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U.S. Developments

Ninth Circuit Rules That Major League Baseball Remains Exempt from Antitrust Laws

By Irving Scher – New York, NY

The U.S. Supreme Court has said that the doctrine of *stare decisis* reflects a "policy judgment that in most matters it is more important" that a "rule of law be settled than that it be settled right,"[1] and that the static nature of settled law usually is strongest when the question is one of statutory interpretation.[2] It stressed in 1978, however that "the general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act,"[3] adding in 1997 that "this Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question."[4] Most recently, in 2007, the Court overruled a 96-year-old precedent that minimum resale price maintenance—or vertical price-fixing, in plaintiffs' parlance—is per se unlawful under the Sherman Act, largely on the ground that its doctrinal underpinnings had been undermined.[5]

Nevertheless, according to a decision last month by a Ninth Circuit Panel,[6] the Supreme Court has determined to let stand its 1922 decision declaring that the Sherman Act has no application to the "business of baseball," even though the decision is based on an

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outmoded interpretation of the Commerce Clause, and even though the Supreme Court has applied the antitrust laws to other professional sports. Accordingly, the appellate panel affirmed dismissal of the district court's decision that the Sherman Act did not apply to matters involving the relocation of a team's franchise to a city within the territory of another franchise.

Background

The Ninth Circuit decision involved an antitrust suit against the Commissioner of Baseball (Bud Selig) by the City of San Jose, California concerning the City's failure to obtain approval of a move by the Oakland Athletics to San Jose. The Major League Baseball (MLB) constitution requires approval of at least three-quarters of the 30 MLB clubs before a team can relocate within another franchise's territory, and the move from Oakland to San Jose would place the Athletics within the exclusive operating territory of the San Francisco Giants. MLB has not acted on the relocation request since 2009. Believing the delay in effect constitutes rejection of the request, the City filed suit claiming, in major part, a violation of the Sherman Act.[7] The district court dismissed the claim, relying on the baseball industry's 92-year exemption from the antitrust laws (which, it recognized was aberrational). The City appealed to the Ninth Circuit.

Baseball's antitrust exemption was created by the Supreme Court's 1922 ruling in *Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs,*[8] that baseball games are a "purely state affair" and therefore exempted from the Sherman Act by the Commerce Clause. This view of the limitations of the Commerce Clause became outmoded within the next 20 years,[9] but the exemption survived. In 1953, in *Toolson v. New York Yankees, Inc.,*[10] the Court reaffirmed Federal Baseball on the basis of *stare decisis*, observing that Congress had "not seen fit" for 30 years to bring baseball under the antitrust laws despite its knowledge of the *Federal Baseball Club* decision. In 1972, in *Flood v. Kuhn*,[11] the Court approved the exemption a third time, relying again on the doctrine of *stare decisis* and Congress's seeming acquiescence in the two earlier holdings by not doing anything to overturn them.

The Ninth Circuit Opinion

Relying on these precedents, the Ninth Circuit effectively told San Jose, "three strikes and you're out." The appellate panel noted that the City "joins the long line of litigants that have sought to overturn one of federal law's most enduring anomalies."[12] The court rejected the City's argument that the 1972 *Flood* decision applied only to the "reserve clause" at issue in that case (a provision in baseball contracts at that time preventing players from changing clubs without the express consent of the club for which they played). The panel also observed that the Supreme Court had declared in its 1953 *Toolson* decision that the antitrust exemption applied to the entire "business of providing public baseball games for profit," and, here, to disturb franchise relocation rules "indisputably interferes with the public exhibition of professional baseball."[13] Additionally, according to the panel, limiting the scope of the exemption would create "confusion and retroactivity problems."[14]

Perhaps most importantly, the Ninth Circuit stressed that congressional acquiescence applies with special force to MLB franchise relocation. In 1998, Congress passed the Curt Flood Act, which withdrew baseball's antitrust exemption with respect to the reserve clause, but specifically maintained it for franchise relocation, stating that the statute "does not create, permit or imply a cause of action by which . . . to apply the antitrust laws to . . . franchise location or relocation."[15] Therefore, although congressional inaction ordinarily lacks persuasive significance, here it did not, according to the Panel, because Congress explicitly exempted franchise relocation issues from the baseball statute it enacted in 1998.[16]

The Ninth Circuit panel did emphasize, however that despite the breadth of its ruling, it did not necessarily mean that all antitrust suits that involve the baseball industry are barred. Collateral issues outside the "heartland" of the business of baseball remain subject to antitrust challenge. As an example, the Ninth Circuit referred to an earlier decision in which it had allowed an antitrust claim by a baseball franchise against stadium concessionaires to go forward without any reference to the baseball exemption.[17] But it declared that few, if any, issues are as central to a baseball league's proper functioning as its rules regarding the geographic designation of franchises.[18] The court (or, at least, Judge Kozinski, who authored the opinion) could not keep from concluding: "Like Casey, San Jose has struck out here."[19]

Analysis

Unlike other instances in which the Supreme Court has not hesitated to disregard the doctrine of *stare decisis* and to overturn discredited or outmoded antitrust principles, and in contrast to the rule that antitrust exemptions must not be liberally interpreted by the courts, it clearly is otherwise with respect to the unique exemption for professional baseball. Indeed, the Ninth Circuit in this case did not even suggest that the Supreme Court should revisit the baseball exemption, despite the fact that all other professional sports are subject to the antitrust laws. For that reason, and in the absence of any conflict within the circuit courts, it seems extremely unlikely that the Supreme Court would entertain a *certiorari* petition if one were filed. In this contest, there likely will be no extra innings.

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[1] *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997).
[2] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007).
[3] *National Soc. Of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).
[4] *State Oil Co. v. Khan*, 522 U.S. at 21 (overruling 29-year precedent treating maximum resale price maintenance as per se unlawful). *See also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (overruling a number of decisions allowing conspiracy claims against a parent corporation and its wholly owned subsidiaries); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (197) (overruling 10-year precedent that applied the per se rule to non-price vertical restraints).
[5] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 899-91(2007).
[6] *City of San Jose v. Office of the Commissioner of Baseball*, No. 14-15139 (Jan. 15, 2015) (citations will be to the Slip Opinion (Slip Op.)).
[7] Slip Op. at 3-4.
[8] 259 U.S. 200, 208 (1922).
[9] *See Wickard v. Filburn*, 317 U.S. 111, 118-35 (1942) (enunciating expanded reach of Commerce Clause). *See also McLain v. Real Estate Bd. Of New Orleans*, 440 U.S. 232m 241-42 (1980)(reiterating that reach of Commerce Clause and Sherman Act are coextensive, and Sherman Act encompasses practices "in" or "affecting" commerce).
[10] 346 U.S. 356, 357 (1953).
[11] 407 U.S. 258, 283-84 (1972).
[12] Slip Op. at 5.
[13] *Id.* at 8.
[14] *Id.* at 6.
[15] *Id.* at 9.
[16] *Id.*
[17] *Id.* at 9, citing *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264 (9th Cir. 1975).
[18] *Id.*
[19] *Id.* at 12.

Fitting Cloned Horses Through the Eye of American Needle – Fifth Circuit Raises Doubts About Organizations Capable of Conspiring With Their Members

By Gregory J. Casas and Alan Wendler Hersh – Austin, TX

In *American Needle, Inc. v. National Football League*,[1] the Supreme Court addressed whether a sports organization is capable of conspiring with its members to restrain trade within the meaning of Section 1 of the Sherman Act. The case involved a clothing manufacturer who sued the National Football League (NFL) and its members for allegedly conspiring to constrain sales of official team merchandise. According to the plaintiff, the NFL and its members formed National Football League Properties (NFLP), through which they granted exclusive licenses to Reebok to manufacture and sell trademarked headwear for all 32 teams. The district court found that NFLP and its members were, "in the jargon of antitrust law, acting as a single entity," and therefore could not contract, combine, or conspire with themselves within the meaning of Section 1.[2] The Seventh Circuit affirmed.

The Supreme Court reversed the Seventh Circuit, concluding that the NFL defendants' activities "constitute concerted action that is not categorically beyond the coverage of § 1." As the Court explained:

> The meaning of the term "contract, combination . . . or conspiracy" is informed by the basic distinction in the Sherman Act between concerted and independent action that distinguishes § 1 of the Sherman Act from § 2. Section 1 applies only to concerted action that restrains trade. Section 2, by contrast, covers both concerted and independent action, but only if that action "monopolizes" or "threatens actual monopolization," a category that is narrower than restraint of trade.[3]

The Court emphasized that determining whether an organization is capable of "concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities." The Court noted that various business organizations, professional organizations, and trade groups—all of which can be legally "single entities"—were previously found to violate Section 1 when the entity was "controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity."[4]

Thus, *American Needle's* analysis emphasizes substance over form to determine whether an organization and its members can be considered a single entity for purposes of Section 1, or are capable of conspiring with each other—looking to the competitive relationship between members rather than the business structure of the organization. In considering the facts of that case, the Supreme Court concluded that the individual NFL teams were actual or potential competitors for the market and sale of their trademarked merchandise, and thus NFLP was merely a vehicle through which these organizations could arguably achieve concerted effort to restrain trade and subject to Section 1 of the Sherman Act.

However, in *Abraham & Veneklasen Joint Venture*, the Fifth circuit recently analyzed a different sport organization's ability to conspire with its members and nearly reached the opposite result.[5] The organization involved was the American Quarter Horse Association (AQHA), "a non-profit association with a general membership of more than 280,000 worldwide that was organized . . . to collect and register the pedigrees and protect the breed of the American Quarter Horse." The plaintiffs alleged that AQHA adopted a rule to ban cloned horses from its registry in order to constrain the market for "elite

Quarter Horses" eligible to participate in various races. The jury returned a verdict in favor of plaintiffs and the trial court issued an injunction requiring AQHA to change the relevant rules to allow cloned horses to register with the association. The Fifth Circuit reversed and rendered judgment in favor of the AQHA.

In its analysis, the Fifth Circuit noted that based on the structure of the AQHA and the composition of its membership, it was unclear whether AQHA was capable of concerted action. Unlike the 32 members of the NFL, AQHA had over 280,000 members, a board of directors that ranged from 280-340 individuals, and "a variety of standing committees that report to the general membership and the Board… AQHA is more than a sports league," the court explained, "and its quarter million members are involved in ranching, horse training, pleasure riding and many other activities besides the 'elite Quarter Horse' market." Borrowing a phrase from *American Needle*, the Fifth Circuit found it "difficult to draw the conclusion that because a tiny number of economic actors within AQHA may 'pursue their separate economic interests,' the organization has conspired with the minority." After expressing its doubts about *American Needle's* applicability, however, the Fifth Circuit "assume[d] *arguendo* that AQHA was legally capable of conspiring with members . . . in violation of Section 1."[6] The court then analyzed whether the plaintiffs had presented sufficient evidence of an actual conspiracy and, finding that such evidence was lacking, reversed the district court's judgment.

Although the Fifth Circuit stopped short of concluding that AQHA was incapable of concerted action, the distinctions it drew between AQHA and the NFL foreshadow issues that courts may face in determining whether a single organization can violate Section 1 of the Sherman Act. Clearly, the difference in governing an organization with 280,000 members as opposed to 32 teams makes conspiracy more difficult, but total membership cannot be the guiding principle. After all, professional organizations and trade groups often have as many if not more members than AQHA, but courts have found that these organizations are capable of concerted action with their memberships.

Rather, the significant distinction between AQHA and the NFL appears to be the economic interest, or lack thereof, that the majority of members have in their organization's complained-of activity. The Fifth Circuit discredited the argument that the minority of AQHA members who had actual financial interests in the registration of Quarter Horses could taint the association's overall purpose of preserving and enhancing the breed's characteristics. This is in stark contrast to the NFL teams in *American Needle*, all of whom had both competing and collaborative interests in the promotion of members' products, making it more likely that the teams could use NFLP to stymie competition.

The question remains, how many members with competing financial interests are enough to potentially make an organization a vehicle for concerted activity? Is it a question of the ratio of financially interested members to disinterested members, or does the relative influence of interested members come into play? There was evidence that although the vast majority of AQHA members did not have a significant financial interest in the registration of elite Quarter Horses, those that did were prominent figures within the horse-breeding community and provided significant financial support to the association.[7] The Fifth Circuit's analysis indicated that even these prominent and outspoken financially-interested members are not enough to taint an otherwise generally financially-disinterested group.

The facts of *American Needle* and *Abraham & Vaneklasen Joint Venture* may present opposite extremes of organizations that may or may not facilitate anti-competitive collusion. Going forward, courts remain left to determine whether a particular organization's conduct is so intertwined with its members'

individual financial interests that, for purposes of the Section 1 of the Sherman Act, the members of the single entity can effectively conspire to restrain trade.

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[1] 560 U.S. 183, 189-90 (2010).
[2] *Am. Needle, Inc. v. New Orleans La. Saints,* 496 F.Supp.2d 941, 943 (N.D. Ill. 2007).
[3] *Am. Needle*, 560 U.S. at 190 (internal quotations omitted).
[4] Conversely, the Court noted, legally distinct entities that effectively function as a single actor—particularly a parent corporation and its wholly owned subsidiary—are incapable of concerted action within the meaning of Section 1 "insofar as use of separate corporations had [no] economic significance." *Id.* at 193 (internal citations omitted).
[5] *Abraham & Vaneklasen Joint Venture v. Am. Quarter Horse Ass'n,* __ F.3d__, 2015 WL 178989 (5th Cir. Jan. 14, 2015).
[6] *Id.* at *6.
[7] Specifically, there was testimony that one prominent member of AQHA warned the other members that he would "not allow this technology [cloning] to move forward. . . . And I have put millions of dollars in this industry, and if this is approved, I will take every dime out of it." *See id.* at *7.

The FTC's Continuing Focus on Trade Associations

By John J. Elliott – New York, NY

Trade Associations, by their nature, are inviting targets for the Federal Trade Commission (FTC) and private antitrust plaintiffs alike. Just since August 2014, six associations have entered settlement agreements with the FTC.[1] Those agreements, and in particular, the two entered into Dec. 23, 2014 discussed in this article demonstrate the need for trade associations to pay careful attention to antitrust requirements in order to avoid potentially collusive behavior.

Background

While there are innumerable ways to attract FTC attention, the two cases it recently settled both involved the same kind of restrictions of competition: limiting competition between the trade association's members via written bylaws and a code of ethics.

The first action was brought against the Professional Lighting and Sign Management Companies of America, Inc. (PLASMA), a non-profit corporation organized in Ohio. It has approximately 25 members across the country that specialize in lighting and electrical sign installation and maintenance.[2] According to the FTC, PLASMA's bylaws restricted competition through (i) territorial restrictions prohibiting a member from providing services in another member's territory, unless that member first declines the work; (ii) a price schedule for performing work in another member's territory; and (iii) a one year non-compete following termination of membership.[3]

In the second action, the FTC alleged that the Professional Skaters Association (PSA), an association of ice skating coaches, similarly restricted competition among its 6,400 members.[4] PSA membership is required by the U.S. Figure Skating Association to coach competitive skaters; many ice rinks also require coaches to be members.[5] The FTC asserted that the PSA's code of ethics limited competition by prohibiting members from soliciting "pupils of another member, directly or indirectly, or through third parties," and by requiring members to determine if a skater has already engaged another member as a coach.[6] The PSA furthered the solicitation ban by highlighting in its magazine and online, including providing examples of prohibited comments (e.g., "I am much more qualified coach than _____ is" and "Join our program. That other program isn't very good.").[7] Finally, the PSA actually enforced the ban, including suspending one coach for six months and sanctioning eight other coaches.[8]

Unsurprisingly, given that the Supreme Court long ago ruled that similar conduct by trade associations violated the antitrust laws,[9] both the PLASMA and PSA entered into consent orders with the FTC in which they agreed to eliminate the challenged practices, and to provide antitrust compliance training to its members.[10]

Analysis

Antitrust requirements, as applied to trade associations, have long been relatively settled. The recent FTC actions are a reminder that trade associations must keep antitrust compliance in mind, particularly when drafting organizational documents or a code of conduct. Not even a small association of 25 members has escaped the FTC's notice.

In particular, trade association members should confirm that any association they belong to does not restrict members from competing with each other, whether through territorial restrictions, price lists, no-solicitation provisions, and the like. Those types of explicit restraints will likely invite FTC scrutiny.

Further, trade association members should avoid discussing with other members such matters as future pricing, employee wages, profits, or billing or fee arrangements. The association itself may, in certain circumstances, compile and disseminate such historical information, but it must be done with careful attention to antitrust law.

While no trade association welcomes an FTC enforcement action, the FTC did not impose monetary sanctions against the PLASMA or PSA. Certainly they went through the expense of hiring attorneys, and in the future they are required to pay attention to antitrust compliance requirements. But the key danger associations (and their members) face when investigated by the FTC is the likelihood of private litigants bringing follow-on Sherman Act complaints based on the conduct publicized by the FTC. Such cases can take years to resolve, and expose defendants to treble damages and plaintiff's attorney's fees. Moreover, the facts of the violations are laid bare by the FTC, making antitrust claims simple to assert (assuming the plaintiff has proper antitrust standing).

Trade associations have always faced antitrust scrutiny. Given the increased attention paid by the FTC, and danger and expense of private follow-on actions, they have even greater incentive at this time to police themselves and their members and assure compliance with antitrust requirements.

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[1] The FTC brought actions against *The National Association of Residential Property Managers, Inc.*, FTC Dkt. 131 0127, *available at*: http://www.ftc.gov/enforcement/cases-proceedings/141-0031/national-association-residential-property-managers-inc-matter; *National Association of Teachers of Singing, Inc.*, FTC Dkt. 141 0031, *available at*: http://www.ftc.gov/enforcement/cases-proceedings/131-0127/national-association-teachers-singing-inc-matter; *Music Teachers National Association, Inc.*, FTC Dkt. 131 0118, *available at*: http://www.ftc.gov/enforcement/cases-proceedings/131-0118/music-teachers-national-association-inc-matter; *California Association of Legal Support Professionals*, FTC Dkt 131 0205, *available at*: http://www.ftc.gov/enforcement/cases-proceedings/131-0205/california-association-legal-support-professionals-matter; *Professional Lighting and Sign Management Company of America, Inc.*, FTC Dkt. 141 0088, available at: http://www.ftc.gov/enforcement/cases-proceedings/141-0088/professional-lighting-sign-management-company-america-inc; and *Professional Skaters Association, Inc.*, FTC Dkt. 131 0168, *available at*: http://www.ftc.gov/enforcement/cases-proceedings/131-0168/professional-skaters-association-inc-matter

[2] *See* Complaint at 1-2, *In re: Professional Lighting and Sign Management Companies of America, Inc.*, FTC Dkt. 141 088, available at: http://www.ftc.gov/system/files/documents/cases/141223prolightingcmpt.pdf.

[3] *Id.*

[4] See Complaint at 1-2, *In re: Professional Skaters Association, Inc.*, FTC Dkt. 131 0168, available at: http://www.ftc.gov/system/files/documents/cases/141223proskaterscmpt.pdf.

[5] *Id.* at 2.

[6] *Id.* at 2-3.

[7] *Id.* at 3.

[8] *Id.* at 4-5.

[9] *See National Society of Prof'l Engin. v. United States*, 435 U.S. 679 (1978) (upholding Justice Department's challenge to ethical rule forbidding members from engaging in competitive bidding)).

[10] *See* Agreements Containing Consent Orders, *available at*: http://www.ftc.gov/system/files/documents/cases/141223prolightingorder.pdf, and http://www.ftc.gov/system/files/documents/cases/141223proskatersorder.pdf.

Revised Clayton Act/Hart-Scott-Rodino Premerger Notification Thresholds for 2015

By Mary K. Marks – New York, NY

On Jan. 15, 2015, the Federal Trade Commission (FTC) announced revised Hart-Scott-Rodino Act (HSR) reporting thresholds under which transactions will be reportable only if, as a result of such transaction, the acquiring person will hold voting securities, assets, or non-corporate interests valued above **$76.3** million, compared to $75.9 million in 2014. The newly adjusted HSR thresholds will apply to all transactions that close on or after Feb. 20, 2015.

In summary, the relevant HSR thresholds are:

Thresholds	Original Amount	2015 Adjusted Threshold
Size of transaction	$50 million	$76.3 million
Size of Person (if applicable)	$10 million and $100 million	$15.3 million and $152.5 million
Size of Transaction above which Size of Person test does not apply	$200 million	$305.1 million

Corresponding increases will also apply to certain other thresholds and exemptions under the HSR Act. The complete list of revised HSR thresholds is available on the FTC's website.

For reportable transactions, the acquiring person's holdings must cross the threshold with respect to which the HSR notification is made within one year of the expiration or early termination of the HSR waiting period. Once the acquiring person has crossed the applicable threshold during the first year, any additional acquisitions by the same acquiring person of the same issuer's voting securities will be exempt from notification during the five years following the expiration or early termination of the waiting period, up to the highest value of the threshold range for which the HSR notification was made. For purposes of this exemption, any subsequent acquisition by the acquiring person would be subject to the adjusted thresholds in effect when the subsequent acquisition is consummated.

HSR filing fees remain as follows:

2015 Adjusted Thresholds	Filing Fee
Transaction valued at greater than $76.3 million but less than $152.5 million	$45,000
Transaction valued at greater than $152.5 million but less than $762.7 million	$125,000
Transaction valued at $762.7 million or greater	$280,000

Non-merger HSR Act Reporting Scenarios

Transaction parties generally are familiar with HSR Act reporting in connection with mergers and acquisitions, but the Act is not limited to the acquisition of control of one entity by another. HSR Act reporting requirements also may come into play in the context of executive compensation, "internal" reorganizations, and acquisitions of control that lead to indirect secondary acquisitions of minority positions in another entity's voting securities. At this time of year it is good to review HSR Act reporting

requirements that apply to some acquisitions made outside of the merger context and what parties should do if a filing obligation has been missed.

1. Executive Compensation Involving Voting Securities

The HSR Act applies to all acquisitions of voting securities in excess of the thresholds unless an exemption applies. For HSR Act purposes, voting securities are those that at present or upon conversion entitle the holder to vote for the election of directors of the issuer, but only the acquisition of voting securities with the current right to vote for directors are subject to the reporting requirements of the HSR Act. The subsequent conversion of a security with a future right to vote for directors (e.g., an option) into a security with the current right to vote for directors (e.g., common stock) is considered an acquisition of the underlying security, and may trigger the HSR Act's reporting requirements. While some voting stock investments are exempt when made "solely for the purpose of investment,"[1] the FTC staff has taken the position that the exemption is not available to a person who intends to influence the basic business decisions of the issuer or participate in its management. Thus, executives of the issuer cannot rely on this exemption.

Executives may receive or acquire company voting stock based on their own investment decisions or in connection with larger transactions involving their employer. Whether these acquisitions are voluntary (e.g., open market purchases or company-level transactions with third parties) or passive (e.g., dividend reinvestment by a 401(k) plan), the type of transaction is not dispositive for HSR Act analysis. All voting securities of the issuer held by the executive after a given acquisition are relevant for the reportability analysis. Thus, it is important to aggregate the value of the new voting securities to be acquired with all of the other voting securities of the issuer then held by the executive. Holdings of an executive's spouse or minor children are aggregated with those held directly by the executive for HSR Act purposes.

Securities received as compensation may trigger reporting requirements under the HSR Act upon the receipt, exercise or vesting of the security. The key issue is: when does the executive acquire voting securities with the current right to vote for the election of directors of the issuer. Stock grants immediately confer securities but may be subject to forfeiture, while stock options and stock-settled stock appreciation rights require an affirmative exercise decision (after vesting or payment of an exercise payment), and other awards may be subject to vesting requirements, requiring HSR analysis of each situation based on the particular facts. A full discussion of the issues is available Winter 2011-2012 Antitrust Quarterly HSR Article.

2. Internal Reorganizations

Although many internal reorganizations are exempt from the HSR Act's reporting requirements as "intraperson transactions," certain reorganizations involving affiliated corporations, limited partnerships or limited liability companies that do not have a common 50 percent investor may require HSR notification.[2] A common investment manager, general partner or managing member will not cause separate legal entities to be under common HSR control in the absence of a 50 percent equity position in each of the entities. If the buyer and seller do not share a 50 perecent investor, then a reorganization viewed by the parties as "internal," (e.g., when a subsidiary of the seller partnership is "transferred" to the buyer partnership), may be a reportable event under the HSR Act if the thresholds are met and an exemption does not apply.

Likewise, certain reorganizations from one type of entity to another type (or reincorporation in another state) may trigger an HSR reporting requirement. Although both entities may have the same capital

structure, if they do not share a 50 percent investor the conversion could trigger reporting requirements if any new assets are contributed to the new entity, or if an investor's relative percent holding in either entity increases.

3. Secondary Acquisitions

HSR reporting for acquisitions of control cover ownership of all entities that are 50 percent owned by the target (primary transaction). However, minority positions held by the target are not under common HSR control with the target, and their acquisition is subject to separate HSR Act analysis by the acquiring person. It may be the case that an HSR filing is required for the primary transaction and a separate HSR filing is required for the secondary transaction. The HSR Act's reporting and waiting period requirements must be observed for both filings before the primary transaction may be consummated.

In addition, although a secondary acquisition may be exempt from the reporting requirements of the HSR Act, it is not exempt from the HSR Act merely because the primary acquisition is exempt. Thus, when the primary transaction is valued in excess of the size of transaction threshold, but still may not be reportable under the HSR Act due to an exemption or valuation below the "size of parties" test, an acquiring party should still inquire as to any minority positions held by the primary target that could independently trigger an HSR Act reporting requirement.

Action to Take In the Event of A Missed HSR Filing

If an acquiring party finds itself in the position of possibly having missed an HSR reporting requirement related to a merger or in any of the non-merger situations discussed above, prompt voluntary filings are key to avoiding or minimizing potential penalties, especially with respect to a first, inadvertent violation. The FTC will consider whether the violation was the result of understandable or simple negligence, or whether the parties realized any benefit that they would not have realized had the filing been made and the waiting period observed. Depending on the circumstances, the FTC may decide to pursue civil penalties of up to $16,000 for every day that the parties have been in violation, generally beginning with the day the transaction was consummated and ending on the day the waiting period with respect to the post-consummation HSR filing expired.

If a missed filing is identified, the party(ies) in violation must send an explanatory letter to the antitrust agencies that explains the facts and includes a detailed description of the steps that have been taken to ensure future compliance. The FTC advises that these steps should include some or all of the following: (i) implementation of training programs by antitrust counsel; (ii) monitoring of company dealings for HSR purposes by the Chief Financial Officer and the General Counsel; (iii) establishment of an HSR review committee; and (iv) inclusion of HSR provisions on acquisition checklists.

New Thresholds Announced With Respect to Prohibited Interlocking Directorates

The FTC also announced revised thresholds above which companies are prohibited from having interlocking memberships on their boards of directors under Section 8 of the Clayton Act. Clayton Act Section 8 generally prohibits a person from serving as a board member or board-elected/appointed officer of two or more competing corporations. These prohibitions do not apply unless each of the companies has combined capital, surplus, and undivided profits in excess of an adjusted threshold, which has been raised to $31,084,000 (Section 8(a)(1)). There is a safe harbor where the competitive sales of either entity are less than an adjusted threshold, which has been raised to $3,108,400 (Section 8(a)(2)(A)), the competitive sales of either entity are less than 2 percent of that entity's total sales, or the

competitive sales of each entity are less than 4 percent of their respective total sales. The new Section 8 thresholds became effective Jan. 20.

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[1] The "investment intent" exemption covers certain "passive" investments up to 10 percent of the outstanding voting securities of an issuer, regardless of value. Investors may "lose" this exemption (and be subject to the HSR Act's reporting requirements) if they acquire over 10 percent of the outstanding voting securities of the issuer or if they change their original intent and thereafter acquire additional shares.

[2] To be under separate control for HSR purposes, corporations must have different persons with a right to designate 50 percent or more of their respective directors, and different 50 percent investors.

Europe Developments

Antitrust Damages in Civil Actions: Will the New Directive Open the Floodgates?

By Hans E. Urlus, Ilana Haramati*, and Teresa Charatjan – Amsterdam

On Dec. 26, 2014, the Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union entered into force (Directive). The Directive's principal purpose is to harmonize the procedures throughout the EU Member States for private plaintiffs' bringing follow-on damages claims in antitrust actions.

Perhaps most significantly, the Directive effectively permits follow-on damages actions for antitrust claims for the first time in several EU Member States. Opening several jurisdictions to these follow-on actions has the potential of increasing the total number of follow-on damages claims for a given antitrust case, and thus may significantly increase the financial exposure for businesses involved in anticompetitive conduct.

Although the Directive is liberal in several respects, the European Commission stated in a press release relating to the Directive that "the European approach does not conceive private damages actions as a tool for punishment and deterrence of those who breach antitrust rules."[1] Rather, the Commission explained that in its view, "Private and public enforcement are complementary tools: their combination will create a stronger enforcement of EU antitrust rules overall. This is why the Directive includes measures to optimize the interplay between these two tools and to avoid any undue interference of private damages claims with effective public enforcement."

Nevertheless, the Directive includes a number of specific noteworthy provisions easing potential private follow-on plaintiffs' evidentiary burden, and thus lowering the hurdles to bringing follow-on claims. First, the Directive makes a national competition authority's decision in a particular antitrust claim binding on the national courts, allowing private individuals to rely in their follow-on actions on a decision that an antitrust violation has occurred as prima facie evidence of the violation. This evidentiary boost should make it easier for private individuals to prevail in their follow-on actions. Second, it codifies a presumption "that cartel infringements result in harm." The presumption, unless rebutted by defendants, makes damages in cartel cases all but guaranteed. Third, the Directive works to facilitate private plaintiffs' ability to prove their cases, subjecting a broad range of documents to disclosure, and enabling disclosure across EU Member States. The Directive is also liberal in its definition of potential plaintiffs, permitting both direct and indirect purchasers harmed by anticompetitive conduct to seek compensation in follow-on damages suits.[2]

Although the Directive provides additional opportunities for follow-on damages claims, and lightens potential plaintiffs' procedural burdens, it remains to be seen whether it will actually open the floodgates for such claims, or only permit their use as an additional tool to "optimize" enforcement against antitrust violators.

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'Patent Wars'– Injunctive Relief Looking Less Likely Option for Standard Essential Patent holders

By Hans E. Urlus, Ilana Haramati*, and Teresa Charatjan – Amsterdam

Huawei v. ZTE, a case currently pending before the European Court of Justice (ECJ), presents the much-anticipated platform for the ECJ to adjudicate whether, and when, Standard Essential Patent (SEP) holders can obtain injunctive relief to enforce their rights in SEPs. The EU Advocate General's Nov. 26, 2014 opinion in this case provided additional insight into the dispute's development, and possible outcome.

As background, SEPs are patents so essential for the development, and implementation of a type of technology that they must be treated differently than ordinary patents. Owners of SEPs in the EU do not have the same proprietary rights as ordinary patent holders. Rather, once a patent is deemed an SEP, the patent holder must commit to the European Telecommunications Standards Institute (ESTI) to grant licenses to that patent on terms that are fair, reasonable and non-discriminatory (FRAND).

In this case, Huawei, the SEP holder, sued ZTE in Germany, requesting that the German court enjoin ZTE's use of Huawei's SEP as the parties had failed to agree on the FRAND terms. The case made its way up to the ECJ, which is currently considering it.

The EU Advocate General's Nov. 26 opinion is part of the ECJ decision-making process.[3] In the opinion, the Advocate General found that Huawei held a dominant position *vis-a-vis* ZTE, and generally found in ZTE's favor. Specifically, the Advocate General ruled that: (1) when an SEP holder and licensee cannot agree on license terms, the SEP holder should detail its proposed terms, including its royalty, which must be based on FRAND principles, and market terms, before it can take any further action against the licensee; (2) if parties cannot agree on FRAND terms, the licensee may (without being considered non-cooperative) request a court or arbitral tribunal to fix the terms; and (3) a licensee may, without being considered unreasonable, reject otherwise FRAND terms that curtail its ability to challenge the underlying patent rights' validity. However, the Advocate General's opinion also included some concessions to SEP holder's legitimate rights. These include that: (1) an SEP may obtain injunctive relief if the licensee is behaving in a "tactical or non-serious fashion;" and (2) an SEP may request that a licensee provide a bank guarantee or post a bond with the court to protect the SEP against financial harm based on the SEP's past or future use.

The Advocate General's decision reflects the position that an injunction by an SEP holder against a licensee should be the last resort. Other, less stringent, measures must be taken before an SEP holder will be able to obtain an injunction.

The Advocate General's stance, largely in favor of ZTE, is an important development in the dispute between Huawei and ZTE currently before the ECJ. Although the Advocate General's opinion is not binding on parties or on the ECJ, the ECJ has followed the Advocate General's opinion in a majority of cases. Therefore, the opinion may be instructive for SEP holders and licensees. Ultimately, however, Huawei, ZTE, and similar parties will have to wait for the ECJ's opinion, expected during the first half of 2015, for certainty on when and whether SEP holders will be able to obtain injunctions against SEP's use by licensees.

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[1] European Commission Press Release, *Antitrust: Commission proposal for Directive to facilitate damages claims by victims of antitrust violations – frequently asked questions* (Apr. 17, 2014), available at http://europa.eu/rapid/press-release_MEMO-14-310_en.htm.

[2] This diverges from the U.S. Sherman Act doctrine pursuant to *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), although a number of states in the UJS allow indirect customer suits.

[3] Advocate General opinion, last visited: 22-1-2015 http://curia.europa.eu/juris/document/document.jsf?text=&docid=159827&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=576044.

Enforcement of European Competition Law by the NCAs and More Particularly by the ACM

By Hans E. Urlus, Ilana Haramati*, and Teresa Charatjan – Amsterdam

National competition authorities (NCAs) are responsible for the national enforcement of (both national and European) competition law. Regulation 1/2003[1] empowered NCAs (and also national courts) to apply all aspects of European competition law, reducing some of the European Commission's burden in enforcing European competition law. Several NCAs combine competition law enforcement with other functions. In the Netherlands, the ACM (Authority for Consumers & Markets) has combined sector-based regulatory functions and competition supervision since its merger with the consumer authority and the postal and telecoms regulator.[2]

All European Union Member States' NCAs are obliged to enforce the same substantive rules as laid down in articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). However, the NCAs have a significant amount of discretion and flexibility to design their own enforcement regimes.[3] The only requirement that Regulation 1/2003 imposes on the NCAs is that they comply with the substantive terms of Regulation 1/2003. Thus, competition law enforcement in the European Union is largely decentralized. In order to evaluate this system and to determine whether there is room for improvement, the European Commission adopted the Communication on Ten Years of Regulation 1/2003 (the Communication). The European Commission concluded that despite that absence of explicit requirements in EU law for NCAs to apply uniform procedures when applying EU competition rules, there has been voluntary convergence of procedures across the EU jurisdictions. However, the degree of procedural convergence on procedures differs, and the NCAs' procedures often diverge, even as to some fundamental powers.[4]

The ACM chairman, Mr. Chris Fonteijn, in his Nov. 25, 2014 speech at the association for competition law, also touched upon this conclusion expressed in the Communication. Specifically, in his speech, the ACM chairman underlined that vertical restraints pose a high risk of harm to consumers when (i) such restraints are instrumentally used to facilitate collusion between producers, or (ii) when such restraints are used to exercise market power in a field where interbrand competition is already limited. However, the mere awareness of these high-risk situations has not, to date, triggered the ACM to apply a strict approach to vertical restraints, although the Austrian, French, German and British NCAs have adopted such an approach. The ACM's approach thus is not in harmony with that of several other NCAs in comparable jurisdictions.

The ACM now seeks to ensure that undertakings and consumers benefit from obvious efficiencies related to vertical agreements, but that they do not suffer from anticompetitive effects. Thus, it prioritizes those situations where there is a high risk of consumer harm.[5] In so doing the ACM seeks to provide consumers, companies, and their advisors transparency and predictability. To this end, the ACM will cooperate with other NCAs and the European Commission in order to reduce legal uncertainty.

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[1] Council Regulation (EC) No 1/2003 of Dec. 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ 2003 L1, 4.1.2003).

[2] April 1, 2013.
[3] See Communication from the Commission to the European Parliament and the Council, 'Ten years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives', COM (2014) 453, at 4. See also Commission White Paper, 'Towards more effective EUR merger control' of July 9, 2014, COM (2014) 449 final.
[4] Communication from the Commission to the European Parliament and the Council, ' Ten years of Antitrust Enforcement under Regulation 1/2003: Achievements and Future Perspectives', COM (2014) 453, at 18
[5] Speech, Association of Competition law meeting Nov. 25, 2014: ACM's strategy regarding enforcement of vertical restraints.

Confirmation of the EU Parental Liability Doctrine

By Hans E. Urlus, Ilana Haramati*, and Teresa Charatjan – Amsterdam

In a Dec. 30, 2014 decision, the Dutch competition authority, the Authority for Consumers & Markets (ACM), followed the European Commission's parental liability doctrine for infringements of article 101 of the Treaty on the Functioning of the European Union (TFEU). For the first time in the Dutch competition enforcement history, the ACM imposed fines on the former private equity firms that invested in the Dutch flour producer Meneba Meel B.V. (Meneba).

The case concerned the participation of Meneba in a price and output-limiting "flour-cartel" from 2001 to 2007, which infringed Article 101 TFEU and the Netherland's equivalent of that article (Article 6 of the Dutch Competitive Trading Act). In 2010, the ACM imposed fines on (amongst others) Meneba and its direct shareholder Meneba B.V., as well as the latter's direct shareholder Meneba Holding B.V. (Meneba Holding). Based on the advice of its Advisory Committee, the ACM conducted a more detailed investigation to assess whether Meneba's infringement could be attributed to the shareholders of Meneba Holding B.V., the private equity companies Capital Investors Group Limited ("CIGL"), CVC Capital Partners Europe Limited (CCPEL) and CVC European Equity Limited (CEEL).[1]

In its Nov. 20, 2014 decision, published on Dec. 30, 2014, the ACM decided that Meneba's conduct was attributable to Meneba Holding's former owners–CIGL, CCPEL and CEEL–on the basis of the parental liability doctrine. The ACM based this conclusion on its finding that the controlling shareholders exercised decisive influence over Meneba during the period of their ownership. The decisive influence of the private equity funds was grounded on the relationship between Meneba and the private equity funds from organizational, economic, and legal perspectives.

The Meneba case demonstrates that the parental liability doctrine is based on the principle that parent companies that have a decisive influence over the commercial policies of their subsidiaries can be held liable to the same extent as their directly infringing subsidiary.

Previously, the European Commission had announced on Sept. 3, 2014, that it had fined four smart card chip producers a total of EUR 138 million ($210 million) for breaching Article 101 TFEU and Article 53 of the Agreement on the European Economic Area (EEA), and held the parent company liable even though it had divested its smart card chips subsidiary after the infringement.

To determine whether a parent company has decisive influence over an infringing subsidiary, several factors should be considered. In its Dec. 13, 2013 decision,[2] the General Court of the European Union[3] indicated that the following factors will be taken into account in this inquiry:

i. whether the parent company presents the cartel participant as part of its group;

ii. whether the parent company controls the cartel participant's supervisory board;

iii. whether the parent company obtains the cartel participant's report on its commercial activity;

iv. whether the parent company has an influence on the nomination of the cartel participant's members of management;

v. the fact that the parent company and the cartel participant are not active in the same field does not preclude the parent company to have a decisive influence; and

vi. whether the parent company and the cartel participant form a single economic entity.[4]

The General Court furthermore determined that when a parent company has an 100 percent shareholding in a subsidiary that infringed the competition rules of the European Union, the parent company can exercise decisive influence over the conduct of the subsidiary and, moreover, there is a rebuttable presumption that the parent company does in fact exercise such decisive influence. In those circumstances, it is sufficient to prove that the subsidiary is wholly owned by the parent company to trigger the presumption that the parent company exercises a decisive influence over the commercial policy of the subsidiary. In these circumstances, the parent company can be regarded as being jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company, which has the burden of rebutting that presumption, adduces sufficient evidence to show that its subsidiary acts independently on the market.[5] In the *Meneba* case, the ACM applied these factors and presumptions to hold the parent company and the controlling shareholders liable for Meneba's violation.[6]

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[1] ACM decision of Nov. 20, 2014, para. 4.
[2] This decision concerned the General Court's assessment of the imposed fine by the European Union on a parent company of an entity that had participated in a cartel in the calcium carbide and magnesium sector.
[3] The intermediate appellate court of the European Union.
[4] General Court T-399/09 decision of Dec. 13, 2013.
[5] General Court T-399/09 decision of Dec. 13, 2013, para. 16.
[6] ACM decision of Nov. 20, 2014 para. 106 *et seq.*

China Developments

Tencent vs. Qihoo –A Significant 2014 Anti-monopoly Ruling in China

By Dawn Zhang and Eric Zhang– Shanghai

After an almost two-year litigation marathon, the Supreme People's Court of China (Supreme Court), in October 2014, upheld the ruling of the Guangdong High Court (High Court) that Tencent QQ did not abuse a market dominance position under the Anti-monopoly Law of People's Republic of China (AML).

Background

In 2010, Qihoo, an advanced and free computer security and antivirus software and solution supplier in China, claimed that Tencent, through its famous instant message software QQ, was invading and thieving the privacy information of its QQ users. Tencent retaliated against Qihoo by disabling the compatibility of QQ with Qihoo safe guard software, and published a letter to its QQ users asking them to take sides on behalf of either Tencent or QQ. As a consequence, some of the QQ users uninstalled Qihoo safe guard software. Additionally, Tencent also offered QQ Apps Manager, the security software developed by Tencent and integrated with QQ, without charge to its QQ users, which Qihoo claimed to be unlawful bundling sales.

Since the fuse was ignited and neither party was in the mood for burying the hatchet, Tencent and QQ started their lawsuits respectively, among all of which the most famous was the one brought by Qihoo based on the AML.

Questions

Before summarizing the appellate case heard by the Supreme Court, we draw your attention to the following issues, which are the pivots for the ruling in the case:

- What was the relevant market, both in products and geography?
- Did Tencent have market dominance in the determined relevant market?
- Were there bundled sales activities when Tencent offered QQ together with QQ Apps Manager?
  - If so, did Tencent abuse its market dominance position to restrict free competition in the relevant market?

Case

Relevant Market. The Supreme Court narrowed down the perimeter of the relevant market defined by the High Court, determining that the relevant market was instant message services in China, including non-generic instant message service based on text, audio, and video or a generic combination of text, audio, and video on both personal computer ports and mobile ports. Pursuant to an SSNIP test (Small but Significant and Non-Transitory Increase in Price), the Supreme Court pointed out that instant message service in its fee-free model was supported by the revenue from advertisements and other add-value telecommunication service, which resulted in the competitors' focuses on the quality, service, and

creativity of their products, rather than their price. Even a zero SSNIP may possibly drive myriad users to flee to other competitors.

Market Dominance Position. Based on the evidence furnished by Qihoo and Tencent, the Supreme Court, ruled that Tencent didn't have market dominance in the relevant market. The Court declared that. pursuant to the AML and related regulation, in order to determine whether a competitor has a dominant market position, the following criteria should apply:

> Market share and the competition status quo in the relevant market;
> Sales and sourcing capability in both upstream and downstream markets;
> Financial and technology conditions;
> Reliance of other competitors on the applicable competitor; and
> Difficulty for others to enter the relevant market.

The AML and related regulation declare that when a competitor occupies at least a 50 percent share of the relevant market, the competitor can be presumed to have market dominance.

Even though Tencent dominated more than an 80 percent share of the instant message market on both personal computer port and mobile port, however, the Supreme Court controversially held that high market share in the relevant market didn't alone mean that Tencent had a dominant market position. The Supreme Court declared that market share was a rough and sometimes misleading criterion to determine market dominance. Competition in the Internet industry was influx, and the boundary of the relevant market, compared with traditional industries, was vague and difficult to determine. In this circumstance, Tencent's high market share may possibly not have been a direct indictor to infer market dominance.

Abuse of Market Dominancy Position. Despite determining that Tencent did not have-market dominance, the Supreme Court analyzed the effect on competition that would be caused by the claimed abuse of market dominance in order to test the correctness of the conclusion that Tencent didn't have market dominance. Disabling the compatibility of QQ with Qihoo's safe guard software restricted the system and environment where QQ might operate, but that did not mean that it restricted competition in the instant message market. The Court determined there are many fungible products in the instant message market, and QQ was not indispensable for its users. Therefore, the disability of compatibility would not cause material adverse effect to the users. The Court determined:

> *There was no corroborative evidence to prove that Tencent's disabling compatibility against Qihoo was intended to keep other potential competitors from the instant message market. Instead, such behavior was only retaliation against the accusation of unfair competition by Qihoo; and, actually brought competitiveness to the instant message market because other instant message competitors achieved active user increases following the behavior.*

As a result the Supreme Court held that Tencent's disabling compatibility behavior was not abuse of market dominance, confirming that Tencent did not have a dominant position in the relevant market.

Qihoo also claimed that Tencent abused its market dominance by bundling the QQ Apps Manager to QQ, which was contrary to business custom and unreasonably restricted the users' option right. The Supreme Court held that, in the absence of corroborative evidence, it was not proven that Tencent had leveraged

its asserted market dominant position in the instant message market into the security software market. Also it declared that no evidence showed that Tencent's bundling QQ Apps Manager resulted in a significant decrease in competition in the security software market, where Qihoo dominated 70 percent or more. In addition, the Supreme Court determined that the bundling of QQ Apps Manager with QQ was commercially reasonable, because these two forms of software can integrate together and serve users better as a result.

As a consequence, the Supreme Court held that Tencent didn't have a market dominance position in the relevant market. Accordingly, the Supreme Court rejected Qihoo's claims, and upheld the award made by the High Court that Tencent did not abuse a dominant position in the relevant market.

Qihoo vs. Tencent is the first Internet related anti-monopoly case heard by the Supreme Court. The analysis of relevant market, market dominance and bundling made by the Supreme Court may become the kind of analysis used by the enforcement authorities in China with respect to other markets.

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