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Supreme Court to Decide Important Class Certification Issue Regarding Class-Wide Damages Evidence

By Alden Atkins and Brian Schnapp

On June 26, 2012, the U.S. Supreme Court granted certiorari in *Comcast Corp. v. Behrend*, No. 11-864, to decide how closely the trial court must examine the plaintiff's proposed proof of damages when deciding whether to certify a class. Under Rule 23(b)(3) of the Federal Rules of Civil Procedure, a class may be certified only if "the questions of law or fact common to class members predominate over any questions affecting only individual members." Last year, in *Wal-Mart Stores, Inc. v. Dukes*,[1] the Supreme Court reaffirmed that trial courts must perform a "rigorous analysis" to determine if the requirements of Rule 23 can be met. Since the Third Circuit's decision in *In re Hydrogen Peroxide Antitrust Litigation*,[2] courts have closely examined whether the plaintiff can prove with common evidence that every member of the class was injured by an alleged antitrust violation. This has led to extensive litigation on class certification about whether the alleged violation impacted putative class members so differently that some did not suffer any antitrust injury at all.

For damages, however, some courts have said that individual determinations of damages are not sufficient to defeat class certification.[3] Those decisions suggest that a class could be certified even though each class member would have to prove its damages individually rather than with common, class-wide evidence. The Supreme Court will address that question in *Comcast*.

In *Comcast*, the plaintiffs claim that the defendants had foreclosed cable television competition by acquiring cable systems in adjacent franchise areas and creating so-called "clusters." The plaintiffs alleged that clustering frustrates other cable companies from "overbuilding" competing cable systems in the same franchise areas, and thus

1 131 S. Ct. 2541, 2551 (2011).

2 552 F.3d 305 (3d Cir. 2008).

3 *E.g., Klay v. Humana, Inc.*, 382 F.3d 1241, 1259 (11th Cir. 2004).

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leads to supra-competitive prices. The plaintiffs sought to certify a class of all cable television customers in the Philadelphia area, which covers many different cable franchise areas. The defendants argued that the circumstances in each franchise area are different, and therefore the plaintiffs could prove neither antitrust impact nor damages on a class-wide basis. The trial court rejected those arguments and certified a class.

A divided panel of the Third Circuit affirmed.[4] The panel held unanimously that plaintiffs could prove antitrust impact on a class-wide basis. For damages, however, the court divided. The majority held that plaintiffs had shown that they would be able to measure damages on a class-wide basis with common proof. The dissent, in contrast, said that the courts must closely examine the damages evidence offered by the plaintiffs to determine whether they can prove damages for all class members. The dissent noted that the defendant cable companies made pricing determinations separately for each of 650 franchise areas, and therefore the damages would vary significantly among class members in different areas. The dissent, therefore, concluded that a rigorous examination of the proposed damages proof offered by plaintiffs showed that damages could not be proven with common evidence for the entire class.

The defendants petitioned for certiorari on both the antitrust impact and damages issues. The Supreme Court granted certiorari, however, only on the damages issue, and it reformulated the question presented to focus on how closely trial courts must examine the method that plaintiffs propose to use to prove class-wide damages. Therefore, the Supreme Court is poised to address whether the alleged damages suffered by individual class members varies so significantly that the plaintiffs cannot meet the predominance test for class certification under Rule 23(b)(3). Significantly for class action defendants, the case may resolve how much damages proof the plaintiff must advance before a class can be certified. ■

4 *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir. 2011), *cert. granted*, 80 U.S.L.W. 3442 (U.S. June 25, 2012) (No. 11-864).

Supreme Court to Review "State Action" Immunity in Hospital Case

By William Vigdor and Nicholas Shum

The Supreme Court will address the scope of "state action" antitrust immunity as applied to a Federal Trade Commission (FTC) challenge of a merger between two hospitals in rural Georgia. Most recently in the April 2012 issue of *Antitrust News & Notes*, we reported that in *Federal Trade Commission v. Phoebe Putney Health System*,[5] the Eleventh Circuit affirmed a U.S. district court's decision that an alleged merger-to-monopoly involving a Georgia hospital authority facility and a nearby for-profit hospital was immune from antitrust scrutiny based on the state action doctrine. Last week, the Supreme Court granted the FTC's petition for certiorari and will address (1) whether the Georgia legislature "clearly articulated and affirmatively expressed" a "state policy to displace competition" in the market for hospital services by vesting a local government entity with general corporate powers to acquire and lease out hospitals, and (2) even if the legislature clearly articulated such a state policy, whether that policy is sufficient to validate anticompetitive conduct in this case given that the local government entity did not actively participate in the terms of sale and fails to oversee the hospital's operation.

In this context, the state action doctrine provides that the federal antitrust laws do not apply to anticompetitive conduct of subordinate public entities created by a state if the conduct is authorized through a "state policy to displace competition" that is "clearly articulated and affirmatively expressed" by the legislature.[6] This immunity extends to private entities if the private conduct is supervised by the state.[7]

Here, the FTC alleged that the merger between Phoebe Putney Memorial Hospital, a private nonprofit facility established by a local hospital district, and its only significant competitor, Palmyra Park Hospital, a privately held for-profit hospital, created an illegal

5 *Federal Trade Commission v. Phoebe Putney Health System*, 663 F.3d 1369 (11th Cir. 2011), *cert. granted*, __ U.S.L.W. ____ (U.S. June 25, 2012) (No. 11-1160).

6 *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39 (1985) (internal citations omitted).

7 *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

monopoly. The FTC further alleged that the hospital district "rubber-stamped" the merger and lacked the intention and practical ability to oversee the private hospitals in a manner intended to displace competition law. In essence, the FTC argued this was a privately negotiated merger which was submitted to the state body to provide an appearance of state approval. While acknowledging the FTC's complaint properly alleges monopoly, the Eleventh Circuit found that Georgia law articulated a state policy sufficient to entitle the hospital authority to state action immunity from antitrust law. When analyzing this doctrine, the Eleventh Circuit asked whether it was "reasonably foreseeable" that Georgia's hospital authority law would allow hospital districts to acquire hospitals and displace competition.

As pointed out by the FTC in its petition for certiorari, this standard is at odds with numerous other circuits (Fifth, Sixth, Ninth, and Tenth).[8] The FTC also asserted that the hospital authority's failure to actively participate in the terms of the hospital sale and oversee the hospital's operation disqualifies it from serving as a legitimately immunizing state actor. To underscore the importance of these questions, the FTC indicated that nearly 20 percent of U.S. hospitals are owned by state and local governments. The FTC also mentioned that these state action principles are equally applicable in determining whether government established special districts providing power, water, education, and other services to the public are immune from antitrust law and should, therefore, be resolved by the Supreme Court.

The Supreme Court's decision should settle disagreement among the various circuits as to how, and under what circumstances, state regulation can shield health care companies from federal antitrust laws. And as emphasized by the FTC in its petition, the Court's holding regarding the state action doctrine may have even wider implications. ■

8 Petition for Writ of Certiorari, *Federal Trade Commission v. Phoebe Putney Health System*, No. 11-1160, 2012 WL 978177 (U.S. March 23, 2012).

Chinese Agency Conditionally Approves Google's Acquisition of Motorola Mobility

By Xiao Yong and Li Zhaohui

On May 19, 2012, the Chinese Ministry of Commerce (MOC) announced its conditional approval of the proposed acquisition of Motorola Mobility Inc. (Motorola) by Google Inc. (Google).[9] This is the thirteenth conditional approval imposed by MOC since China's Anti-monopoly Law (the AML) came into effect on August 1, 2008. The approach taken by MOC, as well as the conditions MOC placed on the transaction, yet again signal that the Chinese antitrust regulatory review process will play a significant and growing role in global M&A transactions affecting Chinese markets.

Background

On August 15, 2011, Google and Motorola announced that they had entered into a definitive agreement under which Google would acquire Motorola for US$40.00 per share in cash, or a total of about US$12.5 billion. By acquiring Motorola, Google obtains control of a portfolio of approximately 17,000 issued patents and 6,800 patent applications, including hundreds of standards essential patents (SEPs) relevant to wireless devices. Although Google announced its intention to run Motorola as a separate business, the vertical integration of Google's mobile computing platform, Android, with Motorola's patent portfolio and device business is expected to enhance Google's ability to compete with other mobile operating systems. Because both Google's and Motorola's businesses have substantial worldwide footprints, the transaction drew international attention from competition authorities, including the U.S. Department of Justice (DOJ), the European Commission (EU), and MOC.

On February 13, 2012, both DOJ and EU approved the Google-Motorola acquisition without conditions. Both regulatory authorities took into account public commitments made by Google to continue non-discriminatory licensing of Motorola's SEPs, and each concluded that the transaction would not be likely to lessen competition in their respective markets. MOC, however, chose to impose conditions on the

9 MOC's decision is available at www.english.mofcom.gov.cn/aarticle/policyrelease/domesticpolicy/201206/20120608199125.html.

transaction. Notably, MOC reached different conclusions from DOJ and EU regarding the competitive effects of the transaction, despite the similar nature of the relevant markets at issue.

MOC's review process also took somewhat longer than the DOJ and EU reviews. Google and Motorola initially gave notice to MOC of their transaction on September 31, 2011, but the notification was not deemed complete or formally accepted by MOC until November 21, 2011. Similar to some other cases announced late last year and early this year with conditional approvals, MOC exhausted the full statutory review periods (*i.e.*, taking 180 days from formal acceptance to review the transaction). As such, it took Google and Motorola 233 days after giving initial notice to MOC to obtain conditional clearance for the transaction. Upon the receipt of MOC approval, Google finally cleared the last of the many regulatory hurdles facing the transaction, and the acquisition closed on May 22, 2012.

MOC's Substantive Assessment

Comparing the published decisions of EU and MOC demonstrates that, although each agency uses a similar analytical approach and focus on similar issues, they sometimes reach dramatically different conclusions.

According to the published decision, MOC primarily focused on the following issues:

Definition of Relevant Product Market

MOC defined the relevant product markets for the transaction as (i) the market for smart mobile devices, and (ii) the market for smart mobile operating systems (Mobile OSs), which is basically consistent with the definition of the relevant product markets by EU. However, while MOC considered these product markets as a part of a world-wide geographic market, it focused its review substantially on the Chinese market, while EU considered these relevant markets on a European Union basis or world-wide basis.

In addition, EU analyzed SEPs, as inputs for smart mobile devices, as a third relevant product market. Though MOC took SEPs into consideration when assessing the competitive implications of this transaction, MOC did not analyze SEPs as a separate relevant product market.

Whether Google Has the Ability and Incentive to Foreclose Downstream Competitors by Abusing Its Dominant Position in Mobile OS

MOC held that Google has a dominant market position in Mobile OSs, and projected that it would retain or strengthen its dominance in the near future, in light of the dependence original equipment manufacturers (OEMs) have on Google's Android Mobile OS, and in light of Google's financial strength, research and development capabilities, and high market access.

Having concluded that Google holds a dominant market position in Mobile OSs, MOC concluded that, following the acquisition of Motorola, Google would have the ability and incentive to favor Motorola over other Android OEMs, e.g., by denying other Android OEMs the latest versions of the Android Mobile OS. Based on their investigation, MOC noted that Google has historically selected a lead OEM to test the newest version of Android, and expressed a concern that after the transaction, Google would choose Motorola as its exclusive partner to test future versions of Android, impairing other OEMs' ability to compete. MOC did not comment in its published decision, however, as to why it believed Google would have an incentive to disfavor other Android OEMs.

By contrast, EU also considered this issue, but reached an opposite conclusion. EU did not specify whether Google has any dominant position in Mobile OS, and maintained that (i) the ability of Google to favor a specific Android OEM would not change as a result of this transaction, because such opportunities existed prior to the transaction, and (ii) Google lacked the incentive to restrict other OEMs' access to Android, as doing so would jeopardize Google's mobile search and advertising revenues — a business that represents more than 90 percent of Google's revenues.

Whether Google Has the Ability and Incentive to Use Motorola's SEPS to Significantly Impede Effective Competition

Like EU and DOJ, MOC recognized that the rationale for this transaction resides in the acquisition of Motorola's patent portfolio. Considering Google's strong capability in developing and integrating software and hardware paired with its dominant position in the market for smart mobile devices, MOC held that following the transaction, Google would have the ability and the incentive to impose unreasonable licensing conditions on third parties seeking to use Motorola patents. MOC further held that if Google were to impose such conditions, Google could restrain competition in smartphones and adversely affect consumers.

EU again reached an opposite conclusion from MOC. EU observed that Google was bound by Motorola's existing commitments to license its SEPs to others on fair, reasonable and non-discriminatory (FRAND) terms, and noted that Google had committed in a February 8, 2012 letter to various standards organizations that it would remain bound to Motorola's FRAND commitment and honor Motorola's current maximum royalty rates.[10]

In addition, DOJ concluded that though Google's substantial share in the market for Mobile OS makes it more likely that the additional SEP portfolio could be used to block rivals, Motorola had had a long and aggressive history of seeking to capitalize on its patents and had been engaged in extended disputes with Apple, Microsoft, and others. As such, the transaction was deemed unlikely to materially alter Motorola's existing policies or substantially lessen competition. Like EU, DOJ also took into account Google's February 8 letter when assessing the licensing issue.

Whether Google Will Change Its Current Business Model: Free and Open Source Android Mobile OS

MOC emphasized that OEMs, software developers, and users have invested substantially in the Android Mobile OS, and as such, there would be extremely high commercial costs for OEMs to switch from Android to other Mobile OSs. MOC also found that the free and open source model of Android was key to its success of gaining dominant market position in a short period of time. MOC deemed it essential that Google maintain its open source business model after acquiring Motorola. Though MOC argued that any change to the open source model would cause significant adverse implications to OEMs, MOC did not state any basis for concern that Google actually intended to change the Android business model, and did not describe how and to what extent a change of business model by Google would adversely impact market competition.

EU, on the other hand, concluded that Google has an incentive to increase its base for search and advertising services, from which Google derives the majority of its revenues. Any change to the open source business model, the EU reasoned, might cost Google some of its Android OEM partners and ultimately reduce use of its search and advertising services. Moreover, to the extent that changing the Android business model would have market impacts, those impacts are not necessarily unique to the Motorola transaction, given that Google could have changed its approach to Android regardless of its owning a hardware partner.

MOC's Remedies

In light of the foregoing conclusions and after consultation with Google, MOC finally agreed to clear the transaction under the following conditions:

1. Google must continue to license Android free of charge and on an open source basis;
2. Google must treat all OEMs in a non-discriminatory manner with respect to the Android Mobile OS;
3. Google must honor Motorola's existing FRAND commitments with respect to Motorola's patents; and
4. Google must appoint an independent supervising trustee to supervise its performance of the foregoing obligations.

Obligations (1) and (2) shall be in effect for five years as long as Google controls Motorola. If there are any changes in market conditions or competitive conditions, Google has the option to apply to MOC in order to remove or change these two obligations.

In addition, during the five-year period, Google is required to report to MOC and the supervising trustee semiannually for compliance purposes.

Comments

The Google/Motorola transaction is another example of how MOC will follow its own approach in assessing global M&A transactions, and may reach conclusions

[10] Google sent the letter to the following organizations: the Advanced Television Systems Committee (ATSC); the Consumer Electronics Association (CEA); the Institute of Electrical and Electronics Engineers (IEEE); the European Telecommunications Standards Institute (ETSI); the International Electrotechnical Commission (IEC); the International Organization for Standardization (ISO); the International Telecommunication Union (ITU); the Joint Electron Devices Engineering Council (JEDEC); the Near Field Communication (NFC) Forum; the Open Mobile Alliance (OMA); the Society of Motion Picture and Television Engineers; TechAmerica; the Telecommunications Industry Association (TIA); and the Wi-Fi Alliance. The letter is also published on Google's website at: www.google.com/press/motorola/patents.

distinct from antitrust authorities in the U.S. and Europe. MOC's unique conclusions may result in part from its relative inexperience in transactions that increase vertical concentration. Its published decision provided little reasoning to support its conclusions as to Google's ability to foreclose competition and little explanation of why Google would have an incentive to do so. In addition, MOC's determination that this vertical transaction could have anti-competitive effects seemed to derive primarily from its conclusion that Google holds a dominant market position in Mobile OS, not any real analysis of the vertical relationship between Google and Motorola. Unlike DOJ and EU, each of which have developed their own dedicated guidelines in respect of vertical and horizontal transactions over time, MOC is still in the formative stages of developing its theories and rules for antitrust review. In addition, MOC is still inexperienced in reviewing transactions that involve the complex interaction of intellectual property rights and antitrust enforcement. Though MOC recognized that the Google-Motorola transaction was primarily driven by Google's desire to acquire Motorola's patent portfolio, the published decision sheds little light on MOC's reasoning and analysis with respect to the competitive impacts of intellectual property transfers, and it is unclear whether MOC specifically considered those impacts when conducting its substantive assessment. For now, MOC's recent decisions underscore the increased importance of implementing a carefully planned Chinese merger strategy when a transaction involves firms with operations in China. ■

District Court's Strong Stance on Overseas Enforcement May Have Prompted First-Ever Settlement by a Chinese Company in a U.S. Cartel Case

By Lindsey Vaala and Ann Weber

In the October 2011 edition of *Antitrust News & Notes*, we reported that the district court in *In Re Vitamin C Antitrust Litigation* had ruled that a putative class was entitled to sue Chinese corporations accused of fixing Vitamin C export prices, notwithstanding the defendants' claim that the Chinese government had compelled the price-fixing activity.[11] In the wake of that ruling, and a further ruling by the district court that it has the authority to enjoin illegal conduct by the Chinese firms, one Chinese company has broken new ground by entering into a US$10 million settlement with the putative class representatives.

The plaintiffs in *In re Vitamin C Antitrust Litigation*[12] filed suit in 2005, alleging that certain Chinese corporate defendants[13] violated U.S. antitrust law by fixing the price of Vitamin C exported from China to the U.S. As previously reported, in September 2011, Judge Brian Cogan of the Eastern District of New York denied a summary judgment motion in which the defendant vitamin manufacturers argued that they were required by Chinese government export regulations to fix prices, and for that reason, they should be immune from U.S. antitrust liability under the foreign sovereign compulsion doctrine. The Chinese government, appearing for the first time as an *amicus* before a U.S. court, submitted a brief in support of the manufacturers' claims of compulsion, but Judge Cogan denied the motion, concluding that the applicable Chinese regulations did not require price-fixing at above-market prices and did not impose penalties on the manufacturers

11 *See* "District Court Denies Motion for Summary Judgment in Groundbreaking Decision Regarding the Foreign Sovereign Compulsion Defense Despite Chinese Government's Appearance as an Amicus," *Antitrust News & Notes*, October 2011, available at www.velaw.com.

12 *In re Vitamin C Antitrust Litig.*, No. 1:06-MD-1738 (E.D.N.Y.).

13 The Chinese corporate defendants include Vitamin C manufacturers Herbei Welcome Pharmaceutical Co., Ltd., Northeast Pharmaceutical Co. Ltd., Weisheng Pharmaceutical Co. Ltd., and Aland (Jiangsu) Nutraceutical Co., Ltd.

amounting to compulsion.[14] Judge Cogan later granted a motion for class certification on behalf of direct purchasers and certified two classes of such purchasers: one seeking damages and another seeking injunctive relief.[15]

Since we last reported on this matter, Judge Cogan has rejected another summary judgment argument seeking to cabin the court's authority over the Chinese defendants. Defendant Northeast Pharmaceutical Co. Ltd. (Northeast) moved for summary judgment on the grounds that injunctive relief against it was not warranted on the facts, and in any event, the court lacked the ability to enforce injunctive relief against a foreign corporation. Northeast argued that an injunction against a Chinese defendant would be unenforceable in practice, because the Chinese government would be unlikely to enforce injunctions issued by U.S. courts against Chinese corporations.[16] According to Northeast's theory, the only mechanism available to a U.S. court for enforcing an injunction against a Chinese corporation would be to "embargo all exports of Vitamin C from Northeast at U.S. ports," and posited that doing so might spark an international trade war.[17] The court disagreed that embargo was the only enforcement means at its disposal, and concluded that it could, among other options, hold Northeast in civil or criminal contempt and assess fines, which could be made payable to Plaintiffs in the event that Plaintiffs sustained losses as a result of Northeast's contempt. Rejecting Northeast's remaining arguments as merely repeating international comity issues he had addressed in his September 2011 ruling on the foreign sovereign compulsion doctrine, Judge Cogan concluded that it is "indisputably permissible" for a court to enjoin private companies from engaging in behavior on foreign soil that is directed towards the United States.[18] The court distinguished the relief requested by Plaintiffs from action that might encroach on a foreign nation's sovereignty – such as enjoining "uniquely foreign behavior" or attempting to force China to revise its domestic laws regarding price-fixing.[19] Noting that Plaintiffs instead sought to enjoin a cartel whose conduct was allegedly directed towards exports, including those to the United States, and that the requested relief was sought against a private entity rather than foreign government, the court held that an injunction in this instance would not inappropriately impact China's sovereignty.[20]

Following the court's September 2011 order denying the foreign sovereign compulsion defense, the class representatives for the Direct and Indirect Plaintiffs reached separate settlements with Defendant Aland (Jiangsu) Nutraceutical Co., Ltd. (Aland). On May 21, 2012, the settling Plaintiffs moved for preliminary approval of their settlements with Aland, the terms of which include payments by Aland totaling $10.5 million, $9.5 million of which would go to the Direct Purchaser Plaintiffs, with the remaining $1 million going to the Indirect Purchaser Plaintiffs.[21] According to a copy of the settlement agreement between Aland and the Direct Purchaser Plaintiffs, Aland further agrees to obey any injunction against Section 1 violations that the district court may enter against non-settling Defendants, and to be treated as though it remains a defendant in the action if the matter goes to trial against the other Defendants.[22] In exchange, Plaintiffs agree to a broad release of claims against Aland.[23] In light of the release, the particulars of how Aland might participate at any future trial likely remain to be seen. The request for court approval is still pending and Aland has reserved the right to rescind the Settlement Agreements should court approval be denied. Aland appears to be the only defendant to have reached a settlement agreement with Plaintiffs, although negotiations with other defendants may be underway.

Should the court approve the Aland settlements, *In re Vitamin C Antitrust Litigation* will mark the first settlement by a Chinese company in a U.S. cartel class action. The settlement, together with Judge Cogan's rulings on

14 *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522 (E.D.N.Y. 2011).
15 *See In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90 (E.D.N.Y. 2012).
16 *In re Vitamin C Antirust Litig.*, No. 1:06-MD-1738, 2012 WL 2016824 (E.D.N.Y. June 4, 2012).
17 *Id.* at *3.
18 *Id.* at *6.
19 *Id.*

20 *Id.* at *6.
21 Joint Memorandum of Law in Support of Direct and Indirect Purchaser Plaintiffs' Motions for Preliminary Approval of Settlements with Defendant Aland, *In re Vitamin C Antirust Litig.*, No. 1:06-MD-1738, Docket #470-1 (E.D.N.Y. May 21, 2012).
22 Settlement Agreement, Exhibit A, Joint Memorandum of Law in Support of Direct and Indirect Purchaser Plaintiffs' Motions for Preliminary Approval of Settlements with Defendant Aland, *In re Vitamin C Antirust Litig.*, No. 1:06-MD-1738, Docket #470-3, *8, 13 (E.D.N.Y. May 21, 2012).
23 *Id.* at * 8, *11.

questions of foreign sovereign compulsion and international comity, are a potent reminder to Chinese and other foreign companies doing business in the U.S. that they may be subject to U.S. antitrust law. With the U.S. Department of Justice and private plaintiffs focusing attention on Chinese companies, those companies should ensure that they are cognizant of U.S. antitrust laws and are implementing effective antitrust compliance policies.

***For more information on issues in international cartel investigations and litigation, particularly those involving Asian defendants, please contact V&E partners* Craig Seebald *and* Matt Jacobs.** ■

Ukraine Antimonopoly Committee Announces Intention to Impose Maximum Fines for Failure to File Pre-Merger Notification

By Kimberley Biagioli

The Antimonopoly Committee of Ukraine (AMC) announced that beginning on July 1, 2012, the AMC will impose the maximum fines permissible under Ukrainian law on companies that fail to file required pre-merger notifications in Ukraine.

In a statement released on June 19, the AMC stated that it intends to impose the maximum allowable fines — under Ukrainian law, 5 percent of the worldwide turnover for the fined parties — when companies fail to report transactions that exceed the statutory pre-clearance threshold. If the AMC actually imposes such fines, it would mark a departure for the AMC, which has rarely issued fines up to the maximum level for failure to file pre-merger notifications.

Filing of pre-merger notification is required under Ukrainian law if, in the previous fiscal year, one party to the transaction earned revenue of or had assets worth 1 million euros in Ukraine; at least two parties to the transaction earned revenue of or had assets worth 1 million euros worldwide; and the aggregate worldwide revenue or assets of all companies to the transaction was at least 12 million euros worldwide. Ukrainian law also requires filing of pre-merger notification if the parties to the transaction, individually or in the aggregate, hold a market share of greater than 35 percent. After filing a pre-merger notification, the parties to the transaction must abide by a 45-day waiting period before closing the transaction.

Parties with Ukrainian assets or operations are advised to carefully consider their obligations under Ukrainian pre-merger notification laws before engaging in significant transactions.

***For more information on pre-merger notification issues, please contact V&E partners* William Vigdor *and* Neil Imus.** ■

DOJ Reports Results of Agricultural Competition Workshops, Commits to Step Up Merger Enforcement

By DeReall Moore

In May 2012, the U.S. Department of Justice, Antitrust Division (DOJ), issued a report concerning five joint public workshops it conducted with the U.S. Department of Agriculture (USDA) to consider competition issues affecting the agricultural industry and the appropriate role for antitrust and regulatory enforcement in that industry. Each workshop addressed particular antitrust trends and issues affecting specific agricultural sectors and actors, and involved high-ranking officials including U.S. Attorney General Eric Holder, U.S. Secretary of Agriculture Tom Vilsack, state officials, as well as independent farmers and producers. The DOJ stated that the goals of the workshops were to "promote dialogue among interested parties and foster learning with respect to the appropriate legal and economic analyses of these issues as well as, to listen to and learn from parties with real-world experience in the agricultural sector." At the conclusion of the workshops, the DOJ stated that it "remains committed to taking all appropriate investigatory and enforcement action against conduct threatening harm to competition in agricultural markets."[24]

The joint public workshops marked an unprecedented collaboration between the DOJ and USDA.[25] The workshops addressed several themes including: (1) the dynamics of competition in agricultural markets, (2) buyer power (monopsony), and (3) vertical integration. The workshops also provided an opportunity for farmers, ranchers, croppers, consumer groups, processors, agribusiness, and other stakeholders to provide examples of alleged anticompetitive conduct, such as bid rigging (e.g., buyers of agricultural commodities agreeing to limit competition between themselves by agreeing on prices to offer or rotating bids), manipulative pricing, high market concentration, and other behavior, as well as to suggest methods to combat and prevent such behavior.

The DOJ reports that it took "particular interest" in public comments regarding mergers among suppliers and retailers, including criticisms that weak merger enforcement in the agriculture sector in recent decades has allegedly contributed to high input prices, low commodity prices, and other harms.[26] Dairy producers in particular contrasted today's more concentrated markets with the more atomized markets of past years, recalling times when they had plentiful trading partners. The DOJ defends its merger enforcement record in its report, pointing to its recent challenges to mergers and acquisitions involving Dean Foods, George's Foods, and National Beef, and emphasizes that some of the concerns expressed at the workshops about merger activity focused on policy goals outside the traditional, competition-focused concerns of antitrust law, such as enhancing food safety or protecting local economies from competitive pressures.[27] Remarking in the report that its enforcement authority is limited to addressing specific anti-competitive acts, the DOJ states that it has no power to break up existing market participants based only on a desire to reduce concentration or otherwise "engineer an optimal market structure."[28]

Some workshop participants pointed to retail concentration as a special area of concern, "charging that retailers are extracting a greater and greater share of the consumer food dollar, leaving producers with an ever decreasing share, and at the same time imposing price increases on consumers."[29] Producers in the beef and pork sectors in particular registered complaints that, in many regions, increasing concentration among suppliers, service providers, and buyers/retailers have squeezed margins for producers and growers. The DOJ observes, however, that not all participants agreed that retail concentration is either excessive or unjustified; producers in some regions reported adequate competition among commodity buyers and efficiency gains resulting from economies of scale in processing and retail.

The DOJ also reports that producers in several industries complained of "increasing difficulty" in "obtaining timely and accurate" price information, suggesting that shortcomings in available data reduces producer bargaining power and leaves markets vulnerable to price manipulation.[30] The DOJ, however, notes that price transparency can be pro-competitive or anti-competitive depending on the circumstances, and for that reason, it is typically the "province of regulation rather than antitrust enforcement."[31] Dairy and beef producers also expressed suspicions that processors and packers use surplus product and large committed supplies to manipulate spot markets, or that price reporting is being manipulated to influence the economics of prevailing-price contracts. In response, the DOJ noted that although it prosecutes concerted bid-rigging activity under antitrust law, the DOJ would ordinarily defer to other agencies, such as the USDA and CFTC, with respect to alleged market manipulation by firms acting independently from one another.[32]

When the DOJ and USDA announced their plan to hold the joint workshops on competition issues facing agriculture they issued a call for public comments and reactions

24 U.S. Department of Justice, *Competition and Agriculture: Voices from the Workshops on Agriculture and Antitrust Enforcement in our 21st Century Economy and Thoughts on the Way Forward*, www.justice.gov/atr/public/reports/283291.pdf (issued May 2012) at 2.

25 *Id.* at 3.

26 *Id.* at 5.

27 *Id.* at 17.

28 *Id.* at 18.

29 *Id.* at 7.

30 *Id.* at 11.

31 *Id.* at 21.

32 *Id.* at 22.

regarding those issues. Farmers, ranchers, consumers, academics, government officials, industry organizations, and other interested parties submitted over 18,000 comments.[33] Members of Congress, governors, state attorneys general, state secretaries of agriculture, the Commodity Futures Trading Commission, the Federal Trade Commission, and other federal and state governmental actors also contributed to the workshops.

The DOJ and USDA stated prior to the workshops' commencement that "a healthy, competitive agricultural sector is vitally important to our nation's economy as well as a matter of national security and public health." After the workshops, the DOJ reaffirmed that position, even while acknowledging that it has only a "limited" ability to address competition problems in agriculture through antitrust enforcement. While the DOJ concluded that antitrust laws do not empower courts to produce an ideal economic landscape of small farms and ranches, control price volatility resulting from legitimate competitive market forces, or promote foreign trade,[34] the DOJ expressed agreement with those workshop participants who argued that the DOJ could play a role in supporting regulatory policy-makers by advocating for the importance of competition. The DOJ stated that in future enforcement efforts it would draw on some of the new relationships fostered during the workshops with the agricultural sector, USDA, and state officials.[35] Finally, the DOJ claims that, as a result of the workshops, it has "redoubled its efforts" to prevent anticompetitive agricultural mergers and conduct.[36]

***For more information on this and other antitrust issues affecting the agricultural industry, please contact V&E partners* Frank Brame *and* Jason Powers.** ■

33 Comments can be accessed on the DOJ's website at www.justice.gov/atr/public/workshops/ag2010/all-comments-num.html. Transcripts of the sessions are also available on the website.

34 *Competition and Agriculture* at 3.

35 *Id.*

36 *Id.* at 16.

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