metropolitan Taxicab Commission* (E.D. Mo. Sept 18)

Product Hopping Developments

Product Hopping Developments

- Briefs filed in Third Circuit in *Mylan v. Warner Chilcott*
 - Lower court (E.D. Pa. Apr. 2015): “there was no exclusionary conduct” because generics could “reach consumers through, *inter alia*, advertising [or] promotion”
 - *Compare NY v. Actavis* (2nd Cir. June 2015): “generics need not be barred ‘from all means of distribution’ if they are ‘bar[red]... from the cost-efficient ones.”
 - Amicus brief filed by FTC on behalf of Appellant (Sept 30)

“The district court held that a brand company may with impunity destroy what is often the only means of generic distribution -- automatic substitution -- so long as generics remain hypothetically free to pursue new and more costly distribution alternatives, such as direct advertising to physicians.”

- Cases re: obligations of firms introducing next generation products extend beyond pharma (e.g. *Berkey Photo, Inc. v. Eastman Kodak Co.*, (2nd Cir. 1979))

Pharma Litigation

Pay For Delay – Cases Dismissed Post-Actavis

- Wellbutrin XL: Summary judgment for defendant (E.D. Pa. Sept 23)
 - "Even if the plaintiffs had shown that the Wellbutrin settlement had anti-competitive effects, the court finds that a reasonable jury could not find that any anti-competitive effects outweigh the pro-competitive benefits of the settlement."
 - Settlement allowed patent dispute to continue
 - Allowed generics to enter at least 10 years before patent was set to expire (earlier if win patent litigation), required patent owner to supply generic Wellbutrin XL to generic manufacturers, and gave a patent license to generics in another set of cases

- Actos: Complaint dismissed (SDNY Sept 23)
 - Defendant provided early-entry licenses to generics as part of settlement, but did not pay a share of profits to keep generics off the market like in *Actavis*
 - Judge: "While some settlements of patent infringement suits may produce anticompetitive effects, yet be cleverly designed to evade antitrust scrutiny, not all settlements are illegal, nor — in the court's view — should they be."

Pharma Litigation

Pay For Delay – Other Appellate Developments

Lamictal

- 3rd Circuit refused to reconsider revival of class action alleging GSK paid Teva through non-cash means to delay generic entry (Sept 23)

Loestrin

- Plaintiffs appealed dismissal of case to 1st Cir. arguing that defining pay-for-delay to required cash payments is counter to case law and not required by *Activis* (Sept 25)

Aggrenox

- 2nd Circuit denied interlocutory appeal by defendants seeking further guidance on the substantive standard that should be applied (Sept 16)

New Senate bills, S.2019 and S.2023, would mandate that “pay-for-delay” settlements for patent litigation are presumed anti-competitive if manufacturers receive anything of value in exchange for limiting research, development, manufacturing, marketing or sales of a generic version.

Government Action

U.S. House Judiciary Committee approves Standard Merger and Acquisition Reviews Through Equal Rules Act (SMARTER Act)

Who Voted?

- Bill was approved mostly along party lines, 18-10
 - All opposed were Democrats
 - All in favor were Republicans, plus one Democrat

Bill Purpose?

- Purpose is to align the merger review standards and procedures of the U.S. Department of Justice and the U.S. Federal Trade Commission

Resulting Changes?

- Act will change the standard required by the FTC to gain a preliminary injunction
 - TODAY: FTC must prove that “weighing the equities and considering the Commission’s likelihood of ultimate success,” injunction would be in the public interest
 - PROPOSED: Courts will apply the traditional four-part test to determine if a preliminary injunction should issue, including showing a threat of “irreparable injury” in an action brought by the FTC – the standard DOJ must meet today.

LITIGATION DEVELOPMENT

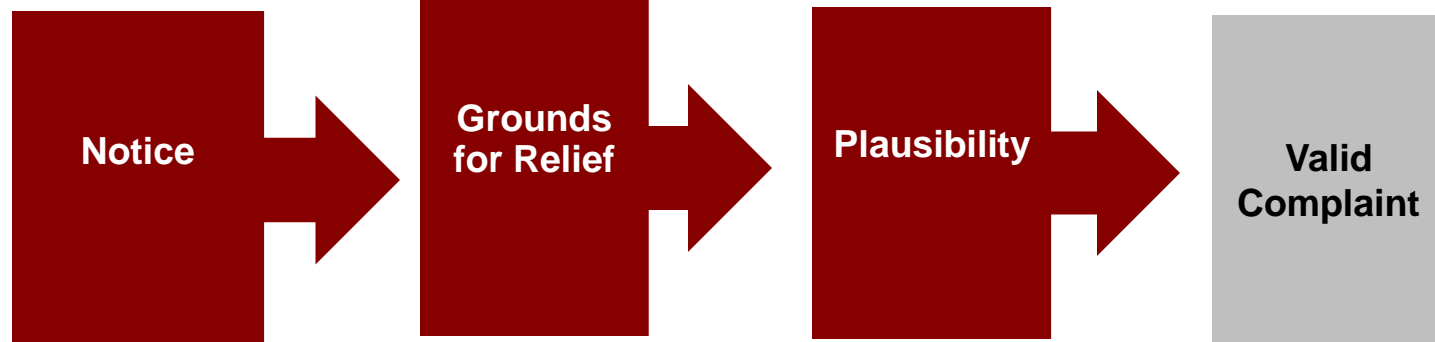
Presented by Tanisha James

Litigation Developments

Courts Still Carving Contours of Twombly

- *SD3 v. Black & Decker* (4th Cir. Sept. 2015)
 - A divided three-judge panel reversed the lower court's grant of motion to dismiss in a boycott conspiracy case that turned on the interpretation of the Twombly "plausibility" standard
- SawStop brought a suit involving allegations of a group boycott
 - The company developed a safety feature for a table saw called "active injury mitigation technology"
 - In August 2000, showed prototypes to table saw manufacturers
 - Complaint alleged that in 200, during a break session of a trade association annual meeting, table-saw manufacturers conspired to stop negotiations with SawStop

Bell Atlantic v. Twombly (SCOTUS 2007)



Litigation Developments

Strong opinions regarding Twombly's application

Majority Opinion

“Importantly Twombly’s requirements to plead something ‘more’ than parallel conduct does not impose a probability standard at the motion-to-dismiss stage...When courts confuse probability and plausibility inevitably begins weighing the competing inferences that can be drawn from the complaint. But that is not our task at the motion-to-dismiss stage....”

Concurring Opinion

“Despite our crystal-clear mandate in reviewing this Rule 12(b)(6) dismissal, the dissenting opinion nevertheless attacks the complaint in a light least favorable to SawStop, viewing the facts and reasonable inferences in the light most favorable to Defendants.....It is simply not our job in reviewing a Rule 12(b)(6) motion to assess which party’s conduct we deem more pro-competitive. In refusing to stick to our limited role, the dissenting opinion engages in breathtaking judicial activism....”

Dissenting Opinion

“It just may be, however, that the institutional limitations at the Court impart institutional obligations on the courts of 67 appeals to respect in fullest measure the highest Court’s approach. In this obligation, I believe the majority has defaulted....I would suggest, most respectfully, that the majority has committed basic conceptual errors and that the consequences of those errors, which the majority prefers not to face and to dismiss as policy, are regrettable.”

Litigation Developments

Circuits split over “heightened ascertainability” standard

Second Circuit

- *Brecher v. Republic of Argentina* (2d Cir. Sept. 2015).
- Series of class actions by holder of defaulted Argentine bonds
- Difficult to determine who owned beneficial interest in a bond at a given time
- District Court certified the class; 2nd Circuit denied class certification

Third Circuit

- *In re Processed Egg Products Antitrust Litigation* (E.D. Pa. Sept. 18, 2015)
- Plaintiff’s egg purchasers alleged increases in egg prices resulting from conspiracy
- Difficult to determine when indirect purchasers bought eggs (egg purchasers at supermarkets)
- District court denied certification of indirect purchasers

Traditional Class Certification Analysis

Numerosity

Commonality

Typicality

Representation

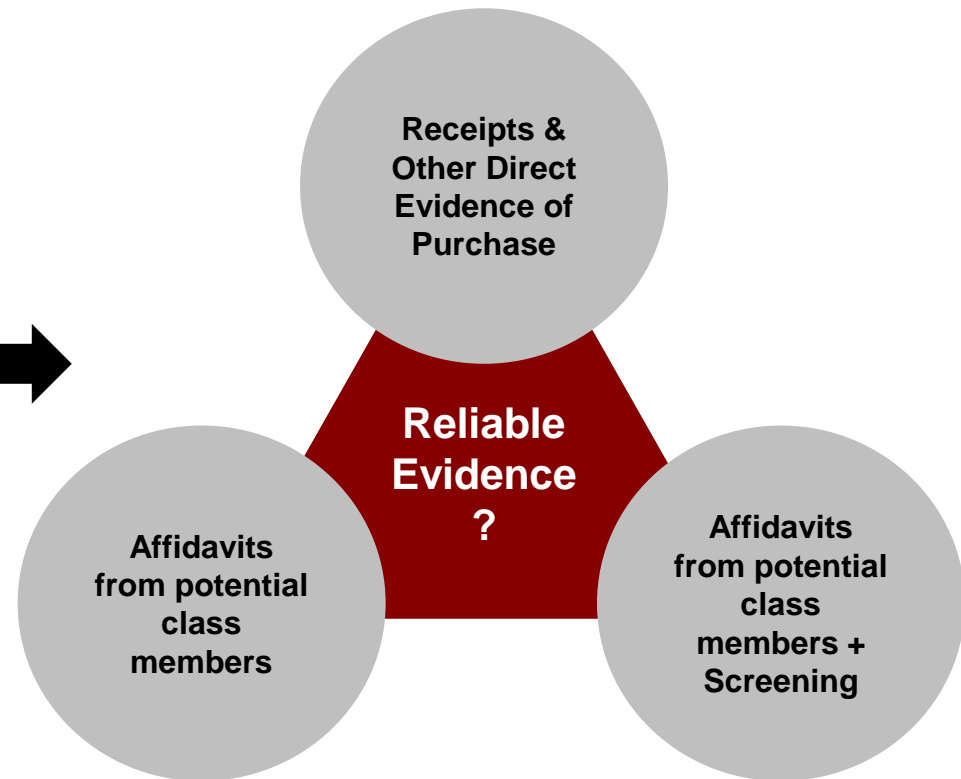
Ascertainability
=
Who purchased
certain goods
during a given
time period?

Litigation Developments

Proving sufficient ascertainability may be challenging

Ascertainability defined by
objective criteria that are
administratively feasible without
engaging in mini trials

(2nd and 3rd Circuit)



In Vince Mullins v. Direct Digital (7th Cir. July 28, 2015), Court recently rejected formal “heightened ascertainability” standard as “upsetting the balance”; places too great a focus on managing the class action

Litigation Developments

Recent settlement developments

- *Stanford Glaberson v. Comcast* (E.D. Pa. Sept. 1, 2015)
- Approval of settlement in 10-year old class action to resolve allegations that Comcast monopolized television service in Philadelphia by swapping customers and acquiring competitors
- Class certification battle made it to *Comcast v. Behrend* (SCOTUS 2013) (raised bar for antitrust class cert)

Settlement = \$50M

- *Cason-Merenda v. VHS of Michigan Inc.* (E.D. Mich Sept. 11, 2015)
- Motion of preliminary approval in action brought on behalf of 24,000 nurses accusing 8 Detroit hospitals of conspiring to keep wages low
- Class certification appealed to 6th Circuit who declined appeal but requested reconsideration in light of *Comcast* SCOTUS case

Settlement \$32M

- *Credit Default Swaps Antitrust Litigation* (S.D. NY Sept 11, 2015)
- Defendants signed a settlement in response to a class action alleging that they conspired to limit competition in the credit-default swaps market
- Size of each banks payment based on its share of CDS trading

Settlement \$1.87B

Litigation Developments

Some courts question Proposed Settlement Agreements

Alice Allen v. Dairy Farmers of America (U.S. Dist. Vt Sept 2015)

- **Class action alleging a milk pricing conspiracy**
- **Judge refused to approve proposed \$50 million settlement**
- **Reasons:**
 - Average recovery of \$4,000 would remain unchanged
 - Injunctive relief too limited
 - Conduct restrictions too lax
 - Modest support from majority of farmers and vehement opposition from minority of farmers

American Express Anti-Steering Rules Antitrust Litigation (E.D. NY 2015)

- **Class action by merchants against American Express anti-steering rules**
- **Judge refused to approve settlement**
- **Reasons:**
 - Reservations regarding the fairness of the deal (merchants in 10 states would not benefit equally from the deal)
 - Conduct by one of the lead plaintiff's attorneys (sending of confidential information of American Express subject to protective order where the email stated "burn after reading")

EU AND REST OF WORLD UPDATE

Presented by Becket McGrath

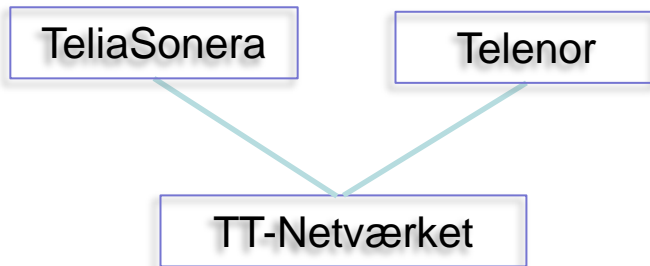
OVERVIEW

Topics Covered

- ▶ EU
 - ▶ Mergers and Acquisition
 - ▶ Agency Update
 - ▶ CMI and Criminal Investigations
 - ▶ Policy Developments
 - ▶ Litigation
- ▶ International

EU Update

TeliaSonera/Telenor Proposal



- Denmark's largest telecoms operator – 40% share
- 4-3 merger
- Formation of quasi-duopoly
- Scale to compete and invest to the benefit of consumers
- Danish market highly competitive – broad range of operators including MVNOs (mobile virtual network operators)
- Commission concerns:
 - Increase prices, weaken innovation and facilitate coordination with the largest telecoms operator (TDC)
 - Lack of a fourth operator

Withdrawal

- September 11- Parties announced withdrawal from proposed merger, in face of looming prohibition
- TeliaSonera offered to divest a stake in its network and transfer mobile customers to allow for a fourth MNO in the market
- Concessions offered would have created a weak fourth player in the Danish telecoms market

EU Update

A shift in approach to telecoms mergers?



Joaquín Almunia (2010-2014)

Series of mergers approved by Commission with limited remedies, allowing reduction of operators from 4 to 3 in **Austria** (Orange/Hutchison 3G), **Ireland** (O2/Hutchison 3G) and **Germany** (E-Plus/ Telefónica Deutschland)

→ Criticism of Commission approach by national regulators – e.g. Austrian competition authority opened an investigation in 2014 into significant increases in consumer prices following the merger



Margarethe Vestager (2014 - present)

Made early public statements indicating scepticism over industry arguments in favour of greater consolidation

TeliaSonera/Telenor evidence of a stricter approach?

Transactions will continue to be scrutinised on a case by case basis

EU Update

Telecoms mergers – looking ahead

UK – Hutchison Whampoa/ O2

- 4-3 merger, creating biggest mobile operator in the UK (customer numbers)
- Combined share of mobile radio spectrum of 27.5%
- CMA requested referral back for national review (Oct. 2)
- NB Commission has previously refused Art 9 requests from the German and Austrian authorities in E-Plus/Telefónica Deutschland and Orange/Hutchinson 3G

Italy – VimpelCom/Hutchison

- Creation of JV that would control 1/3 of Italian market (equivalent to the shares of Telecom Italia and Vodafone)
- Would reduce the number of mobile telecoms providers in Italy from 4-3

Belgium – Liberty Global/BASE Belgium

- Combining Belgium's third largest MNO and largest MVNO: 4 – 3 merger
- Risk of reduction in competition in retail mobile telephony; reduction in incentives for BASE to offer VNOs access to its mobile network
- Phase 2 commenced Oct. 5 2015; Phase 2 deadline – Feb. 18 2016

EU Update

Other EU merger reviews

Semiconductors

- NXP/Freescale (cleared - Sept. 17):
 - Competition concerns: higher prices; less competition
 - Remedies: divestment of NXP's radio frequency power business; manufacturing agreement; transitional services
- Intel/Altera (Phase 1 – Sept. 9)
 - Potential vertical overlaps – Intel processors + Altera FPGAs
- *Avago/Broadcom* (Phase 1 – filed Oct. 2)

Office Supplies

- Staples/Home Depot (Phase 2 – Sept. 25)
 - Distribution of office products
 - Concerns of price increases and less choice
- Phase 2 deadline: Feb. 10 2016

Industrial Packaging

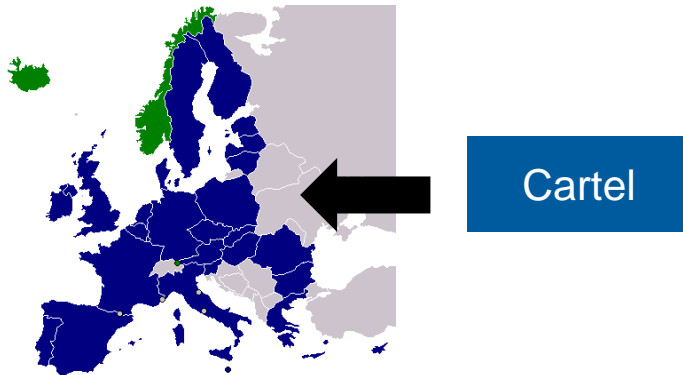
- Mondi/Walki (Phase 2- Sept 2)
 - Risk of removal of key competitor for packaging material
 - Competitors have limited production capacity
- Phase 2 deadline: Jan. 18 2016

EU Update

CRT cartel decision confirmed

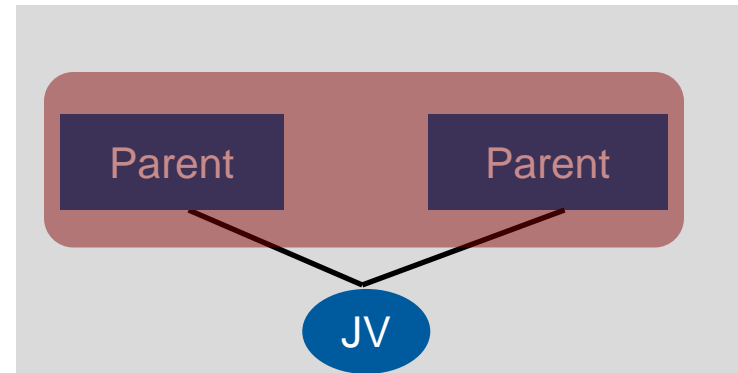
- Sept.9 – Commission decision on TV and computer monitor tubes (CRT) cartel upheld by General Court, albeit with slight reduction in overall fines to EUR 1.4bn
- Two key principles confirmed:

Jurisdiction



- Cartel concerned products that were not sold in EEA
- **Commission still had jurisdiction because cartel directly influenced prices/volumes in EEA of direct sales of processed products**

Parent company liability



- **Parent companies liable for behaviour of JVs**, irrespective of ownership shares
- GC rejected arguments based on lack of awareness of JVs' participation in the cartels

EU Update

Post Danmark II

- Reference to CJEU from Danish Maritime and Commercial Court (MCC) concerning legality of rebate scheme for direct advertising by Danish post office, Post Danmark (PD)
- Case followed 2009 abuse of dominance finding against PD by Danish competition authority (upheld by Danish competition appeal court in 2010 and subsequently appealed to MCC)
- Oct 6. – CJEU confirmed that:
 - rebate scheme’s capability of exclusionary effect depends on “all of the circumstances”, including in particular criteria and rules governing rebate, extent of dominance and conditions of competition
 - no need to apply ‘as efficient competitor’ test
 - only need to show “probable” anti-competitive effect; need not be serious or appreciable

EU Update

Settlement of online hotel booking investigations

- Further closures of investigations of Booking.com on basis of move to ‘narrow MFNs’, under which hotels free to set different prices on other booking platforms
- Cases now closed in:
 - France (April)
 - Italy (April)
 - Sweden (April)
 - Denmark (August)
 - Greece (September)
 - UK (September)
 - Ireland (Oct. 6)
- Investigations continue in Germany and Switzerland
- Expedia and HRS implementing similar narrow MFN model
- German hostility to all MFNs creating divergence in enforcement, leading to calls for more EU-level enforcement by Commission

EU Update

UK: criminal prosecutions

First successful conviction for CMA (Sept. 14)

- Guilty plea by Nigel Snee (director of steel water tank supplier)
- Sentenced to six months imprisonment (suspended for 12 months) and 120 hours community service – discount of 75% due to cooperation with CMA

But:

- Two other individuals who pleaded not guilty were acquitted, presumably because jury found insufficient evidence of dishonesty (July 2015)

Oct.5 – CMA confirmed civil investigation into galvanised steel water tank suppliers continues

Reminder - UK criminal cartel offence applies to:

- Individuals agreeing to implement arrangements between two companies, where products are supplied in the UK
- Post-April 2014, CMA need not prove dishonesty
- Maximum penalties: five years imprisonment, unlimited fines

EU Update

UK: private competition actions

Competition Appeal Tribunal: enhanced jurisdiction

- Standalone/follow-on claims
- Injunctive relief (interim and final)
- Extended limitation periods: six years, not two

Collective proceedings regime:

- Expanded opt-in regime
- New opt-out class regime for UK claimants (non-UK claimants must opt in)
- CAT must approve class representative and confirm suitability for collective proceedings

Consumer Rights Act 2015 (Oct. 1 2015)

Fast track procedure:

- For “simple” claims, to be heard within 6 months
- Application is at discretion of CAT
- No cross-undertaking in damages for injunctions

Collective settlement/voluntary redress:

- CAT may approve collective settlement scheme (binding on all claimants in class)
- CMA may approve voluntary redress scheme during/after investigation

Rest of World Update

China – fines for failure to file mergers

Fines relating to four transactions for failure to fulfil merger filing duties

Bestv New Media/Microsoft: failure to notify JV – CNY 200,000 each

Fujian Electronics: failure to notify 35% stake acquisition in Shenzhen CHINO-E Communication – CNY 150,000

Bombardier Transportation Sweden/CSR Nanjing: failure to notify JV – CNY 150,000

Shanghai Phosun Pharma: failure to notify 35% stake acquisition in Suzou Eyre Pharma – CNY 200,000

- Transactions had no substantive effects on competition – administrative penalties only
- Penalties relatively small – MOFCOM can impose fines up to CNY 500,000
- Approach of “naming and shaming” non-compliant companies only began in 2014

Rest of World Update

Internal restructuring to streamline merger review procedure

- Pre-consultation removed
- Consultation Division to be scrapped and will become another case handling division (three in total)
- All three divisions will be responsible for both pre-review before case initiation and substantive review
- Intention is to streamline merger review process
- Stricter requirements for identification of product codes, product markets and geographic markets

Anti-Monopoly Law, Price Law and Law against Unfair Competition included in State Council's legal work plan for 2015

Rest of World Update

Korea – MOU with FTC and DOJ

KFTC signed MOU with DOJ and FTC (Sept. 8)

- Mutual acknowledgement of importance of antitrust cooperation
- Intention to coordinate enforcement activities
- Framework for communications
- Commitment to maintain confidentiality of information provided by other party and honoring prohibitions on sharing information when not permitted



Third cooperation agreement for the FTC/DOJ with East Asian authorities

- Japan (1999)
- Chinese agencies (2011)

Questions?

These are presentation slides only. The information within these slides does not constitute definitive advice and should not be used as the basis for giving definitive advice without checking the primary sources.



APPENDIX

Cooley

Auto Parts Criminal Settlements – Full List

Date	Products	Company	Fine (millions)
Sep-11	Wire Harnesses	Furukawa Electric	\$200
Jan-12	Electrical Components and Heater Control Panels	Yazaki and Denso	\$548
Apr-12	Wire Harnesses	Fujikura	\$20
Apr-12	Antilock brake system	G.S. Electch	\$2.75
Jun-12	Seatbelts, Airbags and Steering Wheels	Autoliv	\$14.5
Jul-12	Seatbelts, Airbags and Steering Wheels	TRW Deutschland and TRW Automotive	\$5.1
Aug-12	Instrument Panels Clusters	Nippon Seiki	\$1
Oct-12	Heater Control Panels	Tokai Rika	\$17.7
Jul-13	Ignition Coils	Diamond Electric	\$19
Jul-13	Switches, steering angle sensors and HID ballasts	Panasconic	\$45.8
Sep-13	Engine Parts	Hitachi Automotive	\$195
Sep-13	Wiper Systems, Starters, Windows and Fan Motors	Mitsuba Corporation	\$135
Sep-13	Starters, Alternators and Ignition Coils	Mitsubishi Electric	\$190
Sep-13	Compressors and Condensers	Mitsubishi Heavy Industries	\$14.50
Sep-13	Radators and Fluid Warmers	T.RAD	\$13.75
Sep-13	Air Conditioning Systems	Valeo Japan	\$14
Sep-13	Anti-Vibration Rubber	Yamashita Rubber	\$11
Sep-13	Bearings	NSK	\$68.2
Sep-13	Bearings	JTEKT	\$103
Nov-13	Anti-Vibration rubber and Driveshaft Parts	Toyo Tire & Rubber	\$120
Nov-13	Lamp Ballasts	Stanley Electric	\$1.44



Parts Criminal Settlements – Full List Cont.

Date	Products	Company	Fine (millions)
Jan-14	Lamp Ballasts	Koito	\$56.6
Jan-14	lighting fixtures and lamp ballasts	Koito Manufacturing	\$56.6
Feb-14	Electronic Throttle Bodies	Aisan Industry	\$6.86
Feb-14	Anti-Vibration Rubber	Bridgestone	\$425
Apr-14	Electric Powered Steering	Showa	\$19.90
Jun-14	Automotive foam	River Seat, Woodbridge Foam, SW Foam	\$6
Aug-14	Spark Plugs	NGK Spark Plug	\$52
Sep-14	Hoses, airbags, and steering wheels	Toyoda Gosei	\$26
Oct-14	Brake Hoses	Hitachi Metals	\$1.25
Nov-14	Variable valve timing devices	Aisin Seiki	\$35.80
Nov-14	Instrument panel clusters	Continental Automotive Electronics and Continental Automotive Korea	\$4
Jan-15	Air conditioning compressors	Sanden	\$3.2
Mar-15	Spark plugs, oxygen sensors, and starter motors	Robert Bosch	\$57.8
Apr-15	Manual Steering columns	Yamada Manufacturing	\$2.5
Jun-15	Parking heaters	Espar	\$14.9
Sep-15	Catalytic converter substrates	NGK Insulators	\$65.3
Sep-15	Shock Absorbers	KYB	\$62