# Antitrust Quarterly

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## US DEVELOPMENTS



## EUROPEAN DEVELOPMENTS

# FTC ISSUES CONSENT ORDER PROHIBITING EXCHANGES OF NONPUBLIC COMPETITIVE INFORMATION AMONG COMPETITORS, EVEN ABSENT AGREEMENT

By Irving Scher, New York

On April 8, 2013, the Federal Trade Commission (FTC) released a proposed complaint and Consent Order against Bosley, Inc. and its corporate parents (jointly "Bosley"), barring Bosley from exchanging "competitively sensitive, nonpublic information about its business practices" with competitors, including, in particular, HC (USA), Inc., known as Hair Club.[1] The complaint alleges that for at least the past four years, the Chief Executive Officers of Bosley and Hair Club directly and repeatedly exchanged detailed nonpublic information about their companies' future product offerings, minimum prices and discounts, future expansion and contraction plans, and other business intentions.[2] According to the complaint, Bosley also exchanged similar information with other competitors.[3]

The FTC complaint concludes that Bosley's conduct "had the purpose, tendency and capacity to facilitate coordination and served no legitimate business purpose."[4] Accordingly, the conduct allegedly constituted an "unfair method of competition" in violation of Section 5 of the FTC Act, even though no actual agreement with any competitor was alleged.[5] The absence of such a claim means that the FTC, which has exclusive authority to enforce the FTC Act, was not claiming conspiratorial conduct in violation of Section 1 of the Sherman Act, which likely would have given rise to private antitrust treble damage actions (however, it would not be surprising if such suits nevertheless follow).

The newsworthy aspect of the FTC's suit is that it is rare when the FTC does not challenge anticompetitive conduct by competitors without alleging that the horizontal conduct fell short of violating the Sherman Act. In fact, the only such actions brought in the past 30 years were the consent orders issued simultaneously 13 years ago against five recorded music companies challenged for enforcing parallel minimum advertised price (MAP) policies against their customers.[6] An interesting aspect of the action against Bosley is that the information about the competitive exchanges was reportedly obtained by the FTC during the investigation of Bosley's proposed acquisition of Hair Club, which was in the process of being closed without action by the Commission.[7]

## BACKGROUND: FTC HORIZONTAL ENFORCEMENT POLICIES

It is well established that the FTC's "unfair method of competition" authority under Section 5 of the FTC Act authorizes the FTC to challenge anticompetitive practices which, while not constituting actual violations of the Sherman or Clayton Acts, are counter to the spirit or policy of those laws, or constitute incipient violations of those statutes, and therefore allows the FTC to supplement and bolster the traditional federal antitrust laws. Typically, under this authority, the FTC has been permitted by the courts to challenge practices that have effects similar to violations of the Sherman or Clayton Act, but do not violate one of those statutes because of some statutory technicality.[8] Additionally, the courts have authorized the FTC to challenge conduct that may develop into such violations if left alone—incipient antitrust violations.[9] In the early 1980s, a few appellate courts thought the FTC had improperly tried to extend this authority too far. This was particularly evident in decisions by two courts of appeals involving FTC suits challenging conduct by competitors charged with allegedly anticompetitive conduct that fell short of agreement.

First, in the 1980 Boise Cascade case, relying on its authority under Section 5 of the FTC Act to proscribe "incipient" antitrust violations, the FTC had ruled that the parallel adoption of an artificial pricing formula by members of the concentrated plywood industry violated Section 5 even absent a specific agreement. The Ninth Circuit disagreed, declaring that without evidence of collusion, the Commission lacked authority to find a violation of the FTC Act based solely on a rebuttable presumption of an anticompetitive effect.[10]

Then, in 1984, the Second Circuit set aside an FTC order in the *Ethyl* "price signaling" case after the Commission had found that Section 5 prohibited unilateral conduct in an oligopolistic industry that had a significant adverse effect on competition by stabilizing prices among the companies. The appellate court declared that even in an oligopoly, parallel anticompetitive conduct was not an unfair method of competition under Section 5 unless the Commission established some indicia of oppressiveness, such as evidence of anticompetitive intent," or "the absence of an independent legitimate business reason" for the challenged conduct."[11]

After these losses, the FTC retreated and returned to a more traditional mode of analysis, avoiding what appellate courts might consider an over-expansive interpretation of its Section 5 authority in cases involving horizontal conduct. With the exception of the recorded music consent orders in 2000 noted above, it seemed to be limiting its "unfair methods of competition" authority in this area to cases involving invitations to collude or attempted price fixing involving unambiguous overtures to collude with a rival.[12] Then the *Bosley* case came along.

## THE BOSLEY CONSENT ORDER

The proposed Consent Order in the Bosley case would require it : (1) not to communicate competitively sensitive, nonpublic information with any competitor; (2)not to request, encourage or facilitate communication of competitively sensitive information from any competitor; and (3) to institute an antitrust compliance program to assure ongoing compliance with the proposed order.[13]

Providing guidance to the respondent, as well as to interested observers, the proposed order defines "competitively sensitive, nonpublic information" as information such as "nonpublic information relating to pricing or pricing strategies, costs, revenues, profits, margins, output, business or strategic plans, marketing, advertising, promotion, or research and development."[14] This would not include information communicated publicly to customers or investors through widely accessible methods such as websites, analyst conference calls and press releases, and information required by the federal securities laws.[15]

The proposed order also provides guidance as to the kinds of nonpublic information that can actually be exchanged with a competitor, by allowing such an exchange that is "reasonably related to a 'lawful' joint venture or as part of legally supervised due diligence for a potential transaction, and reasonably necessary to achieve the procompetitive benefits of such a relationship,"[16] something that may not have been present in the Commission's assessment of *Bosley's* activities leading up to the Hair Club transaction, and at least for a number of years earlier.

The Bosley proposed consent order has been placed in the FTC's public record to solicit comments from interested parties. After that, the Commission will determine whether to finalize the order as proposed or as modified as a result of public comments.

## ANALYSIS

The proposed *Bosley* Consent Order was entered unanimously by the current four-member Commission (a fifth seat is awaiting Presidential nomination). This is of particular interest, because there has been disagreement among Commissioners in the past few years about the extent of the Commission's Section 5 authority in cases involving alleged anticompetitive conduct by allegedly dominant companies in the technology and health sectors.[17] Most recently, it has been reported that newly confirmed Republican Commissioner Wright has said that he intends to issue his own proposed formal policy statement on the issue, and new Chair Edith Ramirez, a Democratic appointee, declared that she supported the case-by-case approach the FTC has taken to date to limit the extent of its authority, stressing that the bulk of the unfair methods of competition enforcement will continue to stay close to Sherman and Clayton Act requirements.[18] An effort to carefully limit the extent of the Commission's authority appears to be present in the Bosley complaint, because the Commission evidently took heed of the Second Circuit's admonishments in the *Ethyl* case discussed above by stressing that: (1) the challenged anticompetitive conduct involved in the Bosley case could "mutate" into an actual conspiracy because it facilitated coordination and reduced uncertainty about a rival's future prices and strategic plans; and (2) the exchanges at issue served no legitimate purpose.

While the proposed Bosley Consent Order is not yet final, the Commission also used this opportunity to provide potentially valuable guidance to the antitrust community, both as to competitive information exchanges that risk FTC action as well as the kinds of nonpublic competitive information exchanges that should usually be free from challenge, particularly information that can be exchanged as part of legally supervised due diligence related to a lawful joint venture or a potential merger or acquisition.

[1] Complaint, Decision and Order, *In the Matter of Bosley, Inc., Aderans American Holdings, Inc., & Aderans Co., Ltd.*, FTC File No. 121-01854 Apr. 7, 2013 (hereinafter, "Compl," and "Order").
[2] Compl. ¶¶ 12, 13.
[3] *Id.* ¶16.
[4] *Id.* ¶14.
[5] 15 U.S.C. §45.
[6] *In the Matter of Sony Music Distrib., Inc., et. al.*, 5 Trade Reg. Rep. (CCH) ¶24,746 (FTC 2000) (Consent Orders). In 2009, the Commission issued a consent order against the National Ass'n of Music Merchants, settling a complaint claiming—without any allegation of an agreement-- that a trade association engaged in an unfair method of competition by allegedly encouraging the exchange of competitive information among its retailer members at trade association meetings during a three-year period, thereby facilitating possible conspiratorial conduct. However, no action was brought against any of the members. *See In the Matter of National Ass'n of Music Merchants, Inc.,* FTC Dkt. No. C-4255 (Decision and Order, Apr. 8, 2009).

[7] Part I.C. of the proposed order declares that after the acquisition of Hair Care, the term "Aderans" in the Order includes that company. The acquisition closed a few days after issuance of the complaint and order. *See Aderans Co., Ltd*., Notice of Completed Acquisition of Shares in U.S. Company by Aderans Group Company (Apr. 10, 2013).
[8] See, e.g., FTC v. Brown Shoe Co., 384 Y.S. 316 (1966); *Atlantic Ref. Co. v. FTC,* 381 U.S. 357 (1965); *Grand Union Co. v. FTC,* 300 F.2d 92 (2d Cir. 1962).
[9] *See e.g., FTC v. Texxaco, Inc.*, 393 U.S. 223, 229 (1968); *FTC v. Motion Picture Adver. Serv. Co*., 344 U.S. 392, 394-95.
[10] *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 581-82 (9th Cir. 1980).
[11] 11 E.I. du Pont de Nemours & Co. v. FTC, 729 F.2d 128, 139-40 (2d Cir. 1984).
[12] *See, e.g., In the Matter of Valassis Communications, Inc.*, 2006 WL 13667833 (FTC 2006)(Consent Order); *In the Matter of Precision Molding Co*., 122 F.T.C. 628 (1996) (Consent Order); *In the Matter of YKK (U.S.A.)., Inc*., 116 F.T.C. 628 (1993 (Consent Order).
[13] Order Parts II & III.
[14] *Id*, Part I.J.
[15] *Id*.
[16] *Id*., Part II.
[17] *See, e.g., FTC v. Cephalon,* 551 F. Supp.2d 21(D.D.C. 2008); Intel Corp., 2010 FTC LEXIS 82 (2010) (Decision & Order); Negotiated Data Soluti9ons LLC,, 2008 FTC LEXIS 120 (2008)(Decision & Order);
[18] *See Section 5 Cases Offer Best Guidance, FTC Chief Says Portfolio, Inc*., Law 360, Apr. 15, 2013.

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## APPLYING A "RIGOROUS ANALYSIS," SUPREME COURT REVERSES CLASS CERTIFICATION IN ANTITRUST SUIT BECAUSE OF NO SHOWING THAT DAMAGES COULD BE MEASURED ON CLASS-WIDE BASIS

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In 2011, the Supreme Court explained in Wal-Mart Stores, Inc. v. Dukes,[1] that, "[w]hat matters to class certification ... is not the raising of common 'questions,' -- even in droves -- but rather the capacity of a class-wide proceeding to generate common answers apt to drive the resolution of the litigation." The Court expanded that principle in its March 27, 2013 decision in Comcast Corp. v. Behrend,[2] reversing class certification because the plaintiffs in an antitrust suit failed to prove that their alleged damages could be measured on a class-wide basis. In Dukes, the Court addressed whether the plaintiffs' theory of liability was susceptible to common answers, as required by Federal Rule of Civil Procedure 23(a)(2), and rejected the plaintiffs' argument that requiring common proof at the class certification stage depends too heavily on a premature determination of the merits. In Comcast, the Court applied this "rigorous analysis" to the issue of whether the plaintiffs' damages theory in an antitrust suit was susceptible to measurement on a class-wide basis, and held that it was not. This decision is a significant victory for antitrust class action defendants – it confirms that courts may, when necessary, consider the merits at the certification stage not only in assessing whether liability can be established on a class-wide basis, but also in considering whether plaintiffs have offered a competent basis to establish class-wide damages.

Comcast, a cable television provider, acquired competitor cable providers in the Philadelphia and surrounding region, and "swapped" its systems outside the region for the competitors' systems in the region. For example, Comcast acquired Adelphia Communications in this region, and in exchange sold certain of its systems in Florida and California to Adelphia. As a result of many of these transactions, Comcast's share of subscribers in the region increased substantially. Plaintiffs, who are Comcast subscribers, brought a putative antitrust class action against Comcast, seeking treble damages.

Plaintiffs sought class certification under Federal Rule of Civil Procedure 23(b)(3), which permits certification only when "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members...." They proposed four theories of antitrust liability, but the District Court accepted only one – that "Comcast's activities reduced the level of competition from 'overbuilders,' companies that build competing cable networks in areas where an incumbent cable company already operates."[3] The District Court certified a class of over two million current and former Comcast subscribers, finding that damages resulting from "overbuilder-deterrence impact" could be calculated on a class-wide basis.[4] However, Plaintiffs' damages claim for nearly $900 million was based on expert testimony that "did not isolate damages resulting from any one theory of antitrust impact."[5]

On appeal to the Third Circuit, Comcast argued that the class was improperly certified because the damages model failed to attribute damages to overbuilder deterrence, the only theory of liability left in the case. The Court of Appeals rejected that argument, and affirmed the District Court's certification order, holding that such an "attac[k] on the merits of the methodology [had] no place in the class certification inquiry."[6]

In a 5-4 opinion, Justice Scalia delivered the opinion of the Supreme Court, reversing the Third Circuit's decision. Citing Dukes, the Court held that a party seeking class certification must not only "'be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact,' typicality of claims or defenses, and adequacy of representation, as required by Rule 23(a); it must also satisfy through evidentiary proof at least one of the provisions of Rule 23(b)."[7] The provision at issue, Rule 23(b)(3), requires courts to find that "the questions of law or fact common to class members predominate over any questions affecting only individual members."[8]

The Court held that the Third Circuit's refusal to wade into merits issues that necessarily overlap with the predominance requirement was wrong. "Repeatedly, we have emphasized that it 'may be necessary for the Court to probe behind the pleadings before coming to rest on the certification question,' and that certification is proper only if 'the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied.'"[9] "That is so because the class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action."[10]

In applying this analytical overlap to the issue of class-wide damages, the Court noted that, "[i]f anything, Rule 23(b)(3)'s predominance criterion is even more demanding than Rule 23(a)," which the Court examined in Dukes in assessing class treatment of liability issues.[11] Rule 23(b)(3) is designed for situations "in which class-action treatment is not as clearly called for."[12] That "explains Congress' addition of procedural safeguards for (b)(3) class members," such as the right to opt out.[13]

Based on those principles, the Supreme Court held that "[r]espondent's class action was improperly certified" because "[b]y refusing to entertain arguments against respondents' damages model that bore on the propriety of class certification, simply because those arguments would also be pertinent to the merits determination, the Court of Appeals ran afoul of our precedents requiring precisely that inquiry."[14] The Supreme Court recognized that damages "[c]alculations need not be exact, … but at the class-certification stage (as at trial), any model supporting a plaintiff's damages case must be consistent with its liability case. [15] … And for purposes of Rule 23, courts must conduct a rigorous analysis to determine whether that is so."[16] The Supreme Court criticized the Third Circuit's logic of refusing to consider the merits, under which "any method of measurement is acceptable so long as it can be applied class-wide, no matter how arbitrary the measurements may be.[17] Such a proposition would reduce Rule 23(b)(3)'s predominance inquiry to a nullity."[18] The Court concluded that "[t]he first step in a damages study is the translation of the legal theory of the harmful event into an analysis of the economic impact of that event."[19] "The District Court and the Court of Appeals ignored that first step entirely."[20]

This decision is important, not only for its continuing application of rigorous standards at the class certification stage, but also because it rejects a common plaintiffs' argument that damages need not be measurable on a class-wide basis. As the majority explains, without presenting proof of a damages theory tied to the alleged wrong, "respondents cannot show Rule 23(b)(3) predominance: Questions of individual damage calculations will inevitably overwhelm questions common to the class."[21] In other words, if a putative class includes members who may not have been affected at all by the defendant's conduct or whose damages cannot be measured by common proof or at least a common methodology, the class should not be certified.

[1] 131 S. Ct. 2541, 2551 (2011).
[2] No. 11-864, March 27, 2013. (All citations will be to the Slip Op.)
[3] Slip op., at 3.
[4] *Id*. at 4.
[5] *Id*.
[6] *Id*.
[7] *Id*. at 5-6.
[8] *Id*. at 6.
[9] *Id*. (citations omitted).
[10] *Id*. (citations and internal quotation marks omitted).
[11] *Id*.
[12] *Id*. (citing *Dukes*, internal quotation marks omitted).
[13] *Id*.
[14] *Id* at 6-7.
[15] *Id*. at 7 (citations and internal quotation marks omitted).
[16] *Id*. at 8 (citing *Dukes*, internal quotation marks omitted).
[17] *Id*. (emphasis in original).
[18] *Id*
[19] *Id* at 11 (emphasis in original, citation omitted).
[20] *Id*.
[21] *Id*. at 7.

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## THE POWER OF PLUS FACTORS: RATIONAL BUSINESS BEHAVIOR LEADS TO DISMISSAL OF CONSPIRACY CLAIM AGAINST BROKER-DEALERS IN SECOND CIRCUIT

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In a March 2013 decision, the Second Circuit upheld the dismissal of claims by a group of securities buyers and dealers that financial institutions had conspired to simultaneously exit the now-defunct market for auction rate securities (ARS).[1] In *Mayor and City Council of Baltimore, Maryland v. Citigroup, Inc.*, a three-judge panel held that the facts suggested nothing more than that the defendants made rational and unilateral business decisions when each exited the ARS market near the time of the financial collapse in early 2008.[2] In making this determination, the court specifically examined "plus factors" alleged by the plaintiffs — i.e., facts or circumstances alleged by plaintiffs to support a conspiracy claim under Section 1 of the Sherman Act. "Plus factors" generally are used by plaintiffs to take a complaint over the "plausibility" line set down by the Supreme Court in *Bell Atlantic Corp. v. Twombly*[3], which made clear that mere allegations of parallel conduct are, without more, insufficient for antitrust conspiracy allegations to survive a motion to dismiss. While the Second Circuit's interest in examining plus factors is evident from their prominence in both *Citigroup* and the court's decision last year in *Anderson News, L.L.C. v. American Media, Inc.*,[4] it remains unclear exactly how plausible such plus factors must be in order for a complaint to withstand a motion to dismiss.

### BACKGROUND

The Second Circuit recounted the following facts from plaintiffs' complaints. Auction rate securities typically were long-term bonds with flexible interest rates that periodically reset through "Dutch" auctions.[5] Because of their perceived cash-like liquidity and relatively high rates of returns, ARS became popular among investors during the 1990s and 2000s.[6] Uniquely, ARS were typically traded at dedicated auctions, rather than being available for purchase for cash at any time on one of numerous exchanges.[7] These auctions usually were held every seven, twenty-eight, or thirty-five days, pursuant to a given issuance's offering documents.[8] Although ARS themselves were auctioned for par value, their interest rates would reset depending on demand at the auction.[9]

During ARS auctions, investors submitted one of four types of orders: 1) "bid" orders, for investors who wished to buy, 2) "sell" orders for investors who wished to sell regardless of interest rates, 3) "hold" orders for investors who wished to hold their securities, and 4) "hold-at-rate" orders, for investors who wished to sell their shares only if the ARS would otherwise reset below a certain interest rate.[10] The auction manager filled orders, starting the bid with the lowest minimum interest rate and working up.[11] The auction would "clear" if demand exceeded supply and every order was filled.[12] High demand at an ARS auction would lead to a low ARS interest rate.[13] If, however, demand for ARS did not match or exceed the supply of ARS being sold, the auction would "fail," meaning investors attempting to sell would have to retain ownership of their securities, and the interest rate would automatically rise to a "penalty" or "maximum" rate set out in the ARS offering documents.[14]

During the 1990s and early 2000s, ARS auctions rarely failed.[15] The complaints alleged that the ARS were viewed as safe and attractive investments, and they were issued in increasing numbers.[16] However, in 2006, the SEC issued a cease-and-desist order to a group of broker-dealers, finding they had been intervening in the auction process.[17] Specifically, when the broker-dealers had learned ahead of time that an auction was going to fail, they used proprietary trading accounts to place "support bids," absorbing the auctions' excess supply and preventing auction failure.[18] As a result of the SEC's administrative proceeding, these broker-dealers agreed to pay civil fines and disclose to their customers their "material auction practices and procedures."[19] However, they did not agree, nor were they ordered to stop the practice of placing support bids.[20] According to the complaints, as financial market conditions deteriorated in 2007 and early 2008, support bids appear to have taken on new importance in ensuring the auctions' success.[21]

Things came to a head in early 2008.[22] Certain ARS offerings had ties to subprime mortgage lending, and as the housing market slipped into crisis, investors began to extricate themselves from ARS positions.[23] On February 12, 2008, a number of ARS auctions failed.[24] Two days later, on Valentine's Day, the ARS market essentially stopped functioning (surely breaking many investors' hearts).[25] It has never recovered.[26]

In September 2008, on behalf of a putative class of ARS purchasers and a putative class of ARS issuers, plaintiffs in two companion actions sued a group of 11 large broker-dealers and their affiliates alleging they had conspired among themselves to stop placing support bids to prevent ARS auction failure.[27] Specifically, plaintiffs alleged that on February

13, 2008, "all of the major broker-dealers concertedly refused to continue to support the auctions," and "simultaneously exit[ed] the ARS market."[28] Plaintiffs labeled this conduct a concerted refusal to deal and alleged that, as a result, billions of dollars of outstanding ARS became illiquid, injuring investors and issuers.[29] The U. S. District Court for the Southern District of New York (Hon. Barbara S. Jones) granted defendants' motion to dismiss, holding that the alleged conduct was impliedly immunized from antitrust scrutiny by the securities laws.[30] Plaintiffs appealed.[31]

## THE COURT OF APPEALS DECISION

On appeal, the Second Circuit did not reach the issue of whether the conduct was immunized by the securities laws,[32] and instead affirmed on the ground that plaintiffs had failed to allege a plausible conspiracy under Fed. R. Civ. P. 12(b)(6).[33] In doing so, the court outlined the "two clear guidelines" it interpreted as being provided by the Supreme Court in *Twombly*: 1) "[s]omething more" than "a bare allegation of parallel conduct" must be alleged for a complaint to survive a motion to dismiss, and 2) "even if a plaintiff alleges additional facts or circumstances" beyond parallel conduct—described as "plus factors"—"these facts must still lead to an inference of conspiracy."[34]

Here, the court held that plaintiffs had pled "little more" than parallel conduct, and "the few additional facts they do assert plausibly fail to suggest that this parallel conduct flowed from a preceding agreement rather than from [the defendants'] own business priorities."[35] First, the court noted that the allegations in the complaint revealed that defendants were on notice as early as the summer of 2007 that the ARS market was in danger of failing.[36] Faced with "the same dilemma" of whether to "continu[e] to prop up the auctions" and generate commissions for successful auctions, or exit the market with the recognition that if enough auctions failed, ARS would be seen as poor investments, the market would dry up, and defendants would be left with support bids that would turn into major liabilities, the court stated that it was not irrational for each of the defendants independently to decide to exit the ARS market.[37] As "the market as a whole was essentially holding its breath waiting for the inevitable death spiral of ARS auctions," the court stated that the decision to "abandon[] bad investments was not just a rational business decision, but the only rational business decision."[38]

Secondly, the court held that plaintiffs' factual allegations did not plausibly suggest a "common motive to conspire."[39] The court noted that, according to the complaint, the ARS market was "highly concentrated with regulatory and financial barriers that discouraged entries."[40] In an "oligopolistic market," such as found here, the court stated that the fact that the defendants had a common motive to exit the market may, "simply restate the (legally insufficient) fact" that in a concentrated market, "market behavior is interdependent and characterized by conscious parallelism."[41]

Finally, plaintiffs had offered a handful of "specific communications" between defendants that plaintiffs claimed indicated a conspiracy.[42] However, the court noted the majority of these communications were intrafirm, and that there were only two communications between competitors.[43] Moreover, the court found that some of the intrafirm communications actually suggested an absence of interfirm communications.[44] For example, an internal Merrill Lynch communication offered by plaintiffs suggested the firm was relying on third parties for information on Lehman Brothers rather than speaking to Lehman directly.[45]

The court noted that the "prime concern" of *Twombly* was isolating cases that assert a plausible antitrust conspiracy from those that merely presume a conspiracy from parallel action.[46] This case, according to the court, was "without question of the latter variety."[47]

## CONCLUSION

Read together, the Second Circuit's *Citigroup* decision and its *Anderson News* decision last year (denying a motion to dismiss in a case involving parallel conduct in the magazine distribution industry) demonstrate that the allegation of "plus factors" supportive of a conspiracy claim is of utmost importance in the Second Circuit in order to meet the pleading standard established in *Twombly*. What remains unclear, however, is precisely how plausible those plus factors must be at the motion to dismiss stage.

We previously reported on the Second Circuit's decision in *Anderson News*.[48] In that case, decided by a three-judge panel made up of Judges Chin, Kearse and Leval, the court's language suggested that when facts used by plaintiffs to show the requisite agreement could equally show a conspiracy or merely (legal) parallel conduct, the tie goes to the plaintiff at the motion to dismiss stage. Specifically, the court held that "to present a plausible claim at the pleading stage, the plaintiff need not show that its allegations suggesting an agreement are more likely than not true or that they rule out the possibility of independent action, as would be required at later litigation stages such as a defense motion for summary judgment…."[49] The Second Circuit panel went on to note that "[t]he choice between two plausible inferences that may be drawn from factual allegations is not a choice to be made by the court on a Rule 12(b)(6) motion."[50]

By contrast, *Citigroup* (which was decided by a panel that again included Judge Leval, but this time with Judges Katzmann and Hall) might seem to indicate that, to survive a motion to dismiss, the plaintiff must present a factual scenario that suggests it is more plausible than not that defendants entered into an illegal agreement.[51] Of particular note in this regard is the court's language suggesting that a complaint should be dismissed if facts alleged by plaintiffs to show an agreement "could lead to an equally plausible inference of mere interdependent behavior."[52]

Despite this seemingly discordant language, the actual holdings in *Citigroup* and *Anderson News* can be harmonized. The Anderson News court apparently viewed the question of whether plaintiffs' allegations amounted to an illegal conspiracy or merely parallel behavior as a close call. In *Citigroup*, by contrast, the court appeared to view the "few additional facts" alleged by plaintiffs to support their claim of an illegal conspiracy as themselves, suggesting that the plaintiffs were merely making rational business decisions rather than engaging in a conspiracy.[53] Regardless, at this stage, the exact contours of the plus factors required to make out a claim under the *Twombly* plausibility standard in the Second Circuit remain open to some interpretation.

[1] Greenberg Traurig, LLP represented one of the defendants in the proceedings.
[2] 709 F.3d 129 (2d Cir. 2013).
[3] 550 U.S. 544 (2007).
[4] 680 F.3d 162 (2d Cir. 2012).
[5] *Citigroup, Inc.*, 709 F.3d at 132.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 133.
[14] *Id.*
[15] *Id.*
[16] *Id.* at 133, 132.
[17] *Id.*; *see also In re Bear, Stearns & Co. Inc., Securities Act Release* No. 8684, Exchange Act Release No. 53888, 88 SEC Docket 259 (May 31, 2006).
[18] *Citigroup, Inc.*, 709 F.3d at 133.
[19] *Id.* (internal citation omitted).
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Id.* at 133–34.
[28] *Id.* at 134.
[29] *Id.*
[30] *Id.* at 132.
[31] *Id.*
[32] *See generally Credit Suisse (USA) LLC v. Billing*, 551 U.S. 264 (2007).
[33] 709 F.3d at 132; *see also Mayor & City Council of Balt. v. Citigroup, Inc.*, Nos. 08-cv-7746-47 (BSJ), 08 Cv. 7747 (BSJ), 2010 WL 430771 (S.D.N.Y. Jan. 26, 2010).
[34] *Id.*
[35] *Id.* at 138.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.* at 138–39.
[40] *Id.* at 139.
[41] *Id.* (citing *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 322 (3d Cir. 2010)).
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] *Id.*

[46] *Id*. at 140.
[47] *Id*.
[48] S*ee Scott Martin, Second Circuit Finds Anderson News Pleading is Plausible . . . Enough*, Greenberg Traurig Antitrust Quarterly, Spring 2012, available at http://www4.gtlaw.com/marketing/LIT/14580/newsletter.htm#Article1.
[49] *Anderson News, L.L.C.*, 680 F.3d at 184.
[50] *Id*. at 185.
[51] *Citigroup, Inc.*, 709 F.2d at 137–38.
[52] *Id*. at 137 (quoting Apex Oil Co. v. DiMauro, 822 F.2d 246, 254 (2d Cir. 1987)).
[53] *Id*. at 138–39.

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# SUNBEAM TELEVISION CORP.'S LAWSUIT GOES DOWN THE TUBES: ELEVENTH CIRCUIT DENIES ANTITRUST STANDING FOR CUSTOMERS INJURED BY A MONOPOLIST SUPPLIER ABSENT POTENTIAL COMPETITORS

By Ryan Harsch, New York

In *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*,[1] the Eleventh Circuit ruled that a customer seeking to obtain treble damages against a monopolist supplier for a violation of Section 2 of the Sherman Act cannot recover solely for the injury caused to the customer. The customer must also allege that the monopolist's conduct either injured a competing supplier or kept would-be competitors out of the market. In the latter situation, the court held that in order to obtain antitrust standing, a customer must establish that the potential competitor "had the intent and was prepared" to enter the relevant market, but could not do so as a result of the defendant's exclusionary conduct.

## BACKGROUND

In general, a monopolist that obtains monopoly rents from consumers, without more, is not liable for a Sherman Act violation. A monopolization claim requires that the defendant engaged in some anticompetitive conduct to attain or maintain monopoly power, "as distinguished from growth or development as a consequence of a superior product, business acumen or historical accident."[2] Thus, courts have recognized that a monopolist's conduct would have no impact on competition – and thus would not constitute a Sherman Act violation – when there is no competitor present in or seeking to enter a particular market.[3] Higher prices charged to customers does not alone constitute actionable antitrust injury.

In Sunbeam, the Eleventh Circuit was confronted with precisely such a situation, in which an incumbent monopolist was accused of taking actions to foreclose potential competition when there were no direct competitors. The question presented was: "whether, to establish antitrust standing, Sunbeam, as one of Nielsen's customers, must establish the existence of a willing and able competitor that would have entered the relevant market and competed with Nielsen, but for Nielsen's exclusionary conduct."[4]

## THE FACTS

Defendant Nielsen Media Research, Inc. (Nielsen) is a leading provider of television "ratings," which measure the number of viewers of a particular program or station. Television ratings are the primary driver of advertising pricing and revenue. According to the complaint, Nielsen exercises monopoly power in the market for such "television audience measurement services" nationwide and in the Miami-Fort Lauderdale market in particular. Plaintiff Sunbeam Television Corp. Sunbeam operates a FOX-affiliated broadcast television channel in the Miami-Fort Lauderdale area and is a long-time customer of Nielsen's ratings.[5]

According to Sunbeam, in 2008 a change implemented by Nielsen in the device it used to measure television viewership and create its ratings in Miami-Fort Lauderdale caused a 50% drop in Sunbeam's ratings, resulting in a significant decline in its advertising revenue. Evidently recognizing that its harm alone would not state a monopolization claim, the crux of Sunbeam's Complaint was that Nielsen engaged in a panoply of exclusionary conduct to maintain its monopoly position and, as a result of such conduct, prevented potential competitors from entering the ratings services market. Specifically, Sunbeam alleged that Nielsen mandated contractual provisions with its customers that prevented competitors from entering the market; undertook transactions and business strategies intended to neutralize competitors; imposed punitive pricing on customers who resisted its practices; utilized defective ratings data to attract new cable customers and foreclose a potential avenue of competitor entry; imposed onerous contract provisions on customers that left them no recourse; and charged supra-competitive prices. Sunbeam claimed it was damaged because the antitrust violations insulated Nielsen from competition, allowing it to sell inferior products to customers at supra-competitive prices.[6]

## THE COURT'S DECISION

The issue before the Eleventh Circuit was whether Sunbeam could establish antitrust standing for its alleged injuries, as required by Section Four of the Clayton Act, which "involves consideration of the nexus between the antitrust violation and the plaintiff's harm and whether the harm alleged is of the type for which Congress provides a remedy."[7] The Eleventh Circuit employs a two-pronged test for antitrust standing: (1) the plaintiff must establish that it has suffered an antitrust injury, i.e., "injuries of the type the antitrust laws were intended to prevent;" and (2) the plaintiff must be an “efficient enforcer” of the antitrust laws, which requires a “causal relationship between the antitrust violation alleged and the antitrust injury sustained.”[8] The court concluded that it did not need to consider the first prong of the test because Sunbeam was not an efficient enforcer of the antitrust laws.[9]

The standard for determining whether a customer, as opposed to a competitor, is an efficient enforcer in the context of a monopolization claim was an issue of first impression in the Eleventh Circuit. Sunbeam argued that to have standing, a customer need not demonstrate the existence of a “willing and able” competitor that was excluded from the market as a result of Nielsen’s conduct. The Eleventh Circuit disagreed. The court relied on and adopted the opinion of the *D.C. Circuit in Meijer, Inc. v. Biovail Corp*., 533 F.3d 857 (D.C. Cir. 2008), concluding that in order to meet the second prong of the standing requirements, “the plaintiff must prove the existence of a competitor willing and able to enter the relevant market, but for the exclusionary conduct of the incumbent monopolist.”[10]

In order to establish this so-called “preparedness” requirement, Sunbeam was required to prove that a potential competitor “took affirmative steps to enter the business,” which the court described as “particularly important” for “capital intensive” industries.[11] The court cited several examples that would tend to show “preparedness” by a potential competitor to the monopolist, such as preparing cash flow estimates and financial statements, having existing capabilities to serve the market, or taking steps to obtain necessary government permits, although this was not an exhaustive list.[12] Sunbeam argued below that three potential competitors could have entered the television ratings market but for Nielsen’s conduct, but the district court, after examining the record in great detail, disagreed and found that there was no disputed issue of fact as to the existence of a “willing and able” competitor. The Eleventh Circuit agreed with the district court’s determination and affirmed the district court’s grant of summary judgment in favor of Nielsen.[13] Thus, the court did not even reach the question of whether Nielsen’s conduct was exclusionary and therefore actionable under Section 2, since it had no impact on competition.

## CONCLUSION

This ruling underscores the rule that it is not enough for a customer in the Eleventh Circuit attempting to make out a monopolization claim to argue that it suffered an economic injury due to an incumbent monopolist’s exclusionary conduct. Indeed, a defendant such as Nielsen cannot be held liable merely for charging customers supracompetitive prices. That is a benefit of monopoly that is permissible because it supposedly attracts new entry.

Accordingly, a customer injured by such monopoly prices must also demonstrate that a competing supplier was foreclosed from competing with the monopolist or that a potential new entrant was willing and able to enter the market, such that plaintiff would have been able to purchase from this competitor at a lower price were it not for the monopolist’s exclusionary conduct. Absent the presence of a viable actual or potential competitor, there can be no harm to competition and thus no Sherman Act liability. While the Eleventh Circuit did not elucidate precisely what the inquiry to determine whether a competitor is truly “willing and able” entails, it made clear that a potential competitor must have taken some affirmative steps toward entering the market; hypothetical competition is clearly not enough.

This ruling once again demonstrates that customers in industries dominated by a single player may get sympathy for being forced to pay higher prices or accept inferior products or services provided by the monopolist, but must suffer the consequences unless there is an actual or potential competitor to the monopolist that has been harmed—a reason for the regulatory regimes imposed on monopolist utilities and cable companies.

[1] 711 F.3d 1264 (11th Cir. 2013).
[2] *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004).
[3] For example, some lower courts have held that a tying arrangement imposed by a monopolist is not illegal when there are no competitors in the tied product market because there is no foreclosure of competition. *See, e.g., Reifert v. South Cent. Wisconsin MLS Corp*., 450 F.3d 312, 318 (7th Cir. 2006) (“Without evidence of competitors in the [tied product] market ... there can be no foreclosure of competition.”); *Coniglio v. Highwood Svcs., Inc*., 495 F.2d 1286, 1293 (2d Cir. 1974) (same).
[4] *Sunbeam Television Corp. v. Nielsen Media Research, Inc*., 711 F.3d at 1270.
[5] *Id*. at 1267.
[6] *Id*. at 1268-69.
[7] *Id*. at 1271.
[8] *Id*. at 1272.
[9] *Id*.
[10] *Id*. at 1273.
[11] *Id*.
[12] *Id*.
[13] *Id*.

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## UNSCRAMBLING THE EGGS AND OTHER MENU CHOICES

By Mary K. Marks, NY

In the past several weeks, the Federal Trade Commission (FTC) approved final orders in two matters, settling charges that the buyers' consummated acquisitions of their respective competitors, though valued below the Hart Scott Rodino (HSR) Act's notification thresholds, were anticompetitive. In the first consent order approved, the FTC alleged that the acquisitions violated Section 7 of the Clayton Act[1] by eliminating the only significant competition in the market, which resulted in the buyer, Graco, Inc., holding a monopoly position as the only full-line manufacturer of fast-set equipment (FSE).[2] In the second consent order approved, the FTC alleged that the effect of Charlotte Pipe's acquisition of its rivals has been a substantial lessening of competition in the cast iron soil pipe products (CISP) markets in violation of Section 7 of the Clayton Act and Section 5 of the FTC Act[3] by, *inter alia*, eliminating competition, eliminating a maverick firm and increasing concentration and market power.[4] Neither Graco nor Charlotte Pipe have admitted any violation of law.

With the increasing number of agency challenges to consummated transactions not reportable under the HSR Act over the past few years, parties should not be surprised by these latest challenges. However, because the transactions at issue were consummated 3-10 years ago, the FTC was not able to use a "typical" remedy of requiring divestiture of the assets and "recreating" independent going concerns, and instead devised behavioral remedies aimed at facilitating the restoration of competition to the extent possible. The use and monitoring of behavioral remedies presents a number of challenges and, as Commissioner Joshua Wright noted in his separate Statement regarding the Graco matter, they "must be 'tailored as precisely as possible to the competitive harms associated with the merger to avoid unnecessary entanglements with the competitive process.'" [5]

### CHARLOTTE PIPE TRANSACTIONS

According to the FTC's complaint, prior to acquiring the CISP business of Star Pipe in the transaction at issue, Charlotte Pipe had acquired the CISP product assets of at least three other competitors in transactions during 2002, 2004 and 2009 that were not subject to the HSR Act's reporting requirements.[6] The FTC alleged that the CISP product market in the U.S. is highly concentrated, and that at the time of the Star Pipe acquisition, Charlotte Pipe and one other competitor sold in excess of 90% of the CISP products in the United States. According to the FTC, Star Pipe was a maverick that entered the market in 2007 and gained some of the remaining U.S. CISP market share prior to its acquisition by Star Pipe in 2010.[7]

In connection with the acquisition, the parties executed a confidentiality and non-compete agreement that restricted Star Pipe's and certain of its employees' activities in North America for six years and prohibited disclosure of the transaction. According to the FTC, Charlotte Pipe destroyed the CISP production equipment that it acquired from Star Pipe.[8]

To remedy what the FTC claimed to be a substantial lessening of competition, including the alleged elimination of substantial competition between the transaction parties, increased concentration and market power, the elimination of a maverick firm, and the six year non-competition agreement,[9] Charlotte Pipe agreed, without admitting any violation of law, to (i) provide prior notice to the FTC of future acquisitions, whether or not subject to the HSR Act's reporting requirements; (ii) refrain from enforcing the confidentiality and non-compete agreement against Star Pipe; and (iii) send a notice to customers and maintain a link on its website regarding Charlotte Pipe's previous confidential acquisitions of various CISP importers.[10] The FTC's vote to accept the consent order was 4-0.[11]

### GRACO TRANSACTIONS

According to the FTC's Complaint, Graco acquired its only significant competitors in the FSE market, Gusmer and GlasCraft, resulting in Graco enjoying a market share above 90%. These transactions were valued below the HSR Act's notification thresholds. [12] The FTC alleged that FSE manufacturers rely heavily on distributors and do not sell "competitively significant quantities" of products directly to end-users, who require information, parts and services from the distributors.[13] The complaint stated that prior to the transactions, FSE distributors carried multiple manufacturers' brands and that Gusmer, GlasCraft and Graco competed aggressively on price and non-price factors, responding to each other's innovations.[14]

Following its acquisitions of Gusmer and GlasCraft, Graco closed their FSE manufacturing facilities.[15] Graco also initiated certain strategies that the FTC believed reduced prospective entrants' ability to join distribution networks and thus enter the FSE market, including "raising distributors' discounts and inventory thresholds, thereby reducing distributors' ability to carry the products of new entrants, and threatening distributors with termination or other retaliation, should they agree to carry the products of competing manufacturers."[16] The FTC alleged that since Graco is the only remaining full-line manufacturer of FSE, it has "substantial control of the established [FSE] distribution channel in North America," allowing its increased pricing incentives and exclusive behaviors to substantially reduce prospective competitors' access to FSE customers and ability to enter the market.

To remedy what the FTC claimed to be a substantial lessening of competition, including the elimination of substantial competition between the transaction parties, increased prices and reduced offerings and innovation; increased barriers to entry, and substantial increases in market concentration and market power,[17] Graco agreed, without admitting any violation of law, to (i) settle ongoing litigation with a named new entrant and provide an irrevocable license to certain Graco patents and other intellectual property in order to ensure that Graco cannot continue or renew the litigation; (ii) stop imposing conditions on its distributors that could lead to exclusivity; (iii) stop influencing its distributors not to carry or service any competing FSE products; and (iv) provide prior notice to the FTC of future (a) acquisitions of FSE businesses, whether or not subject to the HSR Act's reporting requirements, or (b) legal proceedings against distributors or end-users regarding its trade secrets or FSE intellectual property.[18]

The FTC's vote to accept the Graco Consent Order was 4-0, with Commissioner Wright issuing a separate statement regarding the conditions [at (ii) in the preceding paragraph] prohibiting Graco from entering into exclusive dealing contracts with distributors and establishing purchase and inventory thresholds that must be satisfied in order for distribution to obtain discounts. According to Commissioner Wright, there was insufficient evidence linking these provisions prohibiting exclusive dealing contracts and regulating loyalty discounts to the anticompetitive harm in this case.[19]

## CONCLUSION

In both the *Charlotte Pipe* and *Graco* matters, the defendants agreed to settle rather than proceed through costly and protracted litigation with the government. Indeed, Graco issued a press release stating that it believes that "the complaint contains inaccuracies with regard to both the law and the facts" and "it would prevail in a court of law…." Despite this, merging parties are again reminded that the antitrust agencies will challenge consummated and "relatively small" transactions if they believe one or two competitors will control 90% or more of the relevant market, with the power to cause harm to consumers.

[1] 15 U.S.C. § 18.
[2] See *In the Matter of Graco, Inc.* (Statement of the Federal Trade Commission).
[3] 15 U.S.C. § 45.
[4] See *In the Matter of Charlotte Pipe Foundry Co.* (Analysis to Aid Public Comment).
[5] See *In the Matter of Graco, Inc.* (Statement of Commissioner Joshua D. Wright), quoting the Antitrust Division Policy Guide to Merger Remedies, U.S. Dep't of Justice Antitrust Div., at 7 n. 12 (June 2011, available at http://www.justice.gov/atr/public/guidelines/272350.pdf.
[6] See *In the Matter of Charlotte Pipe Foundry Co.* (Complaint), at 2.
[7] See *In the Matter of Charlotte Pipe Foundry Co.* (Analysis to Aid Public Comment), at 2.
[8] Id.
[9] See *In the Matter of Charlotte Pipe Foundry Co.* (Complaint), at 4.
[10] See *In the Matter of Charlotte Pipe Foundry Co.* (Analysis to Aid Public Comment), at 4.
[11] See http://investors.graco.com/phoenix.zhtml?c=109328&p=RssLanding&cat=news&id=1808338.
[12] See *In the Matter of Graco, Inc*. (Complaint), at 3-4.
[13] *Id*. at 2.
[14] *Id*.
[15] *Id*. at 3-4.
[16] *Id*. at 2.
[17] *Id*. at 5.
[18] See *In the Matter of Graco, Inc.* (Analysis to Aid Public Comment), at 3-4.
[19] See *In the Matter of Graco, Inc.* (Statement of Commissioner Joshua D. Wright) at 1-2.

## HIGH COURT INJUNCTIONS – A BITTER PILL TO SWALLOW FOR UK ANTITRUST LITIGANTS

By Stephen C. Tupper, London

It was never meant to be easy, but a recent decision by the U.K.'s High Court has demonstrated just how difficult it is to pursue antitrust claims before the U.K.'s civil courts. On February 11, 2013, Mr Justice Roth – who prior to becoming a judge in the High Court's Chancery Division was a distinguished competition law barrister – dismissed an application for an injunction brought by Chemistree Homecare Limited ("Chemistree" or "Claimant"), a distributor of pharmaceutical products, against AbbVie Limited, a seller of an HIV treatment ("AbbVie" or "Defendant").

At the heart of the dispute were issues relating to the sale of a patent-protected protease inhibitor, called "Kaletra," used as an element, in combination with other antiretroviral drugs, in the treatment of patients with HIV. Chemistree, a U.K.-based pharmacy business, provided home care services to public sector hospitals, part of which involved the administration of drugs, including Kaletra, to patients at home.

The Claimant and Defendant had been in business together ever since the Claimant had won a contract in 2005 for the provision of home-delivery services on behalf of London-based hospitals. Kaletra, manufactured by a sister-company of the Defendant, was one of the drugs supplied by the Claimant under that contract.

Over their course of dealing, AbbVie started to detect marked changes in the volume and nature of Chemistree's orders. In a very short space of time, the order volumes doubled and a wider range of different formulations were being requested. Clearly suspecting that the Claimant had found a market outside of the London-hospitals allocation, the defendant demanded information regarding the identity and location of those being treated. Eventually, after protracted and increasingly heated correspondence, the Claimant admitted that it had been selling Kaletra on the wholesale market and, in particular, to customers in Lithuania. AbbVie responded by explaining to Chemistree that it had not been authorized to sell as a wholesaler, a segment of the market that AbbVie had decided to service itself, and that thenceforward it would only supply Chemistree with amounts sufficient for Chemistree to service the London market for which it had been authorized. The Claimant reacted, shortly afterwards, by filing suit against AbbVie in which it requested injunctive relief – specifically, an order requiring AbbVie to resume full supplies of Kaletra - on the grounds that the reduced volumes amounted, effectively, to a refusal to supply, an act that, according to Chemistree , constituted an abuse of AbbVie's dominant position and, thereby, an infringement of the prohibitions contained in applicable U.K. and EU competition law.

"Standalone" actions (i.e. cases brought without the intervention of the competition enforcement bodies) are relatively rare events in the U.K. Government is currently trying to find ways to stimulate civil litigation in this area, in an effort, it would appear, to "privatize" the enforcement function. The Chemistree action has, as a result, added poignancy in light of these political developments.

The test applied for the grant of an injunction before the courts in England is two-fold: (i) the Claimant has to have a real prospect of success at the full trial; and (ii) the issuing of interim relief must carry with it the least risk of injustice as between the parties. In this case, the court's decision turned on the first limb. The judge ruled that there was little likelihood that the Claimant would be able to demonstrate that AbbVie was "dominant," and thereby dismissed the Claimant's application.

The court's decision graphically illustrates the reasons for the paucity of private U.K. antitrust litigation and the obstacles that confront plaintiffs, particular smaller under-resourced companies, when they pursue such claims. In this case, the court agreed that, theoretically, it is possible to have a single product market (i.e. a product so unique that in effect it creates a market of its own), although it ruled that, on the evidence before it, one did not exist in this instance. The Defendant had presented data showing that not only did Kaletra have to be taken by patients in combination with other drugs, but also that no less than eight alternative so-called third agents were currently available. The Claimant sought to challenge this fact by saying that while this was true for so-called "naïve" or new patients, it was not the same for patients who had been taking HIV treatments for extended periods of time. Switching was not recommended for that latter group of patients. The court, however, chose to downplay that evidence, provided by way of a witness statement, on the basis that the witness concerned was not a qualified clinician. Judge Roth then went on to conclude:

> "[The Claimant] cannot, in my judgment, be entitled to interim relief on a merely speculative basis in the hope that some evidence giving it a serious question to be tried or real prospect of success will emerge on eventual disclosure."

It is, of course, to the eternal credit of England's judicial system that not only was it able to hear a case of this kind, but was also able to deliver a full substantive decision on it within a matter of weeks – the case was filed in January 2013 with the court's decision being handed down on 11th of February. The speed of the process perversely creates just one more problem for plaintiffs in cases such as these. As counsel for the Claimant pointed out in oral argument, much of the data needed to formulate a coherent case regarding market definition, the dominance of the defendant, etc., is unlikely, in most cases, to be available to a mere distributor. Faced, therefore, with the need to build a case from the ground up, plaintiffs in such cases have the additional problem of having to do so in next to no time. That said, even if they were to be given considerably longer to construct such a case, even to the lower standard needed for interim relief, it would require the kind of skill and resource that would tax even the largest and most sophisticated of litigants.

While it is true that the Claimant in the *AbbVie* case can still pursue its case to a full trial as regards a claim for damages, failure to obtain injunctive relief (i.e. preservation of the status quo ante) means that there is, in effect, now only money at stake – the Lithuanian business that the Claimant had developed almost certainly will have migrated to another supplier by the time the suit is tried to conclusion,.

Even though changes to the civil justice system in England are being contemplated, the most ardent liberalizer is not saying that claims such as that in the *AbbVie* case should be made easy. That said, however, in the battles between the Davids and the Goliaths, tradition dictates that the Davids should, at the very least, be given stones for their slings. If they are not, then the job of regulating the market will fall exclusively to the government enforcers and, in times of economic austerity in England, that may well result in little regulation at all.

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# COMMISSION PROPOSES INCREMENTAL BUT IMPORTANT CHANGES TO EU TECHNOLOGY LICENSING REGIME

By Simon Harms

The European Commission (the Commission) has recently published drafts of the proposed new Technology Transfer Block Exemption Regulation (the Draft TTBER) and accompanying guidelines (the Draft Guidelines). In what is a decennial event, the Draft TTBER and Draft Guidelines will, once finalised, replace the existing TTBER and guidelines which, after a decade in service, are scheduled to expire in April of 2014.

Technology transfer agreements are licensing agreements pursuant to which a licensor authorises a licensee to use its technology (such as patents, know-how and software licences) for the production of goods and services. The existing TTBER and guidelines constitute the framework for assessing the compliance of technology transfer agreements with EU competition law.

Firstly, certain categories of technology transfer agreements benefit from a so-called "safe harbour:" if the market share of the parties to the agreement does not exceed certain ceilings (i.e. 20% for agreements between competitors and 30% for agreements between non-competitors) and the agreement does not contain any so-called "hardcore" restrictions, it is deemed to comply with EU competition law. Agreements falling outside the safe harbour, either because the market share thresholds are exceeded or because they contain hardcore or other specified restrictions, are not automatically presumed to contravene EU competition law. However, such agreements need to be assessed on a case-by-case basis to ensure that they do not fall foul of the prohibition of anti-competitive agreements set out in Article 101 TFEU.

The Commission's current reform proposals do not radically alter the existing framework for assessment. That said, the Draft TTBER and Draft Guidelines do contain a number of important "tweaks" to the current regime. The key changes proposed by the Commission are as follows:

- The Draft TTBER includes an exhaustive list of "technologies" covered: know-how, patents, utility models, design rights, topographies of semiconductor products, supplementary protection certificates, plant breeder's certificates and software copyright.
- The Draft TTBER expressly clarifies that it will only apply if the agreement in question is not caught by the separate block exemption regulations for R&D agreements and specialisation agreements.
- The Commission proposes to use a new test to determine whether the Draft TTBER applies to agreements which – in addition to licensing technology – include purchases from the licensor relating to the product to be produced using the licensed technology. Previously, it had to be demonstrated that the licensing element constituted the "primary object" of the agreement. The Commission is proposing to relax this requirement. The new test now asks whether the purchase provisions are "directly and exclusively" related to the licensing element. If so, the agreement, including the purchasing element, can benefit from the safe harbour.
- The Commission does not propose to alter the safe harbour market share thresholds (i.e. these remain at 20% for agreements between competitors and 30% for agreements between non-competitors). However, it proposes to treat agreements between a licensee which owns a so-called "captive" technology (i.e. one which it only uses in-house) and a licensor of a substitutable product as competitors for the purposes of the Draft TTBER (i.e. such agreements will only benefit from the safe harbour if the combined market share of the licensee and licensor does not exceed 20%).
- As indicated above, the Draft TTBER sets out a list of hardcore restrictions. The presence of such restrictions means that the agreement in question cannot benefit from the safe harbour. In this context, the Commission is proposing to tighten up the current treatment of restrictions which protect licensees from passive sales of other licensees into exclusively allocated territories. Such restrictions will no longer benefit from the safe harbour.
- In contrast with the current regime, the Draft TTBER treats all exclusive "grant backs" (i.e. licence provisions obliging the licensee to exclusively licence improvements to the licensed technology back to the licensor) in the same way. The Commission proposed that all exclusive grant backs will fall outside of the safe harbour and must be assessed individually. However, this is not a hardcore restriction. The remainder of the agreement would be capable of benefiting from the safe harbour.
- The Commission proposes to tighten up the treatment of termination clauses which allow a licensor to terminate the

agreement if the licensee challenges the validity of the licensed technology. The Draft TTBER treats such termination clauses in the same way as the current regime treats “no-challenge” clauses (which prevent a licensee from challenging the licenced technology). If the Commission gets its way, such termination clauses will, in future, fall outside of the safe harbour and must then be assessed individually. However, the remainder of the agreement would be capable of benefiting from the safe harbour.

- The Draft Guidelines clarify that settlement agreements relating to licences can breach Article 101 TFEU if “… a licensee agrees, against a value transfer from the licensor, to more restrictive terms than the licensee would have accepted solely on the strength of the licensor’s technology”. This section of the Draft Guidelines is geared at so-called “pay for delay” or “reverse payment patent settlements” which have featured heavily in recent Commission investigations.
- Lastly, the Draft Guidelines contain a new section on the treatment of technology pools, including guidance on the formation and operation of technology pools as well as on agreements between pools and their licensees. Technology pools are not covered by the Draft TTBER because the regulation only applies to bilateral, not multilateral, technology transfer agreements. Parties involved in technology pools will, therefore, need to look for guidance to the Draft Guidelines which set out the parameters of a “soft” safe harbour for such pools (i.e. one which is not contained in the Draft TTBER itself).

As indicated above, the Commission’s reform proposals do not represent a “big” departure from the current regime governing the assessment of technology transfer agreements under EU competition law. As illustrated above, the proposals do, however, contain important changes to the detail of its operation, which parties to existing and future technology transfer agreements would be well advised to take heed of.

The Draft TTBER and Draft Guidelines are currently being consulted upon. The consultation period ends on May 17, 2013. The Commission is expected to publish revised drafts later this year, with a view to adopting the new regulation and guidelines early next year so that they are in place before the current TTBER and guidelines expire.

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