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Antitrust Quarterly

Spring 2015

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U.S. Developments

Parallel Texts: Tacit Collusion Still Legal

By John J. Elliott and Scott Martin – New York, NY

Although it cited but a single case, a Seventh Circuit panel exhaustively addressed the crucial antitrust standard for examining parallel conduct in its April 9, 2015 affirmance of a defense summary judgment in *In re: Text Messaging Antitrust Litigation*.[1] Judge Richard Posner authored the unanimous opinion in this class action alleging a price-fixing conspiracy involving pay-per-use text messages – an opinion that was expressly intended to "help lawyers understand the risks of invoking 'collusion' without being precise about what they mean."[2]

Background

Between 2005 and 2008, each of the four major wireless network providers (which collectively dominated the text messaging market) increased the prices charged to send or receive per-use text messages (*i.e.*, those not purchased in a bulk package) from as low as 2 cents to 20 cents.[3] Congressional and Department of Justice Antitrust Division investigations followed,[4] as did numerous class action lawsuits alleging that the companies had conspired to increase their text message prices. Those lawsuits were consolidated in 2009 in a multidistrict litigation in the U.S. District Court for the Northern District of Illinois.[5]

In 2010, the district court denied a motion to dismiss an amended consolidated complaint,[6] and the Seventh Circuit allowed an interlocutory appeal. The appeal was of particular interest to the antitrust bar because previously the Seventh Circuit had "only twice discussed the application of [the Supreme Court's pleading standard in] *Twombly*[7] to antitrust violations, and in both cases only in passing."[8] Judge Posner wrote the opinion, affirming the lower court's ruling on the ground that, consistent with *Twombly*, plaintiffs had stated a "plausible" conspiracy claim. Judge Posner noted that many of the allegations of the complaint indeed were both consistent with a possible conspiracy as well as with parallel behavior undertaken independently, but allowed the case to go forward, observing that the plaintiffs may find in discovery "the smoking gun or … additional circumstantial evidence that further tilts the balance in favor of liability."[9]

There followed three years of discovery, after which the district court granted summary judgment in favor of the defendants.[10] Plaintiffs appealed.

The Seventh Circuit Opinion

Judge Posner took the opportunity on his second review of the case to provide a thorough guide to the differences between consciously parallel and collusive conduct in a Sherman Act Section 1 conspiracy claim. The decision offered hypotheticals, behavioral economics, and an argument in favor of keeping tacit collusion legal despite the conflicting view of a noted antitrust scholar (Louis Kaplow). The decision provides a robust defense of companies mirroring their competitors' price increases. It makes plain that, absent an extraordinary set of parallel actions that are absolutely inexplicable absent collusion or a smoking gun admission of collusion, proving a conspiracy case in the Seventh Circuit will be extremely difficult.

Judge Posner began by quoting extensively from his earlier decision in the case, stressing the reasons he had discerned a "plausible" conspiracy at the pleading stage:

> we pointed to the small number of leading firms in the text messaging market, which would facilitate concealment of an agreement to fix prices; to the alleged exchanges of price information, orchestrated by the firms' trade association; to the seeming anomaly of a price increase in the face of falling costs; and to the allegation of a sudden simplification of pricing structures followed very quickly by uniform price increases.[11]

He noted that many of these allegations could have naturally resulted from market forces pushing the competitors to independently coordinate their pricing "without an actual agreement to do so" – permissible "conscious parallelism" (in legal parlance), also called "tacit collusion" (in the language of economists). The "challenge" faced by "the plaintiffs in discovery was thus to find evidence that the defendants had colluded expressly...."[12] The Seventh Circuit Panel failed to find such evidence.

The purported "smoking gun" evidence plaintiffs offered – emails between two employees of one of the companies characterizing the company's price move as "colusive *[sic]*" – did not demonstrate a "conspiracy among the carriers," according to the Seventh Circuit.[13] The evidence actually pointed only to lawful "tacit collusion." The argument that the emails amounted to an improper agreement, according to Judge Posner, demonstrated plaintiffs' counsel's "failure to understand the fundamental distinction between express and tacit collusion. Express collusion violates antitrust law; tacit collusion does not."[14]

Judge Posner then turned to Professor Kaplow's argument that tacit collusion should be "deemed a violation of the Sherman Act."[15] That standard, according to Judge Posner, would provide "perverse" incentives to market competitors and potential competitors. It would turn antitrust law into a "scheme resembling public utility price regulation, now largely abolished."[16]

The "problem" that antitrust plaintiffs find is that market behavior arising from permissible tacit collusion can also arise from impermissible express collusion. Circumstantial evidence of express collusion, Judge Posner continued, "might be a decline in the market shares of the leading firms in a market;" "inflexibility of the market leaders' market shares over time;" "a surge in nonprice competition;" and "a high elasticity of demand." However, "these phenomena are consistent with tacit as well as express collusion; their absence would tend to negate both, but their presence would not point unerringly to express collusion."[17]

Plaintiffs had argued that the four wireless carrier defendants, which comprised 90 percent of the text messaging market, only raised their text message pricing because they had agreed to act in concert. If they did not conspire, Plaintiffs' counsel contended, customers would have signed up with any competitor that did not raise its prices.[18] Judge Posner offered six reasons why the structure of the market, and the incentives each carrier faced, made it just as likely that the defendants had all raised prices independently.[19] These reasons ranged from how a "rational profit-maximizing seller" views losing customers (it cares far more about "its total revenues relative to its total costs"); to the fact that the companies might have wanted to raise individual text message pricing to push customers into buying text messages in bulk ("bundled" plans). If the carriers were going to conspire to fix prices, according to Judge Posner, they would have done so in the much larger bundled plan market.

Further, Judge Posner found factual inconsistencies in plaintiffs' argument. The companies did not raise their prices simultaneously. In fact, one carrier kept its price lower than the others for several months. More significantly, that carrier did not gain a "significant number of customers" due to its lower prices during that period.[20] Ultimately, the panel's decision concluded, plaintiffs did not offer enough circumstantial evidence to infer an agreement to raise prices. The circumstantial evidence plaintiffs offered either contradicted the likelihood of collusion or was consistent with parallel behavior.

The court also discredited plaintiffs' allegations that defendants had the opportunity to, and did, exchange pricing information at trade group meetings. While opportunities for "senior leaders of the defendants to meet privately" at the trade group retreats "abounded," two facts cut against plaintiffs' contention: there were "substantial lags" in the "simultaneous price increase[s]" instated by defendants; and there was "no evidence of what information was exchanged at these meetings."[21] As such, there was no basis for an "inference that they were using the meetings to plot" price increases.[22]

The Decision in Perspective

The Seventh Circuit's decision is a clean bookend to its 2010 decision allowing the case to proceed. In 2010, applying *Twombly* specifically for the first time to an antitrust conspiracy claim, the appellate court found enough "parallel-plus" allegations to make collusion "plausible." At the end of the day, however, with plaintiffs having not discovered sufficient pre-trial evidence tending to prove conspiracy, the Seventh Circuit failed to find genuine issues of fact to allow the case to proceed to trial. Judge Posner was explicit as to the failings of the pre-trial evidence: it is "difficult to prove illegal collusion without witnesses to an agreement."[23] Many of the hallmarks of collusive behavior, according to Judge Posner, are also consistent with independent conduct.[24] And circumstantial evidence "consistent with an inference of collusion, but … equally consistent with independent parallel behavior" is not enough to survive summary judgment.[25] Significantly, the panel hearing the case was unanimous in its decision despite including both Judge Posner, widely considered a conservative arbiter of antitrust theory, and Judge Diane Wood, who is generally viewed as a pro-enforcement antitrust judge.[26]

The Seventh Circuit panel emphasized that in a concentrated industry, courts should "expect competing firms to keep close track of each other's pricing and other market behavior," and to imitate it, rather than undermine it.[27] While it may look like a possible antitrust conspiracy when companies in an oligopoly all adopt price increases, absent much more the claim will fail. Without a witness to an agreement, to defeat summary judgment antitrust plaintiffs will have to uncover behavior that is incompatible with tacit collusion. Conversely, defendants may have to retain experts who can offer rational economic explanations for seemingly damning, or at least problematic, evidence. The wireless carriers and their trade organization did that, and their arguments carried the day.

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[1] *In re: Text Messaging Antitrust Litig.*, No. 14-2301 (7th Cir. April 9, 2015), ("Slip Op.").
[2] *Id.* at 21.
[3] *Id.* at 14.
[4] *Id.*
[5] *Id.*
[6] *See In re Text Messaging Antitrust Litig.*, No. 08 C 7082, 2010 WL 1782006 (N.D. Ill. April 30, 2010).
[7] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).
[8] *In re Text Messaging Antitrust Litig.,* 630 F.3d 622, 626-27 (7th Cir. 2010).
[9] *Id.* at 629.
[10] *See In re Text Messaging Antitrust Litig.*, No. 08 C 7082, 2014 WL 2106727 (N.D. Ill. May 19, 2014).
[11] Slip Op. at 5.
[12] *Id.* at 6-7.
[13] *Id.* at 9.
[14] *Id.* at 8.
[15] *Id.* at 10.
[16] *Id.* at 11.
[17] *Id.* at 17.
[18] *Id.* at 17.
[19] *Id.* at 17-19.
[20] *Id.*
[21] *Id.* at 20-21.
[22] *Id.* at 21.
[23] *Id.*
[24] *Id.* at 17.
[25] *Id.*
[26] The third member of the panel was Judge John Daniel Tinder.
[27] Slip Op. at 17.

Kodak's Pricing Policy for Printer Parts and Ink Gets Jammed By the Sixth Circuit

By Ryan Harsch & Irving Scher – New York, NY

On March 16, 2015, in *Collins Inkjet Corp. v. Eastman Kodak Co.*,[1] the Sixth Circuit became the first court of appeals to adopt a cost-based test for determining when a supplier's differential pricing policy for joint sales of two products constitutes an "economic" tying claim that violates Section 1 of the Sherman Act.

Tying Arrangements

A tying arrangement generally refers to a supplier's policy "to sell one product … only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier."[2] Such a conditioned sale is unlawful when the supplier has "appreciable economic power" in the market for the desired or "tying" product, and the arrangement "affects a substantial volume of commerce" in the market for the "tied" product the buyer would have preferred to buy elsewhere.[3] While tying is usually accomplished via an explicit requirement, in some cases, economic or "non-explicit" tying has been found when a pricing policy makes it unreasonably costly for the customer to buy the tying product without also buying the tied product.[4] This is akin to the proverbial "offer you can't refuse." Determining exactly where that line has been crossed between lawful packaged sales and an unlawful economic tie was the issue before the Sixth Circuit in *Collins*.

Factual Background

Defendant Kodak Corporation (Kodak) manufactured Versamark printing systems, which are large and costly devices that have a life span of 10-20 years and are primarily used by commercial printers. Users of Versamark printing systems from time to time need to purchase refurbished printer components known as "printheads,"which are available only from Kodak, as well as ink specially made for the Versamark printers. Kodak competed with plaintiff Collins Inkjet Corp. (Collins) on sales of Versamark ink.[5]

In 2013, Kodak adopted a new pricing policy under which customers paid different prices for refurbished printheads based on the brand of ink the customer purchased. Customers who purchased Kodak ink would thereafter pay much lower prices for printheads than customers who purchased Collins ink. Collins filed suit, alleging that Kodak's differential pricing policy violated Section 1 of the Sherman Act, and sought to enjoin Kodak from "charging Collins ink customers higher prices for refurbished printheads."[6]

The Sixth Circuit Decision

The district court granted the preliminary injunction sought by Collins, relying on *Virtual Maintenance v. Prime Computer*,[7] in which the Sixth Circuit had declared that a non-explicit tying arrangement was unlawful if the individual price for the tying product was so high that "all rational buyers" would purchase the tied product along with it. The Sixth Circuit affirmed the district court's injunction, but implicitly rejected its earlier "all rational buyers" test, noting that it had not actually adopted that standard in *Virtual Maintenance*, but had used the phrase only in dicta.[8]

The Sixth Circuit observed that differential pricing of the nature challenged by Collins is usually pro-competitive, because "competitive sellers generally aim to make their products significantly cheaper than their competitors' and there is nothing inherently wrong with doing so via differential pricing."[9] The relevant concern, according to the Sixth Circuit in *Collins*, is whether the defendant was using its market power in the tying product to drive out efficient competitors in the tied product market.[10] To avoid such a result, the court declared that a differential pricing policy is not unlawful "unless the differential pricing is the economic equivalent of selling the tied product below the defendant's cost."[11]

To make that determination, the Sixth Circuit panel adopted the "discount attribution" standard established by the Ninth Circuit in *Cascade Health Solutions v. PeaceHealth*[12] for Section 2 monopolization claims involving bundled discounts. Under that test, the full amount of the discounts in a bundle of products is attributed to the competitive product – in *Collins*, the allegedly "tied" product. If the resulting price is below the defendant's average variable – or "incremental" – cost for the tied product, then the arrangement is unlawful.[13] Although there apparently was no evidence of Kodak's incremental costs in the district court record, Kodak had stated that its profits decreased when a customer switched from non-Kodak to Kodak ink. This suggested to the court that Kodak's price for the ink was below its incremental cost of producing the ink, if the full amount of the printhead discount was attributed to the price Kodak charged for the ink.[14] Accordingly, the pricing program failed the discount attribution standard, and the Court determined that Collins demonstrated a likelihood of success on its tying claim.

The Sixth Circuit then ruled that the other preliminary injunction factors also favored Collins. Although lost profits would seem to be compensable by money damages, the court concluded that in this instance, lost sales and market share could damage Collins' goodwill and competitive position in ways that would be difficult to quantify, and thus it faced the prospect of irreparable harm. Moreover, according to the Sixth Circuit, the injunction would not harm Kodak because it would not prevent it from competing with Collins "on a fair playing field."[15]

Analysis

Collins is notable as apparently the first time a court of appeals has articulated a "cost-based" standard for determining whether a differential pricing policy is sufficiently coercive to constitute unlawful tying. It remains to be seen whether courts outside the Sixth Circuit will follow its ruling. There is little doubt that the "all rational buyers" test previously adopted by the Sixth Circuit creates subjectivity as to what a hypothetical "rational" buyer would do. The cost-based approach adopted by the Sixth Circuit is a more objective standard, although it is more akin to a predatory pricing analysis than to a traditional tying analysis, which typically focuses on whether the customers were "coerced" into buying the tied product. Like the Ninth Circuit in *PeaceHealth* (in the context of a Section 2 claim), the Sixth Circuit did not add a requirement that the defendant would likely be able to recoup its losses after it discontinues the challenged policy, a requirement the Supreme Court has imposed in predatory pricing cases. Although individual competitors may be harmed by below-cost pricing when monopoly power is not present, consumers could benefit from the lower prices and overall competition may not be unreasonably restrained.[16]

It also is unclear whether the Sixth Circuit properly applied the discount attribution standard adopted in *PeaceHealth*, which used "average variable cost" in making its determination. Although the Sixth Circuit in *Collins* stated that "incremental" cost is the relevant cost to be considered, it commented that the record before it suggested that Kodak failed the *PeaceHealth* test because it made less profit when it sold the two products jointly. However, profit typically is measured on the basis of total cost, not average variable cost.

Finally, it should be noted that the Ninth Circuit actually did consider a tying claim based on non-explicit economic coercion in *PeaceHealth*, but did not apply the “discount attribution” standard to that claim. Instead, it only considered whether there was sufficient factual evidence of coercion in the record to grant summary judgment on the tying claim. [17] The Sixth Circuit thus may have broken new ground by becoming the first court of appeals to harmonize the analysis of tying and discounted bundling claims, and it remains to be seen whether other courts will follow suit.

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[1] 781 F.3d 264 (6th Cir. 2015).
[2] *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5-6 (1958).
[3] *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 462 (1992).
[4] *Collins*, 781 F.3d at 272.
[5] *Id.*at 268.
[6] *Id.*at 268-69.
[7] 957 F.2d 1318 (6th Cir. 1992), *vacated and remanded on other grounds*, 506 U.S. 910 (1992).
[8] *Collins*, 781 F.3d at 268, 276-77.
[9] *Id.* at 271.
[10] *Id.* at 271
[11] *Id.* at 268.
[12] 515 F.3d 883 (9th Cir. 2007).
[13] *Id.* at 906.
[14] 515 F.3d at 275-76 & n.1.
[15] *Id.* at 279-80.
[16] See *Matsushita Elec. Indus. Co. v. Zenith Rasio Corp.*, 475 U.S. 574, 589 (1986); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222 (1993).
[17] 515 F.3d at 914-15.

Major FTC Exclusive Dealing Decision Upheld By the Eleventh Circuit

By Irving Scher – New York, NY

Introduction

In 2009, following passage of federal legislation that provided a large infusion of money for U.S. waterworks projects that required domestic ductile iron pipe fittings, Star Pipe Products (Star) entered the domestic fittings market. In response, McWane, Inc., which since 2006 was the only U.S. producer of domestic pipe fittings, announced to distributors that (with limited exceptions) unless they bought all of their domestic fittings from McWane, they would lose their rebates and be cut off from purchases for 12 weeks. Last month, the Eleventh Circuit upheld an FTC ruling that the actions constituted an illegal exclusive dealing policy used to maintain monopoly power in the domestic fittings market, in violation of Section 5 of the FTC Act.[1] In doing so, the circuit court adopted the FTC's factual and economic conclusions—that McWane had monopoly power in a product market for domestic fittings produced for domestic-only projects, and that its exclusivity program harmed competition. Specifically, the court held that the FTC's findings were supported by substantial evidence in the record, "as required by our deferential standard of review," and that the Commission's legal conclusions were supported by the governing law under the Federal Trade Commission Act, applying the monopolization standards of Section 2 of the Sherman Act.[2]

Background Facts

Ductile iron pipe fittings join together pipes and help direct the flow of pressurized water in pipeline systems. They are sold primarily to municipal water authorities by distributors. Although there are thousands of unique configurations, approximately 80 percent of the demand is for about 100 commonly used fittings.[3] While more than 80 percent of fittings are imported, a 2009 federal statute provided more than $6 billion to fund water infrastructure projects with domestic-only specifications, and some state laws require domestic materials in public projects, as do certain federal programs.[4] Prior to passage of the 2009 federal statute, competition from lower-priced imports drove most domestic producers out of the market, and by 2008 three major suppliers—McWane, Star, and Sigma—accounted for 90 percent of the fittings sold in the United States.[5] Moreover, two national distributors accounted for 60 percent of the overall waterworks distribution market.[6] Of most significance, from April 2006 until the federal legislation prompted Star to enter the domestic fittings market in late 2009, McWane was the only producer of domestic fittings.[7] Star did not at the outset open a foundry in the United States. Instead, while it sought to build up its business sufficiently to justify opening a foundry, Star contracted with six third-party foundries in the U.S. to produce fittings to its specifications.[8]

In response to Star's entry into the domestic fitting market, McWane implemented its "Full Support Program" to protect its market position. In a September 2009 letter to distributors, McWane declared that if they did not "fully support McWane branded products for their domestic fitting . . . requirements," they "may forgo participation in any unpaid rebates for domestic fittings . . . or shipment of their domestic fitting" of McWane products for up to 12 weeks."[9] The record indicated, however, that the Program was enforced only once, but apparently other distributors feared being cut off from McWane domestic fittings, and the two largest waterworks distributors, with more than 50 percent of distribution, refused to buy fittings from Star.[10]

Nevertheless, Star gained 5 percent of the domestic fittings market in 2010 and 10 percent in 2011.[11] It expected to do even better by the following year—which is when the FTC instituted suit. Star estimated that but for the McWane program its sales would have been greater by a multiple of three by 2011.[12] Star never built or bought a domestic foundry, the FTC finding that this was because Star believed its sales level was insufficient to justify doing so, adding that Star's costs would have been much lower if it had done so.[13] Star's average prices were higher than McWane's in several states.[14]

McWane's production costs for domestic fittings were flat, but it raised its prices despite Star's entry into the market, and increased its gross profits.[15] The duration of the Full Support Program was in dispute, McWane declaring that it ended in early 2010 and the FTC finding that it had never "publicly" withdrew the policy, and some distributors believed it remained in effect at least until the FTC brought suit in 2012.[16]

Based on the above summarized evidence, the FTC ruled 2-1 that McWane's Full Support Program unlawfully enabled it to maintain its monopoly of the domestic fittings market, which was a separate product market because of the higher prices charged for such products than imported fittings, and because imported fittings were not a substitute for domestic fittings in domestic-only waterwork projects.[17]

The Eleventh Circuit Opinion

A very important factor in the Eleventh Circuit opinion affirming the FTC decision was its view that it was required to review the FTC's findings of fact and economic conclusions under the "substantial evidence" standard that applies to the review of federal agency decisions. Under that standard, the agency's findings as to the facts are conclusive if the evidence is such that "a reasonable mind might accept as adequate to support a conclusion," even though it is less than a preponderance of the evidence. Moreover, although the court reviews *de novo* the legal conclusions and the application of the facts to the law, "we afford the FTC some deference as to its informed judgment that a particular commercial practice violated the Federal Trade Commission Act."[18]

After supporting the FTC's narrow market definition,[19] the Eleventh Circuit affirmed the Agency's monopoly power determination because the 90 percent market share McWane retained in 2011 far exceeded the levels courts typically require to support a prima facie showing of monopoly power, and the fact that McWane was able to raise its prices for domestic fittings and "earned significantly higher gross profits than for non-domestic fittings," despite Star's entry and growth, supported the conclusion that it had the "ability to control prices."[20] The court also affirmed the Commission's finding that significant barriers to entry existed in the domestic market because Star did not have business sufficient for it to build or purchase its own foundry, and, because McWane had tied up distributors accounting for more than 50 percent of the market, Sigma, the other major producer, had not entered the domestic fittings market.[21]

After opining that McWane still had monopoly power despite Star's two-year market share growth, the Eleventh Circuit ruled that the Full Support Program helped McWane maintain its monopoly power.[22] The court accepted the FTC's view that the program was an exclusive dealing policy that foreclosed Star's access to necessary distributors, which contributed significantly to Star's inability to purchase its own foundry.[23] Recognizing that the program was short-term and voluntary, and that exclusive dealing arrangements generally are lawful, the court concluded that the program nevertheless contributed to key distributors "freezing out" Star, and deprived it of distribution sufficient to achieve effective scale, thereby raising its costs and slowing or even preventing its successful market entry.[24] Moreover, McWane's prices were not adversely affected by Star's market entry, and it actually raised prices and increased its gross profits.[25] Finally, the court referred to the fact that there was considerable documentary evidence that the Full Support Program was designed to harm competition, and there was substantial evidence that it was successful in achieving that aim.[26] Accordingly, the Eleventh Circuit ruled in favor of the FTC, concluding that the Agency's factual and economic conclusions were supported by substantial evidence, and its legal conclusions comported with the governing law.[27]

Analysis

Assuming the Eleventh Circuit was correct in limiting the relevant market to domestic pipe fittings, although 80-85 percent of fittings sold are lower priced imported fittings, it is questionable whether its determination that McWane had monopoly power in the domestic market was correct. Star was able to enter the market and obtain a 10 percent share in two years, and was continuing to expand despite McWane's Full Support Program, which may have ended by 2011. True, McWane still had a 90 percent market share, but it lawfully controlled 100 percent of the market in 2009, and its share was going down despite the fact that Star was a less efficient competitor. Star did not attempt to build or buy a domestic foundry, and distributors were wary of the six foundries Star had contracted to produce fittings for it, questioning their quality control and unreliability. While McWane did increase its prices during the period, the Eleventh Circuit did not indicate that Star's business was unprofitable, and its prices actually were above McWane's in a few geographic areas. These facts do not appear to be consistent with a conclusion that McWane nevertheless had monopoly power.

It is important to keep in mind, however, that the FTC's *McWane* decision was reviewed by the Eleventh Circuit under the "substantial evidence" standard for judicial review of federal agency decisions. According to the Eleventh Circuit, that standard does not require a court of appeals to ascertain whether an agency's factual and economic conclusions are supported by a preponderance of the evidence. Instead, the court merely determines whether there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Throughout the opinion, the court ruled in favor of the FTC because it concluded there was "substantial evidence" to support the FTC's factual conclusions, although the record contained evidence to the contrary which the court may have found persuasive under a preponderance of the evidence standard. For that reason, the decision may not be very persuasive authority in a Sherman Act challenge to a monopolist's exclusive dealing arrangement by a private party–or even by the U.S. Department of Justice–as distinguished from an FTC suit under Section 5 of the Federal Trade Commission Act, which can only be enforced by the FTC.

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[1] *McWane, Inc. v. FTC*, 2015 WL 1652200 (11th Cir. April 15, 2015).
[2] *Id.* at 6.
[3] *Id.*
[4] *Id.*, n.1.
[5] *Id.* at 6-7.
[6] *Id.* at 7.
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.*
[11] *Id.* at 8.
[12] *Id.*
[13] *Id.*

[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.* at 8-9.
[18] *Id.* at 9-11.
[19] *Id.* at 11-13.
[20] *Id.* at 13.
[21] *Id.* at 13-14.
[22] *Id.* at 17.
[23] *Id.* at 18.
[24] *Id.*
[25] *Id.* at 19.
[26] *Id.* at 20.
[27] *Id.* at 21.

Europe Developments

The New UK Consumer Rights Act – The Changing Face of Collective Actions for Competition Damages in Europe

By Madeleine Gorman* – Amsterdam, Lisa Navarro and Simon Harms – London

On March 26, 2015, Royal Assent was given to the United Kingdom's Consumer Rights Act 2015 (Consumer Rights Act), which is scheduled to come into force Oct. 1, 2015. The Act amends the UK's Competition Act 1998 (Competition Act) by making it easier for individuals and organizations to bring collective actions for breaches of UK or EU competition law. The amended Competition Act will allow opt-out actions and settlements for the first time, and widens the scope of permitted class representatives. Overall, the amendments brought about by the Consumer Rights Act appear to be an effort to entrench the UK's place as the premier EU jurisdiction for competition class actions.[1]

Opt-Out Actions and Settlements

Perhaps the most significant reform that the Consumer Rights Act introduces is that the UK Competition Appeals Tribunal (CAT) may consider collective competition claims on an opt-out basis (rather than solely on an opt-in basis, as in the past).

Under the new regime, claimants do not need to specify whether they are initiating an opt-in or opt-out claim. Instead, the CAT has the discretion to hold a case management conference to determine whether the collective proceeding will be on an opt-in or opt-out basis. Under section 47B(5) of the amended Competition Act, if the CAT finds a collective proceeding claim is suitable, it will issue a document called a "collective proceedings order," which will state whether the relevant collective proceedings will be opt-in or opt-out. In reaching its decision, the CAT must "take into account all matters it thinks fit," as well as considering the strength of the claims, the practicability of opt-in proceedings in the particular matter, and the damages it estimates individual class members may recover if successful.[2]

The Consumer Rights Act also introduces procedures for approving opt-out settlements. In section 49A, the amended Competition Act states that to approve a collective settlement, the CAT must confirm that the proceedings: (1) were commenced as a collective proceeding; (2) were certified by the CAT as an opt-out proceeding; and (3) that the terms of the collective settlement are fair and reasonable.

The CAT has also published draft procedural rules for collective proceedings and collective settlements before the CAT ("CAT Draft Rules") to supplement the CAT's procedural law in light of the amendments. Rule 93(7) of the CAT Draft Rules provides additional factors the CAT must consider in determining whether a proposed settlement is fair and reasonable.

Representatives

The Consumer Rights Act broadens the scope of potential class representatives, enabling individual class members or other representatives to bring collective actions. However, to represent a class, the CAT must consider that it is just and reasonable for that person to act as a representative in those proceedings. The authorized representatives will then be named in the collective proceedings order.

Claims that May be Brought Collectively

Section 47B of the amended Competition Act allows the CAT to certify claims for collective actions if it finds they are suitable to be brought as collective proceedings. In making this determination, the CAT will need to be satisfied that the claims seeking to be incorporated raise, "the same, similar or related issues of fact or law."[3]

Analysis

The potential to bring opt-out collective proceedings should make bringing private action competition claims before the CAT easier for claimants. As it stands, the majority of private actions for breaches of competition law are brought in the UK, with Germany and the Netherlands following next in line. It remains to be seen whether the UK will be able to maintain its lead on the rest of Europe after region-wide implementation (by Dec. 27, 2016) of the EU Damages Directive (Directive) of Dec. 26, 2014. There is growing speculation that the Dutch legislature will present a bill sometime in 2015 enacting the EU Damages Directive and introducing new rules governing collective actions. Further, how the UK and other key EU jurisdictions address the Directive's approach to disclosure, particularly disclosure of leniency documents, will have a direct bearing on how successful efforts to encourage private actions will be in practice. Nevertheless, the reforms introduced by the Consumer Rights Act clearly indicate a renewed focus on competition law claims in the UK.

The private action-friendly provisions of both the Consumer Rights Act and the EU Damages Directive have raised both hopes and fears about the potential for a dramatic increase in the number of follow-on damages claims in competition law cases. While regulators are generally in favor of increasing the number of private actions brought under the competition laws, many commentators have expressed concern that the opt-out mechanism could nurture a more litigious culture. There is also growing unease that this would significantly heighten the financial exposure of businesses accused of anti-competitive conduct. So far, this flood of claims has yet to arrive, but time will tell whether the amendments to the Competition Act will result in a significant increase in collective damages actions in the UK.

**Ms. Gorman is an Articling Canadian Trainee Solicitor.*

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[1] Schedule 8 'Private Actions in Competition Law' Part 1 'of the Consumer Rights Act contains the relevant amendments to the Competition Act 1998.

[2] Rules 78(2) and (3), CAT Draft Rules.

[3] Section 47B(6), Competition Act 1998 (as amended by the Consumer Rights Act).

EU Approach to Information Sharing: CJEU ruling in *Banana Cartel*

By Teresa Charatjan – Amsterdam[1]

Information exchanges between competitors is a highly topical issue under EU competition law. The recent judgment of the Court of Justice of the EU (CJEU), the highest EU court, confirmed its significance when it recently ruled that a bilateral exchange between banana importers of pre-pricing information relating to the weekly quotation prices for bananas amounted to a concerted practice with the object of restricting competition under Article 101 the Treaty on the Functioning of the European Union (TFEU) (Case C-286/13P). This ruling elaborates on the concept of the "by object" restriction standard of illegality with regards to information exchanges among competitors.

Information Sharing Under EU Competition Law

The fundamental premise of EU competition law is that every undertaking must independently determine its intended pricing policy. Companies therefore are strictly precluded from having direct and indirect contact that may influence the pricing conduct of its actual or potential competitors.[2] Article 101 TFEU prohibits concerted practices which by way of object or effect restrict competition. A concerted practice is any form of coordination that substantially reduces uncertainty as to the type of conduct competitors can expect on the market.[3] There is a general presumption that companies that participate in concerted practices involving prices take into account any pricing information exchanged with their competitors when determining their own pricing in the market.[4] Such information sharing between competitors is thus a high risk practice in the EU, because the law on pricing information exchange is stringent and often stricter than the law in many non-EU jurisdictions. The application of Article 101 TFEU is expansive and applies to information exchanges in contexts that have either an anti-competitive effect or an anti-competitive object.

Information exchanges that involve individualized intentions concerning future prices or "quantities" (e.g. future sales or market shares) are considered restrictions to competition by object.[5] This means that once the European Commission (EC) has determined that an information exchange constitutes an infringement by object, it is generally not required to analyze the actual effects the information exchange has on the market. The CJEU determined in the *Cartes Bancaires* case, however, that it is necessary to examine the proper context in which the conduct of a by object restriction arises in order to determine whether the coordination, by its nature, is harmful to the proper functioning of normal competition.[6]

Banana Cartel Case

The CJEU's judgment in the banana cartel case is a stark reminder of the long reach of EU competition law regarding the exchange of information between competitors. The case arose out of an investigation by the EC on the conduct of certain banana suppliers between 2000 and 2002. According to the EC the banana importers had engaged in anti-competitive discussions that entailed: (i) factors relevant to quotation prices (ii) price trends and (iii) share indicators of upcoming quotation prices.

The CJEU determined that there is a rebuttable presumption that companies that participate in price information exchanges and remain active on the market will use any commercially sensitive information shared between competitors to determine their market conduct.[7] The CJEU thus upheld the decision of the General Court declaring that the exchange of pricing information among banana suppliers violated Article 101, and further noted that the information exchanged on quotation prices was relevant to the market, as it acted as a market signal for the intended development of actual banana prices. This means that in order to find that a concerted practice has an anti-competitive object, there does not need to be a direct link between that practice and consumer prices.[8] Furthermore, the employees that were involved in the pre-pricing communications were also active in the meetings of competitors on internal pricing.[9] The CJEU once again determined that an information exchange between competitors that reduces the degree of uncertainty of the operation of the market in question is prohibited.[10] The CJEU's ruling confirms that the concept of competitively sensitive information is not limited to actual pricing information or quantities, but can also include pricing factors.

Conclusion

The CJEU's ruling in the banana cartel case confirms that pricing information exchanges between competitors is a high risk area under EU competition law. Before exchanging any competitive information with a competitor, a company should carefully consider the potential implications of such communications under Article 101 TFEU. As a general rule parties should never share competitively sensitive information (such as pricing strategies, growth strategies, strategic plans, market strategy or customer information). Competition authorities within the EU have increased the constraints and focus on anti-competitive information exchanges. Companies should therefore adopt stringent compliance programs to ensure that all employees are aware of the risks associated with information exchanges involving pricing or any other competitive matters.

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[1] Jacomijn Christ and Maxime van den Dijssel of the Amsterdam office contributed to this article.
[2] Joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73 Suiker Unie and Others v Commission, December 16, 1975, paras. 173 and 174.
[3] Case 8/08 T-Mobile Netherlands, June 4, 2009, para. 35.
[4] *Ibid*, para. 44
[5] Guidelines on the applicability of Article 101 TFEU to horizontal co-operation agreements, para. 73.
[6] Case T-491/07 CB v. Commission, November 29, 2012, para. 53.
[7] Case C-286/13P Dole Food Company Inc. Opinion of AG Kokott to Case C-286/13P Dole Food Company Inc., December 11, 2014, para. 110.
[8] *Ibid*, para. 113.
[9] Case c-286/13P Dole Food Company Inc., March 19, 2015, paras.127, 130, 131.
[10] Case 8/08 T-Mobile Netherlands, June 4, 2009.

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