International Antitrust Bulletin

ABA Section of Antitrust Law

International Committee | ABA Section of Antitrust Law 2010 – Volume 2

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The International Antitrust Bulletin is published four times a year by the American Bar Association Section of Antitrust Law (International Committee).
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Profile:

William Blumenthal

William Blumenthal has worn many hats as an antitrust lawyer, including practitioner, policy maker, and commentator. Currently a partner at Clifford Chance LLP where he chairs the firm's U.S. antitrust group, Mr. Blumenthal has served as Vice Chair of the American Bar Association's Section of Antitrust Law, as chair of the Section's Mergers Committee, and as vice chair of the Section's Joint Conduct Committee. Prior to joining Clifford Chance LLP, he served as General Counsel of the U.S. Federal Trade Commission from 2005 to 2009 and was, for ten years before that, a partner at King & Spalding LLP in Washington, D.C. Mr. Blumenthal spoke with us about the changes in public policy a new administrations brings, key issues confronting U.S. and international competition law practitioners, and the challenges of moving between public service and the private sector,.

Halfway through the Obama administration, Blumenthal is somewhat skeptical of the notion of wide policy shifts between U.S. administrations. While he acknowledges that one cannot judge the government's enforcement record objectively without the same facts that they see in each case, "the record of interventions since January 2009 does not appear to be consistent with predictions of a harder line. Of course, the record of advocacy and policy statements such as the proposed Horizontal Merger Guidelines is a bit harder-line, at least at the margin."

Policy change may, he reflects, be directed more by internal, bureaucratic recalibration than top-down political pressure. "I can think of several complex matters that involved difficult judgments and that ultimately resulted in decisions either not to intervene or to seek more limited relief than might have been required under more expansive theories of challenge . . . had they been presented in 2007 or later." Not because of a switch in administrations between 2005 and 2007, but because of "a change in the Commission's composition and mindset during my period of service." Anyone closely reading the "Commission's rhetoric and enforcement decisions" could predict a turn to more vigorous enforcement.

Blumenthal believes that U.S. antitrust law will continue to present numerous weighty issues for private practitioners and the courts to grapple with beyond the political question of the appropriate general level of government enforcement. The law of single-entity liability was completely reopened by the *American Needle* case. Everyone "will need to rethink their approach to joint ventures, leagues, associations, and other multi-member entities—it's not just that *American Needle* found that the NFL was not a single entity on the facts of the case, but rather that the U.S. Supreme Court did so with language and citations that reopen issues many of us thought had been left in the past. Reconciling the unanimous *American Needle* decision with the unanimous *Dagher* decision presents a doctrinal challenge. Given the prevalence of joint ventures in the economy, I would classify this as a new and unexpected big issue."

Older questions also remain unresolved. For private litigation, "which continues to account for more than 90% of antitrust cases filed in the U.S.," the courts will continue to unravel the implications of *Twombly* and *Iqbal*, which raised the factual threshold for carrying private antitrust cases past the pleading stage and into discovery. The standard governing loyalty discounts has also still not been fixed even though "in *LePage's*, *PeaceHealth*, and the Antitrust Modernization Commission report, we have at least three candidates." The new proposed joint Horizontal Merger Guidelines "present both evidentiary and doctrinal issues, and I expect we'll be working through those for a while." From an enforcement agency perspective, "the *Whole Foods* decision creates an asymmetry between the injunction standards applicable in FTC and DOJ

challenges," which will eventually have to be addressed in a coherent fashion.

Our readers will appreciate that Blumenthal finds that "many of the biggest issues facing U.S. antitrust, particularly federal enforcement officials, relate to cross-border and multi-jurisdictional considerations." On the top of his list is "how to coordinate with foreign agencies without imposing undue burden or endangering confidential information." On the one hand, agencies must learn "how to accommodate foreign investigations and remedies in framing U.S. activity. The recent DOJ decision not to intervene in *Cisco/Tandberg* in the face of commitments received by the E.C. illustrates one model, but other models exist, and all have benefits and drawbacks." On the other hand, U.S. government enforcers must think about how to ensure "that governments do not use their competition laws in furtherance of national industrial policies, trade strategems, or other non-competition objectives, and how to respond when ostensible competition laws are perverted for those purposes." Behind all of these challenges is the subtext of "how to advance U.S. policy objectives in the face of a world that (a) has legal systems that are largely civil law in nature, (b) derives legal systems predominantly from traditions that are not U.S. or U.K. in origin, and (c) largely as a result, increasingly looks to the E.C. as the leading source of competition policy."

The globalization of competition law over the past several years is not entirely without drawback. One is "the burden on international capital markets from the proliferation of merger control regimes with redundant notification requirements, inconsistent time frames, and information demands that too often are excessive when competitive concerns are plainly absent." Another more general problem is "the proliferation of competition regimes with sometimes-inconsistent policy objectives, economic philosophies, and implications for business operations." And a third, which "hasn't received the attention that it deserves," is "how to assure that global competition policy does not devolve into a least-common-denominator framework in which the most restrictive jurisdiction governs." While restrictive regimes are not frustrated by the operation of a foreign free-market regime "current doctrine doesn't seem to provide an adequate mechanism for protecting the interests of those jurisdictions favoring economic liberty." Thus, the objectives that market-oriented regimes "seek to achieve, and in particular the efficiencies that they seek to realize . . . are subverted if the business community must conform to the more restrictive rule."

And how does Mr. Blumenthal find life in private practice in comparison to his tenure with the government? "Reintegrating back into private practice [after government service]" can be challenging whether one has been in government "only a couple of years (as compared to my four years)," whether one is returning to a former firm, and whether one's return "coincides with economic booms [or] economic droughts." The key is to consider all implications to entering government service, so that you can "return to the private sector with realistic expectations." "All in all," he concludes, "the return has been easier than I feared it might be, and for that I credit colleagues around the globe who have been wonderfully welcoming."

The U.S. Supreme Court's *Booker* Decision and Other Recent Decisions Concerning Defendants' Jury Trial Rights Require That the "Naked Agreement" Element of Per Se Crimes Be Treated As Factual Issue for Juries

By: Charles Weller, LLC*

Antitrust practice in the U.S. has long assumed that the "naked agreement" facts of per se crimes such as price-fixing are legal, not jury, issues. However, a recent series of jury trial decisions by the U.S. Supreme Court outside antitrust law, including the revolutionary *Booker* case on the then-mandatory Federal Sentencing Guidelines, are a wake up call for the Antitrust Division and the defense bar that this assumption is not valid, with profound implications for criminal antitrust practice in the U.S., including:

1. At trial, the jury must be presented jury instructions and decide the "naked agreement" issue, not the judge at a charging conference,

2. The grand jury must be presented the facts and decide the "naked agreement" element of a per se crime, not the Antitrust Division,

3. An indictment is defective if it does not include essential facts on the "naked agreement" element of a per se crime.

I. The "Naked Agreement" Element in U.S. Per Se Antitrust Case

In the U.S., one of the elements of per se criminal or civil case is a "naked agreement." As Professors Areeda and Hovenkamp explain, "per se condemnation is appropriate for restraints that are properly classified as 'naked.'"[1] As the Antitrust Division and Federal Trade Commission have stated: "Antitrust law treats naked agreements among competitors that fix prices or allocate markets as per se illegal."[2]

It has long been assumed in both criminal and civil antitrust practice in the U.S. , as noted, that the "naked agreement" issue is a legal, not a jury, issue. As Professors Areeda and Hovenkamp put it, "both principle and practice make clear that a judge rather than a jury decides what is per se unreasonable, even though that decision depends on factual assessments about the nature and likelihood of the harms and benefits at stake for competition."[3] Similarly, the ABA's *Model Jury Instructions in Civil Antitrust Cases 2005 Edition* states that a per se jury "instruction is appropriate if a court determines that the alleged restraint is illegal per se," whereas "if the court determines that the alleged restraint should be evaluated under the rule of reason, the jury should be instructed in accordance with the rule of reason."[4]

* Charles Weller, Cleveland, Ohio (*weller@nxgh.net)* an antitrust practitioner for 37 years, asserted this argument as a member of the successful trial team in a 12-count criminal antitrust case in June 2009 in Cleveland, *U. S. v. Alliance National Limited Partnership*. The two individuals and company defendants were acquitted after a three week jury trial, so there was no appeal of this argument. A longer article that explores this and other arguments developed for the trial are published by the author in 54: 1 *Antitrust Bulletin* 157 (2009).

1 Areeda & Hovenkamp, 7 *Antitrust Law* 403 (2d ed. 2003).

2 U.S. Department of Justice & Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* 71, 107 (1996) (emphasis added).

3 Areeda & Hovenkamp, 2 *Antitrust Law* 74 (3d ed. 2007); "**1909b. Selection of rule presents question of law.** While applying any one of antitrust's modes of analysis might involve many fact questions, the selection of a mode is entirely a question of law." 11 *Antitrust Law* 279 (2d ed. 2005).

4 *Id*. at B-21.

However, another area of law, outside antitrust law, is American constitutional law guaranteeing criminal defendants trial by jury and indictment by a grand jury, which undermines this long standing practice and assumption, as shown next.

II. American Criminal Defendants' Jury, Grand Jury and Indictment Rights under U.S. Constitutional Law

As a matter of American constitutional law, a criminal defendant is guaranteed a jury trial of all elements of a crime. As the unanimous U.S. Supreme Court held in *U.S. v. Gaudin* in 1995:

The Fifth Amendment to the United States Constitution guarantees that no one will be deprived of liberty without 'due process of law'; and the Sixth, that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.' We have held that these provisions require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.[5]

Furthermore, the Court explained, the right to jury decision making "was designed 'to guard against a spirit of oppression and tyranny on the part of rulers,' and 'was from very early times insisted on by our ancestors in the parent country, as the great bulwark of their civil and political liberties.'"[6]

Significantly, six of the Justices of the unanimous Court in 1995 are still on the bench. Criminal defendants also have similar jury rights, for similar reasons, with grand juries, as discussed below. The importance of jury trial rights to the U.S. Supreme Court is underscored by the Court's recent extension of jury trial rights to the sentencing phase of criminal proceedings in *Jones*, *Apprendi, Booker* and other cases that have revolutionized criminal sentencing law.[7]

Sentencing is a complex, disputed and evolving area of constitutional law that need not occupy us here. Fortunately, a criminal defendant's constitutional jury, grand jury and indictment rights are well established.

A. The "Naked Agreement" Element is a Jury, not A Legal, Issue

At trial, the 1995 unanimous decision in *Gaudin* is controlling. *Gaudin* was a criminal case involving an alleged false loan application to a federal agency. The defendant challenged what had become the standard practice that the judge, not the jury, decided the *materiality* element of the crime on the theory it was a legal, not a jury, issue.

The U.S. Supreme Court unanimously held the standard practice of having the judge, not the jury, decide the materiality issue—like the "naked agreement" issue here—was unconstitutional. There is, the Court held, an "historical and constitutionally guaranteed right of criminal defendants to demand that the jury decide guilt or innocence on every issue, which includes application of the law to the facts."[8] Accordingly. the "trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed that right."[9]

Thus, like "materiality" in *Gaudin*, the long-standing antitrust practice in the U.S. that assumes that the "naked agreement" issue is a legal, not jury, issue is also unconstitutional. At trial, the jury must be presented jury instructions and decide the "naked agreement" issue, not the judge at a charging conference.

B. The "Naked Agreement" Element is a Grand Jury Indictment, not An Antitrust Division, Issue

Russell v. United States[10] is a leading case in the U.S. on constitutional issues regarding grand juries and indictments. In *Russell*, the Supreme Court held the indictments of six people were constitutionally defective for not including sufficient facts under the Fifth and Sixth Amendments. The Court explained:

5 515 U.S. 506, 509-10 (footnote omitted) (1995).

6 *Id.* at 510-11 (citations omitted).

7 Jones v. United States, 526 U.S. 227 (1999); Apprendi v. New Jersey, 530 U.S. 466 (2000); Blakely v. Washington, 542 U.S. 296 (2004); United States v. Booker, 523 U.S. 220 (2005); Cunningham v. California, 549 U.S. 270 (2007).

8 515 U.S. at 513.

9 *Id.* at 523.

10 369 U.S. 749 (1962).

Any discussion of the purpose served by a grand jury indictment in the administration of federal criminal law must begin with the Fifth and Sixth Amendments to the Constitution. The Fifth Amendment provides that 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .' This specific guaranty, as well as the Fifth Amendment's Due Process Clause, are, therefore, both brought to bear here. Of like relevance is the guaranty of the Sixth Amendment that 'In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature and cause of the accusation.'[11]

Specifically, the Court ruled on two subjects particularly relevant here.

First, the "'very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.'"[12] Otherwise, "a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."[13]

However, the customary U.S. criminal antitrust practice is for the "naked agreement" element and facts never to be presented to the grand jury, which is asked to indict without ever knowing this essential element of the crime. In the grand jury context, the Antitrust Division of the U.S. Department of Justice, not the grand jury or a judge, decides the issue. The result is just what the Supreme Court in *Russell* makes clear the Constitution intends should not happen: Excluding the "naked agreement" element from the grand jury undermines the "'very purpose of the requirement that a man be indicted by grand jury," which is "to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.'" Further, a defendant could "be convicted on the basis of facts ... <u>not even presented to, the grand jury which indicted him.</u>" (emphasis added).

Second, the Court in *Russell* held that "[w]here guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the criminal statute."[14] The Court also explained that "these basic principles of fundamental fairness retain their full vitality" in Fed. R. Cr. Proc, 7(c), which requires the "indictment or the information shall be a plain, concise and definite written statement of **the essential facts** constituting the offense charged…"[15]

Again, since the "naked agreement" element is assumed to be a legal issue for the court, the essential facts of the "naked agreement" element are not included in the indictment.

Thus, these two *Russell* constitutional grand jury and indictment protections are violated by the customary practice of treating the "naked agreement" element as a legal, not jury, issue. As the Court explained in *Jones*, when "a fact is an element of an offense ... , elements must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt."[16]

Conclusion

The customary practice in U.S. criminal antitrust practice of treating the "naked agreement" facts of per se crimes as legal, not jury, issues violates the constitutional jury and grand jury rights of criminal defendants. If this conclusion is correct, U.S. criminal antitrust trials must implement profound changes to criminal procedure, including:

1. At trial, the jury must be presented jury instructions and decide the "naked agreement" issue, not the judge at a charging conference,

2. The grand jury must be presented the facts and decide the "naked agreement" element of a per se crime, not the Antitrust Division,

3. An indictment is defective if it does not include essential facts on the "naked agreement" element of a per se crime.

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[11] *Id.* at 760-61.

[12] *Id.* at 771 (citation omitted).

[13] *Id.* at 770.

[14] *Id.* at 764.

[15] *Id.* at 766.

[16] Jones, 526 U.S. at 232.

Austria: First-in-Line Leniency Applicant Fined Due to Negligent, Incomplete Cooperation

By: Christina Hummer, Saxinger Chalupsky & Partners

On April 14, 2010 the Austrian Cartel Court ("Court") released a decision[1] imposing an overall fine of EUR 1.52 million on four undertakings participating in a cartel in the printing chemical sector.[2] The investigation of the cartel by the Austrian Federal Competition Authority ("FCA") was triggered by a leniency application by Donauchem. As in other jurisdictions, if all requirements are fulfilled no fine will be imposed on the first leniency applicant for its cooperation with the authority. However, in this particular case, Donauchem negligently failed to fulfil its obligation of full cooperation. Consequently, the FCA requested the Court to impose a fine on Donauchem despite having been the first leniency applicant.

The Leniency Applications

Donauchem was the first leniency applicant. It submitted evidence of the cartel covering a certain period of time ("Period A"). During the investigation of the FCA a second leniency applicant, DC Druck-Chemie, provided the FCA with evidence covering a preceding period of time ("Period B"). For this newly uncovered period of the cartel, the FCA granted DC Druck-Chemie leniency. This is in line with paragraph 26 of the European leniency program, which states that "[i]f the applicant for a reduction of a fine is the first to submit compelling evidence in the sense of point (25) which the Commission uses to establish additional facts increasing the gravity or the duration of the infringement, the Commission will not take such additional facts into account when setting any fine to be imposed on the undertaking which provided this evidence."[3] In addition, DC Druck-Chemie received for its cooperation for Period A a reduction of 50% of the fine, the maximum possible reduction available for a second leniency applicant.

Regarding Donauchem the FCA granted full immunity for Period A, but concluded that due to *negligently* not having provided it with all the evidence in its hands to present the complete infringement Donauchem had violated its obligation of full cooperation according to section two of the Handbook of the FCA on the Implementation of Section 11 paragraph 3 of the Austrian Federal Competition Act ("Leniency Programme"), which states that a leniency applicant "*consequently [has to] cooperate with the FCA promptly and without restrictions in order to fully clarify the matter*."[4] As a result, Donauchem, as the first leniency applicant, was nevertheless subject to a fine for Period B, which, however, was reduced according to § 30 KartG 2005.[5].

Concerning the level of such a reduction, the FCA argued to the Court that in order not to jeopardize the incentive for other companies to apply for leniency in the first place, a reduction of a fine based on cooperation outside of the leniency program has to be lower. Hence, cooperation provided after having been confronted with all the facts of the investigation has to be considered lower than voluntary cooperation before the initiation of proceedings in front of the Court. So far, cooperation outside of the leniency program has already on at least one occasion led to a reduction of fines but at a significantly lower level of only 5%.[6]

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[1] KG 14.4.2010, 29 Kt 5/09. See the FCA's press release at http://www.bwb.gv.at/BWB/Aktuell/druckchemikalien_geldb_14042010.htm. The decision is currently under appeal.

[2] The names of the undertakings and the respective fines imposed are as follows: Donau Chemie AG and Donauchem GmbH (collectively "Donauchem"): € 675.000; DC Druck-Chemie Süd GmbH & Co ("DC Druck-Chemie"): € 397.000; Brenntag Austria Holding GmbH und Brenntag CEE GmbH: € 381.000; Ashland-Südchemie-Kernfest GmbH und Ashland Südchemie Hantos Ges.m.b.H.: € 66.000.

[3] Commission Notice on Immunity from fines and reduction of fines in cartel cases, OJ 8.12.2006 C 298/17.

[4] *See* Leniency Programme, available at: www.bwb.gv.at/NR/rdonlyres/0FFD1CE9-6A5E-4AF5-8775-E1F13DA7376A/35907/Handbookleniency_englishversion.pdf.

[5] The level of cooperation regarding disclosing the illegal conduct during the course of the proceedings in front of the cartel court should be taken into consideration. According to the legislative materials such cooperation can be considered in case an undertaking having participated in the cartel contributes to the disclosure and the prosecution of that cartel.

[6] OGH 8. 10. 2008, 16 Ok 5/08.

However, in the case at hand, the FCA took into consideration that Donauchem admitted its involvement in the infringement for the newly discovered period and largely admitted the facts of Period B of the cartel during the course of the proceedings in front of the Court. Thus, the FCA considered a 25% reduction to be appropriate.

Remarks

The Court, which holds the final authority to impose a cartel fine in Austria, agreed with the FCA's position on the appropriate level of fine to be imposed on Donauchem, the first leniency applicant. The Court found that the cartel violations that took place in two separate periods of time constituted only one single instance of infringement. However, while the Court recognized that the FCA (in line with the practice of the European Commission) could not simply penalize a company for not disclosing the entire period of time of the infringement if unknown to the company, the FCA could revoke protections due to negligent conduct where an applicant failed to take reasonable efforts and care to ensure it had cooperated fully.

If such a case of incomplete cooperation had been subject to an investigation by the European Commission, the conditional leniency of the first leniency applicant probably would have been withdrawn completely, and a reduction of the fine outside of the leniency program[7] granted instead.[8] Consequently, the FCA found an interesting solution by providing Donauchem full immunity for Period A but only a reduction of fine for the Period B. As this cartel case is only the fifth cartel case prosecuted and sanctioned with a fine under the new Austrian regime, which came into force in 2002, and as its leniency program was only introduced in 2006, the FCA did not want to deter potential future leniency applicants. However, at the same time it made it clear that one should take cooperation as a leniency applicant seriously.

The overall outcome, namely that the first leniency applicant ended up with the highest fine imposed on the companies involved in the cartel, is unfortunate but simply the result of a fair calculation, for which the FCA used the main principles of the Fine Guidelines of the European Commission[9] as a basis.

Conclusion

This decision is definitely a landmark decision regarding a negative outcome for a first leniency applicant. However, because the outcome was based on fact-specific circumstances involving negligent incomplete cooperation of a first leniency applicant, it should not give companies any pause in participating in Austria's leniency program, so long as they ensure that their cooperation with the FCA is as thorough, accurate, and complete as reasonably possible.

[7] According to para 29 of the Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, OJ 1.9.2006 C 210/2 ("Fine Guidelines"), it is a mitigating circumstance where the undertaking concerned has effectively cooperated with the Commission outside the scope of the Leniency Notice and beyond its legal obligation to do so.

[8] *See* Case COMP/C.38.281/B.2 - Raw Tobacco Italy.

[9] *See infra* note 7.

The European Commission Study on Quantifying Damages and Indirect Purchasers

By: Henry B. McFarland, Economists Inc.

The brief discussion of indirect purchaser damages in the European Commission's recent study on "Quantifying Antitrust Damages" provides a useful introduction to the subject.[1] Indirect purchaser damages have received increased attention in a number of jurisdictions lately. Canadian courts certified classes including indirect purchasers in two recent decisions.[2] Moreover, while U.S. federal antitrust law does not allow indirect purchasers to collect damages, indirect purchasers recently have had success under certain state laws.[3] Estimating such damages, however, involves a number of complications not encountered when estimating damages for direct purchasers.

Quantifying indirect purchaser damages is difficult because it requires considering the interactions of two separate economic markets: the upstream market where the antitrust violation occurred and the downstream market where some of the effects might have been felt. The central question is the extent to which the effects of the violation in one market are passed through to the customers in the second market. A variety of factors will affect the extent of pass-through.

The study focuses largely on one of these factors, the structure of the downstream market. Theory indicates that if suppliers in the downstream market are perfectly competitive, suppliers will pass-through 100% of any increase in their marginal cost, the cost of producing an additional unit of output. By comparison, a monopolist in the downstream market will pass-through only 50% of an increase in its marginal costs, if those costs are constant with output and if demand is linear. Different oligopoly models suggest pass-through rates between 50% and 100%. These statements concerning the relationship between industry structure and pass-through, however, all assume that marginal costs do not increase with output. That assumption implies a very elastic supply; there is a relatively large increase in the amount the downstream industry supplies in response to the price it receives. That in turn suggests that the suppliers' response will dominate the extent of pass-through. If marginal costs are increasing, then supply will be less elastic, and the reactions of consumers to higher prices, an issue the report only briefly touches on, will also affect the extent of pass-through.

The need to consider consumer reactions may greatly complicate the pass-through analysis, particularly if the violation affects more than one downstream industry. The consumers of different downstream industries may differ significantly in their ability to turn to alternative products and thus in their reaction to a price increase. Thus, different downstream industries may have very different pass-through rates and require separate analyses. For example, the plaintiffs' expert in one of the Canadian cases differentiated purchasers of hydrogen peroxide in the pulp and paper industry from those in water treatment.[4]

Another important issue affecting pass-through rates is whether the antitrust violation affects all or only some of the competitors in the downstream market. The report describes cases where, because not all suppliers are affected by the violation, the pass-through rate is zero. The extent to which unaffected suppliers prevent pass-through, however, depends on their share of the market and their elasticity of supply. Unless the supply of the unaffected suppliers is infinitely elastic, some pass-through will

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[1] "Quantifying antitrust damages. Towards non-binding guidance for courts," study prepared for the European Commission, December 2009, available at ec.europa.eu/competition/antitrust/actionsdamages/. The study does not represent an official position of the European Commission.

[2] *Irving Paper Limited et al. v. Atofina Chemicals Inc. et al.* (*Irving Paper)* [2009] O.J. 4051 (S.C.J.) (hereafter "Irving Paper") and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG,* 2009 BCCA 503.

[3] For an example of a case in which substantial damages were awarded to indirect purchasers based on the antitrust laws of several states, see Shannon Henson, "Hydrogen Peroxide Indirect Purchasers Win $4.2M Deal," *Law360, June 10, 2010, competition.law360.com/articles/174223. See also* Order Granting IP Plaintiffs' Motion for Class Certification and Denying Motions to Exclude Expert Opinions, *In Re: Static Random Access Memory (SRAM) Antitrust Litig.* (N.D. Cal. Nov. 25, 2009).

[4] *Irving Paper* at ¶ 134.

probably occur. Suppose, for example, a price fixing conspiracy raises the costs of a domestic industry that competes with imports but does not affect the costs of the importers. The downstream domestic industry will likely respond to the higher costs by reducing its output. The effect on the consumers downstream will depend on how readily imports expand to replace the reduction in domestic output. If importers require significantly higher prices to increase their sales in the country, then pass-through may be substantial.

Timing is also an important issue when considering pass-through. Price increases in the downstream market may not take place until well after the antitrust violation in the upstream market. As the report notes, the violation may only affect downstream industry costs that are fixed in the short-run. Violations that only affect fixed costs are at first unlikely to affect the downstream industry's price. Over time, however, fixed costs may become variable costs, and thus begin to influence pricing. For example, suppose price fixing increases the cost of an industry's equipment. At first, there will be no downstream price effect, and thus no pass-through, as that industry continues to use the equipment that it already has on hand. Eventually, however, that equipment will wear out. While investments in that equipment may have made an adequate return at the lower price, such investments may not be profitable now that the equipment is more expensive. Thus, the downstream industry may reduce capacity, and as a result its output will fall and its price will rise.

Other factors may affect the timing of pass-through. In some industries, pass-through may be delayed by the existence of long term contracts that do not have escalator clauses. In that case, the timing of pass though may be different for customers whose contracts expire at different times. Moreover, if price increases are costly, for example because they require revising and reissuing a substantial volume of sales literature, then suppliers in the downstream market may delay passing though a cost increase until they determine how long it will last.

As is evident from even this article's brief survey of the topic, accurately calculating indirect purchaser antitrust damages is a highly complicated endeavour requiring exhaustive industry and consumer analysis. There is no default, off-the-shelf model for calculating such damages. For example, if the consumer response in the downstream industry is likely to affect the extent of pass-through, a model of indirect damages may have to take account of factors that influence that response, such as the prices of substitutes. Similarly, in cases where the violation does not affect all downstream suppliers, a model of indirect damages will have to consider how the response of the unaffected suppliers affects pass-through.

Considerations involving the timing of pass-through also have important implications for attempts to quantify damages. If the effects of the violation in the downstream market are likely to lag behind its effects in the upstream market, then the model of indirect purchaser damages will have to account for that possibility. Using a model that assumes that pass-though happens either more or less quickly than is the case can lead to seriously biased estimates of damages.

As courts hear more and more indirect purchaser suits, and as parties gain experience in shaping discovery, expert analysis, trial hearings, and settlement negotiations with respect to calculation of indirect purchaser damages, the economic nuances of such calculations will increasingly become part of the standard repertoire of the antitrust practitioner.

First Price Cartel Cases Under the Chinese AML

By: Cunzhen Huang, Jay Modrall and Matthew Bachrack, Cleary Gottlieb Steen & Hamilton LLP

The Chinese National Development and Reform Commission ("NDRC"), which is the authority responsible for price-related violations of the Chinese Anti-Monopoly Law (the "AML"),[1] recently announced action on two price cartel cases:

- On March 30, 2010, NDRC published the results of its (and its local agencies') investigation of a price cartel among rice noodle producers in Nanning and Liuzhou (two cities in Guangxi province).
- On April 30, 2010, NDRC published the results of its local agency's investigation of a price cartel organized by the local industry association among tableware disinfection product producers in Xiamen (a city in Fujian province).

These cases are the first enforcement actions against price cartels publicized by NDRC and/or its agencies since the AML came into force on August 1, 2008.[2] While both were straightforward cases of price-fixing, the authorities' handling of these cases raises interesting questions about the relations between the AML and other Chinese laws.

The Cartels and investigations

Rice Noodles

According to NDRC, beginning on November 1, 2009, the Nanning Xian Yi Ge Food Plant and its manager, Que Zhihe, organized a cartel among 18 Nanning rice noodle producers. On January 1, 2010, the 18 producers jointly raised prices, and other producers followed. After the price hike in Nanning, several producers in Liuzhou contacted Que Zhihe to discuss the price increase and organized three meetings in January 2010. Ultimately, 15 Liuzhou producers also agreed to raise prices effective January 21, 2010 and signed profit-sharing agreements with Que Zhihe. As a result, in January 2010 wholesale rice noodle prices increased approximately 26% and retail price rose an average of 14%.

The investigation was led by NDRC, with the assistance of the Bureau of Commodity Prices of Guangxi Zhuang Autonomous Region (which is NDRC's local agency at the provincial level) and Nanning and Liuzhou government departments. According to NDRC's press release, the authorities involved also included public security departments, quality supervision departments, grain administration departments, SAIC's commerce and industry departments, food and drug administration departments, and local agencies of MOFCOM.[3]

After preliminarily confirming the existence of price collusion, the Nanning and Liuzhou authorities instructed the concerned rice noodle producers immediately to bring their violations to an end, held meetings to call on producers to ensure normal supply, and established an emergency response plan to stabilize prices and guarantee supply. Subsequently, prices in Nanning and Liuzhou dropped to levels in place prior to the collusion.

Administrative sanctions were imposed on 33 rice noodle producers, with the three organizers receiving the largest fines,[4] 18 other participants receiving fines depending on the gravity of their offenses,[5] and 12 producers who cooperated with the investigation, provided important leads, and took corrective measures on their own initiative receiving only administrative warnings. Price authorities also sent Price Supervision and Inspection Opinions/"reminder of caution" letters[6] to

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[1] Under the AML, the Ministry of Commerce ("MOFCOM") is responsible for merger control notifications and antitrust conduct taking place in international trade, while the State Administration for Industry & Commerce ("SAIC") is responsible for non-price related antitrust conduct.

[2] Unlike MOFCOM, which is required to publish conditional approvals and prohibitions of concentrations, SAIC and NDRC are not obligated to publish their AML decisions.

[3] MOFOCM was involved through a local agency, the department for " rectifying and standardizing the market economy order."

[4] The fines were RMB 100,000 (~$14,700 or €11,000).

[5] The fines ranged from RMB 30,000 (~$4,400 or €3,300) to RMB 80,000 (~$11,700 or €8,800).

[6] A "reminder of caution" is not an administrative sanction. According to NDRC's Measures Regarding Reminders of Caution in

some rice noodle producers that unknowingly followed the price rise, requesting these producers to strengthen "price self-discipline" and maintain "good market price order." Some media reports indicated that five individuals involved in the rice noodle cartel (including Que Zhihe) were detained in March by public security agents for allegedly engaging in the crime of "forcing to deal." It is not clear which authorities issued the decisions and/or imposed the sanctions.

Tableware Disinfection Products

According to NDRC, the Xiamen Bureau of Commodity Prices (which is NDRC's local agency at the city level), and some media reports, on April 19, 2010, the Xiamen Office of Fujian Tableware Industry Association organized a cartel among 28 tableware disinfection enterprises. The association and its members decided that as of May 1, 2010, their distribution price would be increased by RMB 0.10 per 5-piece set. A "Meeting Minute Regarding Price Increase on Tableware Disinfection Products in Xiamen" was signed by the participating enterprises, which were asked not to reduce their prices or compete for customers for three months and to make a deposit of RMB 5,000 to ensure their compliance.

The Xiamen Bureau of Commodity Prices conducted the investigation and held a "reminder of caution" meeting on April 27. At the meeting, the Xiamen Bureau pointed out the illegality of the cartel and requested the industry association and enterprises to immediately bring the violation to an end, take corrective measures (including returning the deposits), and eliminate the ill effects. The Xiamen Office of Fujian Tableware Industry Association and participating enterprises committed to do so. The Xiamen Bureau of Commodity Prices will monitor their compliance.

Legal framework

Two principal Chinese laws apply to price cartels: the AML and the Price Law.

- Price cartels are prohibited by Article 13 of the AML. NDRC's development of implementing rules under the AML has progressed slowly, however; notably, NDRC has not yet proposed a leniency regime for cartels.

- The Price Law, effective as of May 1, 1998, is not specifically aimed at anti-competitive behavior, but it prohibits collusion on prices (Article 14). NDRC, together with its local agencies, has established a relatively comprehensive implementing framework for the Price Law and gained extensive enforcement experience.

Under the AML, NDRC may authorize its agencies at the provincial level to enforce the AML. Under the Price Law, government price departments at and above the town level are responsible for investigating and sanctioning illegal price conduct (Article 33), while in the case of price cartels and below-cost dumping, provincial agencies are responsible for making decisions on cases occurring below the national level (Article 40).

NDRC has stated that the AML must be applied together with the Price Law, since these laws are not substitutes for one another.[7] However, the AML and the Price Law (and its implementing measures) differ with regard to their scope, the administrative sanctions that can be imposed, and the appeal process.

Analysis

Although the rice noodle cartel case was widely reported as the first price cartel case under the AML, NDRC was in fact unclear regarding which law it applied. In the rice noodle case, both the AML and the Price Law were invoked, though interviews and press reports suggest that NDRC and its local agencies relied more heavily on the Price Law than on the AML. NDRC lists the tableware disinfection products cartel under the "anti-monopoly enforcement" tab on its website, but in its report, the Xiamen Bureau of Commodity Prices only cited the Price Law.

Although a number of authorities were involved in the rice noodle cartel investigation, the specific roles they played are unclear. There are no reports regarding the involvement of agencies other than NDRC and its local agencies in the investigation and decision-making process of the tableware disinfection product cartel.

In both cases, the speed and informality of the authorities' approach was striking. In both cases, the

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Price Supervision and Inspection issued on October 24, 2007, a "reminder of caution" only applies when (i) illegal price conduct has not yet occurred or (ii) the illegal price conduct is minor and the authority chooses not to impose administrative sanctions.

[7] *See* http://www.ndrc.gov.cn/jggl/zhdt/t20080829_248411.htm

authorities used "reminders of caution" in the form of meetings or letters, which are not administrative sanctions under Chinese law. In the rice noodle cartel, authorities in Nanning and Liuzhou held "reminder of caution" meetings even before establishing the preliminary evidence of price collusion. Press reports regarding the rice noodle case indicate that the Liuzhou government asked rice noodle producers to reduce their wholesale and retail prices to the pre-cartel level after uncovering preliminary evidence of price collusion. The legal basis for such measures is unclear, but Article 30 of the Price Law authorizes national and provincial agencies to take action when prices of important products or services rise or are likely to rise sharply.

These cases also shed light on NDRC's approach to leniency. NDRC's press release on the rice noodle cartel mentions that 12 producers that cooperated with the investigation, provided important leads, and took corrective measures on their own initiative were given immunity from monetary penalties. This announcement suggests that NDRC applied a kind of leniency policy, though officially NDRC has not yet proposed a leniency regime. The legal basis for these 12 rice noodle producers to be exempted from fines may be Article 15 of the Regulations on Administrative Sanctions for Price-Related Illegal Conduct and Article 27 of the Law of Administrative Sanctions, which provide that "if the illegal conduct is minor and is corrected in time and the conduct does not lead to damages, no administrative sanctions will be imposed." Under Article 15, there is no limit on the number of undertakings who can benefit from the exemption. NDRC's approach is inconsistent with SAIC's proposed leniency policy, which apparently applies to at most three companies, with only the first reporter receiving complete immunity.

Interestingly, while the AML does not criminalize antitrust violations, some media reports indicated that five individuals involved in the rice noodle cartel (including Que Zhihe) were detained in March by public security agents for allegedly engaging in the crime of "forcing to deal" under Article 226 of the Chinese Criminal Law.

Conclusion

Compared to SAIC and MOFCOM, NDRC has been slow to develop rules and guidelines implementing the AML within its field of jurisdiction. NDRC has also been slow to take action, at least publicly, in respect of price cartels. The announcement of two price-fixing investigations in the space of a month may herald a shift in NDRC's enforcement practice. On closer examination, however, NDRC's announcements raise as many questions as they answer.

First, do NDRC's announcements represent a more aggressive approach to cartel enforcement or simply a decision to publicize its enforcement actions? It is notable that in both cases the illegal conduct was identified and action taken very quickly, and both cases involved price fixing on a local level. NDRC may have detected and taken action against other such cartels since the AML entered into force, but chosen not to publicize them.

Second, what is the relationship between the AML and other Chinese laws? Although the AML entered into force in 2008, NDRC continues to apply the Price Law alongside (or even in preference to) the AML. NDRC may feel more comfortable with the Price Law, which has more fully developed implementing rules and a substantial enforcement history.

Third, how is enforcement authority divided between NDRC and other government agencies? The AML and the Price Law confer jurisdiction for price-related violations on NDRC (and its local agencies). In the rice noodle case, however, a number of other authorities were involved, even though the statutory basis for their involvement was not entirely clear.

Fourth, what do these cases indicate about NDRC's approach to leniency? NDRC appears willing to grant leniency to some cartel members, but it does not seem to apply a leniency policy of the type proposed by SAIC and used in other jurisdictions. Twelve members of the rice noodle cartel received only warnings, and no fines were imposed in the tableware disinfectant cartel, even though none of the participants is credited with having blown the whistle on the cartel. NDRC seems to grant leniency based at least in part on the harm done by cartel members, instead of (or in addition to) granting leniency to one or a small number of cartel members while imposing high fines on other members as an inducement for whistle-blowers.

Fifth, what is NDRC's policy on fixing fines and other penalties? Although NDRC imposed fines on a number of rice noodle cartel members, it did not indicate how these fines were calculated. Unlike Western antitrust

authorities, NDRC and its agencies seem to rely on informal measures such as "reminder of caution" letters and meetings quickly to put an end to cartel violations.

Although NDRC's announcements in the rice noodle and tableware disinfection products cases raise many questions, these announcements are a welcome indication that NDRC is actively enforcing Chinese legal prohibitions against price fixing. As NDRC develops its implementing rules and enforcement experience in this area, it can be expected that the AML will evolve into the principal tool for enforcement of price-related antitrust violations, as anticipated when the AML entered into force almost two years ago.

New EU Antitrust Rules for Distribution and Supply Agreements

By: Johannes Zöttl and Mirjam Erb, Jones Day

The European Commission ("Commission") published the long-awaited revised Vertical Block Exemption Regulation ("2010 VBER")[1] and the revised Guidelines on Vertical Restraints ("2010 Guidelines")[2] in April 2010. The 2010 VBER and Guidelines entered into force on June 1, 2010 and will be effective until May 31, 2022.

The 2010 VBER and Guidelines amend and restate previous versions that were in force for ten years. In the EU, these rules and guidelines are the primary source for the antitrust assessment of vertical agreements, i.e. agreements between businesses that operate at different levels of the production or distribution chain. The changes that the 2010 VBER and Guidelines bring about for supply and distribution agreements are limited in scope but nonetheless significant for companies doing business in Europe. This article summarizes some of the key changes that apply since June 2010.

1. Prohibition and Exemption: The Role of Block Exemptions in the EU Antitrust System

The phenomenon of "block exemptions" is particular to the EU antitrust system. They are a reflection of the mechanics of Article 101 of the Treaty on the Functioning of the European Union ("TFEU"),[3] the EU equivalent to Section 1 of the U.S. Sherman Act.

Article 101(1) TFEU prohibits agreements and businesses practices that have as their object or effect the prevention, restriction or distortion of competition and, additionally, may affect trade between EU member states. Article 101(3) TFEU exempts such restraints of trade from the prohibition if they (i) improve the production or distribution of goods or promote technical or economic progress; (ii) allow consumers a fair share of the resulting benefit; (iii) do not impose restrictions on the parties to the agreement or businesses practice that are not indispensable to the attainment of objectives (i) and (ii); and (iv) are unable to eliminate competition with respect to substantial parts of the market involved.

Whether an agreement or business practice satisfies these four conditions for exemption either needs to be assessed individually on a case-by-case basis or follows from the Commission's regulations. If the agreement or business practice satisfies the specific criteria set forth in one of those regulations, the exemption applies irrespective of whether the general exemption criteria of Article 101(3) TFEU are satisfied. There are several of those regulations, and they contain specific criteria for the type of agreement ("block") to which they apply.[4]

The Commission issued the first block exemption for vertical restraints in 1999 ("1999 VBER").[5] The 1999 VBER was the first of a series of block exemptions in which the Commission defined a safe harbor based on market shares and granted an exemption in the absence of severe restraints of competition. Additionally, the Commission published Guidelines for vertical restraints ("2000 Guidelines")[6] that summarized the Commission's perspective on the 1999 VBER and on vertical restraints that were not exempt by operation of the 1999 VBER.

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1 Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, [2010] OJ L142/1.

2 Commission, Guidelines on vertical restraints, [2010] OJ C130/1.

3 The text of Article 101(1) TFEU is identical to Article 81 of the EC Treaty, as amended by the Treaty of Lisbon effective December 1, 2009.

4 In addition to the block exemption for vertical agreements in general, there are block exemptions inter alia for distribution agreements in the motor vehicle sector, IP licensing transactions, specialization agreements and R&D agreements.

5 Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, [2009] OJ L 336/21.

6 Commission, Guidelines on Vertical Restraints, [2000] OJ C 291/1.

The 1999 VBER expired on May 31, 2010. The Commission believed that the regulation has worked well, as it reduced compliance costs and bureaucracy. However, the Commission was well aware that antitrust concepts and markets have changed since 1999/2000 so that certain changes needed to be made to both the regulation and the guidelines.

While each of the 27 EU member states has its own competition rules, these rules may not prohibit agreements or business practices that are legal under the EU competition rules. Conversely, national competition rules may not legalize agreements and business practices that are prohibited by the EU competition rules.[7]

2. Safe Harbor: The New Market Share Threshold

The 1999 VBER set forth a market share threshold of 30% for the supplier. If the supplier was below that threshold, any and all restraints of trade were exempt from the Article 101(1) TFEU prohibition, unless the agreement contained any of the particularly severe types of restraint of trade that the 1999 VBER black-listed in Article 4 (often referred to as "hardcore" restraints). Certain non-compete provisions are not exempt but must be assessed on a case-by-case basis.

The 2010 VBER maintains the structure of the "safe harbour," together with the 30% threshold. However, it applies the threshold to both suppliers and buyers (Article 3(1)). The Commission found this approach necessary to respond to the increasing bargaining power of large retailers.

In its first draft of the 2010 VBER, the Commission went even further. There, it applied the market share threshold to "any of the relevant markets affected by the agreement." This would have meant that the parties would have had to assess the buyer's downstream market share in its selling market(s). The Commission's proposal triggered severe criticism by stakeholders, and the final version of the 2010 VBER pursues a narrower approach. Regardless, the new two-level threshold obviously increases the burden of assessing the market shares involved. Even more importantly, as a result of the new test, the block exemption no longer applies to agreements with buyers in concentrated markets. This may benefit small and medium-sized distributors by making them more attractive as distribution partners.

3. "Hardcore" Restraints: Old Concepts for New Issues

The 2010 VBER carries over the Commission's time-tested "black list" approach and lists restrictions that are considered particularly harmful to competition. If a vertical agreement contains one (or several) such restraint(s), the exemption that would have been available in the absence of the restraint is unavailable with respect to any and all restraints of trade that the vertical agreement contains.

The 2010 VBER left the definitions of hardcore restraints largely unchanged but the 2010 Guidelines provide additional and, in parts, novel guidance on how the Commission interprets those definitions.

3.1 Internet Distribution

Mirroring the 1999 VBER, Article 4(b) of the 2010 VBER prohibits any "restriction of the territory into which, or of the customers to whom, a buyer […] may sell the contract goods or services." Article 4(b)(i) allows restraints on "active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer."[8] The 2010 Guidelines define "active sales" as sales resulting from actively approaching individual customers, while "passive sales" respond to unsolicited requests from individual customers (¶ 51).

All of this was already contained in the 1999 VBER and the 2000 Guidelines. In addition, the 2000 Guidelines clearly stated that "(e)very distributor must be free to use the Internet to advertise or to sell products" (¶ 51). However, under the 2000 Guidelines, the Commission's

[7] Article 3(2) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, [2003] OJ L 1/1 ("Regulation No 1/2003"). This level playing field does not extend to unilateral conduct, in relation to which EU member states are free to enact rules that are more restrictive than Article 101 TFEU. Article 3(3) Regulation 1/2003.

[8] In selective distribution systems, i.e. distribution systems in which suppliers sell goods or render services only to those distributors they selected on the basis of specified criteria, Article 4(c) of the 2010 VBER prohibits restrictions on active and passive sales to end customers.

perspective on restrictions imposed on Internet distributors was quite unclear.[9]

The 2010 Guidelines attempt to strike a balance between the business interests of producers of quality (branded) products and Internet distributors, in light of the Commission's perception of the underlying risks for competition in the EU. The general rule continues to be that online sales qualify as passive sales and, therefore, cannot be prohibited. However, the 2010 Guidelines contain a number of important exceptions and qualifications (¶¶ 52 to 54).

In particular, suppliers may not request that online distributors:

- Prevent customers in territories that are exclusively reserved for other distributors from viewing their website;
- Re-route such customers to other websites;
- Terminate website transactions once the credit card data reveal an address that is not within the distributor's exclusive territory;
- Limit their proportion of overall sales made over the internet; and
- Pay higher prices for products intended to be resold offline than for products intended to be resold offline by the distributor.

By contrast, suppliers may request that online distributors:

- Not use offline advertisements that are specifically addressed to certain customers outside their own exclusive territory (e.g. territory-based banners on third party websites);
- Place links on their websites to websites of other distributors that are responsible for other territories and/or of the supplier;
- Agree to a fixed fee for the support of the distributor's offline or online sales efforts;
- Sell at least a certain absolute amount (in value or volume) of the supplier's products offline; and
- Operate their business in a manner that is consistent with the supplier's distribution model, in particular, complies with the quality and service standards imposed by the supplier.

When the 2010 VBER was published, some E-sellers found the last criteria particularly troublesome. Until a few days before publication, their industry associations continued to submit further expert opinions and press releases in an attempt to persuade the Commission to drop this provision. The Commission remained unimpressed. The 2010 VBER allows a supplier to impose a requirement on re-sellers to operate from "brick and mortar" shops, if the supplier finds that this way of distributing their products best reflects the quality standards suppliers are free to define. Moreover, this applies not only to selective distribution systems but also to exclusive distribution, which is the type of distribution system in which many if not most products are marketed in the EU. However, suppliers are not allowed to dissuade distributors from using the Internet by imposing criteria for online sales which are not "overall equivalent" to the criteria imposed for the sales from the brick and mortar shop (¶ 54).

3.2 Efficiency Defense

Under the 1999 VBER, it used to be the general understanding that hardcore restraints were very unlikely, if not downright unable, to benefit from an individual exemption pursuant to Article 101(3) TFEU. This has changed. On the one hand, pursuant to the 2010 Guidelines, hardcore restraints give rise to a presumption that an individual exemption by Article 101(3) TFEU is not available. On the other hand, the 2010 Guidelines provide that such restraints can be defended on the basis of "likely efficiencies" (¶ 47).

[9] This has lead to inconsistencies in judicial reasoning. For instance, in Germany, the Federal Court of Justice found that the supplier of quality products may prohibit its distributors from selling these products solely online if the supplier operates its distribution system based on specific criteria designed to ensure brand recognition and customer service (November 4, 2003, KZR 2/02). With regard to offline distribution through auction platforms, the Higher Regional Court of Karlsruhe found that a prohibition on using such platforms does not amount to a prohibition on sales in the meaning of the 1999 VBER but, instead, merely reflects quality criteria a supplier may use for selecting distributors for branded products (November 25, 2010, 6 U 47/08 Kart.). The Higher Regional Court of München does also not apply the 1999 VBER to prohibition on the offline distribution through auction platforms, although for different reasons. It regards such prohibitions as too vague and volatile for them to amount to a restriction on the type of customers as defined in the 1999 VBER (July 2, 2009, U (K) 4842/08). By contrast, for a largely similar distribution arrangement, the Regional Court of Berlin did not allow a supplier to prohibit internet sales (July 24, 2007, 16 O 412/07 Kart).

For instance, pursuant to the 2010 Guidelines (¶¶ 61-64), the efficiency defense is likely to succeed if the parties prove that the restraint is necessary:

- To ensure a "genuine entry into a new market," in order to protect investments in promotional activities;
- For the purpose of testing a new product in a limited territory or a limited customer group;
- To recoup the investments in offline distribution such that products must be sold online at higher prices than products sold offline (dual pricing).

In addition, the 2010 Guidelines take a novel position on certain types of resale price maintenance ("RPM"). Article 4(a) 2010 VBER prohibits fixed or minimum resale prices that restrain the distributor's ability to determine its sales price. Maximum resale prices and recommended resale prices are legal. In its administrative practice, the Commission has pursued a rigorous approach to RPM.[10]

Unlike the 2000 Guidelines, the 2010 Guidelines specifically state that RPM can be justified according to Article 101(3) TFEU if efficiencies exist (¶ 225). Examples are RPM needed to increase the distributors' sales efforts:

- To support the introduction of a new product;
- To enable coordinated low-price campaigns in franchise systems (for two to six weeks); and
- For high-quality services in case of complex products.

One wonders if this (new) part of the 2010 Guidelines is the Commission's way of responding to *Leegin*[11]. Important differences between the 2010 Guidelines and the U.S. federal antitrust laws remain. Most notably, the burden of proof regarding efficiencies rests with the defendant, and the standard of proof is particularly high for the efficiency defense under EU law. It remains to be seen whether defendants will be able to raise the efficiency defense successfully.

The 2010 Guidelines, therefore, do not grant much leeway for the efficiency defense. Contrary to the 2010 Guidelines' "presumption" of illegality for hardcore restraints such as RPM, however, the Court of Justice of the European Union found that "no anti-competitive practice can exist which, whatever the extent of its effects on a given market, cannot be exempted, provided that all the conditions laid down in Article [101(3)] are satisfied."[12] Notably, the 2010 Guidelines are legally binding only on the Commission, and not on the courts or the antitrust agencies of EU member states.

4. Conclusions

The Commission has often been applauded for its "more economic approach," which is also reflected in the 2010 VBER and Guidelines. However, this approach means nothing more than the proposition that the EU desires to come to economically sound decisions. The fact that the 2010 VBER applies this approach to the web 2.0 world and RPM within a framework it set more than ten years ago demonstrates the shortcomings of the Commission's attempt, in the 2010 VBER and Guidelines, to fit modern antitrust concepts into a rather mechanic structure defined by lists of prohibited clauses, with vast areas left for self-assessment in light of fairly generic Commission guidance. Regardless, the new rules for vertical restrains of trade are to be welcomed as they provide business with somewhat increased levels of flexibility compared to the 2000 Guidelines, and overall strike a reasonably well structured balance between the commercial interests involved.

[10] *See, e.g.*, July 5, 2000, COMP/36.516 – Nathan-Bricolux; June 29, 2001, COMP/36.693 – Volkswagen (overturned by the General Court in T-208/01 [2003] ECR II-5141); June 24, 2002, COMP/37.7709 – B&W Loudspeakers; July 16, 2003, COMP/37.975 – Yamaha. These decisions are available at the Commission's website.

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

[12] Case T-17/93 – Matra Hachette [1996] ECR II-595 ¶ 85.

Treatment of Intellectual Property Under Competition Law in Korea

By: Soon Sik Ju* ("Sean") and Suejung Alexa Oh**, Yulchon, Attorneys at Law

The *Guidelines on Review for Unreasonable Exercise of Intellectual Property Rights* (the "Guidelines") issued by the Korea Fair Trade Commission went into effect as of April 2010. Aiming to provide businesses with clear guidance as to the type of conduct that is prohibited, the Guidelines also offer predictability in the application of competition laws to various intellectual property issues.

Under the competition laws of Korea, intellectual property rights are, in principal, exempt from application of the *Monopoly Regulation and Fair Trade Act* ("MRFTA").[1] When intellectual property rights are *unreasonably* exercised, however, such conduct comes under the purview of competition laws according to the same standards as other conduct that restrains fair competition. Whether intellectual property rights are being unreasonably wielded, and thus call for the intervention of competition laws, is determined based on standards provided in the Guidelines.

The Guidelines, as amended, crystallizes existing applications of competition laws to intellectual property rights rather than introduce entirely new standards. The relationship between intellectual property rights and competition laws are reinstated and guidance is provided with regard to defining relevant markets and balancing between efficiency enhancements and restraints on competition.

Descriptions of specific conduct under the Guidelines mirror the policy of the Commission as apparent in recent major decisions, most notably its findings against Qualcomm, Intel,[2] Microsoft and certain pharmaceutical companies. For example, patent ambush and discriminatory licensing are types of conduct that are considered to be an unreasonable exercise of intellectual property rights under the Guidelines. Other provisions such as prohibitions against unreasonable agreements in the context of patent dispute settlements address pay-for-delay settlements used in the pharmaceutical industry.

The following is an overview of the major categories of conduct addressed under the Guidelines and examples of relevant enforcement activities:

(1) Licensing practices

The Guidelines prohibit, among other conduct, discriminatory licensing and imposition of royalties after expiration of licenses. Also prohibited are unreasonable licensing terms and conditions that qualify as resale price maintenance, tying or restrictions on trading partners or use of competing technology.

An example of discriminatory licensing may be found in the Commission's case against Qualcomm Inc., where Qualcomm was found to have imposed higher royalties on mobile phone manufacturers that used competing modem chips when licensing CDMA mobile communication technology.[3] The use of tying was an issue in the Commission's case against Microsoft Corporation where Microsoft was found to have abused its market dominant position and conducted unfair trade practices by tying its Windows Media Service to Windows Server Operating Systems and Windows

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[1] Article 59 of the MRFTA.

[2] Decided June 2008. Imposed surcharges and corrective orders against Intel for abuse of market dominance in the CPU market through conditional rebates.

[3] Decided July 2009. Imposed surcharges and corrective orders against Qualcomm Inc. for unreasonable licensing practices for CDMA chipsets.

Media Player and Messenger to Windows PC Operating Systems.[4]

(2) Patent pools and cross-licensing

Unreasonable refusals to license or discriminatory licensing to non-parties of the patent pools are addressed in the Guidelines. Compelling blanket licenses after including expired or non-essential patents in the patent pool are also types of conduct that would qualify as being unreasonable an exercise of intellectual property rights.

In its decision against Qualcomm, the Commission also addressed the issue of imposing royalty payments, after expiration or invalidation of the relevant patents, when licensing CDMA mobile telecommunication technology to mobile phone manufacturers.[5]

(3) Exercise of patent rights in standardization

Patent ambush in the standardization process and unreasonable refusals to license standardized technology may qualify as an abuse of intellectual property rights. Whether a standardized technology is licensed in a fair, reasonable and non-discriminatory manner is a major consideration in assessing whether the particular patent is being unreasonably exercised.

The Guidelines clarify that standardization as used in the Guidelines is not limited to designation by official standardization organizations but may also include intellectual property rights that are in effect considered a standard such as when the use of certain designated technologies is a prerequisite to biddings for public contracts.[6]

(4) Abuse of litigation and patent disputes

Use of sham litigation and unreasonable agreements in patent disputes are also prohibited under the Guidelines. The prohibition against unreasonable agreements in the context of patent disputes aims to prevent patent holders from reaching agreements with generic producers to delay the market entry of generic pharmaceuticals in return for payment (otherwise known as pay-for-delay settlements). The Guidelines prohibit such practice on the basis that such conduct prolongs the monopoly of the expired patent holder, hinders new market entry by competitors, and may reduce consumer welfare.

Merger control

The Guidelines clarify that transfer of intellectual property rights may qualify as a business transfer to which the merger regulations of the MRFTA would apply. This would be the case when transfer of the relevant intellectual property right has the actual effect of a business transfer.

In addition to providing clarity in the Commission's enforcement of competition laws to intellectual property rights, the Guidelines are also viewed by some as a signal of the Commission's next major move—the Commission is said to be planning an industry-wide inquiry into the pharmaceutical and information technology sectors for possible abuse of intellectual property rights. Although the focus of the inquiry is likely to be on the abuse of intellectual property rights in licensing between holders and users of original technology, other anti-competitive conduct not specifically related to intellectual property, such as tying and restriction of various business conduct through conditional licensing agreements are also likely to be targets of the inquiry. In any case, the details of the Guidelines provide insight as to the general policy direction of the Commission and should be noted by all those conducting businesses that affect the Korean market.

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[4] Decided December 2005. Imposed surcharges and corrective orders against Microsoft for tying its Windows Media Player and Messenger programs with its operating system.

[5] *See id.*

[6] For enforcement examples, see the Commission's decision against Kovac Inc. (decided November 2006), case 2006 *seokyung*0442 and 2006 *seokyung*0748.

Commissioner of Competition Initiates Abuse of Dominance Proceeding Against the Canadian Real Estate Association

By: Kaeleigh A. Kuzma of Osler, Hoskin & Harcourt LLP

In February 2010, the Commissioner of Competition ("Commissioner") brought an application against the Canadian Real Estate Association ("CREA") alleging that restrictions on the use of the Multiple Listing Service ("MLS") system violate the abuse of dominance provision found in section 79 of the *Competition Act* (Canada).[1] It is not the first time the Commissioner has taken issue with conduct in the real estate industry.[2] CREA is vigorously defending the allegations and as of this writing a consent (i.e., settlement) agreement does not appear to be on the horizon. The case follows in the footsteps of various U.S. proceedings brought by the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") against providers of residential real estate brokerage services.

The abuse of dominance provision states that the Competition Tribunal ("Tribunal") may find an abuse of dominance where: (a) one or more persons substantially or completely control, throughout Canada or any area thereof, a class or species of business; (b) that person or those persons have engaged in or are engaging in a practice of anti-competitive acts; and (c) the practice has had, is having or is likely to have the effect of preventing or lessening competition substantially in a market. Case law has established that for conduct to be anti-competitive, it must be "predatory, exclusionary or disciplinary"[3] and directed at a competitor.[4] Significantly, only the Commissioner may make an application to the Tribunal under section 79. Where the Tribunal finds an abuse of dominance, it may issue a prohibitive order against any or all firms engaged in the anti-competitive practice, order other actions such as the divestiture of assets or shares, and/or impose an administrative monetary penalty not exceeding ten million dollars (or fifteen million dollars for a subsequent order).

The MLS system is the collective series of electronic databases of homes for sale in Canada and historical sales information. CREA controls the MLS system and related trademarks in Canada and licences their use to its member real estate boards. The Commissioner argues that the MLS system is the only comprehensive listing of homes for sale in Canada. The Commissioner further argues that the majority of brokers believe they must list a property on the MLS system in order to "adequately serve their customers and effectively compete with other brokers", that other options such as newspaper listings are not effective substitutes, and that the MLS system is essential for the provision of residential real estate brokerage services. Because CREA controls the MLS system, in the Commissioner's view, CREA has market power with respect to the provision of residential real estate brokerage services.

CREA has certain use-restrictions on the MLS system that, in the Commissioner's opinion, are anti-competitive. The Commissioner claims that these restrictions impose minimum service requirements on all members, thereby restricting consumers' ability to select real estate services that suit their individual needs and instead forcing consumers to purchase a pre-bundled set of services if they want their home listed on the MLS system (which, as noted above, the Commissioner views as an essential service). It is argued that these restrictions prevent entry and impede the expansion of alternative business models, and eliminate suppliers of fee-for-service or unbundled real estate brokerage services in Canada. The Commissioner further alleges

[1] *Commissioner of Competition v. The Canadian Real Estate Association*, CT-2010-02, documents available at http://www.ct-tc.gc.ca/CasesAffaires/CasesDetails-eng.asp?CaseID=325.

[2] In December 1988, a prohibition order was granted to address alleged agreements to lessen competition with respect to the commissions, service or practices of nine real estate boards in five provinces. The order applied to the nine real estate boards as well as, through agreement with CREA, the other boards across Canada.

[3] *Canada (Director of Investigation and Research) v. NutraSweet Co.* (1990), 32 C.P.R. (3d) 1 at 34 (Comp. Trib.).

[4] *Commissioner of Competition v. Canada Pipe Co.*, [2006] F.C.A. 233 at para. 68.

that the exclusion of fee-for-service brokerage services from the marketplace has also reduced competition among traditional full-service brokerages.

In response, CREA argues that contrary to the Commissioner's assertion, its members offer a wide range of business models, including discounted rates, flat-fee arrangements and various fee-for-service arrangements, and that it is "simply untrue that consumers have only one option if they want to sell their house using a MLS system". Moreover, CREA passed new rules in March 2010 (and advised the Commissioner of these impending changes prior to the Commissioner's filing of the application with the Tribunal) that in its view address the Commissioner's concerns. CREA claims that it is merely a trade association that does not provide residential real estate brokerage services and therefore does not have market power. CREA also states that other sales arrangements such as "for sale by owner" provide a competitive alternative to the MLS system, strong competition exists among real estate agents and brokers, and entry barriers to becoming a registered real estate agent are low. Further, CREA argues that in order for the MLS system to operate effectively and maintain the distinctiveness of the MLS trademark, it is necessary that contributors follow and maintain certain standards associated with the MLS system which reflect a distinct set of professional services, and that the rules associated with MLS are an expression of CREA's "fair and reasonable right to control the use of its trademarks."[5]

In addition, Lawrence Mark Dale and National FSBO Network Inc. ("NFN") requested leave to intervene; these requests were opposed by CREA and the Commissioner, respectively (while the Commissioner did not oppose Dale's request, she took issue with the extent of his proposed participation). Dale, co-founder of Realtysellers (Ontario) Limited, claimed that CREA specifically targeted the company's alternative fee and services program. NFN, a national network of private home sellers, said its involvement in the case would provide the Tribunal with a complete understanding of the residential real estate brokerage services industry in Canada. The motions for leave to intervene were heard in June; Dale's request was rejected (but he will be called as a witness by the Commissioner) whereas NFN's request was granted. The Tribunal hearing is scheduled to commence in April 2011.

The U.S. DOJ and the FTC have launched various cases against what are seen as improper restrictions on competition in the provision of residential real estate brokerage services in the United States. In May 2008, the DOJ announced it had reached a settlement with the National Association of Realtors to address certain policies that in the DOJ's view allowed traditional brokers to discriminate against brokers using an alternative business model by way of limiting their access to the MLS system.[6] Also in May 2008, the DOJ filed an action against Consolidated Multiple Listing Service, Inc. ("CMLS") of Columbia, South Carolina. The complaint stated that CMLS violated section 1 of the *Sherman Act* by limiting membership to only those brokers who provided a prescribed package of services, thereby excluding alternative innovative and lower-cost options. A settlement was reached in August 2009 whereby CMLS agreed to modify its rules and conduct, and was prohibited from requiring potential members to pay an initiation fee exceeding the reasonably estimated cost incurred by CMLS in adding a new member.[7] The DOJ claims that CMLS is not abiding by this term of the agreement and in January 2010 brought a motion requesting that the court direct CMLS to cease overcharging brokers who seek to join CMLS and compete in the Columbia area.

In October 2009, the FTC reversed an administrative law judge decision and found that Michigan-based realtor group Realcomp II Ltd. ("Realcomp") violated section 5 of the *Federal Trade Commission Act* which declares all "unfair methods of competition" unlawful. The FTC found that Realcomp's practice of refusing to post the real estate listings of discount brokers to publicly available websites, and excluding these listings from the default searches within Realcomp's proprietary database,

[5] The Tribunal took into account similar considerations in its decision to strike an application alleging that Warner Music's refusal to grant copyright licences to make sound recordings from their master recordings to BMG, which needed such licences to compete in the mail order music club business in Canada, constituted a refusal to deal under section 75 of the *Competition Act*. See *Director of Investigation and Research v. Warner Music Canada Ltd.* (1997), 78 C.P.R. (3d) 321 (Comp. Trib.).

[6] *United States. v. National Association of Realtors*, No.05C-5140 (N.D. Ill., Eastern Div., Nov. 18, 2008), available at http://www.justice.gov/atr/cases/f239600/239655.htm.

[7] *United States v. Consolidated Multiple Listing Service, Inc.*, No.3:08CV01786SB (D. S.C., Columbia Div., Aug. 26, 2009), available at http://www.justice.gov/atr/cases/f249600/249614.htm.

restricted the ability of its member agents to offer consumers lower-priced alternatives to traditional full-service real estate brokerage services.[8] Realcomp has sought a review of this decision. Notably, the decision confirms the "inherently suspect" analytical framework developed by the FTC in previous cases[9] and signals its readiness to take action against certain conduct that exists within the context of a valid joint venture without a detailed examination of competitive effects.

If the Commissioner's case against CREA is successful, it could result in changes to the way in which the Canadian real estate brokerage services industry operates. Of perhaps broader significance to the competition law community in Canada is that if the case against CREA is ultimately heard by the Tribunal, it would be the first abuse of dominance application before the Tribunal in five years. Canada's enforcement record of this provision is sparse as there are less than one dozen reported cases, and the case would provide the Tribunal with an opportunity to build on Canada's very limited abuse of dominance jurisprudence.

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[8] *In the matter of Realcomp II Ltd.*, FTC Docket No. 9320 (Oct. 30, 2009), available at http://www.ftc.gov/os/adjpro/d9320/index.shtm.

[9] See for example *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) (affirming *Polygram Holding, Inc.*, FTC Docket No. 9298 (2003)).

Private Damages Actions for Antitrust Violations in Russia

By: Vassily Rudomino and Anna Numerova, ALRUD Law Firm

This article examines the law of private antitrust actions for damages brought by individuals and legal entities in Russia. These types of actions are widely brought in the US and the UK, and are becoming increasingly available in other jurisdictions as part of efforts to supplement government enforcement of antitrust laws. Compensation for antitrust damages can be realized under the rules of specific statutory frameworks (such as in the US) or under general rules for compensatory damages provided for in civil law. But in Russia, plaintiffs rarely claim antitrust damages from the wrongdoer, even though the legislation in force permits them to file suit.

The legal basis for antitrust damages is provided in the Civil Code of the Russian Federation ("Code") and Federal Law No.135-FZ (June 26, 2006) "On Protection of Competition." According to article 10 of the Code, restriction of competition and abuse of dominance are prohibited. Article 1064 of the Code articulates the general grounds for liability for damages, requiring full compensation from the person who inflicted the damage due to an antitrust violation. According to the Resolution of the Plenum of the Supreme Arbitrazh[1] Court of the Russian Federation No.30 (June 30, 2008), "On application by the Arbitrazh court of antitrust legislation" ("Plenum Resolution"), a remedy of the violation and even a recovery from the infringer of the sum of illegally received income gained as a result of the violation will not extinguish a separate claim for damages.

The absence of any harmonized judicial practice or regulation of antitrust damages actions in Russia raises a number of unsettled issues, including the following: the range of potential claimants, admissible forms of evidence, and the amount of damages available to the claimant.

Potential claimants

Russian law does not provide a definition of private damages actions or potential damages actions claimants. According to the article 15 of the Code, the person whose rights are violated is entitled to demand the full recovery of the losses inflicted upon him, unless the recovery of losses in a smaller amount is stipulated by law or by agreement. Therefore, every participant in the market can be a claimant in private antitrust procedures if he proves that damages resulted from the breach of antitrust law by the defendant. There are no other restrictions on the range of potential claimants. It should be noted that depending on whether the claimant is an individual or a legal entity, the case on compensation for damages is heard in a court of general jurisdiction or in the Arbitrazh court, respectively.

Recent amendments to the Arbitrazh Procedural Code of the Russian Federation ("APC"), which added new rules on joinder of parties and consolidation of cases and introduced a new type of claims (collective claims), will make damages actions a more efficient mechanism for the protection of rights of market participants. However, in contrast to some foreign countries, in Russia the procedure for filing and prosecuting collective actions is described only in general terms and obviously requires more detailed regulation.

Right to damages

Even within the framework of the specific regulation of private antitrust actions, calculating damages can be difficult. In countries governed by civil law, damages must only be compensatory (as opposed to punitive) in character, avoiding the assignment of unreasonable payments to the defendant.

In Russia , article 15 of the Code defines losses to mean the expenses that the injured person made or would have to make to restore her violated rights, the loss or the damages inflicted to her property (the compensatory damage), and lost profits. A unified approach to calculation of damages has not been established yet. The International Commercial Arbitration Court at the

[1] The Arbitrazh court in Russia is analogous to the commercial courts of several European jurisdictions competent in resolving disputes in the field of business activity.

Chamber of Commerce and Industry of Russia has observed that the Russian legislature did not attach the right of the claimant to receive compensation with an explanation of the method of damages calculation. Thus, the claimant is free to choose any available method, and need only prove occurrence of damages and indicate their reasonable amount.

Elements of damages and civil procedure

The burden of proof rests on the claimant, who shall submit an evidentiary base, provide all necessary documents, and submit a calculation of damages. To be entitled to judgment and recovery, the claimant must prove:

1. A breach of the antitrust laws;

2. The fact of damages and their amount; and

3. A causal relation between the breach of antitrust laws and damages.

If any of the above-named elements is absent, the claim will fail.[2]

Damages action can be brought either before or after the Federal Antimonopoly Service of Russia ("FAS") has issued a decision following an enforcement investigation. But per page 5 of the Plenum Resolution, only courts, not the FAS, are empowered to adjudge civil cases.

In many cases, it will be more efficient for a private claimant to wait until the FAS has concluded enforcement proceedings against an antitrust defendant, because in that instance there will be an official document that proves the violation of antitrust law by the defendant. However, considering that the decision of the FAS can be appealed and litigation can take several months, a claimant will probably prefer to wait until the court of last resort delivers a final judgment. But the question arises: if a claim is made before the decision of FAS is appealed or during such litigation, can a court conduct a *de novo* hearing regarding the factual circumstances of the antitrust violation? In this type of situation, a defendant may ask for a stay of the civil proceeding until a decision on the appeal of the FAS case is rendered. Thus, it is important that, when considering cases arising from the claims of multiple plaintiffs, the Arbitrazh court should notify FAS to provide it with the a notice of whether it intends to intervene.[3]

With regard to discovery, the most important documents concerning the fact of a substantive violation are usually in the possession of a defendant or third parties. These documents are not provided upon the request of a claimant, who must rather petition the court to request the documents itself.[4] The petitioner must specify the elements he expects the requested information will prove or disprove, why he could not such evidence by himself, and where the information is likely to be kept. Consumers who are unaware of all the intricacies of a defendant company's commercial activity will naturally find it difficult to meet the above requirements. Therefore, to avoid possible difficulties concerning collection of evidence, it seems quite consistent to ensure a minimum level of disclosure *inter partes*, as is suggested, for example, by the European Commission's studies on antitrust private actions.

Concerning the recent amendments to the APC providing for collective actions, it is difficult to predict how antitrust private damages actions will cope with collective action procedures because even individual claims remain rare in Russian practice. However, there are several successful attempts to receive redress for antitrust damages to date. For example, in its Decision dated September 15, 2008, No.17AP-6282/08, the Seventeenth Arbitrazh Appeal court upheld a finding of damages resulting from the violation of antitrust laws based on demonstration of a causal relation between the defendant's unfair advertising campaign and the subsequent switching of subscribers from the claimant's cable network to the defendant's. The losses of the claimant arising from the disconnection of the subscribers were not included in the amount of the missed profit, however, because they might have been

[2] Thus, in Resolution NA49-6934/2007-277/27 (June 25, 2008) of the Federal Arbitrazh court of Volga, the court upheld the decisions of inferior courts finding the claimant failed to establish its case when neither causation nor the amount of lost profit was sufficiently demonstrated.

[3] The procedural status of FAS in private civil actions is defined according to page 21 of the Plenum Resolution.

[4] *See* page 4-12 article 66 of the Arbitrazh Procedural Code of the RF, and article 57 of the Civil Procedural Code of the RF ("CPC").

caused by reasons other than the defendant's conduct (e.g., unsatisfactory quality of the claimant's services).

Summary

The institution of private damages actions in Russia appears to be part of a global trend toward supplementing public antitrust enforcement with private law. The courts should be able to apply private action rules successfully in Russia without parties abusing their rights under the system so long as the following provisions are implemented:

- More flexible discovery or disclosure procedures to access the defendant's evidence;
- Formal definition of the precise range of potential claimants and the rights of direct and indirect purchasers; and
- Guidance regarding the application of collective damages procedural rules.

Going forward, probably the most appropriate way to reform antitrust damages actions in Russia is to amend the Federal Law "On protection of competition" to include the creation of a new separate chapter concerning private antitrust litigation.

International Committee Calendar

- ABA 2010 Annual Meeting
  August 5-10, 2010
  San Francisco, CA