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U.S. Developments

FTAIA Remains a 'Foreign' Statute Open to Multiple Interpretations

By Scott Martin – New York, NY

Congress enacted the Foreign Trade Antitrust Improvements Act (FTAIA) in 1982 to *clarify* the extraterritorial reach of the Sherman Act. Subsequently, the FTAIA itself was the subject of a further *clarifying* opinion by the Supreme Court barely a decade ago[1] – one that, unfortunately, left open to debate questions concerning the circumstances under which domestic effects of alleged anticompetitive conduct (*e.g.*, cartel activity in an alleged "global" market) may "give rise" to antitrust claims by a foreign purchaser overseas. And as recent decisions by three high-profile Circuit Courts of Appeal – the Second, Seventh and Ninth – demonstrate, the FTAIA continues to confound and to beg more precise language from Congress or a more definitive interpretation by the Supreme Court.

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The FTAIA provides, in part, that U.S. antitrust laws "shall not apply to conduct involving [non-import] trade or commerce . . . with foreign nations *unless* (1) such conduct has a direct, substantial and reasonably foreseeable effect" on domestic commerce *and* (2) such effect gives rise to a claim" under the Sherman Act. *See* 15 U.S.C. § 6a (emphasis added). As a threshold matter, appellate courts have struggled to determine whether the FTAIA's requirements are jurisdictional or substantive in nature – affecting both the timing and imperative

In this issue

U.S. Developments

- FTAIA Remains a 'Foreign' Statute Open to Multiple Interpretations
- The Second Circuit Limits the Obligation of A Monopolist to Deal with Competitors

European Developments

- European Commission Raises the Stakes for Undertakings to Comply with EU Merger Control Rules
- The European Commission Updates an Important 'Safe Harbor' Protecting Commercial Arrangements from Competition Law Challenges
- EU Commission Publishes Merger Regulation White Paper on Minority Shareholdings

Mexico Developments

- General Overview of Mexico's New Federal Competition Law

China Developments

- Effects of 'Guiding Opinions' on Filing of Simple Cases of Concentration of Business Operations in Merger Control Filings

nature of a court's determination of the statute's applicability (and acceptance of pleaded facts as true), as well as the ability of a party to waive those requirements. In an *en banc* decision in 2012, the Seventh Circuit concluded that "the FTAIA sets forth an element of an antitrust claim, not a jurisdictional limit on the power of the federal courts."[2] In decisions this summer, the Ninth Circuit and Second Circuit have now come to a similar conclusion by addressing a question the court had previously expressly declined to resolve and by overruling earlier precedent, respectively, after reviewing modern Supreme Court decisions concerning when statutory requirements are jurisdictional.[3] In the Second Circuit case, contractual waiver of the FTAIA's requirements was, in fact, argued by the plaintiff-appellant, but rejected by the appellate panel because it had not been raised before the district court and because the provisions at issue appeared to do no more than affirm that the defendants "must abide by the Sherman Act to the extent that it applies" – leaving them free to argue that it did not apply.[4]

However, while there appears to be a developing uniformity of views on the substantive, rather than jurisdictional, nature of the FTAIA's elements, the substance itself – what constitutes a "direct" effect on domestic commerce – has yielded substantially less consensus of late among the appellate courts. In a June 4, 2014 decision, the Second Circuit rejected the district court's reliance on a 2004 Ninth Circuit decision that found "an effect is 'direct' if it follows as an immediate consequence of the defendant's activity."[5] Rather, the Second Circuit borrowed from a 2012 Seventh Circuit case to adopt a more permissive standard suited to flexible, case-specific factual evaluation: that "direct" requires "a reasonably proximate causal nexus."[6] Ultimately, the Second Circuit found that the claims were barred, however, on an alternative ground not raised or ruled on below: that the domestic effect did not "give rise" to the plaintiff's injury, but rather that injury "flowed directly from the defendants' exclusionary foreign conduct [an alleged patent holdup that excluded plaintiff from the market]."[7]

Meanwhile, an opinion last month by a Ninth Circuit panel underscored the seriousness of FTAIA determinations. The panel found that the statute did not bar prosecution of a global conspiracy to fix the price of liquid crystal display (LCD) panels, upholding a well-publicized 2012 jury verdict and a $500 million judgment.[8] In that case, however, the appellate court was able to sidestep – expressly so, stating "we need not resolve whether the evidence of the defendants conduct was sufficiently 'direct' or whether it 'give[s] rise' to an antitrust claim"[9] – because it found overwhelming the evidence that the defendants sold price-fixed panels in *import* trade into the United States, thus falling outside the FTAIA and within the Sherman Act.

* * *

Even while antitrust enforcement is on the rise worldwide both in terms of the number of active jurisdictions and the vigor of those governments' efforts (such as over 100 enforcement personnel being deployed in one of many recent industry raids in China), and even while significant purchasers find new venues and opportunities for private "global" redress, the United States' treble-damage opt-out class action paradigm still holds strong allure for the private plaintiffs' bar. And the extent to which potential damages can vary, especially in international cartel cases, depending upon which purchases are embraced under the FTAIA virtually ensures continuing active litigation over the interpretation of this peculiarly "foreign" statute.

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[1] *See F. Hoffman La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004) (precluding foreign purchasers from bringing suit in U.S. courts under the federal antitrust laws where their foreign injuries are "independent of any adverse domestic effect").

[2] *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 852 (7th Cir. 2012) (en banc).

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[3] *See United States v. Hui Shiung*, ___ F.3d ___, 2014 WL 3361084, at *11-12 (9th Cir. July 10, 2014) (reviewing recent authority and determining that the FTAIA "does not limit the power of the federal courts" but rather "provides substantive elements under the Sherman Act" for non-import trade with foreign nations); *Lotes Co., Ltd. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 403-08 (2d Cir. 2014) (overruling *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922 (2d Cir. 1998), and finding the FTAIA requirements to be non-jurisdictional).

[4] *See Lotes*, 753 F.3d at 408-09.

[5] *See id.* at 409-13 (quoting *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004)).

[6] See *Lotes*, 753 F.3d at 409-13 (citing *Minn-Chem*, 683 F.3d at 857). Interestingly, a Seventh Circuit panel decision earlier this year had drawn a sharp line against finding that the Sherman Act applied to price-fixing of alleged cellular phone component parts purchased by a plaintiff-manufacturer's foreign subsidiaries for manufacture of phones overseas or never for import into the U.S. at all. That decision, however, has since been withdrawn after the Seventh Circuit granted a rehearing request on July 1, 2014.

[7] *Id.* at 413-15.

[8] *United States v. Hui Shiung*, ___ F.3d ___, 2014 WL 3361084.

[9] *Id.* at *18.

The Second Circuit Limits the Obligation of A Monopolist to Deal with Competitors

By John J. Elliott and Irving Scher – New York, NY

When does breaching a contract also violate the antitrust laws? On June 9, 2014, a unanimous panel of the Second Circuit affirmed a district court ruling that an alleged monopolist patent-holding drug manufacturer's alleged breach of an agreement to supply the patented drug to competing manufacturers did not violate Section 2 of the Sherman Act.[1]

Factual Background

The defendant manufactures and owns the patents covering a widely-prescribed drug used to treat attention-deficit/hyperactivity disorder. Shortly after the FDA approved the distribution of the drug in 2001, generic pharmaceutical companies filed applications to manufacture and sell its generic equivalent. They certified, pursuant to the Hatch-Waxman Act,[2] that the generic versions would not infringe the patents involved, or that the patents were invalid. The patent holder responded by bringing patent infringement lawsuits against the generic manufacturers, again pursuant to the Hatch-Waxman Act, which provides an automatic 30-month stay on generics' FDA applications when the patent holder files an infringement lawsuit.[3]

The parties settled their patent litigation five years later, in 2006. The settlement provided that the generics would drop their challenge to the patents and stay out of the market for three years, even if their FDA applications were granted before then. In exchange, they would receive licenses to manufacture and sell the drug starting in 2009; or, if their FDA applications were not approved by then, the patent holder would supply the generics with the drug, which they could then sell, unbranded, in the market.[4]

The Allegations of the Complaint

The plaintiff drug wholesalers in the case before the Second Circuit, alleged that the patent holder breached the settlement agreements just months after they were signed by failing to provide the generics with enough of the product to meet the wholesalers' needs.[5] The wholesalers alleged that this, in turn, caused the price of the generics to rise, and protected the market for the patent holder's brand – relegating the generics to only 50-60 percent of the market, rather than the 90 percent they expected.[6] The wholesaler plaintiffs contended that this breach of the settlement agreements by the patent holder constituted a monopolistic refusal to deal with prospective competitors, foreclosed under Section 2 of the Sherman Act by the Supreme Court's 1985 decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*[7] In *Aspen Skiing*, the Supreme Court held that while non-monopolists have the absolute right to refuse to deal with any competitor,[8] a monopolist cannot so choose when it has a history of prior dealings with that competitor, and when ending those dealings resulted in the monopolist's foregoing of short term profits. (It has long been the law that non-monopolists have an absolute right to unilaterally refuse to do business with competitors).[9]

Judge Marrero, in the Southern District of New York, granted the patent holder's motion to dismiss,[10] largely relying on the Second Circuit's decision in *In re Tamoxifen Citrate Antitrust Litig.*[11] Judge Marrero determined that because the terms of the patents were not extended – that is, because the generic manufacturers were not paid to stay out of the market after the applicable patents expired – the Second

Circuit's previous *Tamoxifen* decision precluded antitrust claims arising out of the agreements.[12] He further found that *Aspen Skiing* did not govern, as the patent holding manufacturer had no obligation to provide any license to the generics whatsoever.

Changes in the Law: *Actavis*

While this case was on appeal, but before any briefs had been filed, the Supreme Court decided *FTC v. Actavis, Inc.*,[13] abrogating the Second Circuit's *Tamoxifen* decision. The Supreme Court held that even when a patent litigation settlement agreement did not extend the scope of a patent, the agreement could still violate antitrust law due to its potentially significant anticompetitive effects.[14] Such agreements, known as "reverse payment" settlement agreements (because despite the patent holder suing for patent infringement, it typically paid the potential infringer to drop its challenge to the patents), must be analyzed using antitrust law's traditional "rule of reason."[15]

Despite an opening provided by the Supreme Court in *Actavis*, the wholesaler plaintiffs in the case before the Second Circuit did not re-plead or attack the settlement agreements themselves as violating the Sherman Act. Rather, they argued that the patent holding manufacturer's act of breaching the settlement agreements, by failing to provide sufficient amounts of the generic, was an impermissible refusal to deal under *Aspen Skiing*.[16]

The Second Circuit's Decision

The Second Circuit made short work of the plaintiffs' appeal. Citing the Supreme Court's *Trinko* decision, decided after *Aspen Skiing*,[17] it reaffirmed that while *Aspen Skiing* stands for "the proposition that a business with market power may be subject to a duty to deal with a smaller competitor," the case "lies at or near the outer boundary of section 2 liability."[18] As characterized in *Trinko*, the defendant in *Aspen Skiing* terminated a long-term, voluntary and "thus presumably profitable" course of dealing that "suggested a willingness to forsake short-term profits to achieve an anticompetitive end."[19] And, as the District Court described, despite allegedly gaining the benefit of three years of exclusivity in the market, and "then failing to uphold its end of the supply-chain bargain" – that is, engaging "in the distasteful act of having its cake and eating it too (or, more accurately, hoarding its cake to drive up the cost of the goods and [its] profits)"[20] – the patent holder did "not terminate any prior course of dealing."[21] Because it had no obligation to license the patented drug at all, it *created* competition in the relevant market.[22] In short, the Second Circuit concluded, the "mere existence of a contractual duty to supply goods does not by itself give rise to an antitrust duty to deal," and the complaint did "little more than attach antitrust labels and conclusions to what is, at most, an ordinary contract dispute to which the plaintiffs are not even parties."[23]

Conclusion

This decision provides yet another illustration of the limits of *Aspen Skiing*. When bringing their claim, the wholesaler plaintiffs faced, on the one hand, the limits of the Second Circuit's earlier decision in *Tamoxifen*, which essentially precluded challenging the reverse-payment settlement agreement on antitrust grounds, and on the other hand, the well-known limitations on *Aspen Skiing*'s prohibition of certain monopolist refusals to deal with a competitor. The Supreme Court may have provided a slight opening by abrogating *Tamoxifen* in its *Actavis* decision, but even then, because the patent holder was not alleged to have paid the generics to stay out of the market, it is unlikely *Actavis* would have created liability. The plaintiffs turned to the principles set forth in *Aspen Skiing* for relief, and found the Second Circuit unwilling to extend its holding.

[1] *In re Adderall XR Antitrust Litig.,* Dkt. No. 13-1232 ("Slip Op.").
[2] *See* 21 U.S.C. § 355(b), (j).
[3] Slip Op. at 4, citing 21 U.S.C. § 355(j)(2)(A)(vii).
[4] Slip Op. at 5.
[5] The generic manufacturers themselves sued to enforce the settlement agreements; those claims were settled. See Stipulation of Dismissal, *Teva Pharms. USA, Inc. v. Shire LLC*, No. 09 Civ. 8860 (MGC) (S.D.N.Y. Nov. 20, 2009), ECF No. 17; Stipulation of Dismissal, *Impax Labs., Inc. v. Shire LLC*, No. 10 Civ. 8386 (MGC) (S.D.N.Y. Feb. 14, 2013), ECF No. 211.
[6] Slip Op. at 6.
[7] 472 U.S. 585 (1985).
[8] *See United States v. Colgate & Co.*, 250 U.S. 300 (1919).
[9] *Id.*
[10] *Louisiana Wholesale Drug Co., Inc. v. Shire LLC*, 929 F. Supp. 2d 256 (S.D.N.Y. 2013).
[11] *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187 (2d Cir. 2006).
[12] *See Louisiana Wholesale Drug Co., Inc.*, 929 F. Supp. 2d at 262 ("settling parties in this arena should be granted wide latitude as long as the scope of the patent(s) at issue is undisturbed"), *relying on In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d at 218 (holding that reverse payment settlement agreement, which provided that generic company accused of patent infringement would receive $21 million in exchange for dropping its challenge to branded drug manufacturer's patents, did not violate Sherman Act because settlement agreements should be encouraged, despite that "such a settlement may ultimately have an adverse effect on competition," and because the scope of the patent was not extended by the settlement agreement – that is, the generic did not agree to stay out of the market after the branded manufacturer's patents expired).
[13] 133 S. Ct. 2223 (2013).
[14] *Actavis*, 133 S. Ct. at 2230-31.
[15] *See id.* at 2230-31, 2237.
[16] Slip Op. at 10-11.
[17] *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004).
[18] Slip Op. at 12-13 (internal citation omitted).
[19] *Trinko*, 540 U.S. at 409.
[20] *Louisiana Wholesale Drug Co., Inc. v. Shire LLC*, 929 F. Supp. 2d 256, 262 (S.D.N.Y. 2013)
[21] Slip Op. at 13.
[22] *Id.* (emphasis in original).
[23] *Id*. at 14-15 (internal citation omitted).

European Developments

European Commission Raises the Stakes for Undertakings to Comply with EU Merger Control Rules

By Hans E. Urlus and Emilie van Hasselt – Amsterdam
Stephen Tupper – London

On July 23, 2014, the European Commission (Commission) imposed a fine of EUR 20 million on Marine Harvest, the Norwegian salmon farmer and processor, after it acquired a 48.5 percent stake in its competitor Morpol prior to obtaining the required clearance from the Commission under the European Union Merger Regulation (EUMR). Pursuant to the EUMR parties to a transaction which falls within the scope of the EUMR are required to notify the transaction to the Commission and are restricted from implementing the transaction before the transaction is approved (the standstill obligation). This requirement is also known as the prohibition on gun jumping.[1] The Commission's decision, and the previous (identical) fine for gun jumping imposed on *Electrabel*, clarify that the Commission will apply the EUMR strictly even when the transaction concerned poses no risk to competition or if the voting rights obtained are not exercised by the acquirer prior to approval.

The Scope of the EU Merger Control Rules

Under the EUMR, undertakings are required to notify transactions that fall within its scope to the Commission. A transaction will fall within the scope of the EUMR if it constitutes a concentration and the turnover of the parties exceed specified jurisdictional thresholds. A concentration includes the acquisitions of both *de jure* and *de facto* control over an undertaking.[2] Under Article 14 EUMR, the Commission has the power to impose a fine of up to 10 percent of the annual group worldwide turnover for failure to notify and for gun jumping, whether intentionally or negligently.[3]

Article 7(2) of the EUMR contains an exemption to the prohibition of gun jumping, however, it is only applicable to public bids and to a series of transactions in securities admitted to trading on a stock exchange whereby control is acquired from various sellers. Implementation of such transactions prior to notification and clearance will not result in a violation as long as i) the transaction is notified to the Commission without delay and ii) the acquirer does not exercise the voting rights attached to the relevant securities.

The Marine Harvest Acquisitions

On December 12, 2013, Marine Harvest acquired a 48.5 percent stake in Morpol, a company listed on the Oslo Stock Exchange. The transaction was completed on December 18, 2012 without any notification to the Commission. After this acquisition Marine Harvest made a mandatory public offer for the remaining 51.5 percent shares. A majority of these shares was acquired on March 12, 2013. With its notification Marine Harvest informed the Commission that it would not exercise *de jure* or *de facto* control pending approval, considering the transaction to be in line with Article 7(2) EUMR.

The Commission cleared the transaction, but raised its concerns that the transaction prior to the public offer breached the EUMR and opened an investigation into the issue. The Commission found that the

acquisition of the 48.5 percent stake had already resulted in Marine Harvest acquiring *de facto* sole control over Morpol due to a stable majority at Morpol shareholder's meetings, the wide dispersion of the remaining shares, and previous attendance rates at meetings. In 1994, the Commission investigated a similar situation in which the acquirer had already acquired *de facto* control before the notified transaction. In *Ford/Hertz*[4], Ford was offered to purchase 5 percent shares of Hertz. Prior to the transaction Ford had *de facto* sole control as it was the single largest shareholder of Hertz with 49 percent of the voting shares. By buying 5 percent of Hertz, Ford acquired *de jure* control, however, this did not alter the decisive influence it had already attained and the transaction therefore did not constitute a concentration.

Marine Harvest mistakenly relied on Article 7(2) EUMR as a defense. The mere fact that a party has not exercised its voting rights does not obviate the need for a notification and this transaction involved a single seller, which excludes the application of Article 7(2) EUMR.

Deterrent Effect of the Imposed Fine

In the *Electrabel*[5] case of 2009 the Commission had already indicated the serious nature of gun jumping as it undermines the fundamentals of the EUMR. In that case, both the Commission and the General Court of the EU stated that a breach that is negligent rather than intentional does not deprive it of its serious nature, neither does the nature depend on the question whether the transaction negatively affects the market or not.[6] Electrabel was also fined EUR 20 million.

Even though the fine of EUR 20 million equates to a mere 1 percent of Marine Harvest's 2013 turnover, the Commission stated that this amount was both proportionate and adequate to provide sufficient deterrence. In its decision the Commission stated that Marine Harvest, as a large company with previous experience and familiarity with the EUMR rules, should have been aware of its obligations to notify and await clearance. However, the Commission did take into account mitigating factors, such as the non-exercise of the voting rights by Marine Harvest prior to clearance.

The *Marine Harvest* and *Electrabel* decisions serve as an important reminder of the need for undertakings to carefully consider the application of the EUMR to all transactions. The facts of the cases demonstrate that the Commission is willing to impose high fines even where the assessment of control is complex, a negative effect on competition is absent or the acquirer does not exercise its voting right prior to approval. Additionally, the decision is important as the Commission has clarified that it may apply the EUMR to initial acquisitions of shares before the launch of a public bid.

At the moment the Commission is seeking views of possible improvements to the EUMR.[7] One of the proposals is to apply the EUMR to the acquisition of non-controlling minority shareholdings. The rationale behind this is that the acquisition of non-controlling minority shareholding can harm competition and lead to a 'signification impediment of effective competition,' which cannot be adequately addressed under the EUMR in its current form. If this proposal is implemented the need for scrutiny will increase even more. But even under the current rules, parties need to be aware that the acquisition of a non-controlling minority shareholding could, technically-speaking, prompt regulatory authorities to investigate other breaches of competition law around concepts of illegal collaboration between competitors, etc.

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[1] Article 7(1) of the European Union Merger Regulation.
[2] Article 3(2) of the European Union Merger Regulation.

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[3] Article 14 of the European Union Merger Regulation.
[4] Case No IV/M. 452, Commission Decision of June 9 1994.
[5] Case No. COMP/M.4994 *Electrabel/Compagnie Nationale du Rhone*, June 10, 2009.
[6] Case T-332/09 para. 246. The General Court noted that 'the Commission is correct to maintain that the ex post analysis of the lack of effect of a concentration on the market cannot reasonably be a decisive factor for the characterization of the gravity of the breach of a system of ex ante control.'
[7] European Commission, White Paper, Towards more effective EU merger control, COM (20140 449 final, July 9, 2014).

The European Commission Updates an Important 'Safe Harbor' Protecting Commercial Arrangements from Competition Law Challenges

By Hans E. Urlus and Emilie van Hasselt – Amsterdam
Simon Harms – London

European Union (EU) competition law prohibits "[…] *all agreements between undertakings […] which may affect trade between [EU] Member States and which have as their object or effect the prevention, restriction or distortion of competition within the [EU's] internal market* […] (the Prohibition).

The Prohibition, as has been widely proclaimed, captures a broad range of commercial arrangements and infringements of the Prohibition can result in the imposition of severe administrative fines, entire agreements being rendered void and – with increasing frequency – civil claims for damages.

The *De Minimis* Safe Harbor

Over the years, a number of "safe harbors" have been designated, which exempt agreements meeting certain criteria from the application of the Prohibition. On June 25, 2014, the European Commission (the Commission) issued an updated version of one of the most important such safe harbors, known as the *De Minimis* Notice (the Notice), which applies to arrangements deemed to have minor competitive importance.[1] While the basic coverage of the exception remains little changed, the new version does make some subtle, but nevertheless important, changes to the scope of the safe harbor and its underlying legal logic. These are explained in more detail below.

By way of background, EU case law has long established the sensible principle that agreements must have an appreciable effect on competition in order for them to be caught by the Prohibition. If an agreement does not appreciably affect competition, it simply falls outside the ambit of EU competition law.

The Notice spells out the narrow confines of that safe harbor. Agreements are not caught by the Prohibition if:

- in the case of **horizontal agreements** (*i.e.*, agreements between actual or potential competitors), the combined market share of the parties on any market affected by the agreement does not exceed 10percent; or
- in the case of **vertical agreements** (*i.e.*, agreements between parties operating at different levels of the supply chain), the individual market share held by each party on any market affected by the agreement does not exceed 15 percent.

If either of the above criteria is met, the agreement will be deemed not to appreciably affect competition, and the Commission will not institute proceedings in relation to it. Further, even if the thresholds are exceeded, the Commission will not impose administrative fines if the parties can demonstrate that they assumed in good faith that the market share thresholds were not exceeded.

Outside the *De Minimis* Safe Harbor

Falling outside of the safe harbor does not mean that the agreement in question is *per se* illegal. Unless other safe harbors are available, it does, however, mean that the agreement will need to be analyzed using a balancing exercise under Art. 101(3) TFEU, which examines whether the anticompetitive effects

of the agreement are outweighed by its benefits; similar – but distinct in several respects – to a U.S. rule of reason analysis.

This is especially important for so-called by object or hardcore restrictions, which cannot benefit from the *de minimis* safe harbor. Such restrictions include:

- in the case of **horizontal agreements**: price fixing, output limitations, market sharing, bid rigging, collective boycott agreements, and exchanges of certain types of competitively sensitive information; and
- in the case of **vertical agreements**: resale price maintenance, restrictions of so-called passive distributor sales outside the contract territory, and Internet sales bans.[2]

Case law and applicable guidance demonstrate that such restrictions only very rarely survive the above referenced balancing exercise. These restrictions are deemed to be so obviously injurious to competition that they will always appreciably affect competition, regardless of the market position of the parties. The Notice unequivocally states that such restrictions cannot benefit from the safe harbor.

While this has been known to be the Commission's position since time immemorial, the updated Notice leaves no room for doubt in this respect, and thereby reflects recent case law of the EU Court of Justice on this point.

The essential elements of the former Notice have been retained and preserved in the new version (e.g., the use and level of the key market share thresholds). The closed list of black list exceptions to the safe harbor has been removed from the text and a statement regarding the nature of restrictions that will never be acceptable has been put in its place. To assist in compliance, the Commission also has provided a catalogue of examples of those restrictions in a separate document.[3] Henceforward, smaller businesses that enter into agreements that include restrictions will have to ensure that they satisfy the core elements of the Notice and have not agreed to something identified in the catalogue. Only then will they obtain the benefit of the safe harbor.

Another Safety Net?

As indicated above, it is now beyond doubt that "hardcore" restrictions cannot benefit from the *de minimis* safe harbor, and it is well-known that such restrictions very rarely satisfy the strict requirements of the Art. 101(3) balancing exercise.

However, as recognized by the Notice, there remains one potential safe harbor that might shield an agreement containing a "hardcore" restriction: the Prohibition only applies to agreements that may appreciably affect trade – as opposed to competition – between EU Member States. EU competition law has no role to play in respect of agreements incapable of doing so.[4]

The standard effect on trade test developed by the EU courts implies that it must be possible to foresee with a sufficient degree of probability, on the basis of objective factors of law or fact, that the agreement may have an influence, direct or indirect, actual or potential, on the pattern of trade between EU Member States. The Commission has issued detailed guidance on each of the elements of that test. In particular, the Commission considers that agreements are not capable of appreciably affecting trade between EU Member States if:

- the combined market share of the parties on any relevant market within the EU affected by the agreement does not exceed 5 percent, <u>and</u>

  (i) in the case of **horizontal agreements**, the combined annual EU-wide turnover of the companies concerned in the products covered by the agreement does not exceed €40 million; <u>or</u>

(ii) in the case of **vertical agreements**, the combined annual EU-wide turnover of the supplier in the products covered by the agreement does not exceed €40 million.

It follows that if an agreement meets the above criteria, it is exempt from EU competition law even if it contains "hardcore" restrictions.[5]

Further, if the above thresholds are exceeded, the agreement will not automatically be deemed to appreciably affect trade between EU Member States. Each agreement has to be assessed on a case-by-case basis. In practice, however, the EU courts have set the bar relatively low when it comes to establishing EU jurisdiction under the effect on trade concept.

Conclusion

The fact that the Commission has issued a new updated version of the *de minimis* safe harbour Notice, and the accompanying compilation of "hardcore" restrictions is to be welcomed.

The Notice also contains useful clarifications regarding the interplay between the "effect on competition" safe harbor and the "effect on trade" safe harbor, thereby confirming the analysis used by practitioners for some time.

While the Notice contains a number of minor tweaks, it does not shift the goalposts in any meaningful way. That said, the document does serve to provide practitioners and in-house counsel a useful reminder of the availability and narrow scope of the existing safe harbors.

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[1] Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). C(2014) 4136 final.

[2] The classic types of such restrictions are well understood. By way of guidance, the Commission has also recently issued a compilation, summarizing the types of restrictions that have previously been held by the EU courts to fall within this category: *Commission Staff Working Document Guidance on restrictions of competition "by object" for the purpose of defining which agreements may benefit from the De Minimis Notice.* The Commission intends to update this document regularly.

[3] See footnote 2, *supra*.

[4] Such agreements may, however, be caught by the national competition laws of the EU Member States, many of which are modeled on EU competition law and outlaw the same types of restrictions classified as "hardcore" in EU competition law.

[5] Commission Notice – Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty. OJ C 101, 27.4.2004, p. 81–96.

EU Commission Publishes Merger Regulation White Paper on Minority Shareholdings

By Hans E. Urlus and Emilie van Hasselt – Amsterdam
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Introduction

In the United States, merger control rules require notifications to be submitted to the Federal Trade Commission and Department of Justice in respect of certain acquisitions of non-controlling minority shareholdings.

In the European Union (EU), under the current Merger Regulation (Council Regulation (EC) No. 139/2004), the European Commission (Commission) only has jurisdiction to review transactions that result in a change of control. Specifically, reviews of acquisitions of non-controlling minority shareholdings (or "structural links") can only be carried out post-transaction under the standard behavioral competition rules set out in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU).[1] This constitutes what the Commission refers to as an "enforcement gap" in the EU. The Merger Regulation cannot be applied to non-controlling minority shareholdings, even if they may result in potential to harm competition, as was confirmed by the recent *Ryanair/Aer Lingus* case.[2]

Due to concerns about this perceived enforcement gap, the Commission initiated studies on the importance of minority shareholdings in the EU in 2011 and, as previously reported,[3] launched a public consultation (Consultation Paper) in June 2013 on possible modifications to the Merger Regulation, including the expansion of merger control to cover a number of non-controlling minority shareholdings situations. The Consultation Paper considered different options for reviewing such shareholdings. The responses to the Consultation Paper generally revealed a lack of consensus about the existence and extent of the perceived enforcement gap.

On July 9, 2014, the Commission published a White Paper, *"Towards more effective EU merger control"* (White Paper), setting out its proposals on how to apply merger control rules to acquisitions of non-controlling minority shareholdings. Interested parties, which include companies, industry associations, and national competition authorities, have until October 3, 2014 to comment on the White Paper.

Proposed Review of Acquisitions of Non-Controlling Minority Shareholdings with a "Competitively Significant Link"

The previously issued Consultation Paper proposed regulating the acquisitions of non-controlling minority shareholdings either through a notification system, a transparency system, or a self-assessment system. The White Paper diverges from that proposal, recommending instead a consolidation of the self-assessment and transparency systems that is intended to be more "targeted." According to the Commission, its suggested "targeted" system is designed to be the most practical means of achieving the Commission's principal aims, which include ensuring that: potentially anticompetitive transactions are subject to review, the process used is not unnecessarily burdensome on companies and regulatory authorities, and is also aligned with the existing EU and national merger control regimes.

According to the White Paper, this targeted transparency system would be applicable to acquisitions of minority shareholdings in competitors of either: (1) at least 20 percent; or (2) between 5 percent and 20

percent, if the acquired stake is combined with "additional factors" such as a *de facto* blocking minority, a seat on the board of directors, or access to commercially sensitive information. In other words, the targeted transparency system is applicable to minority transactions that create a "competitively significant link."

Proposed Control Procedure

The White Paper targeted transparency system would function on the basis of information notices. An "information notice" providing the Commission with basic information about the parties and the transaction would need to be submitted to the Commission with respect to any transaction involving the acquisition of a non-controlling minority shareholding creating a competitively significant link. The Commission would use the information notice to decide whether further investigation into the transaction is necessary. EU Member States may also request that a case be referred for further investigation.

Only if an investigation were deemed necessary, would the parties be required to submit a full notification to the Commission. However, parties seeking legal certainty would be permitted to submit a full notification voluntarily. Based on the information obtained in the full notification and investigation, the Commission would issue a formal ruling regarding the compatibility of the transaction in the usual way.

The Commission has also proposed a waiting period (of approximately 15 days) to provide the EU Member States with time to request referrals for particular cases. During the waiting period, which would begin with the submission of an information notice, the parties would not be permitted to close the transaction. Subsequent to the waiting period, the parties would be able to close the transaction if no EU Member State referred the case and the Commission determined that no further investigation was necessary.

However, even after expiration of the waiting period, the Commission would have the right to initiate an investigation at any time within six months after the information notice, regardless of whether or not the transaction had been completed.

Comments

The proposals regarding the application of EU merger control to acquisitions of non-controlling minority shareholdings are imperfect in several ways, as elaborated below.

First of all, the White Paper's proposals leave significant legal uncertainty. Because of the proposal's potential application to acquisitions of shareholdings of a low as 5 percent, a large number of transactions would have the potential to fall under the proposed merger control rules. However, because the proposal's application of EU merger control to transactions of between 5 and 20 percent depends on the presence of one of numerous undefined "additional factors," this may lead to significant legal uncertainty as regards the application of the merger control regime. Past experience in Germany and the United Kingdom has shown that it is often unclear whether any "additional factors" render a transaction notifiable. Thus, to avoid legal uncertainty, it might be beneficial to establish clear thresholds, such as the acquisition of shareholdings in excess of 25 percent. Doing so would minimize uncertainty as to the application of the merger control rules to minority acquisitions.

Second, the White Paper's proposal would require that the parties to such transactions self-assess whether the transaction creates a "competitively significant link." Given that market definition is not an

exact science, such a self-assessment may prove to be burdensome and result in defensive lawyering in the form of unnecessary just-in-case notifications. Indeed, the proposal, if adopted, may very well lead to legal uncertainty on various fronts, including: the obligation to submit an information notice, the obligation to respect a waiting period, and the potential that the Commission may commence a merger control procedure after the expiration of the waiting period.

Third, although a main objective of the White Paper is to reduce undue administrative burden, it remains unclear whether the information notice requirements or simplified procedures, would accomplish that task. Cases where parties are required to provide (alternative) market definitions and market data may still present a significant burden.

Fourth, the proposed waiting time, combined with the Commission's ability to commence investigations after the waiting period's expiration could prove to be problematic. Allowing the Commission to investigate after the waiting period will subject parties to a substantial degree of legal uncertainty. Even after the parties have spent the time and energy to submit an information notice and adhere to the waiting period, they would have no comfort as to the legality of their transaction.

Fifth, the White Paper's proposal on case referrals by the EU Member States relies heavily on Member States that have competence within their national law to review the acquisition of minority shareholdings. However, a significant majority of Member States currently do not have that power. It is unclear how the Commission envisions the case referral request process for Member States that do not have the ability to do so pursuant to their national laws.

Considering these concerns, it is likely that the additional regulatory burden resulting from the implementation of the White Paper will be more significant than the Commission anticipates. Moreover, considering the small number of minority transactions with the potential to raise competition concerns, it is possible that the burden will significantly outweigh the anticipated benefit.

Next Steps

The Commission's White Paper provides interested parties with an opportunity to express their views on the proposed changes until October 3, 2014. The responses to this consultation will allow the Commission to assess whether the White Paper's proposed changes for the revision of Merger Regulation are satisfactory, and likely to pass political muster.

Only after the Commission has reviewed the responses will it be able to complete the legislative proposal, the timetable for which remains unclear. Any proposed reforms would require a decision by the European Council, which represents the interests of the EU Member States. Practically speaking, therefore, it will most likely be a number of years before changes to merger controls for minority shareholdings come into effect in the European Union.

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[1] However, as part of a review of an acquisition of control, the Commission may also review existing minority shareholdings, when such are held by the parties to a notified transaction.

[2] COMP/M.6663 – *Ryanair/Aer Lingus*, decision of February 27, 2013.

[3] See *EU Merger Control and Minority Shareholdings: Time to Plug the Enforcement Gap?* Greenberg Traurig Antitrust Quarterly, Fall 2013.

Mexico Developments

General Overview of Mexico's New Federal Competition Law

By Bertha A. Ordaz-Avilés and Blanca Luévano García – Mexico City

This Article provides a general overview of Mexico's new Federal Competition Law (the Federal Competition Law), as well as certain amendments and additions to the Federal Criminal Code on competition grounds that were all published in the Official Gazette on May 23, 2014, and became effective as of July 7, 2014.

The Mexico Federal Competition Law, and the amendments and additions to the Federal Criminal Code derive from the constitutional reform on telecommunications, broadcasting and economic competition published on the Official Gazette on June 11, 2013 (the Constitutional Reform), which, among other things, extinguished the former Federal Competition Commission and created the Federal Economic Competition Commission (COFECE) as an autonomous agency to be the competition authority for all industries except for telecommunications and broadcasting.

The Constitutional Reform also extinguished the former Federal Telecommunications Commission, and created the Federal Telecommunications Institute (IFT) as an autonomous agency in its capacity as regulator and also competition authority for the telecommunications and broadcasting industries.

In consequence, the Federal Competition Law sets forth, without limitation: (i) organic and operational provisions for the integration and operation of the COFECE, as well as for the appointment of the Commissioners that integrate such agency; (ii) new internal areas such as the "investigating authority" and the "controller's office"; (iii) the way the Commissioners may be in contact with interested parties (by means of hearings and interviews to be held under certain rules); and, (iv) mechanisms to resolve questions or conflicts concerning the powers and jurisdiction of the COFECE and the IFT.

The COFECE is further empowered to, *inter alia* (i) impose measures to eliminate barriers to competition and free access to markets; (ii) determine the existence and regulate access to essential facilities; (iii) issue an order to divest assets, rights, or equity interests as may be deemed necessary to eliminate anticompetitive effects; (iv) issue and publish regulatory provisions that are necessary to fulfill its duties (including matters related to the imposition of sanctions; monopolistic practices; determination of individual or collective (joint) substantial power; determination of relevant markets; barriers to competition and free access to markets; essential facilities, and divestiture of assets, rights, or equity interests); (v) issue guidelines and technical criteria, after public consultation, on mergers clearance or concentrations, investigations, reduction of sanctions, suspension of conducts featuring probable monopolistic practices or illicit mergers or concentrations, among others; and, (vi) request independent studies evaluating COFECE's performance.

On July 8, 2014, the COFECE published in the Official Gazette its Organic Statute which is in line with the provisions of the Federal Competition Law. In addition, the COFECE shall publish the corresponding regulatory provisions necessary for the fulfillment of its duties no later than six months after the Federal Competition Law entered into force.

The Federal Competition Law contains other relevant aspects, as described henceforth.

Monopolistic Practices

Concerning monopolistic practices (horizontal practices), new conduct subject to sanctions are added, including: (i) the establishment, agreement or coordination of proposals or refraining from submitting proposals in private biddings and auctions (not only in public biddings and auctions as previously set forth in the competition law that has been abrogated); and, (ii) the exchange of information among competitors with the purpose or effect of fixing, agreeing or manipulating prices; restricting supply; segmenting or assigning markets; and, coordinating proposals in public or private biddings and auctions (under the former law, information exchange was penalized only in connection with prices).

Regarding relative monopolistic practices (vertical practices), concerning the essential facility concept, the following penalized conducts are added: (i) denial, restriction or discriminatory access to an essential facility; and, (ii) margin squeeze in connection with an essential facility.

The existence of an essential facility shall be determined by the economic competition authority, considering: (i) whether or not the essential facility is under the control of one or more economic agents that either have substantial power or are dominant (are preponderant) pursuant to a decision issued by the IFT; (ii) whether or not the reproduction or replication of the facility by another economic agent is not technically, legally or economically viable; (iii) whether or not the facility is vital to provide goods or render services in one or more markets considering, as applicable, if the facility has any close substitutes; (iv) the circumstances under which the economic agent(s) gained control of the facility; and, (v) any other criteria that may be set forth in the regulatory provisions to be issued by the COFECE under its authority.

Certain special proceedings are set forth or complemented in order to: (i) determine an essential facility or competition barriers; (ii) resolve market conditions; (iii) issue opinions or resolutions in the process of granting or awarding licenses, concessions and permits; (iv) reduce sanctions; and, (v) request the competition authority to issue a formal opinion on free access to markets and competition, concerning the emergence of new or unsolved questions in connection with the application of the Federal Competition Law.

Merger Clearance and Concentrations

The parties involved in a merger clearance and concentration, would not be able to consummate and close the transaction without having obtained the previous authorization from the competition authority (in terms of the former law, the parties, under their own responsibility, could consummate the transaction as long as they had not been issued a stop action order from the competition authority).

One of the several criteria that determine whether a merger or transaction must be filed to and authorized by the COFECE, are the value of the assets and annual sales volume of the economic agents involved in the transaction. Such criterion is now limited to the value of those assets and annual sales volume that the economic agents involved in the transaction have within Mexican territory, no longer considering the value of such indicators abroad, as the former law provided.

Also in connection with merger control and concentrations, the term for the economic competition authority to resolve a matter is extended to 60 business days instead of the 35 business days set forth under the former law, following the reception of the notification or the additional information that might be requested by the authority to the parties, as the case may be. Such term can still be extended for another 40 business days.

Sanctions, Investigations and Procedures

In addition to those sanctions that were already covered by the former competition law (including, but not limited to, sanctions applicable in cases of absolute monopolistic practices; relative monopolistic practices; illicit mergers or concentrations; false declarations or information), certain aspects are added such as: (i) the imposition of measures to regulate access to essential facilities under the control of one or more economic agents; (ii) the imposition of restrictions to individuals to act as board member, manager, director, executive, agent, representative or attorney-in-fact of an entity for a period of up to five years, in addition to the imposition of fines, upon participating, whether directly or indirectly, in a monopolistic practice or an illicit merger or concentration, on behalf of or representing an entity; (iii) the imposition of fines to public notaries and commercial notaries that intervene in acts regarding a merger or concentration that might not have been authorized by the economic competition authority; (iv) the imposition of fines to an economic agent that fails to comply with regulation concerning essential facilities or with an order to eliminate barriers to competition; and (v) the imposition of orders to divest assets, rights or equity interests, as may be deemed necessary to eliminate anticompetitive effects, in case of recurring offenders and under the terms provided for in the Federal Competition Law. Such sanction may only be imposed upon resolution of the *amparo* proceedings that might be initiated by any given interested party, as applicable.

The COFECE has the obligation to make available to the public, both in the Official Gazette as well as on its web site, the transcription of the plenary sessions along with the agreements and resolutions issued by such Commission, as applicable, always respecting the confidentiality, reserve and secrecy of the corresponding information, investigations and procedures.

Concerning criminal matters, consistent with the conduct that the Federal Competition Law deems as absolute monopolistic practices, article 254 *bis* of the Federal Criminal Code has been included in order to comprise another conduct that is penalized (in addition to fixing, agreeing or manipulating prices; restricting supply; segmenting or assigning markets; and, collusive bidding): (i) the establishment, agreement or coordination of proposals or refraining from submitting proposals in private biddings and auctions (not only in public biddings or auctions as set forth in the previous law); and, (ii) the exchange of information among competitors with the purpose or effect of fixing, agreeing or manipulating prices; restricting supply; segmenting or assigning markets and, collusive bidding in public or private biddings and auctions (under the former law and former article 254 *bis* of the Federal Criminal Law, information exchange was penalized only in connection with prices).

On the same grounds, article 254 *bis* of the Federal Criminal Code provides for an increase in the penalties that are applicable for incurring in absolute monopolistic practices, which shall be prosecuted only upon a criminal complaint brought by the COFECE or the IFT, as applicable. Such complaint may only be formulated based on the determination of probable responsibility issued by any of such authorities within the scope of their powers and duties, in accordance with the Federal Competition Law.

Furthermore, article 254 *bis* 1 was incorporated to the Federal Criminal Code, setting forth imprisonment and financial sanctions to any person that, during a verification visit, either directly or indirectly, whether totally or partially, alters or destroys, documents, images or electronic files containing information or data, in order to divert, obstruct or prevent investigations or administrative proceedings.

China Developments

Effects of 'Guiding Opinions' on Filing of Simple Cases of Concentration of Business Operations in Merger Control Filings

By Dawn Zhang – Shanghai

I. Background

In February of this year, the PRC Ministry of Commerce (MOFCOM) released the *Tentative Provisions on Standards Applicable to Simple Cases of Concentration of Business Operations (for Trial Implementation)* (the *Tentative Provisions*). The *Tentative Provisions* set forth the standards for "simple" merger cases, which include cases in which: (i) for business operations participating in the concentration that have a horizontal relationship, the aggregate market share is less than 15 percent; (ii) for business operations participating in the concentration that have a vertical relationship, and the market share of each business operation accounts for less than 25 percent in both the upstream market and downstream markets; (iii) the business operations participating in the concentration neither have a horizontal nor vertical relationship and account for less than a 25 percent market share in their respective markets that relate to the concentration; (iv) the business operations participating in the concentration establish a joint venture outside China, and the joint venture does not engage in any economic activities within China; (v) the business operations participating in the concentration acquire the equities or assets of overseas enterprises, and the overseas enterprises do not engage in any economic activities in China; (vi) a joint venture mutually controlled by more than two business operations is controlled through the concentration by one or more of such business operations. However, the *Tentative Provisions* do not provide the filing procedures for such cases.

In April, MOFCOM released *Guiding Opinions on Filing of Simple Cases of Concentration of Business Operations* (the *Guiding Opinions*), which set forth basic procedures and relevant filing materials for simple cases, as summarized below.

II. Procedure and Filing Materials for Simple Cases

A. Procedure

1. Voluntary Application

The *Guiding Opinions* provide that for concentrations that meet the standards of simple cases, the notifying party may apply with the Anti-monopoly Bureau (the Bureau) to file the concentration according to the procedure for simple cases; however, without application by the notifying party, the concentration will not be treated as a simple case.

2. Conversion to Non-simple Case

After filing materials are submitted to the Bureau, the Bureau examines the materials and determines whether the case meets the standard for simple cases. In the event the case does not meet the standard, the notifying party should re-file the case as a non-simple case. In addition, any time during the Bureau's

review of the case, the Bureau may determine that the case does not meet the standard, revoke its determination as a simple case, and order the notifying party to re-file as a non-simple case.

3. Disclosure Requirements

According to the G*uiding Opinions*, the notifying party should submit a disclosure form along with other filing materials. The disclosure form should include a description of the transaction within 200 words, brief introduction of the concentration business operations, and the reason for applying as a simple case. In the event that the reason for application is based on market shares, the defined product market and geographical market should be specified along with relevant market shares, which may be provided in the form of a range of less than 5 percent. The disclosure form will then be published on the website of the Bureau for a disclosure period of 10 days. During the disclosure period, any third party may submit a written opinion to the Bureau on whether the concentration should be treated as a simple case. Any such objection should be raised within the disclosure period, and should be submitted along with relevant evidence and contact information.

B. Filing Materials

Compared to the required filing materials for non-simple cases, the *Guiding Opinions* no longer require the following information for simple cases:

1. The names and shareholding structure of non-PRC affiliates of the concentration business operations;
2. The basic information, business licenses and approval certificates of PRC affiliates of the concentration business operations;
3. The demand and supply structure of the relevant markets, including the names of the major suppliers and customers and their contact information, volume and value of the relevant products etc.;
4. Market entry information, including the market entrants in the past five years, potential market entrants, and difficulty in entering the market;
5. Horizontal or vertical cooperation agreements;
6. Efficiency of concentration;
7. Whether the concentrations involves bankrupt companies or companies facing bankruptcy;
8. Opinions in this concentration of other entities.

The *Guiding Opinions* also require additional filing information as to the reasons for applying as a simple case.

Summary and Observations

Compared to the non-simple case, the filing of a simple case requires less filing materials. Particularly, the *Guiding Opinions* have simplified the disclosure requirements for the affiliates of concentration business operations. Thus, the concentration business operations no longer need to describe complicated shareholding structure with affiliates or collecting certificates from PRC affiliates. The *Guiding Opinions* also have deleted the requirements for disclosing demand and supply structure of the relevant markets and relevant data, so that the concentration business operations no longer need to calculate such data or bear the business risk of disclosing such sensitive commercial information. The *Guiding Opinions* still do

not make clear the timing of simple case filing procedure. However, we believe that given the nature of such cases and the reduced requirements as to filing materials, the review period of simple cases should be shorter than that of non-simple cases. It is notable that the *Guiding Opinions* do provide that under certain circumstances, a simple case may be converted to non-simple cases and is subject to re-filing as a non-simple case. In this event, the entire filing process may be even longer than filing as a non-simple case at the outset. In addition, the *Tentative Provisions* give the Bureau very broad scope of discretion to revoke the determination of a simple case. In light of the above, we suggest that parties to a concentration consult with the Bureau before filing as a simple case, in order to better evaluate whether the concentration in fact meets the standard for a simple case.

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