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Partial Victory for Pharmaceutical Companies Over Dual Pricing Policies in the EU

By: Laurie-Anne Grelier, LLM Graduate, Chicago-Kent College of Law

The pharmaceutical sector has been under close scrutiny from the European Commission (the "Commission") for several years[1]. Differentiated (or dual) pricing arrangements are among the practices the Commission has been focusing on.

Differentiated pricing systems within the pharmaceutical industry in the European Union ("EU") result from the absence of a complete harmonization of the national legislations regarding medicine prices. While some countries (Spain, France…) have set maximum prices for medicines reimbursed by their national health insurance schemes, others do not define maximum prices (Germany), and only monitor pharmaceutical companies' profits (UK)[2]. Therefore, significant price differences remain between the EU Member-States. Wholesalers use these differentials to buy medicines from pharmaceutical manufacturers in EU countries where prices are rather low in order to resell them in Member-States where medicines are more expensive.

To limit this parallel trade, some pharmaceutical manufacturers have implemented differentiated pricing policies under which they set different prices for their products depending on the Member-State where the medicines are to be resold.

This type of policy was condemned by the Commission as infringing the EC Competition rules[3]. However, its decision was challenged and the EU Courts recently handed pharmaceutical manufacturers a partial victory.

The EU Courts' approach to differentiated pricing systems

This case involved the GlaxoSmithKline group ("GSK") and the General Sales Conditions it applied to its wholesalers established in Spain. In fact, they agreed on different prices depending on whether the medicines were to be resold in Spain or exported to other EU countries. The price for medicines sold by GSK to its wholesalers that were destined for the Spanish market could not exceed the "maximum industrial price" set by the Spanish Health Authorities[4]. But GSK required its wholesalers to pay higher prices for the medicines to be resold in other Member-States [5].

In 2001, the Commission found that GSK's policy infringed Article 81(1) EC (renumbered Art. 101(1)), which prohibits agreements among undertakings that restrict competition within the internal market. The Commission further refused to exempt GSK's pricing policy from antitrust liability, ruling that the requirements for an exemption specified in Article 81(3) EC (renumbered Art.101(3)) were not met[6].

On appeal, the EU Court of First Instance ("CFI") was asked to determine whether such a differentiated pricing agreement indeed infringed the EC Competition rules, and, if so, whether it could nonetheless qualify for an exemption under Article 81(3) EC[7].

Unlike the Commission, the CFI refused to find that such agreements had an anticompetitive object. According to the CFI, the identification of an anticompetitive object in this case required to show not only that the differentiated pricing system was intended

[1] See Pharmaceutical Sector Overview: ec.europa.eu/competition/sectors/pharmaceuticals/overview_en.html

[2] Surveying, Assessing, and Analysing the Pharmaceutical Sector in the 25 EU Member States, Report Commissioned by the EC Commission, available at: ec.europa.eu/competition/mergers/studies_reports/oebig.pdf

[3] Commission Decision 2001/791/EC of 8 May 2001 relating to a proceeding pursuant to Article 81 of the EC Treaty, OJ 2001 L 302, p.1.

[4] Commission Decision 2001/791/EC, para. 20.

[5] Commission Decision 2001/791/EC, para. 20.

[6] Commission Decision 2001/791/EC.

[7] Case T-168/01, *GlaxoSmithKline Services Unlimited v. Commission of the European Communities* (2006).

to limit parallel trade in medicines, but also that this policy could be presumed to deprive final consumers of advantages "in terms of supply and price"[8].

Nonetheless, the CFI approved the Commission's ruling that GSK's policy had anticompetitive effects, and thus infringed Article 81(1) EC, as both patients and national health insurance systems were deprived of the possibility to benefit from price reductions that could have resulted from "the participation of [GSK's] Spanish wholesalers in intrabrand competition"[9].

However, the CFI disagreed with the Commission's analysis regarding GSK's claim for an exemption under Article 81(3) EC. In fact, according to the Commission, GSK had not shown that its dual pricing policy could contribute to promoting technical progress or improving the distribution of medicines. On the contrary, GSK claimed that differentiated pricing would enable it to realize profits that could be reinvested in R&D, thus contributing to technical progress[10]. Basically, the CFI reproached the Commission with failing to carry out a thorough examination of GSK's evidence and efficiencies arguments before refusing to exempt it from the EC competition rules[11].

On appeal, even though the European Court of Justice ("ECJ")[12] disagreed with the CFI as to its analysis of the anticompetitive object of GSK's dual pricing system, it nonetheless upheld the CFI's judgment, in particular with respect to the Commission's "insufficient" analysis of the qualification for an exemption.

As a result, the Commission will have to "reconsider" whether GSK's differentiated pricing policy may be exempted from the EC Competition rules[13].

[8] Case T-168/01, *GlaxoSmithKline* para. 121 and147.

[9] Case T-168/01, *GlaxoSmithKline*, para. 189-190.

[10] Case T-168/01, *GlaxoSmithKline*, para. 220, 258-259.

[11] Case T-168/01, *GlaxoSmithKline*, para. 303.

[12] Case C-501/06P, C-513/06P, C-515/06P and C-519/06P, *GlaxoSmithKline Services Unlimited v. Commission of the European Communities* (2009).

[13] Court of Justice of the European Communities, Press release n°85/09 (2009).

A partial victory

If the EU Courts' judgments in the *GlaxoSmithKline* case undoubtedly constitute a victory for pharmaceutical companies, it remains a partial one. Indeed, pharmaceutical laboratories should be aware that the EU Courts, like the Commission, do consider that differentiated pricing policies infringe Article 81(1) EC. Therefore, it will be up to each medicine manufacturer, if challenged, to bring forward substantiated evidence of efficiencies to outweigh the anticompetitive aspects of such agreements.

Parallel trade vs. differentiated pricing policies

The *GlaxoSmithKline* case illustrates the debate over dual pricing and parallel trade practices in the pharmaceutical sector.

On one side, the opponents of differentiated pricing argue that such systems maintain a partitioning of the internal market, whereas parallel trade benefits patients and health care systems as it contributes to driving down medicine prices. It therefore provides patients with more affordable medicines and also puts less financial pressure on National Health Care budgets, as it helps reduce the "costs of the medicines which they reimburse"[14].

On the other side, advocates of dual pricing arrangements claim that parallel trade actually does not benefit patients or National Health Insurance schemes, as wholesalers keep most of the profits resulting from it, so that the profits deriving from parallel trade are never passed on to the final consumers. They also argue that differentiated pricing is necessary in the pharmaceutical sector because of the critical importance of innovation. Pharmaceutical companies can thus reinvest a significant part of the profits recovered through dual pricing in researching and developing new medicines, therefore providing patients with more efficient or new treatments to cure diseases[15].

The tension between these two concerns has encountered new developments as some Member-States are considering legislation that would authorize differentiated pricing for medicines exported to other EU

[14] Case T-168/01, *GlaxoSmithKline*, para. 188.

[15] Case T-168/01, *GlaxoSmithKline*, para. 300.

Member-States. For instance, France has just adopted a bill that would allow such practices[16]. This bill is in contradiction with past legislation that favored parallel imports of medicines from other EU countries. This legislative effort surely represents another victory for pharmaceutical manufacturers operating in France. However, in light of the *GlaxoSmithKline* case (the French Bill is quite similar to the Spanish law in *GlaxoSmithKline*), it will not constitute a full protection against potential antitrust liability. Pharmaceutical manufacturers would still need to bring forward evidence of procompetitive effects resulting from their dual pricing arrangements.

These judicial and legislative developments show that the battle over dual pricing in the EU is not over.

[16] Social Insurance Financing Bill for 2010, passed on November 26th, 2009, Article 11-IV and 11-V, available at: www.senat.fr/petite-loi-ameli/2009-2010/99.html. It modifies Art. L5123-1 of the Public Health Code and foresees that the price of medicines sold in France cannot exceed the national pharmaceutical price set by the Ministry of Economy. It also sets that this regulatory cap does not apply to medicines intended to be exported, therefore allowing to charge higher prices for medicines resold through parallel trade. As of 21 December 2009, the bill is still under review by the French Constitutional Court and thus has not come into force yet.

Modification of Structural Remedies in Colombia's Merger Control

By: Gabriela Mancero, Cavelier Abogados

A landmark decision by the Colombian competition agency (SIC) was reached this year when it accepted a request made by *Postobón*, a major player in the beverages sector in Colombia, to modify the remedies it had imposed on the company after it had acquired 100 per cent of the shares of *Productora de Jugos SA*, a wholly-owned subsidiary of *Bavaria SA* (*SabMiller*'s Colombian arm). The main trademark owned by Postobón in the juice sector is the Hit trademark.

The merger also included the acquisition of assets for juices' bottling and production and trademarks Tutti Frutti and Orense covering beverages. Postobón intended to make Productora de Jugos a key player in the export of fruits.

The intention of the parties was also to integrate horizontally in the production of fruit juices and vertically in the supply of fruits. The merger was filed for clearance before the Superintendence of Industry and Commerce (SIC) who approved it but subject to certain remedies.

SIC's initial decision

In its 30 March 2007 decision, the Competition Agency considered that the vertical integration was favourable to the market due to the increase in the upstream access by Postobón to the supply of fruits. However, the agency was concerned with the fact that trademarks Hit and Tutti Frutti together had a very high share in certain segments of the market, thus restricting competition by third parties.

SIC gave Postobón the option of either selling or licensing the trademark Tutti Frutti, the know-how related to the preparation of fruit juices under such trademark and all related assets. If Postobón chose to license the trademark, such licence had to be granted under strict conditions including at least a 15-year term for the corresponding agreement.

The decision was appealed without success and became final. After this, Postobón requested the SIC to modify the structural remedy imposed on the company in order to avoid the divestiture of the Tutti Frutti trademark.

This article seeks to analyse how remedies should be addressed by the Colombian competition agency and what were the most likely grounds on which the agency accepted a modification of Postobón' structural remedies imposed in March 2007.

Modification of structural remedies

Powers by the SIC

The SIC has ample powers to accept or propose remedies that may overcome obstacles to the clearance of a merger. The SIC has proposed and accepted both structural and behavioural remedies. If the SIC is the one proposing remedies, it would include such remedies within the text of the first instance resolution to the parties. In the case of remedies proposed by the parties involved in the merger, they must offer the corresponding remedies to the regulator and, if acceptable, the regulator will issue a resolution accepting the remedies, imposing follow-up conditions if applicable and clearing the merger.

Once remedies have been either imposed or accepted by the SIC, it usually establishes a follow-up procedure to be carried out by the parties involved in the merger. If the parties do not comply with the terms and conditions set forth in such procedure, the SIC has powers to impose fines and penalties and even to revoke clearance of the merger.

Elements of a remedy

The Colombian competition agency does not publish any guidelines on remedies. Nevertheless, based on international practice, one may argue that assessing the effectiveness of a remedy will involve the following elements:

(a) Restoring the process of rivalry between competitors through remedies that re-establish the structure of the market expected in the absence of the merger (so-called structural remedies such as divestitures) should be

expected to address the adverse effects at source. Such remedies should normally be preferable to measures that seek to regulate the ongoing behaviour of the relevant parties (so-called behavioural remedies such as price caps and supply commitments) as these are unlikely to deal with the adverse effects as comprehensively as structural remedies and may result in distortions compared with a competitive market outcome.

(b) Remedies need to address effectively the length of time for which the restrictive situation is expected to last.

(c) Remedies need to be practical. Remedies that are too difficult to implement or that involve very high costs to the parties may be more complicated to implement, monitor and enforce.

(d) Even though the effect of any remedy will always be to some degree uncertain, it is important for the competition agency to make sure that customers or suppliers of merging parties do not bear significant risks that remedies will not have the impact for which they were imposed or accepted.

The Postobón structural remedy

As previously mentioned, back in March 2007 the SIC imposed on Postobón the divestiture of its Tutti Frutti business. Pursuant to the agency's decision, the remedy would restore competition to what it was in the period analysed at that time (late 2006).

Postobón filed an application to the agency requesting the modification of the remedy, based on the following grounds:

(a) During the two years that had lapsed since the date of the agency's resolution, the fruit juice market had changed substantially with an increase in the number of competitors and the intensity of competition.

(b) A number of beverages companies such as Danone Alqueria SA, Ajegroup, Jumex and Jugos del Valle entered the Colombian market. Bavaria SA, the seller of the business, currently also has a juice manufacturing facility.

(c) The Colombian beverages market had been developed in the past two years and there were now a number of substitutes to fruit juices.

The applicants requested the agency to modify the remedy imposed so that, if a new competitor required distribution and delivery services for its non-returnable container fruit soft drinks, Postobón must enter into a contract for the delivery of such products at the sale point, with such competitors. With the above-proposed modification, Postobón was trying to avoid a divestiture of its Tutti Frutti trademark.

The agency finally reached a decision in May 2009, and decided to grant Postobón the right to keep its Tutti Frutti trademark, under the condition it would continue offering the distribution services to competitors on equal terms and would keep the Tutti Frutti trademark in the market as an option for consumers, as much as it would be possible due to market conditions.

Conclusions

A divestiture should seek to remedy a substantial lessening of competition by either creating a new source of competition through disposal of a business or set of assets to a new market participant or by strengthening an existing source of competition through disposal to an existing market participant independent of the merger parties. To be effective in restoring or maintaining rivalry in a market where the competition agency has decided that there is a substantial lessening of competition, a divestiture remedy must be always analysed within the framework of a constantly changing marketplace. In the particular case of Colombia where there is currently an important flow of foreign capital and foreign industries are establishing their businesses in the country, the agency must keep a balance between making sure that its remedies are duly implemented and evaluating whether such remedies are still producing the expected results in a quickly-changing market environment.

THE SUPREME COURT'S CONSTITUTIONAL LIMITS IN CRIMINAL CASES ON THE USE OF CONCLUSIVE PRESUMPTIONS APPLY TO ALL *PER SE* CRIMES*

By: Charles Weller, Law Offices of Charles Weller, LLC

1. The Supreme Court's Constitutional Limits on Conclusive Presumptions of an Element of a Crime in *Gypsum* and Other Cases Means The Standard Criminal *Per Se* Jury Instructions Are Unconstitutional

"Serious questions under the United States Constitution are raised by the creation and use of presumptions in criminal cases." K. Broun, *McCormick on Evidence* 585, 573 (6th ed. 2006). The Supreme Court's Constitutional rulings limiting the use of presumptions in criminal cases are summarized in Rule 303 of the Federal Rules of Evidence, "Presumptions in Criminal Cases," which was adopted by the Supreme Court in 1972 (although not by Congress), and explained in the Advisory Committee Notes to Rule 303 (see Appendix). See also *McCormick on Evidence, supra*, at 584-93.

Six years later in *Gypsum*, the Supreme Court held a jury instruction that "conclusively" presumed the criminal intent element of a Sherman Act §1 crime was unconstitutional, in effect applying Rule 303:

> "A conclusive presumption [of intent] which testimony could not overthrow would effectively eliminate intent as an ingredient of the offense." *Morissette, supra* at **342 U. S. 275**. The challenged jury instruction, as we read it, had precisely this effect; the jury was told that the requisite intent followed, as a matter of law, from a finding that the exchange of price information had an impact on prices. Although an effect on prices may well support an inference that the defendant had knowledge of the probability of such a consequence at the time he acted, the jury must remain free to consider additional evidence before accepting or rejecting the inference. Therefore, although it would be correct to instruct the jury that it may infer intent from an effect on prices, ultimately the decision on the issue of intent must be left to the trier of fact alone. The instruction given invaded this fact-finding function. [483 U.S. at 446].

In *Gypsum*, the element of an antitrust criminal violation that was involved was the intent element. The same Constitutional limit, however, applies to all elements of the case. *Per se* cases involve "conclusive" presumptions of the unreasonable restraint of trade element.

Therefore, under *Gypsum*, the jury instruction on the unreasonable restraint of trade element must leave "ultimately the decision on the issue" of the unreasonable restraint of trade element "to the trier of fact alone" -- the jury.

Further, the Court's other Constitutional jury rulings, summarized in Rule 303, mean that criminal jury instructions must follow the following standards:

- "The judge is not authorized to direct the jury to find a presumed fact against the accused."
- "When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt."
- "Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so."
- "In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt."

2. Moreover, The Supreme Court Has No Constitutional Authority to Create Common Law Crimes, So the *Per Se* Rules Are Not Common Law Crimes But Evidentiary Rules

The government has at times argued that judicially created *per se* crimes are substantive law rather than evidentiary presumptions. For example, the Seventh Circuit in *U. S. v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101, 1106 (7th Cir. 1979), quotes an Antitrust Division brief asserting:

Since the per se rules define types of restraints that are illegal without further inquiry into their competitive reasonableness, they are substantive rules of law, not evidentiary presumptions. It is as if the Sherman Act read: "An agreement among competitors to rig bids is illegal."

See also U. S. v. Giordano, 261 F.3d 1134 (11th Cir. 2001).

However, common law crimes in the United States are unconstitutional. See, e.g., *U.S. v. Hudson & Goodwin*, 11 U.S. 32 (1812). Since the statutory terms of the Sherman Act do not contain any *per se* crimes, *per se* "conclusive presumptions" are Constitutional if, and only if, they are evidentiary, rather than common law crimes.

Accordingly, this means that jury instructions that take the unreasonable restraint of trade element from the jury using a per se rule's "conclusive presumption" is unconstitutional, and must comply instead with *Gypsum* and the cases underlying Rule 303. Needless to say, this means that the standard government jury instruction in *per se* offenses are unconstitutional, and need to be re-written to comply with the Court's limits on evidentiary presumptions in criminal cases, or Congress will have to pass a law making *per se* offenses a crime.

RULE 303.

FEDERAL RULES OF EVIDENCE

PRESUMPTIONS IN CRIMINAL CASES

(adopted by the Supreme Court; not adopted by Congress)

(a) Scope. Except as otherwise provided by Act of Congress, in criminal cases, presumptions against an accused, recognized at common law or created by statute, including statutory provisions that certain facts are prima facie evidence of other facts or guilt, are governed by this rule.

(b) Submission to jury. The judge is not authorized to direct the jury to find a presumed fact against the accused. When the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge may submit the question of guilt or of the existence of the presumed fact to the jury, if, but only if, a reasonable juror on the evidence as a whole, including the evidence of the basic facts, could find guilt or the presumed fact beyond a reasonable doubt. When the presumed fact has a lesser effect, its existence may be submitted to the jury if the basic facts are supported by substantial evidence, or are otherwise established, unless the evidence as a whole negatives the existence of the presumed fact.

(c) Instructing the jury. Whenever the existence of a presumed fact against the accused is submitted to the jury, the judge shall give an instruction that the law declares that the jury may regard the basic facts as sufficient evidence of the presumed fact but does not require it to do so. In addition, if the presumed fact establishes guilt or is an element of the offense or negatives a defense, the judge shall instruct the jury that its existence must, on all the evidence, be proved beyond a reasonable doubt.

* This argument was developed by the author as part of the trial team and asserted in a criminal antitrust case in Cleveland, *U. S. v. Alliance National Limited Partnership.* The defendants, two individuals and their company, were acquitted after a three week jury trial in June 2009, and thus no appeal on this argument was necessary.

Recent Developments in National Security Reviews of Foreign Investments in Canada

By: Omar Wakil and Phil Mohtadi, Torys LLP

When assessing multi-jurisdictional pre-merger filing requirements, foreign lawyers should not overlook the potential need to submit a foreign investment review application in Canada. Recent changes to the *Investment Canada Act* to permit national security reviews have resulted in heightened interest in Canada's foreign investment review legislation, and have expanded the range of cross-border transactions that might require review.

Under the *Investment Canada Act*, a direct acquisition of control of a Canadian business is generally subject to review if the acquiror is not Canadian and the asset value of the Canadian business exceeds C$312 million. (This asset-value test is expected to change in 2010 to a test based on enterprise value with a significantly higher threshold.) Following amendments enacted earlier this year, the Act now also provides for the review of any foreign investment that could be "injurious to national security," regardless of the asset or enterprise value of the Canadian business, its revenue levels or the percentage interest in the target that will be acquired.

The legislation does not define "national security" or provide a list of factors to consider in assessing whether a transaction may give rise to national security concerns. However, a national security assessment will consider (i) the activities of the Canadian business, in particular whether it has military or strategic importance, and (ii) the nature of the foreign person making the investment.

Although early experience with the new process is limited, a number of developments suggest that the Canadian government will use its power to initiate national security reviews sparingly, and only in connection with transactions that give rise to obvious concerns. Four of these developments are outlined below:

- First, China Investment Corporation's investment in Teck Resources earlier this year did not trigger a national security review, nor did China-based Jilin Jien Nickel's unsolicited bid in September to acquire control of the nickel mining company Canadian Royalties. Although the Teck transaction involved the acquisition of a minority and non-controlling stake, both transactions support the view that, absent other factors, investments in the natural resources sector, even by state-owned enterprises (SOEs), will not generally trigger national security reviews. Conversely, transactions involving critical military or strategic resources, such as uranium, should be expected to involve a review.

- Second, the Canadian government recently declined to review Ericsson's acquisition of the majority of Nortel's North American wireless business. This was a positive early indication that the national security review process would not become politicized. The government declined to act despite intense media coverage, political scrutiny and popular pressure to review the transaction on national security grounds. Some competitors and opposition politicians asserted that next-generation wireless technology should remain in Canadian hands, and that a review was vital to determine whether the acquisition was in Canada's national interest. The Minister of Industry made it clear that the test assesses risk to national security, not national interest, and concluded that "there are no grounds to believe that this transaction could be injurious to Canada's national security."

- Third, the government has issued guidelines regarding how it will review investments by SOEs and sovereign wealth funds (SWFs) seeking to acquire control of a Canadian business. The guidelines make it clear that the issues regarding these investments are commercial orientation and corporate governance. Enforcement staff will not presume that an investment by an SOE or SWF will give rise to national security issues; in fact, the guidelines do not refer to "national security." Notably, International Petroleum Investment Corporation's acquisition of NOVA Chemicals last June, the first major acquisition by an SOE of a Canadian business, did not involve a national security review. Although this does not rule out the possibility that an investment by an SOE or SWF could give rise to national security concerns, the mere fact that an investor is an SOE or SWF is not, in itself, sufficient to trigger a national security review.

- Fourth, the government has repeatedly expressed its desire to attract foreign investment; therefore, commencing a national security investigation without good reason would send a conflicting and potentially damaging signal to foreign investors with respect to Canada's desire for such investment. Earlier this year, the Minister of Industry announced that he had no intention of using the *Investment Canada Act* to discourage foreign investment. On the contrary, he stated, "We are reducing the challenges currently facing international investors who want to invest here. This is critical, because international investment is vital to our country." Similarly, in the context of the CIC/Teck transaction, the Minister of Finance said that investments by state-owned Chinese companies are welcome as long as they are made on a commercial basis. According to a recent Bloomberg report, the Minister said that the *Investment Canada Act* "won't be an obstacle for future investments by the Chinese wealth fund." Notably, the Minister of Industry subsequently approved PetroChina International's investment in properties owned by Athabasca Oil Sands.

The Canadian government appears to have invoked its new national security power only once since the new rules came into force. In August, the government sent a notice to George Forrest International requiring it to supply information about its proposed acquisition of Forsys Metals, a natural resources company whose chief asset was an offshore uranium mining project. News reports speculated that the government requested information about the source of financing for the transaction. Shortly after the notice was received, the transaction was terminated for other reasons, and neither the government nor any of the parties involved have commented on the transaction. This case is interesting because it suggests that an assessment of the origin of an investment will go beyond the acquiror and include the buyer's sources of funding, presumably on the theory that a person or entity financing an acquisition may have the ability to exercise influence over the acquired business. It also highlighted that, as expected, uranium will be the one natural resource in which the government will normally take an interest, even if those assets are not in Canada.

Despite some uncertainty about the scope of the new national security review powers, it is clear that national security concerns are unlikely to play a material role in the vast majority of transactions. Early signs indicate that the Canadian government will use its powers sparingly and that it will not be unduly influenced by popular opinion or motivated by a desire to advance broader national interests. However, assessing the likelihood of a Canadian national security review should be an important part of a multi-jurisdictional pre-merger review analysis.

A Leniency Program in Argentina: Closer than Ever Before

By: Alfredo O'Farrell and Miguel del Pino, Marval, O'Farrell & Mairal*

A decade after the enactment of the Antitrust Law No. 25,156 (the "Antitrust Law") in Argentina, the Antitrust Commission (the "Commission") has recently unveiled its preliminary bill for its amendment (the "Bill"), in order to incorporate a leniency program, as well as the corresponding regulations for the enforcement of such program (the "Regulations").[1]

The Antitrust Commission has defined cartels as those agreements between competitors that restrict competition by agreeing on prices, allocating markets or sharing sensitive competitive information such as sales and volumes of sales.[2] Under the current drafting of the Antitrust Law, in the event that a cartel is proved, the offender will be ordered to cease the infringing conduct and a fine could be imposed, which can range from AR$ 10,000 (approximately US$ 2,700) to AR$ 150,000.000 (approximately US$ 40,540,000).[3] The amount of the fine is calculated considering the loss incurred by the affected parties, the benefit that was obtained by the members of the cartel and the value of the assets involved. The amount of the fine can be doubled in the event of a repeated offence.[4]

However, cartel cases have been rarely prosecuted in Argentina and only a very few have been sanctioned in the past.[5] One of the reasons for this lack of prosecution is the difficulties that the authorities have in investigating the existence of a cartel. A leniency program may solve this problem and increase the number of cartel investigations in Argentina.

The Bill and Regulations

Last November, the Commission released a preliminary version of the Bill Regulations for comment. While the Bill may be subject to changes prior to its filing before Congress, it provides an outline of the leniency program as envisioned by the Commission.

The Bill sets out two different scenarios for infringing parties, namely an exemption and a reduction, both based on a "race-to-the-door" structure.

Infringing parties must comply with the following requirements in order to obtain an exemption from the sanctions set out by the Antitrust Law: (i) to be the first cartel participant to provide the Commission with information and evidence, either in the event that the Commission has not initiated an investigation or if the Commission has initiated an investigation, but has not been able to gather sufficient evidence; (ii) must immediately cease the infringing conduct, unless the Commission deems otherwise in order to preserve the investigation; (iii) must collaborate until the end of the investigation; (iv) must not destroy, forge or hide evidence of the anticompetitive conduct, nor make public the fact that it has filed for leniency, unless such communication is to other antitrust regulators and (v) must not be the leader of the anticompetitive conduct.

Parties who are not 'first in' can request a reduction of sanctions, if they are able to meet the remaining requirements and provide the Commission with useful information for the investigation. The Bill sets out that

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[1] Preliminary bill for the amendment of Antitrust Law No. 25,156 and corresponding regulations for the enforcement of such program recently unveiled by Commissioner Diego Pablo Povolo.

[2] "Cement case", Decision No. 513, issued by the Antitrust Commissión on July 25, 2005.

[3] Considering an exchange rate of AR$ 3.84 for US$ 1.

[4] The Antitrust Law also sets out that the management and other members of the staff of the infringing companies can also be held jointly liable with the company in the event of the setting of a sanction.

[5] "Cement case", Decision No. 513, issued by the Antitrust Commissión on July 25, 2005; "Liquid Oxygen case", Decision No. 510, issued by the Antitrust Commission on July 8, 2005; "Sand producers case", Secretary of Domestic Trade Resolution No. 442, dated October 27, 1986, "Shell Totalgaz case", Decision No. 529, issued by the Antitrust Commission on October 2, 2006, among others.

the reduction could be of 20%, 30% or 50% of the sanction.

The reduction ratios are to be determined by the Commission by taking into account the chronological order of the filing, as well as the number of participants involved in the conduct. If the conduct involves three members, the reduction of the fine to the first requesting party would be 50%, if the conduct involves four parties, the second requesting party's fine reduction would be 30% and if the conduct involves at least five parties, the reduction of the fine for the third requesting party would be of 20%.

The Bill also includes a "leniency plus" provision, by means of which those parties that would not be able to request an exemption regarding the first cartel, but that could provide information on a second cartel can obtain an exemption on the latter, with a 30% reduction in respect of the former.

Additionally, the Bill specifically sets out that there cannot be a joint application for leniency by two parties, the sole exception being if a company and its directors or other members of its staff request leniency under the program.

According to the Regulations, the analysis of the requests for leniency program are carried out by a Leniency Division, which would inform the Antitrust Commission whether the requirements are met in order to grant an exemption or a reduction. All members of the Leniency Division must treat the information filed by the requesting parties as confidential and may be held liable in the event of a leak of information.

The availability of private litigation set out in Section 51 of the Antitrust Law would not be modified under the Bill. This entails that, should a requesting party obtain leniency and be granted a total exemption of the applicable fines, it would still be liable to any third party that may have been damaged by the anticompetitive conduct.

Finally, it is important to bear in mind that an issue that has not been covered by the Bill is the fact that there are penal sanctions set out by Section 300 of the Argentine Penal Code. Such section sets out that any person that may generate a rise or decrease of the price of merchandise, publicly offered funds or securities, by means of false news, fake negotiations or by agreement of the main holders of a good, in order to sell or to refrain from selling at a specific price, will be sanctioned with imprisonment, which may range from six months to two years.

The leniency program, under its current draft, would only be applicable to the sanctions that are set out in the Antitrust Law. Therefore, a requesting party would be granted immunity regarding the sanctions of the Antitrust Law, but could be prosecuted under the provisions of the Argentine Penal Code. This could ultimately discourage parties from using this leniency program.

Conclusion

While it is still too early to decide whether the leniency program will be effective, it shows that the Commission has taken notice of the requests of both the public and private sectors regarding the need for such program.

There are, however, certain issues that should be further analyzed by the Commission.

The inclusion of a provision regarding any applicable penal sanctions would help the future application of this program; otherwise, this process could be in jeopardy due to the fact that managers or other key members of the company's staff could be open to criminal prosecution regarding the very same events in respect of which they have provided evidence to the Commission.

Such possibility, added to the fact that third parties could initiate private litigation against the company based on the result of the investigation of the Commission, will most certainly cast a shadow on the effectiveness of this Bill.

New Trends in Antitrust Regulation in Russia

By: Vassily Rudomino, ALRUD Law Firm

In August 2009 the Federal Law "On Protection of Competition" (the "Competition Law")[1] and the Code on Administrative Offences underwent significant changes.[2] Also at the end of October 2009 amendments to Article 178 of the Criminal Code providing for criminal liability for violation of the antitrust legislation came into force[3](hereinafter "the Second Antimonopoly Package"). The Second Antimonopoly Package covers all sections of the antitrust legislation such as mergers, cartels, restrictive agreements and dominance. The Federal Antimonopoly Service of the Russian Federation (the FAS) is currently preparing the official guidelines on this matter since the new legislation has raised many questions from the business community. The necessity of further development and clarification of the new law is evident, therefore the FAS together with other state bodies started the process of elaboration of the amendments to the Competition Law and the Code on Administrative Offences which are now being referred to as "the Third Antimonopoly Package".

Extraterritoriality of the Competition Law

The Competition Law applies to agreements or actions executed by Russian and / or foreign legal entities, if such agreements or actions are concluded / conducted in relation to assets located in Russia or shares / rights of commercial companies carrying on business activity within the territory of Russia or have any other effect on the state of competition in Russia. This means that the Russian antitrust regulations may be applicable to any agreement or transaction executed outside Russia provided one the parties involved carries on its activity in Russia.

In relation to foreign companies the main question is what criteria should be used to determine whether the company is carrying on business activity in Russia. One of the positions expressed by the FAS officers is that a foreign company can be considered as carrying on activities in Russia if it has a branch / representative office / subsidiary in Russia or has at least one contract regarding goods / works / services in Russia (regardless of the volume of obligations of the parties thereunder). The list of such criteria is not exhaustive; therefore any foreign producing company goods which are circulated in the Russian market can potentially fall under antitrust regulation.

Based on European practice the Competition Law includes the concept of "***the effect on competition"*** as a ground for application of the law to agreements or other actions of legal entities. However the law does not define any criteria for determining whether there has been an effect on competition. One may assume that in assessing the effect of an agreement or a transaction on competition in Russia criteria such as changes in market share, reduction of the number of participants on a particular commodity market and others should be considered. So far as there are no definite criteria and the FAS can make its assessment on a case by case basis.

It is understood that such scope for the application of the Competition Law is too broad, especially in the sphere of merger control. Therefore, currently the FAS is considering the possibility of introducing a new threshold for filing related to the companies' assets or turnover in Russia. These amendments are subject to discussions among the FAS officials responsible for drafting the Third Antimonopoly Package.

[1] The Federal Law "On Protection of Competition" No. 135-FZ dated July 26, 2006 (as amended) initially published in the "Russian gazette" No. 162, 27.07.2006. http://base.garant.ru/12148517.htm

[2] The Code on Administrative Offences of the Russian Federation No.195-FZ dated December 30, 2001(as amended) initially published in the "Russian gazette" No. 256, 31.12.2001. http://base.garant.ru/12125267.htm

[3] The Criminal Code of the Russian Federation No.245-FZ dated June 13, 1996 (as amended) initially published in the "Russian gazette" No.113, 18.06.1996, No. 114, 19.06.1996, No. 115 , 20.06.1996, No. 118, 25.06.1996 http://base.garant.ru/10108000.htm

Restrictive agreements and concerted practices

In the FAS's view it is more appropriate to speak about the effect on competition with regard to restrictive agreements (concerted practices) rather than merger control. For instance, an agreement or coordinated actions of competing foreign companies, irrespective whether they have subsidiaries or some turnover in Russia, aimed at cooperation in the form of market sharing, price fixing, volume of sale and purchase of goods, etc in Russia, can be considered by the FAS as having an effect on competition in Russia. However it should be said that in order to establish that such an agreement or action violates the antitrust regulations, the FAS must also prove the possibility or the fact of restriction of competition, unless the agreement or action falls under the *per se* prohibitions established by the Competition Law. If agreements and concerted practices contain the provisions which fall under the prohibitions *per se*, the FAS does not have to prove the negative consequences for competition in Russia of such an agreement or action.

The Second Antimonopoly Package provided for the liberalization of regulation in respect of vertical agreements. Starting August 2009 they do not fall under the *per se* prohibitions except (i) agreements which lead to fixing of the price for reselling, and / or (ii) agreements which prohibit selling competitor's goods. Companies supplying goods to the Russian market via distribution chains should bear in mind that the above provision related to price fixing is interpreted by the FAS broadly and includes, *inter alia*, setting of minimum / maximum and recommended prices. Even providing distributors with information materials where prices for reselling are indicated can be considered price fixing, provided the FAS finds that most distributors follow such prices. Depending on the market shares of the legal entities participating in the agreement, provisions (i) and (ii) above can apply.

It is expected that the Third Antimonopoly Package will introduce significant changes in the regulation of restrictive agreements and concerted practices. Provided the proposed amendments come into force, the application of the *per se* prohibitions will be limited to horizontal agreements and agreements / actions executed within one group of entities will be excluded from the Competition Law provisions concerning restrictive agreements and concerted practices.

Control over economic concentration (Merger control)

Under the new provisions the pre-transaction filing requirements were limited for certain intra-group transactions; in these cases notification to the FAS nedd only be provided within 45 days after execution of the transaction. However a very large number of intra-group transactions still require pre-transaction notification to the FAS.

The extension of the list of intra-group transactions excluded from the FAS preliminary approval in the Third Antimonopoly Package, to include all deals among groups of companies, is currently being discussed.

Liability for violation of antitrust regulations

Generally the FAS imposes a fixed administrative fine for violation of the merger control regulations and a turnover fine for restrictive agreements and concerted practices. However, recently the FAS imposed a turnover fine on companies which failed to obtain FAS approval for execution of a transaction subject to merger control. The FAS established that the transaction resulted in the restriction of competition, but the positive economic effect of the transaction outweighed the negative effects and therefore the parties were released from liability[4]. Although the FAS's decision to apply a turnover test in this case is of questionable validity it cannot be ruled out that the FAS will continue to impose turnover fines for violation of the merger control regulations in future cases.

A further development with respect to the imposition of liability for antitrust violations, is the imposition of administrative liability on officers of violating companies in addition to the companies themselves. In the short term the FAS is planning to impose separate fines on officers of companies who are the subject of administrative liability for violation of the antitrust regulations.

[4] http://www.fas.gov.ru/news/n_26596.shtml

Cross-Border Antitrust Class Actions: The Canadian Courts Certify Class Actions in the HP and DRAM Cases

By: Christopher Naudie and Catherine Weiler, Osler, Hoskin & Harcourt LLP*

There has been a surge in antitrust class actions in Canada in recent years. In most of these cases, proceedings have been initiated on the heels of international cartel investigations in the U.S., Europe and elsewhere. Until recently, however, only a small number of antitrust class actions have proceeded to a contested certification motion. In virtually all of these cases, the courts have denied certification, largely on the basis that the plaintiffs have failed to demonstrate the existence of a "viable" and "workable" methodology for assessing loss and liability under the *Competition Act*[1] on a class-wide basis. As the leading authority in this area, the Ontario Court of Appeal denied certification of a proposed class proceeding on behalf of indirect purchasers of iron oxide in Canada on these grounds in *Chadha v. Bayer Inc.* in 2003.[2] However, there have been recent signs that the tide is shifting direction. In the past three years, lower courts in Ontario have certified two vertical antitrust class actions, and lower courts in Quebec have certified two horizontal antitrust class actions. But these cases involved purely domestic allegations implicating narrow and (arguably) direct classes. As a result, the antitrust bar in Canada has been closely watching the outcome of two pending certification decisions arising from international price-fixing investigations, namely the certification motion in *Irving Paper Limited v. Atofina Chemicals Inc.*[3] and the certification appeal in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG.*[4]

In its decision in *Irving Paper* in September 2009, the Ontario Superior Court certified a consolidated class of direct and indirect purchasers in the hydrogen peroxide case. In brief, following regulatory investigations in the U.S. and Europe into alleged price-fixing by manufacturers of hydrogen peroxide, class proceedings were launched in the United States and Canada. In late 2008, the Third Circuit released its well-publicized decision which vacated certification of a proposed direct class in the U.S.[5] In early 2009, shortly after the release of the Third Circuit's decision, the plaintiffs argued certification before the Ontario Superior Court of Justice. In the heart of her analysis, Justice Rady focused on whether the plaintiffs had demonstrated a methodology for assessing loss and liability on a class-wide basis. After reviewing the current certification law in Ontario, she concluded that a number of recent decisions outside the antitrust areas had signaled a "different approach" to certification which departed from the Ontario Court of Appeal's decision in *Chadha*. Pursuant to this "different approach", Justice Rady found that the plaintiffs could establish "potential liability" on a class-wide basis by showing that "the defendants acted unlawfully" and by relying on the aggregation provisions under class proceedings legislation.[6]

On the heels of that decision, the British Columbia Court of Appeal in *Pro-Sys* certified a consolidated class of direct and indirect purchasers in the DRAM case in November 2009. Similar to the hydrogen peroxide case, the plaintiffs in *Pro-Sys* had launched class proceedings in B.C. in conjunction with parallel class proceedings in the U.S. arising out of ongoing regulatory investigations relating to the pricing of DRAM (a type of computer memory chip). At first instance, the B.C. Supreme Court denied certification in 2008 (i.e., before *Irving Paper*). In applying the principles of *Chadha*, the certification

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[1] R.S.C. 1985, c. C-34 ("*Competition Act*").

[2] (2003), 63 O.R. (3d) 22 (C.A.), leave denied [2003] S.C.C.A. No. 106 ("*Chadha*").

[3] [2009] O.J. No. 4021 (S.C.J.) ("*Irving Paper*").

[4] 2009 BCCA 503 ("*Pro-Sys*").

[5] *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3d Cir. 2008)("*In re Hydrogen Peroxide*").

[6] *Irving Paper*, *supra* at para. 118

judge had found that the plaintiff had failed to adduce a viable expert methodology for dealing with loss and liability on a class-wide basis, particularly since DRAM was a relatively small component of larger electronic products and was sold through a number of diverse and complex distribution channels.

On appeal, the B.C. Court of Appeal unanimously reversed and granted certification, albeit under a slightly different line of reasoning compared to *Irving Paper*. On behalf of the Court, Justice Smith found that the plaintiffs might be able to establish liability on a class-wide basis under a number of restitutionary theories based on wrongful conduct and resulting gain, without individualized inquiries into whether a given purchaser suffered an actual loss. Justice Smith further suggested that the plaintiffs could rely on "the admissions inherent in the guilty pleas and the plea agreements in the U.S. criminal proceedings" to establish liability to the class, regardless of the ultimate incidence of the alleged overcharge in Canada.[7] Similar to *Irving Paper*, Justice Smith found that the plaintiffs could rely on the aggregation provisions contained in class proceedings legislation. And more generally, Justice Smith found that at the certification motion, the plaintiff's expert evidence should not be subjected to the same "rigorous scrutiny" as it would be at trial. Rather, the plaintiff is only required to meet a "low threshold" by showing a "plausible" methodology for assessing damages on a class-wide basis using regression techniques which might "in theory" be able to ascertain the incidence of the overcharge throughout the class.[8]

If these two decisions are upheld and get traction with other courts, they could represent a sea change in the law of private antitrust enforcement in Canada. The Ontario Superior Court's decision in *Irving Paper* represents the first time that a Canadian court has certified an antitrust class action in an international price-fixing case on a contested basis (*i.e.*, outside a settlement context). Similarly, the B.C. Court of Appeal's decision in *Pro-Sys* represents the first time that a senior appellate court in Canada has certified an antitrust class action in an international price-fixing case on a contested basis. However, taken together, these twin decisions represent a marked departure from the existing law on antitrust class certification in Canada, and they are troubling from a number of perspectives.

First, and most significantly, in *Pro-Sys*, the B.C. Court of Appeal has suggested that a plaintiff may seek to certify an antitrust class proceeding solely based on allegations of wrongful conduct arising from pleas in foreign jurisdictions, even if there is no class-wide method for assessing the "loss" or "deprivation" experienced by purchasers in Canada. In *Chadha* and other prior cases, the courts have repeatedly held that "loss" or "deprivation" is an integral element of the test for civil liability under the *Competition Act* and/or in restitution, and that in absence of a workable class-wide method of assessing these critical issues, a class proceeding would be unmanageable and would not achieved the goals of class proceedings legislation. However, based on the preliminary expert evidence adduced in both cases, there was no meaningful way of assessing whether a particular class member suffered a "loss" or "deprivation" on class-wide basis, particularly given the complexity of the distribution channels, the "ingredient" nature of the product, the largely indirect character of the proposed classes and the real prospect that the alleged overcharge may have simply dissolved at various points in the distribution chain before the DRAM chip or HP solution reached Canadian shores.

In *Pro-Sys*, the Court appeared to assume that the plaintiffs could establish "liability" to class members solely in reliance on the existence of foreign guilty pleas. However, Canadian antitrust law is fundamentally different from U.S. law and that of other jurisdictions. In any event, even if these foreign pleas might have constituted the admission of an offence in Canada, a plaintiff is still required to establish liability to a particular class member which requires the proof of loss and causation. Even under restitutionary doctrines, a plaintiff must still demonstrate the existence of a causal link between the defendant's gain and the plaintiff's deprivation. To establish liability under any of these theories, the Court must engage in individualized inquiries in respect of the impact of the alleged overcharge on millions of consumers in Canada, and the proposed class proceeding would likely degenerate into thousands of individual trials which would be completely unmanageable.

Second, the courts in *Irving Paper* and *Pro-Sys* appear to have adopted an overly low threshold for certification.

[7] *Pro-Sys*, *supra* at para. 44.

[8] *Ibid.* at para. 68.

Under the established case law under *Chadha*, a plaintiff bears the clear onus of leading persuasive evidence that there is "some basis in fact" for the certification requirements. Moreover, in its decision in *Hollick*, the Supreme Court of Canada specifically envisaged that a defendant would have the right to challenge the plaintiff's expert evidence through cross-examination and through its own responding expert analysis.[9] But on the face of their reasoning, the courts in *Irving Paper* and *Pro-Sys* appear to have reduced the test for certification to a pleading test based on the assertion of a "plausible methodology", without "rigorous" review.

Third, with respect to their shared reliance on the aggregation provisions of class proceedings statutes, the courts in *Irving Paper* and *Pro-Sys* applied a line of reasoning that has been discredited in the prior case law given the express language of class proceedings statutes in Canada. In short, these statutes make it clear that the aggregation provisions were intended to assist with the valuation of damages after liability has been determined at trial. As such, numerous courts, including the Ontario Court of Appeal in *Chadha*, have concluded that these provisions cannot be used to identify and establish the existence of common issues at the certification stage before liability has been ascertained.

Finally, from an international perspective, the decision in *Irving Paper* is particularly interesting, since the Ontario Superior Court appears to have reached the complete opposite result as the Third Circuit in the hydrogen peroxide case in the U.S. – even though the plaintiffs relied on the same expert and similar methodologies in both the U.S. and the Canadian proceedings.[10] These two decisions suggest that the standard for certification in Canada may be more liberal (and "less rigorous") than the prevailing standard for certification in the U.S. Given the increasing incidence of cross-border antitrust litigation, it will be troubling to litigants that the certification standards in United States and Canada might be materially different.

Given these issues and the existence of outright conflict at the appellate level in Canada, the B.C. Court of Appeal's decision in *Pro-Sys* is arguably ripe for review by the Supreme Court of Canada. But in the interim, these decisions will almost certainly lead to more antitrust class proceedings in Canada in international conspiracy cases, particularly where a defendant has entered guilty pleas in the U.S. and where plaintiffs have launched parallel class proceedings in the U.S.

[9] *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158.

[10] *In re Hydrogen Peroxide, supra.*

Refinement is the New Expansion: The International Competition Network Prepares for its Second Decade

By: Maria Coppola Tineo, Federal Trade Commission

In eight years, the International Competition Network's membership has grown from 16 to 109 of the world's competition agencies.[1] Similarly, non-governmental advisor (NGA[2]) participation in the Network's annual conference has doubled since the first conference in 2002.[3] The quantity of work has expanded as well: there were fewer than five projects the first year, and today there are more than 35 projects.[4]

The escalation in numbers mirrors the breadth of topics the Network addresses[5], including in the area of developing international best practice. In 2001, ICN members and advisors embarked on developing international best practice ("Recommended Practices") in three areas of merger notification and review procedures; today the Network has adopted 13 best practices on that topic.[6] More than half of the ICN's members with merger control laws have indicated recently that they intend to effect change that would bring their jurisdictions into greater conformity with these Recommended Practices; many jurisdictions have already relied on them to introduce change, including, *inter alia*, Australia, the European Commission, Germany, Korea, Japan, and the United States.

In recent years, the ICN developed international best practice on the assessment of dominance and on the application of unilateral conduct rules to state-created monopolies.[7] In the area of merger analysis, the Network has adopted best practice on topics such as the use of market shares, and entry and expansion, and will put forward best practices on market definition and failing firm defense for adoption later this year.

In addition to creating these international benchmarks, the ICN has developed handbooks, manuals, model legal provisions and documents such as waivers, tip sheets, contact lists, and other practical tools to facilitate the Network's goals of better international cooperation and greater international convergence.

In size, scope, and output, the ICN has grown exponentially since its establishment in 2001.

Refinement is the New Expansion

If "expansion" marked the first eight years of the ICN, refinement may mark the next few years. In 2009, under the leadership of Steering Group Chair John Fingleton, CEO of the UK's Office of Fair Trading, the ICN introduced a series of reforms designed to prepare the Network for its second decade.

Long-Term Vision

This year, the ICN begins preparation for its next decade through the development of long-term vision statements. Steering Group Chair John Fingleton launched this initiative in June 2009, saying "The ICN must develop a bigger and bolder vision, and must innovate in what it

[1] For a complete list of ICN members, see http://www.internationalcompetitionnetwork.org/members/member-directory.aspx.

[2] NGAs are non-governmental experts, including private practitioners, representatives of international organizations, industry and consumer groups, and academics, selected by member agencies to participate in the work of the ICN.

[3] Approximately 50 NGAs participated in the first annual conference in 2002, over 100 NGAs attended the 2009 annual conference.

[4] See June 2009 Summary of ICN Work Product, http://www.icn-zurich.org/Downloads/Materials/ICN_Executive_Summary_of_ICN_Work_Product_June2009_Final_090522.pdf at 22.

[5] In 2001, ICN had a working group on advocacy and another on mergers. Today, ICN has working groups dedicated to advocacy, agency effectiveness, cartels, market studies, mergers, and unilateral conduct. In between there have been dedicated project groups on capacity building, regulated sectors, telecommunications, abuse of superior bargaining position, etc.

[6] The Merger Recommended Practices are all available at: http://www.internationalcompetitionnetwork.org/working-groups/current/merger.aspx.

[7] The Unilateral Conduct Recommended Practices are available at: http://www.internationalcompetitionnetwork.org/working-groups/current/unilateral.aspx.

does. . . . Building on this success, we now need to develop a longer-term vision for the future. There are things we can only achieve over 10-20 years, and these need investments now."[8]

Cooperation and convergence will continue to serve as the ICN's guiding principles, but long-term vision statements will allow the Network to articulate these concepts in a more ambitious fashion by expanding the time horizon for future plans. In contrast with previous years, when projects were planned on a one to two year time horizon, ICN's substantive groups ("working groups") now are looking forward to desired outcomes over the next five years or more and developing high level plans to realize these outcomes.

Prioritization

The demands on ICN grow every year, not just in accomplishing its original objectives or dealing with a larger membership base, but also in taking on new and complex topics. Success in difficult areas such as merger analysis and unilateral conduct means that the competition community looks to the ICN not only to address traditional issues, but also for its insight on new areas as well – most recently, the role of competition policy in the economic downturn. The organization, however, remains entirely "virtual" and voluntary, with no bricks and mortar secretariat nor employees.

The increasing demands come at a time when many agencies and advisors are forced to reexamine their resource base. To meet these challenges, the ICN is examining portfolios, evaluating the value of each individual project and assessing how it contributes to larger goals of cooperation and convergence. Special sessions at this year's annual conference will try to capture accurately member demand for specific projects. Each group's annual work plan will be judged carefully by the working group members and the Steering Group before it is put forward for adoption. The Steering Group will also survey the plans as a whole, to determine whether the projects balance immediate impact and success with projects that lay the foundation for meeting longer-term goals.

[8] See John Fingleton, June 2009 Closing Speech to the ICN Conference, http://www.oft.gov.uk/shared_oft/speeches/2009/spe0909.pdf at 5-6.

Member and NGA Engagement

The Network wants to engage more deeply its members and NGAs, so that each project benefits from a broad perspective of views. Improvements in technology are an important part of this strategy. In the past few months, the ICN's Vice Chair for Outreach, US Federal Trade Commission Commissioner William Kovacic, created the ICN's first blog and bulletin board, at www.icnblog.org. Working groups also began holding webinars for members and NGAs.[9] In January 2010, the ICN launched a more user-friendly website, with improved search capability for ICN documents and better organization for displaying working group accomplishments and new projects, such as the blog and webinars.

The ICN Steering Group has made outreach to new NGAs a major initiative in autumn 2009, with the goal of broadening the diversity of professions and geographic distribution of NGAs. In concrete terms, this has meant the creation of an NGA Liaison position to facilitate outreach to non-members[10], regular communications to existing NGAs[11], information pages for new NGAs[12], and internal guidance about how NGAs participate. The Steering Group will continue this initiative in the spring, examining the experience of other networks to see whether and how non-members might be included better in the ICN's work.

The Road to Istanbul

The ICN's next annual conference will be held in April, 2010 in Istanbul.[13] In addition to the wide range of working group output expected this year – addressing topics such as effective market studies, digital evidence gathering, market definition in mergers, refusals to deal,

[9] See, for example, the November 2009 webinar on excessive pricing, available at: http://www.internationalcompetitionnetwork.org/uploads/2998674%20bundeskartellamt%2018.11.09.mp3.

[10] In September 2009, Fingleton asked Bruno Lasserre, President of the French Autorité de la Concurrence, to act as NGA Liaison until the next annual conference.

[11] See, for example, "Quarterly Update" at http://www.icnblog.org/?p=44.

[12] See "Related Content: Non-Governmental Advisors" at http://www.internationalcompetitionnetwork.org/members/get-involved.aspx.

[13] For more information, see www.icn-istanbul.org.

and agency effectiveness – look for additional signs that the network is focused on a promising future, with long range planning and increased member and NGA engagement.

International Committee Calendar

- Mergers From Strategy To Hearing: A Six-Part Series -- Part Four: Second Requests And Consent Decrees
  January 26, 2010 - 12:30 - 1:30pm ET

- State Sales Below Cost Laws: Everything You Wanted to Know About Navigating A World Without *Brooke Group*
  January 28, 2010 - 12:00 - 1:00pm ET

- December/January In-house Counsel Antitrust Update
  February 2, 2010 - 12:00 - 1:00pm ET

- THE BOWL CHAMPIONSHIP SERIES - IS ANTITRUST NEEDED TO LEVEL THE PLAYING FIELD?
  February 3, 2010 - 12:30 - 2:00pm ET