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Recent Activities*DOJ Antitrust Highlights**FTC Antitrust Highlights**FTC Consumer Protection Highlights**International Antitrust Highlights**FCC Antitrust Highlights***THREE COURTS OF APPEALS REVERSE AND REMAND IN LIGHT OF SUPREME COURT'S DECISION IN EMPAGRAN S.A.**

On June 14, 2004, the United States Supreme Court announced its decision in *F. Hoffmann LaRoche Ltd. v. Empagran, S.A.*, 124 S. Ct. 2359 (2004) ("Empagran"). On a writ of certiorari to the Court of Appeals for the District of Columbia, Justice Breyer, writing for six members of the Court, held that the domestic-injury exception to the Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), which permits antitrust claims to be based on foreign commerce having a required effect on U.S. commerce, does not apply where the anticompetitive price fixing activity, while arguably causing domestic antitrust injury, independently causes separate foreign injury to foreign purchasers. The Court held that the domestic-injury exception does not apply where a plaintiff's claim rests solely on independent foreign harm, and does not have a "direct, substantial, and reasonably foreseeable effect" on domestic commerce. As part of its analysis, the Court engaged in an extended discussion of the principles of comity that applies in FTAIA cases.

Since the Supreme Court's decision in *Empagran*, three separate Courts of Appeals have added their voices to echo the Supreme Court's conclusion that "directness" means what it says, and says what it means. Let's take a look at the guns of August.

1. In *Sniado v. Bank Austria A.G.*, 2d Cir., No. 02-7012, 8/5/04, the Second Circuit revisited the construction of an FTAIA claim that it had ruled upon in a prior decision. See *Sniado*, 352 F.3d 73, (2d Cir. 2003.) In its prior decision, the Second Circuit reversed the district court's judgment dismissing the plaintiff's antitrust suit for lack of subject matter jurisdiction under Section 6a(2) of FTAIA. Appellees filed a timely petition for a writ of certiorari with the Supreme Court, and the Second Circuit stayed the issuance of its mandate pending Supreme Court review.

On June 21, 2004, the Supreme Court granted appellees' petition and remanded the matter for further review in light of *Empagran*. See *Sniado v. Bank Austria A.G.*, 124 S. Ct. 2870, 2871 (2004). After directing the parties to submit supplemental briefs, the Second Circuit vacated its prior decision and affirmed the district court's dismissal in light of *Empagran*. The Second Circuit had vacated the district court's dismissal and

remanded for further pretrial proceedings based upon the court's decision in *Kruman v. Christies's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002). *Kruman* held that the jurisdictional requirement of Section 6a(2) was satisfied where a plaintiff alleged an anticompetitive effect on domestic commerce that gave rise to a claim in general.

Empagran abrogated the court's holding in *Kruman*, based upon a history of antitrust law and international comity concerns. See *Empagran*, 124 S. Ct. at 2371-72. The Supreme Court's decision emphasized that to withstand scrutiny under FTAIA, a plaintiff must allege that the foreign conspiracy's effect on domestic commerce gave rise to his specific claim, and not on general, independent effects.

Accordingly, based on *Empagran*, the Second Circuit vacated its previous decision and affirmed the district court's dismissal for lack of subject matter jurisdiction under Section 6a(2).

2. In *BHP New Zealand Ltd. v. UCA International, Inc.*, 3d Cir. No. 01-3329, 8/9/04, and in *Ferromin International Trade Corp. v. UCA International, Inc.*, 3d Cir. Nos. 01-3340, 01, 3991, 8/9/04, the Court of Appeals for the Third Circuit, in an unpublished decision, ordered reconsideration of a decision by the district court that it had subject matter jurisdiction to adjudicate claims relating to an alleged worldwide price fixing and market allocation scheme involving graphite electrodes.

Judge Dolores K. Sloviter ordered reconsideration based upon *Empagran*. *Empagran* clarified that the FTAIA does not allow foreign victims of a worldwide cartel to use the United States judiciary to obtain a remedy for "independently caused foreign injury." Any other interpretation, the *Empagran* Court held, would violate international principles of comity.

The Third Circuit viewed the principal issue as whether the Sherman Act's coverage with respect to activities involving foreign commerce, as defined by the FTAIA, in the wake of *Empagran*, extended to specific antitrust claims asserted by plaintiffs as to alleged injuries beyond the borders of the United States. In light of *Empagran*, the Third Circuit asked the parties to submit additional briefs on the jurisdictional issue. The Court of Appeals remanded the case back to the district court where it can take evidence on "whether the alleged anticompetitive conduct's domestic effects were linked to an alleged foreign harm," and on "any other related issue," . . . "if necessary or helpful."

3. In *United States v. LSL Biotechnologies, et al.*, 9th Cir. No. 02-16472, 8/11/04, the Court of Appeals for the Ninth Circuit affirmed a dismissal by a district court, which determined that it lacked subject matter jurisdiction over an action alleging injury occasioned by an international joint venture allocating territories among the venture partners for the development of a genetically-altered tomato seed that would produce tomatoes with a longer shelf-life.

LSL and Hazera sought to develop a tomato with enough shelf-life after reddening on the vine to be successfully imported into the American market before spoiling. They signed a contract that regulated their relationships and participation rights in the joint venture. This included an allocation to each party of exclusive territories in which each could sell the seeds which were jointly developed, as well as seeds that were developed by each party on its own. LSL was awarded exclusive rights in the North American market.

The parties went through a series of disputes, and subsequent renegotiations of their reciprocal rights. In an addendum, including a restrictive clause, which

was the trigger for the filing of an action by the United States, the parties provided that subsequent to the termination of the agreement itself, Hazera could not engage, directly or indirectly, in the development, production, marketing or other activities involving tomatoes having long shelf-life qualities.

On September 15, 2002, the United States filed a complaint alleging a market allocation in violation of Section 1 of the Sherman Act. The government alleged that but for the restrictive clause, Hazera would likely be a significant competitor in North America. LSL filed a motion to dismiss the complaint, arguing that the government failed to state a cause of action, and that the district court lacked subject matter jurisdiction pursuant to FTAIA.

The district court granted the motion without prejudice, and held that the complaint's market definition was insufficient to establish the requisite anticompetitive effects under FTAIA. The government chose not to amend.

In affirming the dismissal, the Ninth Circuit held that the FTAIA was not a mere codification of the "effects" test developed in *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 444 (2d Cir. 1945). ("*Alcoa*"). It held that FTAIA was a "clarification" of the Sherman Act, and made more explicit its intention to exempt export transactions that did not injure United States commerce from Sherman Act jurisdiction. It held that "direct" means "direct". It held that the *Alcoa* "effects" test did not require that the effect be sufficiently "direct." "Direct, substantial and reasonably foreseeable" does not simply mean "some substantial effect." It means a direct, non-speculative effect, that is present here and now. It is not a potentiality, and it is not an incipency. It held that the allegations in the complaint relating to the restrictive clause simply raised potentialities that may or may not occur. As such, they were not sufficiently precise

allegations of the "directness" required by the Act. The court stated that an effect cannot be "direct" where it depends on such uncertain intervening developments such as whether Hazera, on its own, would independently develop hardier tomato seeds that would allow consumers to enjoy better tasting winter tomatoes. In further distinguishing *Alcoa*, the court noted that *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993) involved sufficient "directness," as an agreement not to market certain types of primary insurance in the United States market was akin to a "direct" output exclusion.

Senior Circuit Judge Aldisert, sitting by designation, issued a lengthy and academically titillating dissent. He agreed with the government that FTAIA was a codification of the "effects" test of *Alcoa*, and that the court should be instructed by the developments of the application of a "direct effect" test on interstate commerce jurisdiction litigation, with an eye to the legal notion of "proximate causation" as a discretionary benchmark to measure "directness." He also developed an interesting discussion of the relationship of the concept of "directness" to antitrust standing, citing and discussing *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982). While a scholarly dissertation, a dissent is but a dissent, and at the end of the day, the Ninth Circuit's affirmance of the district court's dismissal rules. The score for August in the federal appellate courts remains defendants 3, plaintiffs nothing.

However, in *MM Global Services, Inc. v. Dow Chem. Co.*, No. 3:02cv 1107 (AVC), 8/11/04, the District of Connecticut District Court denied the defendants' third motion to dismiss an antitrust claim that the defendants had engaged in resale price maintenance with respect to the resale of Union Carbide products, purchased in the United States, for resale in India. The court held that *Empagran* notwithstanding, the complaint contained sufficient allegations to pass

muster under Sections 6a(1) and (2) of FTAIA. The court ruled that the complaint satisfied the requirements of 6a(2) because it alleged “that the defendants’ conduct led to effects on U.S. Commerce that gave rise to the plaintiffs’ injuries.”

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

ARCH COAL MERGER PROCEEDS -- TACIT COORDINATION THEORY UNDER ATTACK

The Court of Appeals for the District of Columbia denied the FTC’s request for an emergency stay of the proposed merger pending appeal on August 20, 2004, and, almost immediately, Arch Coal, Inc. completed its \$364 million acquisition of Triton Coal Company. See *FTC v. Arch Coal, Inc., et al.*, D. C. Cir., No. 04-5291, 8/20/04. Three days earlier on August 17, the Commission sought the emergency stay after the U.S. District Court for the District of Columbia denied its request for a preliminary injunction to block the proposed coal transaction. See *FTC v. Arch Coal, Inc. et al.*, D.D.C. No 04-0534, 8/16/04; *State of Missouri, et al. v. Arch Coal, Inc., et al.*, D.D. C. No. 04-0535, 8/16/04.

During the two-week trial before United States District Judge John D. Bates, the FTC alleged that the combination of Arch and Triton would lead to higher prices in two markets: one a market of low-sulfur coal, a high quality coal product burned to generate electricity; the other a market of all coal mined in Wyoming’s South Powder River Basin (“SPRB”). The Commission claimed that the top three producers including Arch/Triton, Peabody Energy Corp., and Rio Tinto plc’s Kennecott Energy and Coal Company would control about 80 percent of all coal mined in the SPRB region. The Commission also asserted that the low-sulfur content coal mined in SPRB constituted a separate, relevant

antitrust market because of its preferred use due to its particularly clean burning characteristics. The merger would increase three firm market concentration of the low-sulfur coal producers in the SPRB region to 100 percent.

The key anticompetitive theory advanced by the FTC was that the proposed merger, if consummated, would substantially lessen competition for all SPRB coal (and low-sulfur coal as well) since tacit coordination of output among the three major SPRB coal producers would be easy to implement and could be successfully maintained going forward. This illegal coordination, the Commission alleged, would take the form of restricting output by constraining SPRB coal production so that increases in supply would lag behind increases in demand creating upward pressure on price.

Though Judge Bates accepted the Commission’s broader product market definition of SPRB coal producers (he in fact rejected the more narrow low-sulfur market), he observed that the Commission’s theory of competitive harm was suspect. In fact, he called it “novel.” Judge Bates held that the FTC’s proposed anticompetitive theory required it to “show projected future tacit coordination, which itself may not be illegal, which is speculative and difficult to prove, and for which there are few if any precedents.” Judge Bates further observed that “prior coordinated effects challenges to mergers based on alleged output coordination have invariably been accompanied by a coordinated effects theory grounded on price coordination.”

Judge Bates indicated that because of the “novel approach taken by the FTC in this case,” the Commission’s burden of proof to establish anticompetitive effects in the “post-merger SPRB market” is higher and more stringent. According to the court, to support its case and theory of antitrust

harm, the FTC must “establish that the proposed transaction will increase the risk of coordinated output restriction and decrease the likelihood of deviation in the SPRB market.” Having defined the Commission’s burden for it, Judge Bates then determined that the FTC evidence produced at trial failed to meet this higher burden. In fact, the Judge held the FTC failed to demonstrate that SPRB producers actually ever engaged in price or output coordination in the past and there was little or no indication that it would occur in the future. However, the judge did acknowledge that the FTC met its “prima facie case burden,” but, given the novel nature of the case, that was not strong enough.

The Commission’s evidence was considerable. It consisted of testimony relating to the feasibility of coordination of output, as well as producer testimony of a keen interest in greater production discipline in the market. Clearly, from the Commission’s perspective, all of this evidence suggested coordination was distinctly likely in the future. The court did not buy it. It determined that the Commission failed to satisfy its burden. Judge Bates also observed that the “SPRM has been (and remains) a competitive market with no historical evidence of actual express or tacit anticompetitive coordination.” The court also determined that the market’s unique structure and dynamics did not support a likelihood that coal producers would be able to reach consensus on coordination. Judge Bates observed that the products were heterogeneous, shipments of coal were tied to long-term contracts, demand was not easily predictable, and bids were submitted under seal and in confidence.

The Commission immediately sought an expedited appeal and an emergency stay, raising particular concern with the D.C. appellate court that its theory of competitive harm was not “novel.” In fact, in its emergency motion, the FTC noted that the only thing “novel” in the matter was Judge Bates’ “abandonment

of well-established principles of merger jurisprudence – a departure inspired by the court’s failure to grasp the basic economic principle that output restrictions often are the means by which rivals collectively raise prices....” The Circuit Court listened in part. However, it denied the FTC’s motion for an emergency stay. But, in its one-sentence ruling, the D.C. Circuit strongly stated that it “agree[d] with the FTC that there [was] nothing novel about the theory it has advanced in this case....”

The merger was consummated and tacit output coordination theory remains under attack. But it is clearly not “novel.” Indeed, it remains to be seen if the Commission will continue its challenge of the Arch/Triton deal before an Administrative Law Judge using the same anticompetitive theory. An FTC trial will begin on October 12. We don’t expect a different theory of harm to be advanced by the Commission. Oral argument on the Commission’s appeal before the Court of Appeals is scheduled for January 18, 2005.

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

FTC CLEARS CEPHALON/CIMA TRANSACTION

On August 9, 2004, Cephalon Inc. and the FTC entered into a consent agreement allowing the company to complete its \$515 million acquisition of Cima Laboratories Inc. The Commissioners voted to drop antitrust objections to the merger after Cephalon promised to grant a full paid-up, irrevocable license to manufacture and sell a generic formulation of its break through cancer pain (“BTCP”) drug Actiq to generic drug maker Barr Laboratories Inc. in the United States.

The consent agreement resolved the FTC’s anticompetitive concerns regarding Cephalon’s

acquisition of Cima. While Cephalon is currently the only company selling a BTCP drug in the United States, the FTC alleged that Cima is the most likely entrant into the narrowly defined market with a drug called OraVescent fentanyl. The Commission was concerned that if the acquisition were cleared without conditions, it would have strengthened Cephalon's alleged monopoly position in the BTCP market.

The FTC claimed that BTCP drugs help reduce or eliminate the spikes of severe pain that chronic cancer patients experience. BTCP drugs provide a faster onset of pain relief than other treatments and can be self administered in convenient and portable dosages. Cephalon's Actiq is the only BTCP drug approved by the Food and Drug Administration ("FDA"). Actiq is a fentanyl based drug that is administered orally in the form of a lollypop. Cephalon also is developing a sugar free Actiq formulation, which it expects to launch in 2005. Cima's OraVescent fentanyl tablet is also administered orally in a tablet form, however the drug is not FDA approved and is not scheduled to be launched until 2006 or 2007 if at all. While a number of other potential competitors exist, many of these potentially competitive drugs are not yet FDA approved and are not expected to be launched until at least 2008. Therefore, the FTC believed that the combination of Cephalon and Cima would reduce the number of future BTCP competitors from two to one for a short period of time.

FTC Commissioner Mozelle Thompson dissented from the FTC's decision because he claimed in a separate statement that the antitrust remedy will not restore competition lost from the acquisition. He believes the Commission should have challenged the acquisition in court. The FTC, however, would have had a difficult time challenging the transaction in court for a number of reasons. First, the FTC staff would have had difficulty in defining the relevant product market because a number of pain relieving drugs

exist and drawing lines between pain relieving drugs for cancer patients such as morphine and Actiq would not have been easy. Second, the FTC would not have been challenging the combination of direct overlapping product lines that are currently marketed to consumers. Instead, the Commission would have been challenging the acquisition of a company that has no marketable products. The FTC would have had to make the case that Cima's BTCP drug was likely to be approved and that Cima was capable of obtaining FDA approval. Third, the FTC would have had to overcome the argument that competition was only being harmed for a very short time given the other potential competitors that have drugs in the FDA pipeline. Clearly, the case would not have been an easy one to litigate.

That being said, the FTC staff believed that Cima was poised to become Cephalon's major competitor in the BTCP market in the next few years. This led the FTC and the parties to enter into settlement negotiations given the Commission's narrow view of the relevant market. Cephalon and Cima announced that they had reached a settlement with the FTC in June, but the settlement agreement was not completed until August because of complex licensing and timing issues. The FTC staff was concerned about how Cephalon's licensing of Actiq would actually work and when the license would be issued to Barr. It was complicated because Cephalon did not want to commit to license its Actiq drug until it became certain that Cima's OraVescent fentanyl would gain FDA approval. On the other hand, the FTC wanted to make sure that Cima's licensing commitment was solid, otherwise a generic drug company would not invest in the manufacturing and marketing of Actiq.

As far as timing is concerned, the settlement requires Cephalon to license Actiq to Barr once the FDA approves OraVescent fentanyl. If that approval is delayed, Cephalon must still issue the license for Actiq to Barr by February 2007. Cephalon must also

agree to supply the drug to Barr if Barr cannot get FDA approval for its manufacturing process of Actiq quickly enough to commercially produce the generic product. This part of the settlement agreement was made to ensure generic entry at least a year earlier than would otherwise have been possible. The case is noteworthy because the companies are unlikely to develop new types of fentanyl-based pain killers and Actiq is nearly off patent. By expediting development of generic Actiq, the FTC sought to ensure that consumers will benefit more by the acquisition than if the companies remained separate.

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

NEW EUROPEAN COMPETITION COMMISSIONER NOMINATED

Neelie Kroes, who is on the boards of Lucent Technologies Inc., Royal P&O Nedlloyd NV, MMO2 Plc and Volvo AB, has been nominated as the Europe Union's Competition Commissioner, the chief antitrust enforcer with authority over mergers, cartels and state subsidies across the 25-nation European Union's 9.7 trillion-euro (\$12 trillion) economy. Her considerable private sector experience was an important factor in the decision by Jose Manuel Barroso, the European Commission President-designate, to appoint her to Europe's top antitrust post.

Ms. Kroes, 63, is a member of the Netherlands's pro free-market political party VVD and will replace 61-year-old Mario Monti, who blocked General Electric Co.'s \$47 billion takeover of Honeywell International Inc. and levied a record fine against Microsoft Corp. Both these decisions are currently being challenged in the European Court of Justice.

Ms. Kroes studied economics at Rotterdam's Erasmus University. She entered Liberal Party politics at the local level and served two terms as

minister for transport, public works and telecommunications during the 1980s. She was also an adviser to Karel van Miert, the then Transport Commissioner and later Competition Commissioner. Between 1991 and 2000, she also served as president of Nijenrode University, a prestigious private Dutch business school located south of Amsterdam. During her confirmation hearing, she will almost certainly be questioned by the European Parliament about the University's award of an honorary degree to Bill Gates of Microsoft during her time as University President and whether it will influence the EU's ongoing antitrust investigation of the software company.

Ms. Kroes faces the challenge of enforcing new EU rules governing antitrust enforcement and mergers which were only implemented in May this year and will face of opposition from some member states that want industrial policy to take precedence.

With respect to merger control, following three successive court defeats in 2001, Mr. Monti implemented reforms that give companies greater due process rights and pay greater attention to economic arguments. However, the real test will be whether Ms. Kroes will be able to remain sensitive to business's needs for mergers to be predictable and transparent in the face of increased merger and acquisitions activity, as well as pressure from particular Member State governments.

The reforms in May also decentralized the enforcement of the EU antitrust rules to the Member States' own antitrust agencies and national courts enabling them to have greater responsibility for the enforcement of the European antitrust rules. The reforms are intended to allow the European Commission to focus on tackling more serious antitrust violations, such as international cartels. But the decentralization of the enforcement of the EU antitrust rules will bring many challenges. Ms. Kroes

must ensure the consistent application of the rules across the Member States and that the new rules will provide a more effective enforcement method in an enlarged EU.

The handling of complaints and investigations into dominant companies remains a contentious issue. The application of the antitrust rules to powerful companies in this difficult area, where law and economics meet, is a fundamental antitrust concern and will have to be addressed, especially in cases where there are alleged abuses by some of the numerous former incumbent European companies (e.g. telecoms and energy providers) which continue to retain high market shares in their respective national markets. Perhaps Ms. Kroes will be able to utilize her experience as a board member of several large European companies and in deciding whether the Commission will pursue a more interventionist policy.

Much work remains in tackling Member States' anticompetitive funding of state enterprises, especially in the new accession Member States of Eastern Europe. Mr. Barroso has stated that his objective is to increase the European economy's competitiveness. The reform and application of the state aid rules will, therefore, play an important part in this strategy. Ms. Kroes' experience in overseeing the privatization of the Dutch postal and telecommunications service means she is well placed to implement a potential overhaul of the existing state aid rules based on a strict economics-based approach.

Finally, Ms. Kroes will have to coordinate her efforts not only on a European scale, but also at an international level as the antitrust environment becomes increasingly global. Mr. Monti ensured that there was increased cooperation and coordination with the U.S. antitrust authorities and attended global

forums that aimed to increase convergence between the approach of antitrust agencies around the world. In the next five years, Ms. Kroes will need to draw upon her international corporate experience to continue this work and liaise with Asian regimes as they develop their antitrust laws.

These are important and substantial challenges for the new Competition Commissioner. Taking into account her governmental and corporate experience, EU antitrust lawyers hope that Ms. Kroes will be able to ensure that her post remains immune from political pressure by the Member States so that she can see through the important reforms initiated by her predecessor. Her appointment still needs to be ratified by the European Parliament but is considered a formality as the Parliament cannot reject individually nominated European Commissioners, but only the European Commission nominated as a whole.

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

THE FTC PETROLEUM INDUSTRY STUDY

On August 13, the FTC Bureau of Economics released a staff report titled "The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement" ("Report"). The Report is the third in a series since 1980 to outline and evaluate competitive conditions in the petroleum industry. It covers in detail various enforcement actions the FTC has taken in the industry and the motivation and effects of those actions, partly to provide insight for those in the industry who might contemplate future ventures, and partly to justify the FTC's earlier choices.

The Report breaks the industry down into five major segments: production and reserves of crude oil; bulk transport of crude oil to refineries; refining; bulk

transport of petroleum products from refineries to product terminals and marketing sites; and end-product distribution and marketing. While the Report concludes that concentration in the various sectors of the petroleum industry generally remains low, it goes to great trouble to show the special care the FTC uses to define markets and evaluate transactions on a case-by-case basis.

The Report should serve as an excellent resource to evaluate the potential for FTC involvement when considering potential deals. Generally, several important themes emerge:

Vertical integration (e.g., a major producer refining and marketing product from its own crude) has decreased significantly in recent years. The FTC credits this largely to growth in the spots and futures markets (e.g., reducing the need to rely on intracompany supply of crude) and improvements in refinery technology that allow refineries to switch between types of crude or produce different end products depending on supply/demand dynamics. The development of spot markets and improved technology, such as just-in-time inventory systems and in-pump blending at retail outlets, have also permitted a sharp drop in inventory holding. Diminishing vertical integration has the benefit of enhancing refineries' and marketers' ability to respond to anticompetitive price increases. On the other hand, the FTC admits (in a footnote) that several studies show that vertical integration actually reduces retail prices.

Bulk transportation continues to exert a major influence on competition in the petroleum industry. While water transport via tankers tends to be highly unconcentrated and present few antitrust concerns (with some limited exceptions), pipeline transportation requires significant sunk costs and can exert substantial control over local prices. Therefore, the Report emphasizes that geographic markets for

production, refineries, and marketers cannot be determined without a careful study of the available transportation to or from such sites. Further, since many pipelines are owned by refiners and/or marketers, the FTC will carefully examine the effect of mergers and acquisitions on the concentration of pipeline ownership.

Geographical market definition is difficult in the petroleum industry, due to its extremely complex nature and heavy regulation. As discussed above, transportation can play a very important role in the definition of relevant geographical market. Another factor that the FTC emphasizes is legal restrictions. In particular, California's strong pollution requirements localize the California gasoline market since a limited number of refineries are outfitted to produce gasoline according to state standards. The Jones Act also limits substitutability in relevant markets by limiting which tankers can transport oil in bulk domestically. The FTC emphasizes that every transaction must be reviewed on a case-by-case basis.

Changes in retailing. The FTC notes with interest the entrance of hypermarkets (e.g., discount retail warehouses or large grocery stores that also offer gasoline retailing) into the retail end of the industry. This new form of competition may exert important constraints on the ability of retailers to raise prices. Moreover, the FTC traces the decline of the service station and its replacement by convenience stores as the consumers' favorite choice for gasoline retail. These developments mirror the FTC's observation that, despite the reduction in vertical integration, the industry as a whole is benefiting from increased economies of scale.

The Report leaves the unmistakable impression that one of the FTC's major, if unstated, goals was to deflect blame for recent gasoline price increases. The FTC has come under a number of high profile

attacks from state governments and elsewhere suggesting that collusion or other anti-competitive behavior must be responsible for spiking gas prices. While the Report sidesteps these issues (compare Commissioner Harbour's separate statement, which addresses these issues openly), the FTC underscores several points that could be seen as defenses to those attacks, including:

- the low concentration of crude oil supplies;
- the relatively minor effect of major U.S. petroleum mergers on that concentration;
- the correlation of crude oil prices to gasoline prices;
- low industry margins and returns on investment;
- the substantial impact of federal and state taxes on gasoline prices;
- increases in regulatory compliance costs;
- the relative equivalence, in real dollars, of current and historical gas prices; and
- the FTC's own unusually aggressive enforcement with respect to the petroleum industry (at least in the majority opinion; in his separate statement, Commissioner Thompson disagrees with this position).

According to the Commission's majority statement, the FTC is developing another report to further explore the genesis of recent gas price increases. In the meantime, this Report outlines the FTC's defense against any suggestion that a lack of enforcement is to blame. Whether or not the Report successfully achieves this goal, and whether or not it serves more as an analytical tool or as a resource for justifying mergers, acquisitions, and joint ventures, it seems certain that the Report will serve as a useful source of information for the petroleum industry and business community at large.

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.

Missouri Road Construction Company And Executive Indicted On Bid-Rigging Charge

A federal grand jury in Kansas City, Missouri, on August 11, indicted a Missouri road construction company and its vice president for conspiring to rig a bid submitted for a \$7.1 million highway construction project led by the State of Missouri. APAC-Missouri Inc. and its vice president, Donald G. Mantle, were charged in the U.S. District Court in Kansas City, Missouri, with participating in a conspiracy to suppress and eliminate competition from approximately July 20, 2000 until April 16, 2002 by rigging a bid on a road construction contract.

APAC-Missouri Inc. is a wholly owned subsidiary of Ashland Inc., a transportation construction, chemical and petroleum company headquartered in Kentucky. The indictment charged that the conspirators agreed not to compete on a highway construction project in July 2000, by designating that APAC-Missouri would submit the low bid and its co-conspirator would submit a higher complementary bid, with APAC-Missouri subcontracting a portion of the project to its co-conspirator, after APAC-Missouri was awarded the project by the State of Missouri. The highway construction project was located in Ste. Genevieve County, Missouri, and was worth more than \$7.1 million to the State of Missouri.

The ongoing investigation is being conducted by the Antitrust Division's Chicago Field Office, with the assistance of the U.S. Department of Transportation,

Office of Inspector General, and the Federal Bureau of Investigation. APAC-Missouri Inc. and Mantle are charged with bid rigging in violation of 15 U.S.C. § 1, which carries a maximum fine of \$10 million for companies, and a maximum penalty for individuals of three years in prison and a fine of \$350,000 for violations occurring prior to June 22, 2004. The maximum fines may be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime if either of those amounts is greater than the statutory maximum fine.

Japanese Executive Pleads Guilty To Participating In International Antitrust Conspiracy

On August 5, Hitoshi Hayashi, an executive of the Japanese chemical giant Daicel Chemical Industries Ltd., agreed to plead guilty, to serve a three-month jail sentence in the United States, and to pay a \$20,000 fine for his role in a 17-year international conspiracy that suppressed competition in the food preservatives industry. The penalties agreed to by Hayashi are subject to court approval. If approved by the court, Hayashi would be the first Japanese citizen to serve a prison term in the United States for an antitrust offense.

The superseding felony case filed in the U.S. District Court in San Francisco charged Hayashi, a resident of Japan, with one count of fixing prices and allocating volumes of sorbates sold in the United States and

elsewhere from 1992 until 1996, the time period of his participation in the conspiracy. Hayashi agreed to cooperate fully with the ongoing federal investigation of anticompetitive behavior in the sorbates market.

According to the DOJ, the conspiracy to fix the prices and allocate the volume of sorbates sold in the United States and elsewhere affected nearly \$1 billion in U.S. commerce. Roughly \$200 million worth of sorbates - which includes potassium sorbate and sorbic acid - are sold annually worldwide. Sorbates are chemical preservatives used primarily as mold inhibitors in high-moisture and high-sugar food products, such as baked goods, wine and cheese.

Hayashi was originally indicted in January 2001 along with three other foreign defendants for participating in the sorbates cartel. Until recently, he had remained a fugitive beyond the reach of U.S. jurisdiction. Once Hayashi has been sentenced on this 2003 charge, he will be dismissed from a January 23, 2001 indictment, which will still stand against the three remaining defendants.

Companies from Europe, Japan, and the United States have already pled guilty to antitrust charges stemming from their involvement in the conspiracy. Those companies were sentenced to pay criminal fines totaling \$132 million.

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

RECENT ACTIVITIES

DOJ ANTITRUST HIGHLIGHTS

- On August 25, the DOJ announced that it is 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. Syngenta and Advanta currently compete to develop and produce sugar beet seeds planted in the United States. Sugar beets are sold to processors, who convert them to sugar. According to the complaint, Syngenta and Advanta are two of only three significant developers of sugar beet seeds suitable for growing in the United States. Therefore, the DOJ alleged that the transaction would have resulted in higher prices and reduced seed innovation for U.S. sugar beet growers without the divestiture.

RECENT ACTIVITIES

DOJ Antitrust Highlights (Continued)

- On August 25, the DOJ entered into a settlement agreement with Wachovia Corporation to make divestitures in order to resolve the DOJ's antitrust concerns about the company's pending merger with SouthTrust Corporation. Under the agreement, Wachovia will divest 18 SouthTrust branches with about \$592 million in total deposits in four banking markets located in Florida and Georgia. The proposed merger is subject to the final approval of the Board of Governors of the Federal Reserve System. The DOJ will advise the Federal Reserve Board that, subject to the divestiture of specified branch offices and associated loans and deposits, the Antitrust Division will not challenge the merger.
- On August 24, NASD reported that the DOJ's Antitrust Division is investigating possible anticompetitive practices at the American Stock Exchange ("Amex") and Chicago Board Options Exchange. NASD, in its annual report, said the Amex received a civil investigative demand (subpoena) on June 16 from the DOJ's Antitrust Division. The inquiry concerns a "product allocation agreement" between the Amex and the Chicago Board. NASD said the Amex believes that no product allocation agreement between Amex and Chicago Board has ever existed and that the subject of the investigation is without foundation. It said the Amex was working out a schedule to comply with the DOJ's requests. The Amex has not publicly commented on the investigation other than to say that it is cooperating fully with the DOJ. The Chicago Board said it was cooperating with the DOJ as well.
- On August 6, the DOJ announced that it reached a settlement with American Airlines Inc. ("American") that resolves the government's concerns regarding American's alleged violations of a 1994 consent decree. American has agreed to pay a \$3 million civil penalty to the United States, which includes reimbursement to the government for its investigation. The settlement prohibits American from using travel dates when initiating or matching fare increases. Along with the settlement, the Division also petitioned the court to find American in civil contempt for violating the consent decree. According to the petition, American violated the consent decree by publishing a fare with increased advance purchase requirements that did not apply to current travel, but rather contained a first travel date in the future. The future first travel date had little or no meaning to consumers and, when disseminated, substantially reduced American's risk of losing passengers to other airlines that did not have the increased requirements.
- On August 2, the DOJ reached a settlement with Allied Waste Industries Inc. ("Allied") that resolved the government's concerns regarding Allied's alleged violation of an existing consent decree in connection with Allied's acquisition of Browning-Ferris Industries Inc. ("BFI"). The Division filed an enforcement order to ensure that Allied complies with its obligations under a 2000 consent decree that resolved the Division's concerns with the Allied/BFI transaction. The order further requires Allied to implement a compliance program to ensure that Allied fully conforms with the requirements of the decree. Along with the enforcement order, the Division petitioned the court to find Allied in civil contempt for violating the 2000 decree. Among other things, the decree requires Allied to grant ash and bypass waste disposal rights at the former BFI landfill in Fall River, Massachusetts to the SEMASS incinerator owned by American Ref-Fuel Company. According to the Division's petition, Allied violated this provision of the decree by prematurely terminating SEMASS's disposal rights at Fall River. The enforcement order agreed to by Allied and the Division confirms that Allied will accept ash and bypass waste from SEMASS at the Fall River landfill, as required by the 2000 decree. This action, along with the action against American Airlines, demonstrates that the Antitrust Division is vigorously enforcing its consent decrees and underscoring the Division's expectations that parties honor the terms of court-ordered settlement decrees.

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

RECENT ACTIVITIES

FTC ANTITRUST HIGHLIGHTS

- On August 20, a three-judge panel of the United States Court of Appeals for the District of Columbia Circuit denied the Commission's motion for an injunction pending appeal and permitted Arch Coal Inc. to complete its \$364 million acquisition of Triton Coal Co. The FTC appealed U.S. District Judge John D. Bates' August 13 refusal to block the transaction. Arch completed its acquisition shortly after the Circuit Court ruled. The Commission can continue its challenge to this acquisition in an FTC administrative proceeding. See article in today's *Sheppard Mullin Antitrust Review* at p. 4.
- On August 16, Deborah Platt Majoras was sworn in as Chairman of the FTC. President Bush nominated Ms. Majoras on May 11, 2004, and announced his intention to appoint her to the position on July 30, 2004. She previously served as deputy assistant attorney general and principal deputy at the U.S. Department of Justice's Antitrust Division. Ms. Majoras holds a bachelor's degree from Westminster College and a J.D. from the University of Virginia.
- On August 13, the FTC issued a report by the staff of the Bureau of Economics entitled, "The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement." The report presents a detailed overview of structural changes in the petroleum industry and describes Commission law enforcement activities related to petroleum industry mergers. The Report develops five major themes: (1) mergers of private oil companies have not significantly affected worldwide concentration in crude oil – this fact is important, because crude oil prices are the chief determinant of gasoline prices; (2) despite some increases over time, concentration for most levels of the petroleum industry has remained low to moderate; (3) thorough FTC merger investigations and enforcement have helped prevent further increases in petroleum industry concentration and avoid potentially anticompetitive problems and higher prices for consumers; (4) economies of scale have become increasingly significant in shaping the petroleum industry; and (5) industry developments have lessened the incentive to be vertically integrated throughout all or most levels of production, distribution, and marketing.

The report discusses 15 large petroleum mergers that the FTC investigated since 1981. These mergers would have resulted in significant reductions in competition and would have harmed consumers in one or more markets had they proceeded as announced. In 11 of these cases, the FTC obtained significant divestitures to prevent reduced competition and harm to consumers. In the four other cases, the parties abandoned the transactions altogether after antitrust challenge. The report also details the FTC's enforcement actions to protect competition and consumers of refined petroleum products, including administrative litigation against Union Oil Company of California, the ongoing gasoline price monitoring program, and the investigation of gasoline pricing in the U.S.'s western states and Midwest region. See article in today's *Sheppard Mullin Antitrust Review* at p. 8.

- On August 12, the Commission announced a settlement with two generic drug marketers. Generic drug manufacturers Alpharma, Inc. and Perrigo Company will give up \$6.25 million in illegal profits to settle Federal Trade Commission charges that their agreement to limit competition for over-the-counter ("OTC") store-brand children's liquid ibuprofen drove up prices and violated federal law. According to the FTC's complaint, Perrigo paid Alpharma – the only other manufacturer of OTC store-brand children's liquid ibuprofen approved by the U. S. Food and Drug Administration ("FDA") – to eliminate Alpharma as a competing supplier. The settlements call for Perrigo to pay \$3.75 million and Alpharma to pay \$2.5 million to the FTC. In addition, the companies will pay the state attorneys general an additional \$1.5 million to resolve their claim challenging the same agreement. The FTC's settlements will bar the companies from entering into agreements not to compete when either party is the first filer of an abbreviated new drug application ("ANDA") with the FDA. The settlements also require the companies to notify the FTC of agreements that fall within four narrow exceptions to the general prohibition.

RECENT ACTIVITIES

FTC Antitrust Highlights (Continued)

The FTC will use the \$6.25 million settlement funds to compensate customers harmed by the companies' conduct. The proposed orders also bar each company from repeating the alleged unlawful conduct by entering into similar agreements not to compete where one party to the agreement is a first ANDA-filer, subject to certain exceptions identified in the orders. Perrigo and Alphantra must provide notice to the FTC of any agreement falling within one of these exceptions. The FTC conducted its investigation jointly with the States of Maryland, Florida, Colorado, and Ohio. Fifty states and territories filed a complaint challenging the same agreement and reached a settlement prohibiting the same conduct that the FTC's settlements with the companies prohibit. In addition, the companies will pay a total of \$1.5 million in lieu of civil fines or forfeitures to those states and territories.

- On August 11, the Commission announced that Piedmont Health Alliance settled FTC price-fixing charges. A North Carolina physician-hospital organization ("PHO") and ten of its physician members have agreed to settle Federal Trade Commission charges that they fixed prices for the services of the PHO's 450 physician members, hindered competition in four western North Carolina counties, and raised costs for consumers. The proposed consent order bans Piedmont Health Alliance, Inc. ("PHA") and the ten physicians from collectively negotiating with payors on behalf of physicians and setting the prices or other terms on which physicians deal with payors. The proposed order also prevents PHA, for a period of time, from operating as a "messenger," or contracting agent, on behalf of physicians in dealing with payors.

PHA is a for-profit PHO located in the "Unifour" area of west-central North Carolina, which encompasses Alexander, Burke, Caldwell, and Catawba counties. Most of the physicians in the Unifour area, and three of the five area hospitals, are PHA members. The proposed consent order prohibits PHA and the ten named physicians from entering into or facilitating any agreement between or among any physicians practicing in the Unifour area: (1) to negotiate with payors on any physician's behalf; (2) to deal, not to deal, or threaten not to deal with payors; (3) to designate the terms to deal with any payor; or (4) to refuse to deal individually with any payor, or to deal with any payor only through an arrangement involving PHA. The proposed order also prohibits PHA, for a period of time, from operating a "messenger model" or other arrangement for physicians in their dealings with a payor to facilitate readjustment of the market so that prices for physician services are determined by competition. The proposed order allows PHA to engage in potentially procompetitive activities, such as information technology and medical management services, that do not pose a significant risk of anticompetitive effects. Under the proposed order, the ten named physicians and PHA, after a period of time, may participate in any legitimate financially or clinically integrated joint arrangement among physicians.

- On August 9, the Commission announced a consent agreement which will allow Cephalon, Inc.'s \$515 million acquisition of Cima Labs, Inc., provided that Cephalon grants Barr Laboratories, Inc. a fully paid-up, irrevocable license to manufacture and sell a generic formulation of Cephalon's breakthrough cancer pain ("BTCP") drug Actiq in the United States. The order, which conditionally allows the acquisition, remedies the anticompetitive concerns raised by Cephalon's acquisition of a BTCP drug in development. Cephalon is currently the only company selling a BTCP drug in the United States. Cima is best positioned to be the next entrant into the market. The proposed acquisition would have allowed Cephalon to continue its monopoly of the U.S. BTCP drug market. See article in today's *Sheppard Mullin Antitrust Review* at p. 5.
- On August 6, 2004, Commissioner Mozelle W. Thompson submitted his resignation as Commissioner of the Federal Trade Commission, effective August 31st. He issued the following statement.

My six and one-half years on the Commission have been a period of great challenge and accomplishment. I have been able to witness profound changes in the American economy and to

RECENT ACTIVITIES

FTC Antitrust Highlights (Continued)

consider important issues that will continue to affect businesses and consumers around the world. In doing so, I have had the privilege of helping to chart a course for the future of the global marketplace. My experience has been made especially rewarding because I have had the honor of working with my fellow Commissioners and the FTC staff – a group of dedicated men and women who embody the best in public service.

*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

- On August 30, the FTC announced the implementation of a new fee structure for the use of the national “Do Not Call” Registry system. Under the new fee system, commercial organizations accessing the registry are to pay \$40 per area code, with a maximum fee of \$11,000 for any entity accessing 280 area codes or more. Organizations will be able to access the first five area codes of data at no cost, and “exempt” entities (such as political organizations, charities, and survey companies) may access the Registry free of charge. Subscription account numbers (“SANs”) for telemarketers are good for 12 months and subscriptions must be renewed at the end of the 12-month subscription period.
- On August 27, the FTC announced two settlements totaling almost \$1 million against two Maine marketers of dietary supplements who were alleged to have made deceptive advertising claims about their products. The FTC had filed complaints against Pinnacle Marketing, LLC (“Pinnacle”) and VisionTel Communications, LLC (“VisionTel”) and their respective principals, alleging that the companies made false and unsubstantiated claims with respect to weight-loss related and other dietary supplements. According to their respective settlement decrees, Pinnacle must pay \$219,000 and VisionTel must pay \$750,000 in consumer redress. The FTC received assistance from the Attorney General’s Office of the State of Maine on both of these matters.
- On August 26, the FTC announced that it has charged two companies and two individuals with violations of the FTC Act and the Telemarketing Sales Rule for making false and misleading claims with respect to selling business opportunities to market privately-held mortgage notes. According to the complaint filed in the U.S. District Court, Western District of Washington, the defendants charge consumers as much as \$5000 to \$8000 for “The Stefanchik Program,” which allegedly teaches consumers to profit quickly by selling privately-held mortgage “paper.” According to the complaint, the defendants advertised the program through direct mail, and telemarketers, and on the Internet, asserting that consumers can quickly earn \$10,000 a month in their spare time if they follow the “program.” However, according to the FTC, virtually no consumers have made any money using the Stefanchik Program, and the promised “personal coaches” do not have the experience or advertised accessibility to consumers. The FTC also charged the defendants with making unsubstantiated claims with respect to the revenue that consumers could expect to earn by following the program.
- On August 25, the FTC announced that it has settled charges against a Florida-based company and its principals for allegedly preying on the goodwill of consumers by making misleading fundraising calls. According to the complaint originally filed in May of 2003, representatives of Community Affairs, Inc., a for-profit telemarketing operation, supposedly impersonated police officers and law enforcement personnel in calling consumers under the guise of soliciting donations

RECENT ACTIVITIES

FTC Consumer Protection Highlights (Continued)

to police and firefighters-related charities. According to the complaint, the defendants also misrepresented the causes to which donations were to be used, and retained approximately 80% of the total donations by consumers. The settlement permanently bans the defendants from soliciting contributions on behalf of any entity, and making any false misrepresentations with respect to the sale of any goods or services.

- On that same day, August 25, the FTC announced that the agency is seeking comments on a recently published staff report on the agency's Franchise Rule, entitled "Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures." The report is available at <http://www.ftc.gov/os/2004/08/0408franchiserulerpt.pdf>. According to the Federal Register notice, the comment period ends on November 12, 2004.
- On August 17, the FTC announced settlements with the sellers of lists containing consumer information. Guidestar Direct Corp. (d/b/a Carney Direct Marketing), ListData Computer Services, Inc., and NeWorld Marketing, LLC, are list management companies that sell lists of consumer information to telemarketers and other direct marketing entities who look for consumers who would be likely to respond to telemarketing or direct mail offers. These three companies have agreed to settle Federal Trade Commission charges (in three different federal district courts around the United States) that they violated the agency's Telemarketing Sales Rule (TSR), by providing sample "scripts" to telemarketers that indicated the telemarketers were selling advance fee credit products that "guaranteed" consumers credit cards for "one-time fees." However, the TSR prohibits telemarketers from charging up-front fees for credit products and from representing that consumers are "guaranteed" or highly likely to obtain credit. The settlement permanently bars the defendants from providing lists to telemarketers engaging in illegal business practices and requires them to pay nearly \$200,000 combined in consumer redress.

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

INTERNATIONAL ANTITRUST HIGHLIGHTS

- On August 25, the European Commission decided to open an in-depth investigation into the proposed joint acquisition by Microsoft and Time Warner of ContentGuard. On July 12, Microsoft and Time Warner sought clearance under the European Union's Merger Regulation for plans to jointly acquire ContentGuard, formerly controlled by Xerox. ContentGuard is active in the development and licensing of intellectual property rights ("IPRs") relating to DRM solutions. DRM technology makes it possible to "hardwire" in digital content the content owner's rights, and to prevent illegal use (such as illegal copying).

After a routine Phase I review, the Commission has decided to investigate whether the deal might create or strengthen Microsoft's already leading position in the DRM solutions market. Under Microsoft's and Time Warner's joint ownership, ContentGuard may have both the incentives and the ability to use its IPR portfolio to put Microsoft's rivals in the DRM solutions market at a competitive disadvantage. This joint acquisition could also slow down the development of open interoperability standards. As such, this would allow the DRM solutions market to "tip" towards the current leading provider, Microsoft. DRM solutions are forecasted to become pervasive throughout the entire IT industry. As a consequence, the notified concentration may have spill-over effects on a number of related markets ranging from mobile telephony to word processors.

RECENT ACTIVITIES

International Antitrust Highlights (Continued)

The opening of a second-stage merger investigation does not prejudice the Commission's conclusions and final decision, which must be reached in a maximum of four months, i.e. by January 6, 2005.

- On August 19, InVision Technologies, Inc. was told that it must sell its German units if General Electric is to be approved to acquire the infrastructure security systems group. GE Infrastructure announced the \$900m deal in March 2004, saying that it would significantly enhance GE's capabilities in explosive detection and security technologies. Bundeskartellamt, the German Cartel Office, found that after the acquisition, GE would dominate the market for certain specialist X-ray machines in Germany. Therefore it has ordered that the InVision units must be sold prior to the merger.
- On August 18, the UK's Department of Trade and Industry ("DTI") cleared the Barclay brothers' takeover of the Telegraph Publishing Group, including The Daily Telegraph, The Sunday Telegraph and The Spectator. The clearance comes immediately after the OFT announced it was going to review the deal on competition grounds. Whilst the DTI cleared the takeover on the basis of a public interest test, the OFT will consider the competitive impact on the markets in which the Telegraph Group operates. The only national newspaper the Barclay brothers currently control is the weekly paper, The Business.
- On August 18, the European Commission announced that it had given conditional approval under Article 6(2) of the new EC Merger Regulation (Regulation 139/2004) to the acquisition by Syngenta Crop Protection AG of Advanta B.V. The Commission's market investigation pointed to serious competition concerns in a number of national seed markets within the EU. These were sugar beet seeds in Belgium, Finland, France, the Netherlands, Portugal, Spain, Austria, Ireland and Italy, maize seeds in Denmark, the Netherlands and the United Kingdom, sunflower seeds in Hungary and Spain as well as the French market for spring barley seeds and the UK market for vining pea seeds (a type of pea seeds). The operation would create a very strong market leader, often twice or more the size of the next competitor. In the market for sugar beet seeds, the proposed operation would also bring together two of the three major European sugar beet seed breeders, which are also the main suppliers of sugar beet seeds in Europe. In order to remove the Commission's concerns, Syngenta has offered to divest Advanta's whole European seed business to an independent purchaser, thereby removing entirely the overlap of the parties' operations on all relevant markets within the European Union. Based on Syngenta's commitment, the Commission was therefore able to give its go-ahead to the notified operation. This was the first case investigated by the Commission under the new EC Merger Regulation (*Regulation 139/2004*) (which came into force on 1 May 2004) in which the Commission identified serious competition concerns necessitating remedial action. Under the new Merger Regulation, the Commission is applying a revised substantive test: whether the merger significantly impedes effective competition in the common market or a substantial part of it, in particular as a result of the creation or strengthening of a dominant position.
- On August 18, two Democratic Progressive Party legislators called for the Taiwanese Fair Trade Commission to end what they allege is price fixing and monopolization of the market by cement manufacturers. Tuan Yi-Kang and Chen Chinteh told a joint news conference that the price of cement has not fallen with a decline in consumption. Tuan alleged that manufacturers have created a false 'short-supply' phenomenon, and prevented lower-price imports from the Philippines and Korea through quota control systems.
- On August 17, Automobile-Eclerc, the French company that imports cars to sell at a discount, launched legal action against PSA Peugeot Citroën alleging abuse of a dominant position and cartel formation. Auto-Eclerc claims that PSA's links with Ford, Toyota, and General Motors act to prevent competition. PSA has defended its position by drawing

RECENT ACTIVITIES

International Antitrust Highlights (Continued)

attention to the fact that its only links with Toyota and Ford are through joint ventures and, moreover, that there is no direct link in terms of capital.

- On August 17, the French Finance Ministry gave the green light to the takeover by Groupe SEB S.A. (“SEB”) of Moulinex S.A., for the second time. Both SEB and Moulinex are electrical equipment makers. The three-year-old takeover had previously been given antitrust approval, but the Conseil d’Etat appeals court cancelled the approval in February, following intervention by three rivals, who argued that insufficient account had been given to consolidation in the market. Clearing the deal this week, the Finance Ministry said the deal was not of a nature to affect competition. The European Commission had been responsible for reviewing the impact of the acquisition elsewhere in Europe, but gave local competition authorities responsibility for reviewing its impact in France.
- On August 17, the Korean Fair Trade Commission announced that it had opened an investigation into four oil refiners, SK Corp, LG Caltex, S-Oil and Hyundai Oilbank. The Commission wants to find out if the four conferred over domestic oil prices, but the investigation is part of a wider government effort to tackle high oil prices and inflation.
- On August 16, it emerged that the European Commission had written to the Italian government expressing its concern following allegations by British Airways (BA) that Italy’s civil aviation authority (“ENAC”) is demanding that BA and other airlines operating long-haul flights raise their prices to a level with those of the national carrier, Alitalia. The European Commission’s concern comes after a complaint by British Airways, which was lodged with the European Transport Commission because the dispute relates to an air accord between the UK and Italy. Several countries reportedly have such bilateral deals that prevent airlines from offering cheaper indirect flights. Although the EU initially seemed reluctant to act because it did not think it had the powers to do so, the Commission has also written to all 25 EU member states asking for details of their bilateral air agreements.
- On August 12, Neelie Smit-Kroes, a former Dutch transport minister and now a businesswoman, was nominated as the next European Competition Commissioner to replace Mario Monti in October. After weeks of patient negotiation, the European Commission’s President Designate Jose Manuel Barroso announced the job portfolios of his new team. The Dutch appointment to the “inner council” that will attempt to force through the major European economic reforms known as “the Lisbon Agenda” in the EU came as a surprise. Mr. Barroso said, “She knows business well, she knows the private sector... She has the independence necessary to be commissioner responsible for competition.” Ms. Kroes is on the boards of Volvo AB, Royal P&O Nedlloyd NV, Lucent Technologies Inc.’s Dutch unit and MMO2 Plc. It is reported that in her native Netherlands, Ms. Kroes was nicknamed “Nickel Neelie,” after the UK’s “Iron Lady” Margaret Thatcher. According to Karel Van Miert, a former Competition Commissioner, Ms. Kroes “has always taken a positive stance towards liberalization.” Her appointment needs to be ratified by the European Parliament. See article in today’s *Sheppard Mullin Antitrust Review* at p. 7.
- On August 6, the German cartel office, the Bundeskartellamt, gave the green light to the proposed acquisition of Viva Media, a German music TV company, by Viacom. Viva Media manages two music channels and owns Brainpool, a production company. Viacom controls MTV music and also owns Paramount Pictures. The takeover, which values Viva at about EUR 309m, still requires approval of a German media control authority.
- On August 4, Jiangsu-based industry leader in cigarette manufacture, Xuzhou Cigarette Factory, declared its successful acquisition of the Chengcheng Cigarette Factory in the province of Shaanxi.

RECENT ACTIVITIES

International Antitrust Highlights (Continued)

- On August 4, UFJ Holdings, the fourth largest Japanese bank is at the centre of a takeover battle following its second consecutive year of losses following the disposal of its non-performing loans. It faces a \$29.2 billion hostile bid from Japan's third-largest bank, Sumitomo Mitsui Financial Group ("SMFG"). UFJ President, Takamune Okihara, however, has indicated his preference to merge with Japan's second-largest bank, Mitsubishi Tokyo Financial Group, following their signature of a merger agreement which would result in a new bank called Mizuho. If SMFG's bid is successful, it would create a Japanese financial services powerhouse with assets of \$1,600 billion, which would oust Citibank from its number one position.
- On August 3, the European Commission filed its "Statement of Objections" which set out the preliminary findings of its probe into the VISA association membership rules and a rule in the Visa International bylaws. In particular, the Visa International Board does not accept for membership any applicant deemed by the Board to be a competitor of Visa. The Commission is concerned that this Visa membership rule reduces competition in the merchant acquiring markets across Europe and is a barrier to the entry of a potentially powerful new entrant with a pan-European card business strategy. In addition, the Commission believes that being refused Visa membership prevents potential new entrants from engaging in cross-border acquiring, a newly evolving segment of the acquiring business which has the potential of increasing competition in the national European markets by making domestic service providers compete with acquirers based in other EEA Member States.

In April 2000, Morgan Stanley Dean Witter ("MSDW"), who operates the Discover brand credit card, filed a complaint with the Commission requesting the latter to prevent Visa from applying its membership rules in a way as to exclude MSDW from Visa membership. While MSDW as the owner of the Discover network was refused Visa membership, the owners of several other payment card schemes have been admitted as Visa members. In addition, the Commission noted that MasterCard does not have any rule which would be similar to the Visa rule in question, and MSDW had been admitted as a MasterCard member.

VISA has now been given the opportunity to address the Commission's concerns within a three-month deadline and can also set out its point of view in an oral hearing.

- On August 3, the Australian Competition and Consumer Commission ("ACCC") decided not to intervene in the proposed merger of BMG Australia and Sony Music Entertainment (Australia) which forms part of a global joint venture between Sony Corporation and Bertelsmann AG. The ACCC said it was unlikely that the proposed merger would substantially lessen competition in either the wholesale recorded or online music markets. Both the European Commission and the Federal Trade Commission have also decided not to oppose the joint venture.

The ACCC will host the Cracking Cartels: International and Australian Developments conference on November 24, 2004. A number of Australian and international speakers and panelists will discuss how competition regulators deal with cartel behavior, including the effectiveness of leniency policies. The International Competition Network Cartel and Leniency Workshops will be held prior to the conference. Further information on the conference can be found on the ACCC's website: www.accc.gov.au

- On August 2, the Iconcard joint venture between Italy's credit card market leader CartaSi and the European subsidiary of financial services company, American Express, was approved by the Italian Central Bank and antitrust authority.

RECENT ACTIVITIES

International Antitrust Highlights (Continued)

Banca d'Italia authorized Iconcard to utilize CartaSi's distribution network to issue and manage Amex cards until the end of 2007, following an antitrust probe that began in 2003. Authorities claim that this venture will support banks and financial institutions and provide innovative services and were unconcerned that the JV will boost CartaSi's market share to over 70%.

- On August 2, Alcatel, the French telecoms firm, acquired the submarine telecoms business of Italian cable and tire company, Pirelli & C. SpA. The deal was approved by the Italian Antitrust Authority on the grounds that it would not create conditions in which the merged entity could exploit a dominant position.
- On August 1, it emerged that HBOS, the UK's fifth largest bank and formed by the merger of Halifax and the Bank of Scotland, was considering a bid to acquire Abbey National Bank following an offer from the Spanish Banco Santander Group (a combined Banco Santander and Abbey will create Europe's 9th largest bank by assets). Industry speculation and comments from consumer groups suggest that HBOS' bid may well come under intense antitrust scrutiny given its 23% and Abbey's 12% market shares in the UK mortgage market. Abbey shareholders have welcomed the interest as Santander's offer is significantly below the target's share price.

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

FCC ANTITRUST HIGHLIGHTS

- The FCC is currently considering competing ways to measure how many people are watching television programming, after an appellate court in June ordered the Commission to revise rules governing mergers among broadcast and newspaper companies. Such a test is key to gauging the level of diversity in the nation's media, which the FCC is mandated to protect. Whether the U.S. government will use the new measure to ease or instead restrict media company deals remains to be seen. But Hearst-Argyle Television Inc., a New York-based broadcaster with 28 stations, is lobbying the FCC to adopt a so-called viewership index that would allow broadcast companies to buy additional TV outlets in a given market if their share of the audience, based on Nielsen Media Research data, is 30% or less. Under this proposal, in large markets around the country, the size and number of stations a single company could own would not be restricted as long as its total combined audience did not exceed the 30% cap. For the biggest markets, no company could own more than three stations. This plan would likely spur media consolidation because it would replace the FCC's blanket prohibition on mergers among the top four TV stations in midsize and large markets. Companies that surpass the audience cap through organic growth, rather than mergers, would not be required to divest assets, though they could not complete additional in-market deals. At the same time, though, consumer groups are petitioning the FCC to adopt a divergent way to measure viewership, one that would curb industry consolidation. Consumer Federation of America's Mark Cooper opposes Hearst-Argyle's proposal that the FCC count all TV viewers in developing media ownership limits. According to Cooper, that approach equates someone watching cartoons with a person watching news and consequently produces a distorted picture of the diversity of views on the nation's airwaves. Instead, telecom regulators should measure media diversity by tracking how many viewers watch news broadcasts. Cooper plans to introduce a plan in October that would use Nielsen ratings to assess TV audiences during peak news broadcasting hours, while excluding from the count viewers of non-

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FCC Antitrust Highlights (Continued)

news programming. This approach would effectively allow a few mergers in the 10 largest U.S. markets, but bar many deals in the 150 midsize U.S. markets. The FCC's revised media rules are expected by mid-2005 at the earliest.

- On August 13, the FCC approved DirecTV Inc.'s request to move its "DirecTV 5" satellite into an orbital slot controlled by Telesat Canada. Moving the bird to the 72.5 degrees west longitude location will allow DirecTV to expand its local-into-local channel service to an additional 24 markets, bringing its total to 130, covering 92% of TV households in the United States, the direct-broadcast satellite provider said. Customers in those 24 markets will need second 18-inch dishes to access the local channels, and DirecTV said it will provide and install those dishes free-of-charge for subscribers who commit to one year of "DirecTV Total Choice" programming. "We appreciate the FCC expediting its approval of this request," DirecTV CEO Mitchell Stern said in a prepared statement. "By doing so, the twin policy goals of competition and localism will be enhanced in an additional 7 million households."
- The FCC approved DirecTV Group Inc.'s sale of PanAmSat Corp. on August 11. The satellite company is being sold to affiliates of Kohlberg Kravis Roberts & Co. L.P., The Carlyle Group, and Providence Equity Partners Inc. for approximately \$2.6 billion. The following day DirecTV also announced that it has reached an agreement with PanAmSat's buyers to compensate for the xenon-ion-propulsion failure of PanAmSat satellite Galaxy 10R, which was announced last week, and other issues. The agreement shaved \$200 million off the original purchase price, but it did not affect the \$23.50-per-share purchase price being paid to other PanAmSat shareholders.
- The DOJ is reportedly in the final stages of its investigation into Cingular Wireless LLC's \$41 billion acquisition of AT&T Wireless Services Inc. In fact, the deal should be wrapped up by Sept. 25, much earlier than investors initially expected. As a result, the FCC would then conclude its probe in October. Cingular had predicted clearance late in the fourth quarter, and many analysts expected it to occur in 2005. One source involved in the transaction said the government will not require Cingular to divest significant wireless spectrum assets, though it appears the company will be required to make some targeted sales in narrow geographic markets. Most of these are rural areas where the companies are not fully utilizing the spectrum. Regardless, the required divestitures will not come close to giving Cingular the right to back out of the deal. The merger agreement requires the company to sell spectrum and customers worth up to \$8.25 billion. That equates to dumping 10 million of the 22 million AT&T Wireless customers that Cingular is gaining in the transaction. Sources said Cingular has been working overtime to secure government acceptance of the merger prior to the November elections. Cingular fears that a change in presidential administrations could significantly delay the deal, since a new assistant attorney general and FCC chairman would require time to get up to speed on the transaction.

*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

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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