SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP
ATTORNEYS AT LAW

Antitrust Review

Published by the Antitrust and White Collar Defense Practice Group

Volume 2, No. 10 October 2004

In This Issue

Recent Activities

ANTITRUST DIVISION FAILS TO ENJOIN ORACLE'S HOSTILE BID FOR PEOPLESOFT

On September 9, 2004, United States District Judge Vaughn Walker of the Northern District of California issued an order denying the Antitrust Division of the Department of Justice's request for a preliminary injunction, enjoining the hostile bid by Oracle to acquire PeopleSoft ("DOJ"). *United States v. Oracle Corp*., N.D. Cal. No. C04-0807 VRW (September 9, 2004). In a 164 page decision, Judge Walker rejected the DOJ's request, and held that it had failed to sustain its burden of proof in defining an appropriate relevant product and geographic market. The DOJ and ten attorneys general failed to convince Judge Walker that Oracle's hostile takeover attempt was likely to substantially lessen competition in violation of Section 7 of the Clayton Act. Because the DOJ's market definition was artificially narrow, and thus rejected, the court was not required to conduct a burden-shifting statistical analysis under *United States v. Philadelphia National Bank*, and the government was thus not entitled to a presumption of illegality.

The DOJ had contended, in a six-week trial, that a merger of Oracle and PeopleSoft would substantially diminish competition in the market for two components of "high-function" Enterprise Resource Planning ("ERP") software. These components were Financial Management Systems ("FMS") and Human Relations Management ("HRM"). High function FMS and HRM software serves the special needs of large customers. DOJ contended that only three companies competed in this market. These were Oracle, PeopleSoft and SAP. In arguing that unlawful unilateral effects would result from the merger, DOJ asserted that Oracle and PeopleSoft were each the closest substitute of the other, with SAP lagging considerably behind.

Of note, Judge Walker gave little weight to customer and industry witnesses produced by DOJ. The customers and industry witnesses agreed with DOJ in testifying that the merger would severely limit their high-function FMS or HRM software options and, as a result of the merger, Oracle would be able to raise prices successfully in the absence of adequate substitutes available to purchasers in the relevant market. Industry witnesses also testified that no other vendors could adequately service the needs of large customers in the FMS and HRM market. Of particular interest was the testimony of Microsoft that it did not presently service such customers, and had no plans to enter the markets in the future.

Judge Walker gave little credence to the testimony and found the customer testimony to be "largely unhelpful". Judge Walker dismissed the Microsoft testimony that it had no plans to enter the relevant markets in the future, and held that Microsoft was already in the market, and could quickly ramp up its presence such as to render unprofitable any increase in prices resulting from the merger. In dicta, Judge Walker further rejected the government's contention that the relevant geographic market was limited to the United States, and found that SAP would be able to expand its efforts and focus on the United States market and that the correctly defined geographic market was thus "worldwide".

The DOJ's defeat is but one in a continuing series. Recently, DOJ lost a merger challenge to *Dairy Farmers of America* in its acquisition of two competitors in the supply of milk to schools, and more recently, the FTC lost in a bid to block the acquisition by Arch Coal of two rivals in the coal production market. *See, United States v. Dairy Farmers of America*, 2004-1 Trade Cas. (CCH) ¶ 74,364 (E.D. Ky 2004) and *FTC v. Arch Coal*, 329 F. Supp. 2d 109 D.D.C.(2004). The Court does not explain why it did not credit Microsoft's testimony as to its current and future intentions and capabilities. Customer complaints and opinions on mergers have been the traditional grist of enforcement agency cases. Customers in industry participants are the primary constituency in such cases, and their testimony has traditionally been accorded substantial weight. Stay tuned.

For more information, please contact Don Hibner at (213) 617-4115 or dhibner@sheppardmullin.com

DOJ Loses Dairy Merger Challenge

The Antitrust Division and the state of Kentucky alleged in a 2003 complaint, which was amended in March of 2004, that Dairy Farmers of America's ("DFA") ownership of half of Southern Belle Dairy Co., LLC and half of Flay-O-Rich violated Section 7 of the Clayton Act as DFA's transactions essentially combined the only two competing dairy producers in a local geographic market in Kentucky. DFA is a milk marketing cooperative that acquired two competing dairies. The DOJ sought to undo the dairy combination as the government alleged that the transactions recreated the effects of a criminal conspiracy carried out by the two companies from the 1970s to 1989. Indeed in 1992, both dairies pleaded guilty to felony bid-rigging for raising the cost of school milk by agreeing which diary company would bid lower. The DOJ alleged that from the late 1990s until February 2002, Flav-O-Rich and Southern Belle competed vigorously for school milk contracts. The DOJ further alleged that through subsidiaries DFA acquired control of Flav-O-Rich in December 2001 and purchased half of Southern Belle in February 2002, asserting control over both competitors. The facts appeared to show that DFA controlled the only two dairy producers serving the relevant geographic area.

After a failed attempt to settle the lawsuit, DFA restructured its ownership of Southern Belle, giving full control to co-owner Bob Allen and leaving DFA with a passive non-voting capital interest in Southern Belle. Nevertheless, the DOJ maintained that the DFA should divest itself of one dairy company because DFA has a clear incentive to encourage the dairies to raise prices and not go after each other's customers. Moreover, the DOJ claimed that both of the co-owners who manage Flav-O-Rich and Southern Belle have long lucrative relationships with DFA. The DOJ noted in one of its pleadings that the managers of both dairies are experienced enough to understand that their interests are best served by reducing competition between each other. In summary, the Antitrust Division argued the deal was illegal because DFA would be obtaining profits from both entities, which means there is no incentive for them to compete against each other for school milk contracts.

Despite the government's allegations, the district court held that the DOJ failed to establish a causal connection between DFA's acquisition of a 50% non-voting, non-managerial interest in a dairy and anticompetitive effects with respect to the sale of milk to schools. Basically, the district court rejected the DOJ's theory of anticompetitive effects under which DFA's 50% interest in the dairy combined with its 50% voting interest in the only other competitor in the market created the incentive and opportunity to collude and to diminish competition for the sales of milk to local schools. The district court concluded that DFA could own 50% of one dairy with managerial control and buy a passive 50% stake in a rival dairy without harming competition because the DFA would not have the ability to influence or control the dairy with respect to its pricing decisions. Therefore, a finding of causation is not likely when the acquirer does not have the ability to be involved in the decision making that forms the basis of the alleged anticompetitive effects.

Moreover, the district court held that the government was not entitled to a presumption of illegality. While a combination is presumed to be illegal if the relevant market is sufficiently concentrated and the challenged acquisition significantly enhances concentration, a presumption is not applicable unless a buyer acquires some control of a large percentage of a market. The district court found that a partial passive interest in the dairy did not increase concentration in the market and stated that the challenged transaction was not horizontal because it was not a merger of two competitors.

The decision is noteworthy because unless the DOJ decides to appeal and it is overturned, the decision basically rejects the DOJ's coordinated interaction theory based on opportunity and incentive to collude. It also provides precedent for a company to legally buy two direct competitors by making at least one passive investment of 50% or less of a direct competitor as long as it does not oversee, influence or control the pricing decisions of one of the acquired companies.

For more information, please contact Andre Barlow at (202) 218-0026 or abarlow@sheppardmullin.com

Brooke Group "Recoupment" Standard Inapplicable To Forest Products Company's Efforts To "Corner The Market"

On July 27, 2004, the United States District Court, District of Oregon denied defendant Weyerhaeuser Company's renewed motion for judgment as a matter of law, and affirmed a single damages verdict of $5,287,743. *Washington Adler LLC v. Weyerhaeuser Co.,* No. CV 03 753 PA (July 27, 2004).

Washington Alder LLC, ("Washington"), a sawmill operator, was found to have suffered antitrust injury as a result of Weyerhaeuser's efforts to "corner the market" in alder sawlogs by purchasing more saw logs than it needed, in order to prevent competitors from obtaining them at economical prices. Washington alleged that it had experienced considerable difficulty in obtaining quality logs at reasonable prices, and was forced to buy smaller-diameter and lower-quality logs, and pay substantially higher prices, in order to keep its mill in operation.

Weyerhaeuser urged that it was entitled to judgment as a matter of law because the plaintiff failed to prove that Weyerhaeuser would have recouped the cost of its alleged predatory conduct, in accordance with the predatory pricing standard in *Brooke Group Ltd. v. Browne & Williamson Tobacco Corp.,* 509 U.S. 209 (1993).

In denying the motion, Judge Owen Panner noted two apparent flaws. First, he held that the act of deliberately driving up the price of logs did not invoke the application of the *Brooke Group* predatory pricing standard. The court noted that the *Brooke Group* recoupment standard was appropriate in predatory retail pricing cases because lower retail prices would benefit consumers. A rigid recoupment standard is appropriate to prevent "false positives", which would deter aggressive price competition that would promote consumer welfare. Not so here, where the predatory conduct was creating a market scarcity for essential inputs into the plaintiff's sawmill operation. Second, the Court noted that neither the Supreme Court nor the Ninth Circuit had ever applied the *Brooke Group* predatory pricing test in a case where prices were driven up, and not down.

The court noted that while "honest competition" for logs is not unlawful conduct, even if Weyerhaeuser outbid competitors to obtain logs that were necessary to its operation, or entered into requirements contracts to assure a steady future supply, the antitrust laws are violated when the behavior goes beyond satisfying the defendant's legitimate needs, and is undertaken for the purpose of preventing competitors from obtaining necessary inputs at reasonable prices. In this situation, the court held, a showing of actual recoupment would create a rule that subjects a monopolist to liability only if its scheme succeeds, and would require competitors to wait until they are driven from the market before they could seek relief in the courts. The court held that it would be sufficient that it was "likely" that Weyerhaeuser would have been able to recoup its losses.

For more information, please contact Don Hibner at (213) 617-4115 or dhibner@sheppardmullin.com

The Role Of Private Litigation In European Antitrust Law

It is widely acknowledged that the private enforcement of European antitrust law has been extremely limited to date. In Europe, antitrust law is mostly enforced by national antitrust agencies subject to review by the courts. It is much less common that the national courts enforce directly the law at the initiative of private parties.

The European Commission ("EC") has recognized that the greater private enforcement of European Union antitrust laws would lead to even greater compliance with European antitrust rules, bring clear benefits for the functioning of Europe's single market, and increase the competitiveness of the European economy. The European Court of Justice ruled in *Courage v. Crehan* that the full effectiveness of Article 81 of the EC Treaty (which prohibits anticompetitive agreements) would be put at risk if it were not open to individuals to claim damages for loss caused by infringement of this provision.

Initiatives by the Commission

The EC has already taken some initiatives to facilitate private enforcement. When drafting its proposal for Regulation 1/2003, the new instrument for the application of Article 81 and Article 82 (which prohibits anticompetitive behavior by companies with significant market share), the Commission was all too aware that its 'monopoly' to grant exemptions to potential infringements represented a major obstacle to more extensive application of the antitrust rules by European national courts.

Regulation 1/2003 eliminates the exemption monopoly of the Commission and, as a result, national judges are able to rule on Articles 81 and 82 in their entirety. In order to further facilitate the application of European antitrust law by national courts, Regulation 1/2003 expressly provides for a number of mechanisms by which courts can ask for opinions or information from the Commission. Although the new enforcement regime established by Regulation 1/2003 strengthens the possibilities for private parties to seek and obtain relief before national courts, many obstacles to private enforcement appear to remain.

In order to assist the Commission in its research into potential obstacles to private enforcement, a study was commissioned on the conditions for claims for damages in case of infringement of EC competition rules. The study found that not only is there "total underdevelopment" of actions for damages for breach of EC competition law, but also there is "astonishing diversity" in the approaches taken by the Member States. It identified only twelve successful damages awards for breach of European antitrust law since the inauguration of the EC antitrust enforcement system in 1962. The study also established that there has been a similarly limited number of damages awards under national competition law. This compares poorly, for instance, with the US system, where private action accounts for a very important share of antitrust enforcement.

Initiatives by Member States

The importance of the private enforcement of the European antitrust rules is also underlined by the initiatives which have been taken, or are under consideration by a number of EU countries. In the UK, a number of measures have already been taken. In particular, the creation of a specialized court, the Competition Appeal Tribunal ("CAT"), can hear actions for damages where a prior decision of the OFT or the EC exists. In Sweden, "opt in" class actions were introduced in 2003, although these are restricted to parties in a contractual relationship with the infringing party. A Government Committee has recently recommended a number of measures to further support private enforcement, including the extension of class actions to consumer groups and other private individuals affected by an infringement of antitrust law.

The German Government has also recently proposed a reform package which is intended to ensure that German antitrust law is in accordance with Regulation 1/2003. This so-called 7th amendment of German antitrust law contains a number of measures intended to facilitate private enforcement. This includes the relaxation of the "protective purpose" requirement in German law, which the courts have interpreted as limiting the circle of potential claimants to those directly targeted by the infringer, a requirement which has proved very difficult to fulfill in practice. Furthermore, a review is being undertaken in the Netherlands on how the conditions for private enforcement of European antitrust law can be further improved.

Conclusion

Private enforcement of European antitrust law is an important issue and any reforms will not be rushed. The European Commission is looking for a broad debate with all interested parties which discusses how the benefits of private enforcement will be balanced with its costs. Overall, an extended system of private enforcement in Europe that does not fall into the excesses that we have seen in other legal systems would be in the interest of the European economy and, more importantly, European consumers.

For more information, please contact Neil Ray at (415) 774-3269 or nray@sheppardmullin.com

In The Tenth Circuit, Economic Protectionism Is A Legitimate State Interest

"[A]bsent a violation of a specific constitutional provision or other federal law, intrastate economic protectionism constitutes a legitimate state interest." So held the Court of Appeals for the Tenth Circuit in *Powers v. Harris*, 379 F.3d 1208 (10th Cir. Aug. 23, 2004) in upholding a law it assumed was designed essentially to favor one industry over another.

In *Powers*, the plaintiffs challenged an Ohio law restricting the intra-state sale of "time of need" caskets only to licensed funeral directors operating out of a funeral establishment. Plaintiffs, who operate an Ohio-based business selling caskets online, alleged that the statute violated the Equal Protection and substantive Due Process protections of the federal constitution. Specifically, they argued that less than 5% of the rigorous and time-consuming requirements for becoming a licensed funeral director actually addressed casket sales (embalming, for example, occupies a far more significant portion of the curriculum). Defendants, members of the Ohio State Board of Embalmers and Funeral Directors, countered that the statute was rationally (if loosely) related to a legitimate government interest: protecting vulnerable customers from over-reaching. While the district court acknowledged that the law was burdensome and largely unnecessary to casket-selling, it nonetheless refused to overturn it on constitutional grounds.

Rejecting the parties' appeal to consumer protection, the court stated that the statute was viable on a much broader ground: it was rationally related to a legitimate government interest in intra-state economic protectionism. This holding, the court acknowledged, runs directly contrary to a recent Sixth Circuit case, *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002), which struck down an almost identical state regulation on the grounds that economic protectionism is an illegitimate interest. *Craigmiles*, the *Powers* court argued, made the fatal mistake of confusing *interstate* protectionism – forbidden under the Dormant Commerce clause – with permissible *intrastate* protectionism. The Supreme Court, the *Powers* opinion concluded, has never held that intrastate protectionism is an illegitimate goal; to the contrary, several decisions appear to uphold that interest, allowing (for example) an Iowa statute fostering riverboat gambling by taxing it at a lower rate than racetrack gambling; a California law favoring established "mom-and-pop" businesses over newer chain stores; and a New Orleans ordinance prohibiting the entry of new push-cart vendors in the French Quarter while permitting the two existing vendors to remain.

The court further rejected any appeal to "heightened rational basis scrutiny." Regardless of whether (as one commentator has argued) there are as many as six versions of rational-basis review, the *Powers* majority pointed out that the Supreme Court has never openly admitted that there is any more than one. Even if a heightened scrutiny (such as that arguably applied in *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) and *Romer v. Evans*, 517 U.S. 620 (1996)) existed, the court held that their protection of "politically unpopular groups" would not apply to internet sales of funeral caskets. Further, the court surmised, *Cleburne* and *Romer* could rely on an implicit finding that punishing a politically unpopular group was the *only* basis for the challenged statutes. Here, in contrast, the challenged statute had more than just a desire to harm non-licensed time-of-need salespeople – it had naked economic protectionism to justify it.

In a concurring opinion, Judge Tymkovich objected to the court's wide-ranging holding and pointed out that most of the cases relied on by the majority involved some state interest *other than* naked protectionism. The majority rejected such reasoning, however, noting that "while baseball may be the national pastime of the citizenry, dishing out special economic benefits to certain in-state industries remains the favored pastime of state and local governments. [A]dopting a rule against the legitimacy of economic protectionism and applying it in a principled manner would have wide-ranging consequences. …While the creation of such a libertarian paradise may be a worthy goal, Plaintiffs must turn to the Oklahoma electorate for its institution, not us." In the meantime, this decision has set up an interesting split in the circuits. It remains to be seen whether the Supreme Court will take up the opportunity to further elaborate on what "rational basis review" really means.

For more information, please contact Jane Langdell at (213) 617-4261 or jlangdell@sheppardmullin.com

DOJ White Collar Crime Update

In the past month, the Antitrust Division indicted a company in the road construction industry on bid-rigging charges and obtained a guilty plea from an international player in the food preservatives industry.

Bayer Pleads Guilty

On September 30, the Justice Department announced that Bayer Corporation ("Bayer"), the Pittsburgh subsidiary of German firm Bayer AG, agreed to plead guilty and to pay a $33 million criminal fine for participating in a conspiracy to fix prices of a chemical called polyester polyols, which is used in a number of consumer products, including plastic grocery bags, shoe soles and automotive parts. Polyester polyols are also used in automotive coatings, filters, belts, seals and gaskets, adhesives, sound-proofing products, and textiles. The chemical involved in the Bayer case, aliphatic polyester polyols made from adipic acid, is added to other chemicals to improve tensile strength and resistance to abrasion. According to the felony charge filed in U.S. District Court in San Francisco, Bayer conspired from 1998 to 2002, with an unnamed producer and unnamed individuals, to suppress and eliminate competition in the United States for aliphatic polyester polyols made from adipic acid. Under the plea agreement, Bayer agreed to assist the government in its ongoing investigation.

Chemical Company Pleads Guilty

The Justice Department announced on September 20 that Degussa U.K. Holdings Ltd. ("Degussa"), an international chemical producer based in Britain, agreed to plead guilty and to pay a $1.5 million fine for its participation in a criminal conspiracy that suppressed competition in the world markets for organic peroxides. Organic peroxides are industrial chemicals used in the production of numerous plastics and rubbers and the manufacture of polyvinyl chloride, high and low-density polyethylene, polypropylene, and most polystyrene products such as containers and packaging. In the U.S. District Court in San Francisco, Degussa was charged with one count of conspiring to fix the prices of organic peroxides (t-butyl perbenzoate and t-butyl peracetate, in particular) sold in the United States and elsewhere from August 1997 until March 1998. Degussa, which is now a subsidiary of German chemical giant Degussa Aktiengesellschaft, operated independently at the time of its criminal offense under the name Laporte plc. Under the terms of the plea agreement, Degussa has agreed to cooperate fully with the ongoing federal investigation of anticompetitive behavior in the organic peroxides industry.

Rubber Chemical Executive Pleads Guilty

The Department of Justice announced on September 14 that Joseph B. Eisenberg, a former executive of Crompton Corporation, a U.S. manufacturer of rubber chemicals based in Middlebury, Connecticut, agreed to plead guilty to participating in an international conspiracy to fix prices in the rubber chemicals market. In a felony case filed in the U.S. District Court in San Francisco, Eisenberg was charged with fixing the prices of certain rubber chemicals sold in the United States and elsewhere from 1995 until 2000. Eisenberg was Crompton's Executive Vice President for Performance Chemicals and Elastomers during the majority of the time he participated in the conspiracy. Under the plea agreement, which must be approved by the court, Eisenberg has agreed to assist the government in its ongoing rubber chemicals investigation. Rubber chemicals are a group of additives used to improve the elasticity, strength, and durability of rubber products, such as tires, outdoor furniture, hoses, belts, and footwear. Approximately $1 billion of rubber chemicals are sold annually in the United States. The former Crompton executive was charged with carrying out the conspiracy with his co-conspirators.

Charges Filed Against Spammer Under CAN-SPAM

Last month, the U.S. Attorney in Los Angeles filed charges against an individual under the CAN-SPAM Act of 2003, alleging the man drove around Venice, California, and using a wireless antennae attached to a laptop, found open, unencrypted wireless access points for computer networks, and then sent thousands of spam messages advertising pornographic Web sites (*United States v. Tombros,* C.D. Cal., CR 04-1085, *court appearance* 8/30/04). A criminal information filed in U.S. District Court for the Central District of California charged that Nicholas Tombros, of Marina del Rey, CA, accessed without authorization a computer involved in interstate communications, and intentionally initiated the transmission through that computer of multiple commercial e-mail messages that affected interstate commerce. CAN-SPAM regulates interstate commerce by imposing limitations and penalties for transmitting unsolicited e-mails. Tombros appeared in U.S. District Court in Los Angeles on August 30, but the matter was continued until September 15. Donald J. Townsley, an attorney based in Orange, California, is representing Tombros.

For more information, please contact Camelia Mazard at (202) 218-0028 or cmazard@sheppardmullin.com

RECENT ACTIVITIES

DOJ ANTITRUST HIGHLIGHTS

- On September 27, the Antitrust Division announced that its Office of the Director of Operations, including the Premerger Notification Unit, has relocated from the Patrick Henry Building, 601 D Street, N.W., Washington, D.C. to the Robert F. Kennedy Main Justice Building effective September 27, 2004. The Office of Operations coordinates the investigation and litigation policies and procedures affecting the Antitrust Division. The new mailing address for the Premerger Notification Unit is: Department of Justice Antitrust Division, Office of Operations, Premerger Notification Unit, 950

RECENT ACTIVITIES

DOJ Antitrust Highlights *(Continued)*

Pennsylvania Avenue, NW, Room 3335, Washington, DC 20530. For deliveries other than those via the U.S. Postal Service, the ZIP code 20004 should be used with the address information shown above. Use of the 20530 ZIP code for deliveries other than U.S. Postal Service deliveries will result in a delay of the delivery to the Premerger Notification Unit. Delivery of Hart-Scott-Rodino Premerger Notification & Report Forms and other materials to the Premerger Unit will be similar to current procedures in place at the Main Justice Building. All telephone numbers for the Premerger Notification Unit will remain the same.

- At the end of August, the DOJ announced that it reached a settlement requiring Connors Bros. to divest its Port Clyde sardine snack business in order to prevent competitive harm from Connors' acquisition of Bumble Bee. According to the complaint, Connors and Bumble Bee were the only two significant sellers of mainstream sardine snacks and competed against each other throughout the country until the acquisition. Connors and Bumble Bee owned the four dominant sardine snack brands (Connors' Brunswick, Beach Cliff, and Port Clyde brands and Bumble Bee's own brand). The challenge was noteworthy because the DOJ allowed the parties to close the deal prior to conducting its merger investigation on April 30, 2004, so that the parties could comply with a closing deadline imposed by Canadian Investment law. Prior to closing the deal, Connors and Bumble Bee made two agreements with the DOJ. First, they agreed to make certain divestitures if the DOJ in its sole discretion determined they were necessary after conducting its investigation. Second, Connors and Bumble Bee agreed to hold separate their sardine businesses pending the government's merger investigation.
- In late August, the DOJ also announced that it was requiring Syngenta AG to divest the worldwide sugar beet seed business of Advanta B.V. in order to proceed with its planned $475 million acquisition of Advanta. According to the complaint, Syngenta and Advanta competed to develop and produce sugar beet seeds planted in the United States. Sugar beets are sold to processors, who convert them to sugar. Syngenta and Advanta are two of only three significant developers of sugar beet seeds suitable for growing in the United States. Both companies also devoted considerable research and development resources to seed innovation. The divestiture is designed to promote competition.

For more information on any of these activities, please contact Andre Barlow at (202) 218-0026 or abarlow@sheppardmullin.com.

FTC ANTITRUST HIGHLIGHTS

- On September 30, the Federal Trade Commission announced that Enterprise Products Partners L.P. ("Enterprise") agreed to make several divestitures to settle allegations that the $13 billion merger of Enterprise and GulfTerra Energy Partners L.P. ("GulfTerra") would harm competition. The Commission's consent order requires divestitures of: 1) an interest in a natural gas pipeline transportation system in the Western Central Deepwater region of the Gulf of Mexico, and 2) an interest in a propane storage and terminaling services facility in Hattiesburg, Mississippi, which serves the Dixie Pipeline, the only common-carrier propane pipeline in the southeast United States. The Commission's order is designed to remedy the alleged anticompetitive effects of the transaction. It also contains a hold separate order requiring the companies to maintain the assets to be divested as separate, viable, and competitive entities pending their sale to an FTC-approved purchaser.

RECENT ACTIVITIES

FTC Antitrust Highlights *(Continued)*

According to the Commission's complaint, the West Central Deepwater market is highly concentrated, with assets controlled by Enterprise and GulfTerra accounting for two of the three major pipelines that provide the market with natural gas pipeline transportation services. Combined, these two pipelines account for approximately 60 percent of the natural gas pipeline capacity in the West Central Deepwater market. Further, the proposed merger would substantially increase concentration in this already highly concentrated market, and due to the high costs associated with pipeline construction, new pipeline entry is highly unlikely to mitigate the loss of competition that would result from the transaction. By eliminating actual and direct competition between Enterprise and GulfTerra in this market, the proposed merger would likely cause substantial competitive harm to natural gas producers, which must buy pipeline transportation services in the West Central Deepwater market. The complaint also contends that the market for propane storage and terminaling services in Hattiesburg, Mississippi, is highly concentrated, with Enterprise and GulfTerra currently controlling approximately 53 percent of the propane storage capacity in that market. The companies are direct and substantial competitors in the provision of propane storage and terminaling in Hattiesburg. The proposed merger would provide the companies with a controlling interest in three of the four propane storage and terminaling facilities in Hattiesburg, and would substantially increase concentration in an already highly concentrated market. New entry into this market is unlikely to be timely or sufficient to alleviate the FTC's competitive concerns with the proposed transaction.

- On September 29, the FTC announced that Magellan Midstream Partners, L.P. ("Magellan") would be able to complete its proposed $492.4 million acquisition of selected pipeline and terminal assets from Royal Dutch Petroleum Company ("Shell"), provided it divested a refined petroleum products terminal in Oklahoma City, Oklahoma, within six months to a Commission-approved buyer. To protect competition pending the divestiture, Magellan is required to hold the Oklahoma City terminal assets separate and maintain their viability until they can be sold. If Magellan is unable to divest the terminal within six months of consummation of the deal, the FTC may appoint a trustee to accomplish the sale.

Magellan is a publicly traded limited partnership owned 64 percent by public shareholders and 36 percent by Magellan Midstream Holdings, L.P. It is primarily engaged in the storage, transportation, and distribution of refined petroleum products and ammonia. Its assets include a petroleum products pipeline and terminal system serving the mid-continent region of the United States, marine terminals along the Gulf Coast and New York Harbor, inland petroleum products terminals in the southeastern United States, and an ammonia pipeline system in the mid-continent region. Shell is a diversified multinational energy company engaged in the manufacturing, refining, distribution, transportation, terminaling, and marketing of a range of petroleum products, including gasoline, diesel fuel, jet fuel, motor oil, lubricants, petrochemicals, and other products. Shell Oil Company is the United States operating arm for the Royal Dutch/Shell Group of companies, which is owned 60 percent by Royal Dutch Petroleum Company of the Netherlands and 40 percent by The Shell Transport and Trading Company, p.l.c. of the United Kingdom.

According to the Commission's complaint, the proposed transaction would eliminate competition in violation of the FTC Act and the Clayton Act, as amended, in a relevant market that consists of the terminaling of gasoline, diesel fuel, and other lightweight petroleum products in the Oklahoma City Metropolitan Area. The complaint charges that marketers and other wholesale buyers of gasoline, diesel fuel, and other lightweight petroleum products have no effective alternative to terminals located within this area, and that because of costs and delivery logistics, terminals located outside of the Oklahoma City Metropolitan Area are too far away to supply buyers in that area. The FTC's complaint also contends

RECENT ACTIVITIES

FTC Antitrust Highlights *(Continued)*

that if the proposed transaction were consummated, competition in the supply of terminaling services for gasoline, diesel fuel, and other lightweight petroleum products in the Oklahoma City Metropolitan Area would be substantially lessened. This would occur through the elimination of direct competition between Magellan and Shell in the market for terminaling services in the Oklahoma City Metropolitan Area and an increase in the likelihood of collusion or coordinated interaction in the post-merger environment. The result could be increased prices for gasoline, diesel fuel, and other light petroleum products.

- On September 28, a physician-hospital organization ("PHO") in New Mexico agreed to settle FTC charges that it drove up the cost of health care for consumers in the Alamogordo, NM area by jointly fixing prices charged by physicians and by nurse anesthetists to health plans and other payors. The consent order prohibits White Sands Health Care System, L.L.C., the Alamogordo Physicians' Cooperative, Inc., and their agent from negotiating, refusing to deal, and setting terms for dealing with payors on physicians' and other providers' collective behalf. White Sands, created in 1996, is a PHO based in Alamogordo that consists of Alamogordo Physicians, an independent practice association ("IPA"); Gerald Champion Regional Medical Center, the only hospital in the Alamogordo area; and 31 non-physician health care providers, including all five nurse anesthetists in the area. Alamogordo Physicians has 45 physician members, representing 84 percent of all physicians independently practicing in the area.

  The FTC's complaint charges that White Sands' physician and nurse anesthetist members refuse to deal individually with health plans and instead enter into contracts that Laurenza negotiates on their behalf. The FTC's complaint also states that White Sands claims to operate as a "messenger model." Competing providers may lawfully use a "messenger" to reduce costs and facilitate contracting with payors, as long as the arrangement does not involve collective price-setting or other anticompetitive agreements among the providers. In this case, the FTC's complaint alleges, the respondents engaged in collective negotiations with payors and orchestrated collective refusals to deal with payors that resisted their terms. According to the FTC, White Sands' members' joint negotiations did not enhance efficiency or consumer welfare. The proposed consent order bars the respondents from entering into any collective agreement between providers: (1) to negotiate with payors on any provider's behalf; (2) to deal or not deal with payors; (3) to designate the terms upon which any provider deals with any payor; or (4) to refuse to deal individually with any payor, or to deal with any payor only through an arrangement in which the respondents are involved.

- On September 27, the FTC announced Buckeye Partners, L.P. ("Buckeye") would be permitted to complete its proposed $517 million acquisition of selected refined petroleum pipelines and terminals from Shell Oil Company (Shell). To protect competition for terminaling in and around Niles, Michigan, the parties will be required for 10 years to notify the FTC before acquiring, selling, or transferring the Niles terminal assets that were part of the parties' originally proposed transaction. Buckeye will acquire from Shell five refined petroleum products pipelines and 24 petroleum products terminals in the United States, including: (1) the 309-mile North Line Products System; (2) the East Line Products System; (3) the Two Rivers Pipeline and two pipelines serving St. Louis, Missouri; and (4) terminals in Illinois, Indiana, Ohio, and Michigan.

  Buckeye, a Delaware corporation, is a partnership engaged in the storage, terminaling, and pipeline transportation of refined petroleum products, including gasoline, diesel fuel, and other light petroleum products. With operations primarily in the Northeast and Midwest regions of the United States, the corporation reported annual sales of $273 million in 2003. In addition to the transportation services it provides, Buckeye and its wholly owned subsidiary, Buckeye Terminals, LLC,

RECENT ACTIVITIES

FTC Antitrust Highlights *(Continued)*

own and operate 16 petroleum storage facilities and truck loading terminals in Indiana, Illinois, Michigan, New York, Ohio, and Pennsylvania.

According to the Commission's complaint, the transaction as originally proposed could be anticompetitive and could violate the FTC Act and the Clayton Act, in that it could substantially lessen competition in the market for the terminaling of gasoline, diesel fuel, and other light petroleum products in the area around Niles, Michigan. The FTC alleged that the market for terminaling services in the Niles area appeared to be highly concentrated and that had the original transaction been consummated as proposed, concentration in that market would have increased significantly. In contrast, the modified acquisition conditionally approved by the FTC would not alter concentration levels in the Niles area, as it does not involve the sale of Shell's Niles terminal to Buckeye. The complaint also alleges that entry into the relevant market for terminaling services in the Niles area is difficult, and would not be timely, likely, or sufficient to remedy the possible anticompetitive effects of the transaction as originally proposed. The complaint further alleged that the acquisition, if consummated as originally proposed, may have led to a substantial lessening of competition in terminaling services in the Niles Area, and that such competitive harm could result from: (1) the elimination of direct competition between Buckeye and Shell in the supply of terminaling in the Niles area; and (2) an increased likelihood of collusion or coordinated interaction between the remaining competitors in the post-merger environment in the relevant markets.

- On September 22, The FTC hosted a symposium on September 22 and 23, 2004, in honor of the agency's 90th anniversary. The event featured over 40 participants, including current FTC officials and alumni.

- On September 15, the FTC announced a consent agreement that will conditionally allow General Electric Company's $900 million acquisition of InVision Technologies, Inc., while requiring GE to divest InVision's YXLON nondestructive testing ("NDT") subsidiary to a Commission-approved buyer within six months. GE and InVision are the two leading U.S. producers and sellers of x-ray NDT and inspection equipment, which is used for a wide range of purposes including inspection of aircraft and automobile components. The action was taken to ensure continued competition in the highly specialized U.S. market for x-ray NDT and inspection equipment.

GE is a diversified technology and services company headquartered in Fairfield, Connecticut. GE Infrastructure, the company's unit that is acquiring InVision, oversees operations of GE's security and sensing, water technologies, and automation enterprises. Another GE unit, GE Inspection Technologies, designs, manufactures, and sells various NDT and inspection equipment under the Seifert, Pantak, Krautkramer, and Hocking brand names. The company's NDT and inspection products serve customers in the aerospace, energy, petrochemical, and automotive industries.

InVision, headquartered in Newark, California, is the leading supplier of explosive detection systems ("EDS") to the U.S. government for civil aviation security. Its EDS devices are used at airports to screen checked passenger baggage. InVision also offers industrial NDT and inspection equipment through its YXLON subsidiary. YXLON, headquartered in Hamburg, Germany, was purchased by InVision in 2003, and designs and sells x-ray NDT and inspection equipment for use in the aerospace, automotive, and petrochemical industries, among others.

GE's proposed acquisition of InVision specifically raised concerns in the U.S. markets for the development, manufacture, and sale of x-ray NDT and inspection equipment of three types: (1) standard x-ray cabinets; (2) x-ray NDT inspection

RECENT ACTIVITIES

FTC Antitrust Highlights *(Continued)*

systems equipped with automated defect recognition software (ADR-capable x-ray systems); and (3) x-ray generators capable of producing energy levels higher than 350 kilovolts (high-energy x-ray generators). According to the Commission's complaint, GE's acquisition of InVision's YXLON subsidiary would be anticompetitive and in violation of Section 5 of the FTC Act and the Clayton Act. GE and InVision are the two leading suppliers of x-ray NDT and inspection equipment in the United States, including: (1) standard x-ray cabinets; (2) ADR-capable x-ray systems; and (3) high-energy x-ray generators – and the U.S. markets for these products are all highly concentrated.

Significant impediments to new entry exist in the U.S. market for x-ray NDT and inspection equipment that limit the ability of a new firm to compete. These impediments include the high cost of developing x-ray NDT and inspection equipment and establishing a broad service and support network. Customers typically only buy x-ray NDT and inspection equipment from suppliers with reliable local service and support networks, such as GE and InVision, to ensure a quick and effective response to any support needs that arise. Further, customers value suppliers with a good reputation in the industry and are reluctant to switch to a new company that does not have a proven track record of producing quality x-ray NDT and inspection equipment. Accordingly, the FTC contends that entry would not be timely enough to alleviate the alleged anticompetitive effects of the proposed acquisition. According to the complaint, with no timely possibility for new entrants, GE's acquisition of InVision would allow the former to exercise unilateral market power, increasing the likelihood that x-ray NDT and inspection equipment buyers would face higher prices and reducing existing incentives to improve product quality or pursue further innovation in these markets.

- In response to a request from California Assembly Member Greg Aghazarian, on September 10, FTC staff commented on a bill (AB 1960) that requires pharmacy benefit managers ("PBMs") to disclose certain information to purchasers and prospective purchasers of their services, as well as to prescribers and consumers. The bill was passed by both the California Senate and Assembly and is currently pending before Governor Schwarzenegger.

Health plan sponsors and health insurers hire PBMs to administer drug benefits programs. AB 1960 is intended to increase cost transparency in transactions between PBMs and their health plan clients, provide more information to consumers and prescribers with respect to certain drug substitutions, and ensure that any realized cost savings are passed on to consumers. The FTC staff letter concluded that AB 1960 is actually more likely to increase the cost of pharmaceuticals, increase health insurance premiums, and reduce the availability of insurance coverage for pharmaceuticals.

AB 1960 requires PBMs to disclose certain financial information concerning their transactions with pharmaceutical companies to purchasers and prospective purchasers of PBM services. It also imposes disclosure requirements on prescribers and patients before a PBM may substitute one medication for another. Although a PBM does not have to make disclosures to prescribers when it is requesting substitution of a generic equivalent of the prescribed medication, it must communicate certain information to consumers when any drug substitution is requested. The bill also requires PBMs to monitor the health of patients for whom drug substitutions were made.

The FTC staff found that AB 1960 was likely to have an adverse effect on consumers in two ways. First, mandated disclosures may actually increase prices. "Whenever PBMs have a credible threat to exclude pharmaceutical manufacturers from their formulary, manufacturers have a powerful incentive to bid aggressively. . . Whenever competitors

RECENT ACTIVITIES

FTC Antitrust Highlights *(Continued)*

know the actual prices charged by other firms, tacit collusion - and thus higher prices - may be more likely. It is for this reason that California law requires the state to use sealed bids to procure desired goods and services whose value exceeds $25,000," the FTC's letter states. Second, the FTC found that the bill had a number of provisions that are likely to make drug substitution more expensive. PBMs frequently use drug substitution to reduce costs and promote competition between branded drug makers. Generic substitution is encouraged by the FDA and widely recognized as safe, and California already requires prescriber approval for the substitution of one branded drug for another. Because current safeguards appear sufficient to protect consumers, AB 1960 is likely to increase costs to consumers without providing any additional benefits.

- On September 9, the FTC's Bureau of Competition and Office of the General Counsel today informed the U.S. Court of Appeals for the District of Columbia Circuit that the FTC would not pursue an appeal of the decision of the U.S. District Court denying the Commission's request for a preliminary injunction to halt Arch Coal's acquisition of Triton. On April 1, 2004, the Commission issued an administrative complaint, Dkt. 9316, challenging the transaction. The administrative trial of the matter is scheduled to begin on October 12, 2004.

- On September 3, the FTC announced that Jon Leibowitz, most recently vice president of congressional affairs for the Motion Picture Association of America ("MPAA"), had been sworn in as a commissioner. Leibowitz joins the FTC approximately two weeks after the swearing-in of Chairman Deborah Majoras.

  Prior to holding his position at the MPAA, where he worked as the film industry's liaison to members of Congress, Leibowitz was the Democratic chief counsel and staff director for the U.S. Senate Antitrust Subcommittee from 1997 to 2000. He worked concurrently as chief counsel to Senator Herb Kohl from 1989 to 2000. His other Capitol Hill experience includes stints as chief counsel to the U.S. Senate Subcommittee on Terrorism and Technology from 1995 to 1996 and the U.S. Senate Subcommittee on Juvenile Justice from 1991 to 1994. He worked for Senator Paul Simon from 1986 to 1987 and as an attorney in private practice in Washington from 1984 to 1986.

  Mr. Leibowitz is a graduate of the University of Wisconsin with a B.A. in American History. He subsequently graduated from the New York University School of Law in 1984. He is a member of the District of Columbia Bar.

For more information on any of these activities, please contact Robert W. Doyle, Jr.
at (202) 218-0030 or rdoyle@sheppardmullin.com

FTC CONSUMER PROTECTION HIGHLIGHTS

- The FTC's Do Not Call Team received a Service to America Medal on September 28, honoring the agency's work in creating and implementing the Do Not Call Registry. The medal honors the finest achievements of federal employees. The Do Not Call Team was one of two teams from federal agencies receiving a medal this year. According to an FTC press release celebrating the team's receipt of the medal, the Do Not Call Registry now contains 64 million customer phone numbers, and telemarketer compliance remains high. A 2004 Harris Interactive Survey indicated that 57 % of the adult population in the United States has registered a phone number, with 92 % reporting fewer telemarketing calls.

RECENT ACTIVITIES

FTC Consumer Protection Highlights *(Continued)*

- In a September 27 press release, the FTC announced that the Federal District Court for the Southern District of New York ruled that Verity International and three other defendants are responsible for $1.6 million in unauthorized charges for purported "videotext" services to consumers between the months of July and September 2000. The court also ruled that the FTC may seek to release funds frozen by the court when the FTC originally filed its complaint in October 2000 for the purposes of providing reimbursements to wrongly-charged customers. According to the FTC's complaint, the defendants caused the consumers to inadvertently download "dialer" software from various sites, which caused a consumer's modem to disconnect from its usual internet service provider, and then reconnect online via an international phone number in Madagascar. This resulted in consumers being charged rates of $3.99 per minute. In addition to unfreezing assets for further use as redress funds, the court's order places restrictions on the ability of Verity and associated defendants on billing consumers, and holds these defendants liable for $16.3 million in harm caused to consumers.

- On September 27, the FTC announced that it is seeking public comments on a proposed regulation intended to make existing notice of a consumer's right to opt out of prescreened solicitations for credit or insurance. "Prescreened" solicitations, like pre-approved credit card offers, are required by law to inform consumers of their right to "opt out" of receiving future offers. The Commission's proposed rule would require a "layered" notice in all prescreened solicitations that consists of a short, prominent notice of the right to "opt out" listing the appropriate telephone number, and then a longer notice informing consumers of other associated rights. Comments must be submitted on or before October 28, 2004.

- On September 22, Commissioner Orson Swindle testified before the House Subcommittee on Technology, Information Policy, Intergovernmental Relations and the Census of the Committee on Government Reform that businesses that store consumer information should also develop a security plan and monitor the security of the stored information as a part of their regular business operations. Commissioner Swindle testified that if stored consumer information is compromised, companies should alert local law enforcement agencies, notify other businesses where appropriate, and then assess whether they must inform consumers. Commissioner Swindle's testimony also provided information on the FTC's law enforcement efforts in the area of information security and can be found at the agency's website at: http://www.ftc.gov/os/2004/09/040922infosecidthefttest.pdf.

- In a press release dated September 17, 2004, the agency announced that the Commissioners voted to rescind its Tire Advertising and Labeling Guides (the "Tire Guides") by 4-0-1 vote, with Commissioner Jon Leibowitz not participating. Although the Tire Guides have remain largely unchanged since 1968, consumers now have access to a wide variety of resources, including the Internet, dealerships, and tire retailers. Moreover, the National Highway Traffic Safety Administration has developed its own set of comprehensive guidelines governing the disclosure of information relating to tires. Therefore, the vote was premised on the Tire Guides being redundant and obsolete due to these existing resources as well as changes in the market.

- The FTC issued a report on September 16 that assesses the extent to which a rewards or "bounty" system would be useful in enforcing the CAN-SPAM Act, which became effective at the beginning of this year. According to the report, a "bounty system" would help overcome hurdles faced by the FTC in enforcing the Act, such as the identification of spammers, developing sufficient evidence, and obtaining a monetary award. The report concluded that potential whistleblowers that are associated with the spammers are the most likely source of

RECENT ACTIVITIES

FTC Consumer Protection Highlights *(Continued)*

information in anti-spam investigations for a variety of reasons, and that a "bounty system" would potentially incite whistleblowers to come forward with information. The report can be found on the FTC website at http://www.ftc.gov/reports/rewardsys/040916rewardsysrpt.pdf.

- The FTC announced on September 15 that the agency and the National Institute of Standards and Technology (NIST) will co-host a two-day summit to explore the development of anti-spam technology. The summit will focus on the development of domain-level e-mail authentication systems that would allow ISPs and network managers to verify that e-mail messages are actually coming from the domain in the sender's e-mail address. This would help cut down on the use of "spoofing" and other techniques used by spammers to mask the actual origins of spam e-mails. The FTC also stated that in conjunction with the summit, the agency is seeking public comment on additional issues related to e-mail authentication systems and standards that will be discussed at the summit. The specific issues are identified in the Federal Register Notice concerning the summit, available on the FTC's website at http://www.ftc.gov/os/2004/09/040915emailauthfrn.pdf.

For more information on any of these activities, please contact June Casalmir at (202) 218-0027 or jcasalmir@sheppardmullin.com

INTERNATIONAL ANTITRUST HIGHLIGHTS

- On September 30 and October 1, the European Court of First Instance ("CFI") heard Microsoft's appeal to have the remedies imposed by the European Commission suspended until its appeal of the antitrust verdict has been decided by the European Courts. The remedies imposed by the Commission on Microsoft in the long-running antitrust case include that it license information to its rivals and, that it offer a version of its operating system Windows without its Media Player software. Microsoft argued that the former infringed its intellectual property rights and, would allow competitors to gain sufficient information on its software to develop similar products. Microsoft is also calling for the suspension of the second remedy. However, the Washington Post reported that Microsoft has developed a version of Windows without the media player, in case it loses its bid.

- On September 29, the CFI found that Mario Monti, the European Competition Commissioner, was wrong to block a $127 billion merger between WorldCom and Sprint because the two parties had withdrawn their bid. On June 27, 2000, the telecommunications companies formally stated to the Commission that they no longer proposed to implement their envisaged merger in the form notified to the European Commission. On June 28, 2000, the Commission nevertheless adopted a decision declaring the merger to be incompatible with European antitrust law. The Commisison's lawyers argued that the parties' withdrawal was no more than a 'sham'. The CFI ruled that in this case the Commission should have found that it no longer had the power to adopt the merger prohibition decision and, that the Commission should, at the very least, have informed the parties that their letter was not sufficient to result in closure of the file. A spokesman for the European Commission said that it was "unfortunate" that the CFI's decision was over "a technicality". A spokesman for WorldCom (now MCI) described the outcome as a "moral victory" but said that it would not try to take over Sprint again.

RECENT ACTIVITIES

International Antitrust Highlights *(Continued)*

- Chile's Ministry of Commerce ("Mofcom") recently established a specialized anti-monopoly office to assist in the preparation of the long-delayed PRC Anti-monopoly Law. As well as working on the proposed new Anti-monopoly law, the Office will also be responsible for: (1) investigations into alleged monopolistic practices by multinational companies; (2) drafting anti-monopoly rules and regulations; and (3) conducting international cooperation with respect to anti-monopoly of matters. While the Office is stated to be a temporary mechanism, observers expect that it will continue to be the entity tasked with investigating such activities after the promulgation of the Anti-monopoly Law. The anti-monopoly office comes under the aegis of Mofcom because of its jurisdiction over foreign and internal trade. However, the State Administration of Industry and Commerce has jurisdiction over unfair competition through its Bureau of Fair Trade, and how the two entities will work together will be an issue to be worked out in practice.

- On September 29, the Canadian Competition Bureau launched a national consultation process on the role of efficiencies under the Competition Act. To assist in the discussion, the Bureau has issued a consulted paper entitled, 'Treatment of Efficiencies in the Competition Act'. This follows parliamentary hearings, which promoted many stakeholders to suggest that the subject would benefit from broad public debate.

- On September 28, the nominee for the post of European Competition Commissioner, Neelie Kroes, in a three-hour hearing at the European Parliament said that she would act "independently and impartially" and, that she would be a "tough girl" in fighting cartels, which she deemed to be a priority. Ms. Kroes also underscored her belief in free-market liberalism. However, Ms Kroes appeared visibly nervous under close questioning and, revealed certain gaps in her knowledge of European antitrust policy. Some observers were also concerned at her less than fluent English – the working language of the European Commission's antitrust department. Ms Kroes gained important business experience by serving on the boards of more than a dozen multinational companies but has given up all her business interests, committed not to rule in cases where her judgment might be questioned by her previous business associations, and agreed not to take up any business posts after stepping down as Competition Commission to allay any conflict of interest concerns. The European Parliament will vote on whether to approve the entire Commission at a plenary session on October 25-28.

- On September 23, the Financial Times reported that Oracle's hostile $7.7bn bid for rival software group. PeopleSoft, is expected to be cleared by the European Commission. A U.S. federal court decision cleared the proposed acquisition in spite of opposition from the Department of Justice. It was said that the Commission would clear the deal in spite of its earlier misgivings about the deal, and that it had been inclined to do so for some months because Commission officials realized that a prohibition decision would unlikely stand up to a legal challenge. If the Commission does approve the merger, it will allay fears of a possible transatlantic rift in antitrust policy, such as the one seen over the controversial General Electric/Honeywell merger in 2001.

- On September 22, the Canadian Competition Bureau announced that VAW Carbon had pleaded guilty and had been fined $500,000 by the Federal Court of Canada for its role in an international conspiracy to fix the price of cathode blocks. The conspiracy lessened competition in the Canadian market for the products, which are used principally in the production of primary aluminum. "This conviction demonstrates the Bureau's resolve to hold foreign firms accountable for their participation in anti-competitive agreements that affect Canadians," said Richard Taylor, Acting Senior Deputy Commissioner of Competition. "The Competition Bureau will continue to aggressively pursue international cartels that affect our economy." German-based VAW Carbon was a member of an international cartel that agreed to implement and

RECENT ACTIVITIES

International Antitrust Highlights *(Continued)*

maintain price increases relating to the sale and supply of cathode blocks in Canada and elsewhere. Between 1996 and 1997, VAW Carbon was one of a limited number of companies engaged in the production, manufacture, distribution, sale and supply of this product throughout the world.

- On September 21, the Canadian Competition Bureau published revised Merger Enforcement Guidelines. This is the first revision since the Guidelines were originally published in 1991. The Merger Enforcement Guidelines provide an insight into the Competition Bureau's approach to the enforcement of Canadian antitrust merger review law. Although not legally binding, the Guidelines are a strong indication of the way that Canada's competition authorities will assess mergers. The format and accessibility of the Guidelines has improved in the revised version; they are easier to follow than the old version as they adopt the Competition Bureau's analytic approach to merger review. The Guidelines are particularly helpful in enabling parties to understand in which category of complexity a transaction will be classified. These classifications determine the amount of time that the Competition Bureau will need to review the filing, and allow the parties to know approximately when they will be able to proceed with closing their transaction (assuming a favorable outcome). The time frames range from two weeks to five months. While much of the policy and guidance of the 1991 Guidelines has survived the revision, the Guidelines have clearly placed a new emphasis on "co-ordinated effects" concerns with respect to mergers that give rise to oligopolistic market structures. Key substantive changes to the Guidelines reflect important reforms over the past fourteen years.

- On September 17, Mario Monti, the outgoing European Competition Commissioner, stated that he would like to see more private antitrust suits and is trying to make it easier for consumers and companies to pursue such action. In a speech to the IBA 8th Annual Competition Conference, Mr. Monti argued that private action has a string deterrent effect and, would lead to a higher level of compliance, develop a culture of competition amongst market participants, and that private litigants might take actions that national authorities would not pursue. He also pointed out the advantages of private action to private parties, including compensation awarded for losses suffered. He referred to a recent study which showed that there is a total underdevelopment of actions for damages for breaches of European antitrust law, also astonishing diversity in the approached taken by the Member States. Mr. Monti noted that at the moment, European courts are not adequately equipped to handle such antitrust suits. To combat the courts' lack of experience, he has launched a database of all ongoing antitrust actions in European antitrust law.

- On September 16, the Brazilian antitrust authority, CADE, found air carriers, TAM, Varigm VASP and Transbrasil guilty of cartel practices in a ticket sale activity at the Rio-Sao air corridor, and sentenced them to pay a fine. The CADE considered that in late 1999, TAM, Vasp, and, Transbrasil readjusted their fares in line with price increases by Varig, which was at that pint the market leader for the corridor. The CADE belived that the readjustment took place after a meeting between the management boards of TAM, Vasp and, Transbrasil. Under the fines, the air carriers will have to pay 1 per cent of their total turnover from the air corridor in 1998.

- On September 15, the European Commission granted clearance to the proposed acquisition of UK bank, Abbey National Plc by Banco Santander Central Hispano S.A of Spain. The takeover raised no competition concerns since the two banks presently operate mostly in different countries. On August 13, 2004, Banco Santander notified the Commission of its intention to acquire Abbey National, the United Kingdom's sixth largest banking group. Banco Santander is Spain's leading banking and financial services group. In Europe, however, the group operates mostly in Spain and Portugal which means that there are either no geographical overlaps with the activities of Abbey – itself

Recent Activities

International Antitrust Highlights *(Continued)*

mostly a UK player – or they are insignificant. When notifying the bid to the Commission, Banco Santander indicated that it had agreed with Royal Bank of Scotland (RBS) to terminate certain aspects of their 1988 alliance. RBS is one of the four big banks in the UK. One such aspect concerned the reciprocal representation on each other's boards, or cross-directorships. The agreement to amend the Banco Santander/RBS alliance was considered as a fact in the Commission's assessment of the proposed operation. Given the above, the Commission concluded that the proposed transaction raised no competition concerns and granted regulatory clearance.

- On September 3, the European Commission fined a group of companies a total of € 222,3 million for operating a cartel in the European market for water, heating and gas tubes for a period of up to 12 years. They were Sweden's Boliden group, Halcor S.A. of Greece, HME Nederland BV, the IMI group (UK), the KME group (Germany, Italy and France), Mueller Industries, Inc. (USA, UK and France), Finland's Outokumpu and Wieland Werke AG of Germany. "Because of the companies' illegal behavior, European consumers paid more for plumbing replacement work or when buying a house than if the healthy forces of competition had been at play. Today's decision again illustrates the relentless fight against cartels by this Commission", said Competition Commissioner Mario Monti.

- On August 30, the Russian government submitted a bill amending the thresholds for the application of the merger control regime contained in Articles 17 and 18 of the Competition Law for approval by the State Duma, Russia's lower chamber of parliament. The proposed amendments to the Competition Law are limited to substantially raising the present low notification and reporting thresholds by a factor of about 150. The bill seeks to tighten merger control over transactions involving large companies and, in strategic industries, by relaxing the notification and reporting obligations for smaller transactions. The amendments will appreciably decrease the workload of the Federal Antimonopoly Service (FAS) with regard to small and intermediate transactions. The changes will be welcomed by businesses, as the new thresholds abolish the time-consuming preparation of notifications for even minor transactions. The bill does not, however, introduce any other desirable changes to the merger-control regime. For example, intra-group transactions are still subject to clearance by FAS if the above-mentioned thresholds are met.

- The European Commission concluded that the main producers of the copper water, heating and gas tubes that go into houses and buildings operated a cartel between June 1988 and March 2001 in most of the European Economic Area in a clear breach of EU Treaty and EEA Agreement rules that outlaw restrictive business practices (Articles 81 and 53 respectively). The market was worth around € 1.15 billion a year in 2000, the cartel's last full year. The Commission was informed about the illegal behavior in January 2001, when Mueller Industries approached it in application of the 1996 Leniency Notice, which enables a company to escape a fine if it is the first to reveal the existence of a cartel. The investigation carried out by the Commission showed that the companies operated a well-structured, classic cartel with codenames, meetings in anonymous airport lounges and, the clear objective to avoid competition through the allocation of production volumes and market shares, the setting of price targets and increases as well as other commercial terms for plain copper plumbing tubes (and, as far as the KME and the Wieland groups are concerned, plastic-coated copper plumbing tubes). At the meetings they would also monitor implementation of the illegal arrangements by exchanging information on sales, orders, market shares and pricing.

For more information on any of these activities, please contact Neil Ray at (415) 774-3269 or nray@sheppardmullin.com

RECENT ACTIVITIES

FCC ANTITRUST HIGHLIGHTS

- According to sources familiar with the matter on October 4, FCC Chairman Michael Powell plans to recommend Cingular Wireless ("Cingular") receive approval to purchase AT&T Wireless Services Inc. ("AT&T Wireless") with some divestitures. Some of the conditions to the closing of that transaction, which was initially made on February 17, will likely include forcing the companies to sell assets in some rural areas where the number of competitors to the new company will dwindle to one or two. At least two other FCC commissioners will have to agree with Powell before the $41 billion cash deal could be approved by the agency. The commissioners could seek changes to the divestitures, either adding or subtracting, before voting. The divestitures, potentially in two dozen counties under Powell's proposal, could include selling business or airwaves in a market, or adjusting equity ownership the companies have in some entities that operate there, the sources said. Also on October 4, Powell said the recommendation would likely circulate to the other four commissioners that week. The acquisition will also require the green light by antitrust authorities at the DOJ. Cingular, a joint venture of BellSouth Corp. and SBC Communications Inc., and AT&T Wireless have already offered to divest some airwaves in markets where they together would have more than 80 megahertz of airwaves. That likely will mean the new company would have to sell airwaves in Texas, Georgia, and Oklahoma, where the companies hold more than 80 MHz of airwaves in several counties. FCC Commissioner Kathleen Abernathy has said that it could take the agency some additional weeks to complete the review of the deal because of its complicated nature. If the deal is approved, Cingular would leapfrog Verizon Wireless to become the biggest U.S. wireless carrier.

- A bill expected to clear the Senate in early October includes a provision that would require the FCC to quickly resolve a long-standing dispute between the cable and broadcasting industries. The issue, contained in an amendment adopted unanimously on September 29, would force the FCC to decide whether cable companies need to carry every programming service that a digital-TV station can pack into its signals. Currently, about five or six digital channels can fill the same amount of bandwidth used by a single analog service. The provision is sponsored by Senate Commerce Committee Chairman John McCain (R-Ariz.) and would require the Commission to issue "a final decision" on the cable-carriage issue by January 1. It is supported by the National Cable & Telecommunications Association ("NCTA"). FCC staff is planning to recommend cable carriage of all digital-TV multicast services offered free-of-charge to over-the-air viewers. Broadcasters have been pushing the FCC to overturn a 2001 decision that digital-TV stations were entitled to carriage of just one service. The cable industry has been fighting back, saying that digital-TV stations would use a multicast mandate to flood their networks with low-quality infomercials and home shopping fare while squeezing out cable networks that don't have broadcast licenses. McCain's provision was added to a national intelligence-reform bill (S.2845), which is expected to reach the White House this year. McCain's multicasting amendment would need to survive a joint House-Senate committee that reconciles dissimilar legislation.

- On September 23, DTV Norwich LLC ("Norwich"), an affiliate of Cablevision Systems Corp. ("Cablevision"), received an FCC license for wireless services in New York City, but the agency warned that the affiliate would forfeit the license if it failed to rectify a cross-ownership violation within 270 days. Norwich bid for the multichannel-video-distribution and data service ("MVDDS") license in an FCC auction held in January. The company did so even though agency rules banned the common ownership of an MVDDS license and a cable system in the same market. Cablevision is the region's dominant cable operator. Norwich has promised the FCC that it will take the necessary steps to clear up the cross-ownership problem within the allotted 270 days. Cablevision's wholly owned Rainbow Media Holdings LLC owns

RECENT ACTIVITIES

FCC Antitrust Highlights *(Continued)*

49% of Norwich. The FCC said it anticipates that Cablevision's planned spinoff of Rainbow and other steps will cure the cross-ownership violation. The agency said it didn't want to rush Norwich because it has long opposed requiring a licensee to engage in a "fire sale" that might produce a below-market price for the asset. If the ownership problem persists, the FCC said it would cancel the license and not return the $24.2 million bid by Norwich. An MVDDS license is intended for the terrestrial distribution of video programming and one-way high-speed Internet access. MVDDS spectrum is located in the same band used by direct-broadcast satellite providers.

- On September 9, the FCC adopted its Ninth Annual Report to Congress on the state of competition in the commercial wireless - or Commercial Mobile Radio Services ("CMRS") - industry. The Commission concluded that there is effective competition in the CMRS marketplace, based on the analysis of several measures of competition, including: the number of carriers competing in an area, the extent of service deployment, prices, technological improvements and product innovations, subscriber growth, usage patterns, churn, and investment. The Commission reviewed competitive market conditions using a framework that groups indicators of the status of competition into four categories: (1) market structure; (2) carrier conduct; (3) consumer behavior; and (4) market performance. With respect to market structure, the Commission found that 97 percent of the total U.S. population lives in a county with access to 3 or more different operators offering mobile telephone service. Regarding carrier conduct, the Commission found that competitive pressures continue to compel carriers to introduce innovative pricing plans and service offerings, and to match the pricing and service innovations introduced by rival carriers. With respect to consumer behavior, the Commission found that consumers contribute to pressure on carriers to compete on price and other terms and conditions of service by actively searching for information on competitive alternatives and freely switching providers in response to differences in the cost and quality of service. The Commission noted that average monthly churn rates remain at about 1.5 to 3.5 percent per month and that the advent of wireless local number portability in November 2003 has lowered consumer switching costs by enabling wireless subscribers to keep their phone numbers when changing wireless providers. Finally, with respect to market performance, the Commission concluded that competitive conditions in the CMRS marketplace are providing significant benefits to consumers by a number of performance indicators, including subscribership and average minutes of use per subscriber per month, among others. The full reports is available online at the FCC's website at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-216A1.doc.

For more information on any of these activities, please contact Olev Jaakson at (202) 218-0021 or ojaakson@sheppardmullin.com

Antitrust and White Collar Defense Practice Group

Del Mar
(858) 729-9000
Pamela J. Naughton
Elizabeth Balfour

Los Angeles
(213) 620-1780
James J. Burgess
Frank Falzetta
David R. Garcia
Andrea Hasegawa
Don T. Hibner, Jr.
Jane R. Langdell
Kathyleen A. O'Brien
Mark Riera
Michelle Sherman
Carlton A. Varner

Orange County
(714) 513-5100
Finley L. Taylor

San Diego
(619) 338-6500
James J. Mittermiller
Robert D. Rose
Timothy B. Taylor
Frank Polek

San Francisco
(415) 434-9100
Edward C. Duckers
Gary L. Halling
James L. McGinnis
Thomas D. Nevins
Neil Ray
Michael W. Scarborough
David D. Sohn
Mona Solouki

Washington D.C.
(202) 218-0000
Andre P. Barlow
M. June Casalmir
Robert M. Disch
Robert W. Doyle, Jr.
John R. Fornaciari
M. Roy Goldberg
Roscoe C. Howard, Jr.
Robert L. Magielnicki, Sr.
Camelia C. Mazard
Mark E. Nagle
Daniel S. Seikaly

For further information, please contact:

Sheppard, Mullin, Richter & Hampton LLP

Antitrust and White Collar Defense Practice Group

Robert W. Doyle, Jr. at 202.218.0030 or rdoyle@sheppardmullin.com

www.sheppardmullin.com