Editor's Note

Antitrust Enforcement: Never a Dull Moment

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GOVERNMENT ANTITRUST enforcement and litigation can sometimes appear routine. There will be times when cases all seem to involve obvious price-fixing or transparently problematic mergers (e.g., where two of the only three competitors combine) and result in outcomes that, while interesting, are fairly predictable. This is not one of those times. Unexpected twists abound in an array of recent agency enforcement actions

A variety of cases, many described in articles in this issue, demonstrate that antitrust and competition theories continue to evolve, and remind us that just when antitrust enforcement appears headed in a particular direction, something will come as a surprise.

Enforcement Outside the Beltway. Actions taken by antitrust authorities other than the Federal Trade Commission, Department of Justice, and European Union do not always get the attention they deserve. Two recent government cases show that developments in places other than Washington, D.C. and Brussels can have significant impact on the antitrust landscape.

First, in a matter that has undeservedly received scant U.S. attention, Brazil's antitrust regulator, Cade, fined five industrial gas companies 2.94 billion reais ($1.68 billion) for engaging in cartel-like activities.[1] According to Brazilian regulators, the companies fixed prices, shared markets and, when more than one of them wanted a client, held raffles to decide the winner. The conduct allegations may be relatively straightforward, but the amount of the fine is not—it is the largest ever levied by Brazil's antitrust body. The fine is almost as large as the biggest imposed in the United States (in the air cargo price-fixing cases), but was levied on just a handful of companies, in contrast to the more than twenty companies involved in the air cargo cases.[2]

Another significant recent action involves a challenge and resulting settlement by the State of California in a case involving vertical price fixing. This comes three years after the U.S. Supreme Court in *Leegin*[3] rescinded the rule of per se illegality for vertical price fixing under federal antitrust law and held that resale price maintenance would be judged under more elaborate rule of reason analysis.

It is somewhat surprising that although *Leegin* was high-profile and overturned decades of precedent, the decision has had little apparent impact. Bills were introduced in the last Congress and current one to repeal the *Leegin* ruling, and states have made clear that their own state laws on vertical price-fixing need not follow *Leegin*. True to that view, California charged Bioelements, a Colorado company, with unlawful vertical price fixing of cosmetics and other products, stating in its press release that "*Leegin* . . . sharply curtailed federal antitrust law pertaining to vertical price-fixing, but did not affect California's strict state antitrust law."[4]

The key facts alleged in California's complaint are summarized in one paragraph:

> Beginning in mid 2009, Bioelements entered into many dozens of written contracts . . . [which] . . . state[ ], in part, that "Accounts shall not charge less than the Manufacturer's Suggested Retail Price (MSRP)." [Another set of Bioelements] contract[s] state[ ], in part, that "Accounts are prohibited from charging more or less than the Manufacturer's Suggested Retail Price (MSRP)."[5]

The settlement required Bioelements to pay $51,000 in penalties and attorneys' fees and inform any third parties that Bioelements will not enforce these contracts. One lesson from this case is that a company considering a resale price maintenance program in the states that have expressed an intention to enforce that law vigorously should continue to think twice. Notwithstanding *Leegin* and an absence of opposition from the FTC and Department of Justice, the risk of a state law challenge is significant.

Has the Traditional Approach to Market Definition Become More Difficult? In *Shrinking from the "Third Rail": Avoiding Direct Effects Analysis in* Lundbeck, Richard Parker, Michael Antalics, and Bilal Sayyed describe the *Ovation* case. There, a Minnesota district judge dismissed a Section 7 challenge by the FTC and State of Minnesota to a consummated transaction between rival sellers of the only two drugs used in the treatment of patent ductus arteriosus.[6] The FTC structured its arguments on market definition in traditional fashion—pointing, for example, to defendant's documents that supported a product market consisting of the two drugs at issue. The FTC did not de-emphasize market definition in favor of a more effects-based analysis, as the 2010 Horizontal Merger Guidelines suggest the Agencies may do in certain cases.[7] Indeed, the agency did not argue, as it did in the *Whole Foods* appeal, that market definition was unnecessary.[8]

In their article, Parker, Antalics, and Sayyed suggest that the FTC focused much less on Ovation's significant post-merger price increase than it did on proving the relevant market—but still failed to persuade the court on market definition. Disagreeing with the FTC, the court found that "NeoProfen

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and Indocin IV are not in the same product market" based on a lack of evidence of price-elasticity between the products. The authors ask, "[W]ould the agency have been better off if it had focused the court on evidence showing anticompetitive effects in lieu of its focus on the relevant market?"

Non-Merger Cases: Which Laws Are Violated? In the past year, the FTC and the DOJ have brought a variety of interesting non-merger cases, which are discussed in this issue. John Graubert and Jesse Gurman, in their article on the FTC's *Intel* consent agreement,[9] describe the order's provisions that limit Intel's conduct with respect to discounts, predatory design and deceptive disclosure. Ken Glazer and Catherine LaRose address the DOJ's *Amex* and *Blue Cross Blue Shield of Michigan*[10] cases, explaining the differences between exclusionary and collusionary conduct highlighted by those cases. Both articles observe that the agencies appear to have carefully considered the statutory violations charged in their respective complaints. *Intel* was brought under Section 2 and Section 5, but, as the authors note, Commissioner Rosch would have brought the case under only Section 5. Graubert and Gurman also note that the FTC's relief in some ways falls short of, but in other ways goes beyond, the purview of Section 2 case law.

Neither of the two DOJ matters examined by Glazer and LaRose, in contrast, alleges a Section 2 violation (they were limited to Section 1 charges)—although the authors contend that the allegations in *Blue Cross Blue Shield* could have supported a Section 2 charge. Whether a Section 2 count's inclusion (*Intel*) or exclusion (*Amex* and *Blue Cross Blue Shield*) has any practical significance to the outcomes of those matters is far from certain. Still, how the agencies decided to frame their charges sheds some light on how they may view the reach of the statutes they enforce with respect to anticompetitive conduct.

Evolving Theories of Harm. The $37 billion Comcast/NBCU transaction combined Comcast's cable assets with NBCU's programming assets—generating one of the largest transactions to face antitrust scrutiny in recent years. It also led to one of the longest investigations, culminating in a consent decree with the Department of Justice.[11] In his article in this issue, Jonathan Baker, Chief Economist at the Federal Communications Commission, provides a cogent explanation of the theories of harm that the FCC considered in its assessment of this vertical transaction. Baker explains that "the legal framework and economic evidence identified by the FCC provide a contemporary roadmap for the analysis of vertical mergers when the competitive concern involves exclusion."

The DOJ complaint also reads as one focused on theories of antitrust harm through the exclusion of rivals.[12] An interesting aspect of the DOJ's complaint is the acknowledgment that the competitors at risk of foreclosure may not be particularly significant today. The DOJ approach appears to go beyond traditional vertical foreclosure cases and suggests a theory akin to vertical foreclosure of a potential competitor. The complaint alleges harm to multichannel video programming distributors (MVPDs) and online video programming distributors (OVDs) like Netflix and Hulu, which provide online viewing options to consumers. The complaint asserts that "[b]oth MVPDs and OVDs are participants in [the relevant market of video programming distribution]" (¶ 38) but clarifies this competition as "nascent." (¶ 4). The complaint further notes that "OVDs have *begun* to provide professional video programming" (¶ 3) (emphasis added) and that that "OVDs' Internet-based offerings are *likely the best hope* for additional video programming distribution competition in Comcast's cable franchise areas." (¶ 9) (emphasis added). Forced to make a prediction as to the future of innovation, the agency alleged:

> Today, OVDs have a *de minimis* share of the video programming distribution market in any geographic area. . . . However, established distributors, such as Comcast, view OVDs as a growing competitive threat and have taken steps to respond to that threat. OVDs' current market shares, therefore, greatly understate both their future and current competitive significance in terms of the influence they are having on traditional video programming distributors' investment decisions to expand offerings and embrace Internet distribution themselves. (¶ 45).

Indeed, as Assistant Attorney General Christine Varney stated: "The settlement we are announcing today ensures that the transaction will not chill the nascent competition posed by online competitors—competitors that have the potential to reshape the marketplace by offering innovative online services."[13]

One can certainly debate whether the DOJ's predictions of the future will prove to be accurate. As Dr. Edward Felten, the FTC's new Chief Technologist, notes in his interview featured in this issue:

> As a technologist, I am probably more attuned to the innovation ecosystem—that is, the technical and economic conditions that enable innovation—and what is needed to keep it healthy. Having said that, it is important to recognize the limits on our ability to predict the technical future.

The DOJ sought to impose a remedy tailored to the nascent nature of the industry. The DOJ intended the remedies to replicate the "but for" world. Consequently, rather than impose a scheme of mandatory licensing of NBC Universal content, the DOJ required licensing only if certain conditions were met. In some cases, distributors can require NBC Universal to license content as it has in the past. In other cases, where there may not be NBC Universal precedent for licensing content, the Final Judgment requires NBC Universal to license content to a distributor if its peers have done so.

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Predicting where antitrust enforcement is headed is always a perilous task. Right now it seems particularly difficult and risky to do so. But it is the job of antitrust practitioners to guide their clients as to what the agencies and courts are likely to do—and the challenges this presents are always interesting. ■

[1] *Industrial Gas Companies Face Fine Muito Grande*, Central Science: The Chemical Notebook (Sept. 2, 2010, 1:09 p.m.), http://cenblog.org/the-chemical-notebook/2010/09/industrial-gas-companies-face-brazilian-fine-muito-grande/.

[2] Press Release, U.S. Dep't of Justice, Florida West Int'l Airways Inc., Three Executives Indicted in Conspiracy to Fix Rates on Air Cargo Shipments (Dec. 3, 2010), *available at* http://www.justice.gov/atr/public/press_releases/2010/264754.htm.

[3] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).

[4] Press Release, Office of the Attorney Gen., State of Cal. Dep't of Justice, Attorney General Halts Online Cosmetics Price-Fixing Scheme (Jan. 14, 2011), *available at* http://oag.ca.gov/news/press_release?id=2028&y=2011.

[5] Complaint at 3, California v. Bioelements, Inc., No. 10011659 (Cal. Super. Ct. Riverside Cnty. Desert Region Dec. 30, 2010), *available at* http://ag.ca.gov/cms_attachments/press/pdfs/n2028_bioelements_complaint.pdf.

[6] FTC v. Lundbeck, No. 08-6379, 2010 WL 3810015 (D. Minn. Aug. 31, 2010).

[7] U.S. Dep't of Justice & Federal Trade Comm'n, Horizontal Merger Guidelines ¶ 4 (2010), available at http://www.ftc.gov/os/2010/08/100819hmg.pdf.

[8] FTC v. Whole Foods Mkt., Inc., 533 F.3d 869, 876 (D.C. Cir. 2008).

[9] Intel Corp., FTC Docket No. 9341 (Nov. 2, 2010) (Decision and Order), *available at* http://www.ftc.gov/os/adjpro/d9341/index.shtm.

[10] United States v. Am. Express Co., No. 1:10-cv-04496-NGG-CLP (E.D.N.Y. Oct. 4, 2010); United States v. Blue Cross Blue Shield of Mich., No. 2:10-cv-14155-DPH-MKM (E.D. Mich. Oct. 18, 2010).

[11] The author represented General Electric Co. and NBC Universal before the Department of Justice in this matter.

[12] Complaint, United States v. Comcast Corp., No. 1:11-cv-00106 (D.D.C. Jan. 18, 2011).

[13] Christine Varney, Remarks as Prepared for Delivery at Briefing on Comcast/NBCU Joint Venture (Jan. 18, 2011), *available at* http://www.justice.gov/atr/public/speeches/266156.htm.