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Antitrust Enforcement and Compliance: A Global Perspective

February 2009

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Antitrust Enforcement and Compliance: EC Cartel Enforcement

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EC's Current Overall Enforcement Results

- Powerful Investigatory Tools
  - Dawn raids
  - Compulsory requests of information
  - Leniency applications
  - Ex-officio economic research (oligopolies)
- Successful EC Leniency Program for Corporations
  - For amnesty or reductions, the EC is demanding upfront evidence which brings significant added value to the proceedings
  - Better quality decisions, normally upheld by the EC Courts, result in higher fines and more deterrence – *vicious circle (*see next slides for examples).
- Coordination between DG COMP and 27 Member States
  - Has led to multiplication of efforts
  - Harmonized leniency policy throughout EU (role of the ECN)

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Cartel Fines 1990-2008

Year	Amount in €*
1990-1994	€566,691,550
1995-1999	€569,886,000
2000-2004	3,697,516,100
2005-2008	8,139,075,100
Total	**12,973,168,750**

* Not corrected per Court Judgments

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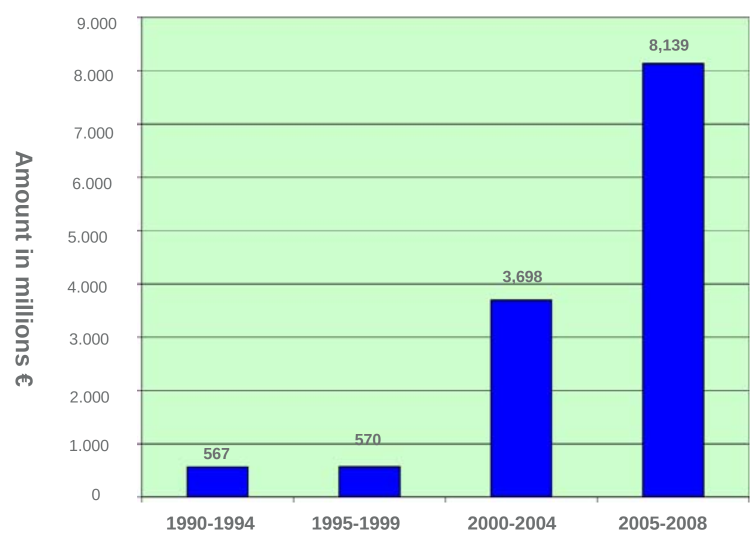
Cartel Fines 1990-2008



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Ten Highest Cartel Fines Per Case (since 1969)

Year	Case Name	Amount in €*
2008	Car Glass	1,383,896,000
2007	Elevators and escalators	992,312,200
2001	Vitamins	790,515,000
2007	Gas insulated switchgear	750,712,500
2008	Candle waxes	676,011,400
2006	Synthetic rubber (BR/ESBR)	519,050,000
2007	Flat glass	486,900,000
2002	Plasterboard	458,520,000
2006	Hydrogen peroxide and perborate	388,128,000
2006	Methacrylates	344,562,500

***Amounts corrected for changes following judgments of the CFI and ECJ.**

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EC's Current Overall Enforcement Results

- EC Settlement Program
  - Separate, although ancillary to Leniency Program
  - Potential additional 10% discount if company's cooperation facilitates administrative process
  - Not a Classical Negotiation Scenario
    - EC will have enough evidence (and/or readily provable evidence)
    - EC initial position: "Take it or leave it"
    - Ability to establish trust and good working relationships will be essential
  - But discussion on e.g., duration, parental liability & range of fines

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Differences between EC & US Enforcement

US	EC
- Criminal	- Administrative
- Prosecutor (DoJ)	- Decision-maker (EC)
- Corporations + individuals	- Corporations
- Fostering quick race and outcome (plea bargaining)	- Full and lengthy investigation (principle of equal treatment)
- Strong discovery culture	- Aversion to discovery
- Plea bargaining	- No plea bargaining, but settlement, and no requirement to waive right of appeal

- EC Cartel enforcement inspired by the US, but with significant legal and enforcement differences which need to be understood in order to successfully coordinate.
- Lawyers and corporations must understand the differences and coordinate US/EC to minimise risks and benefit from existing opportunities.

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International Cartels: Need for Coordination

- It is essential to manage time and scope of provision of evidence against company before DoJ and DG COMP
- EC procedure/policy aims to prevent foreign courts discovering information submitted under EC leniency/settlement programs
- As a result, in parallel cartel cases (EC/US) lawyers must be aware of how and when EC/US enforcement processes can influence each other
- Therefore, it is important to:
  - Manage information: when/how it is disclosed for civil and criminal proceedings (US)
  - Be aware of the need for sophisticated coordination if investigation results from coordinated raids and information is limited
  - Consider Other Issues: differences across the EU; e.g. Germany - has no leniency program for allegations of bid rigging

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Cartel fined in the elevators and escalators sector ([1])

Andrés FONT GALARZA, Gyula CSEREY, René PLANK and Eline POST

On 21 February 2007 the Commission adopted a prohibition decision and imposed fines totalling €992 million on the Otis, KONE, Schindler and ThyssenKrupp groups for operating cartels for the sale, installation, maintenance and modernisation of elevators and escalators in Belgium, Germany, Luxembourg and the Netherlands. The decision was addressed to 17 national subsidiaries of the above undertakings, as well as their controlling parents, and to Mitsubishi Elevator Europe B.V. which participated in the Dutch cartel. KONE subsidiaries received full immunity from fines under the Commission's leniency programme in respect of the cartels in Belgium and Luxembourg, for being first to provide information about these cartels. Similarly, Otis received full immunity in respect of the cartel in the Netherlands. The ThyssenKrupp group had its fine increased as it is a repeat offender. The addressees of the Decision participated in four single and continuous infringements of Article 81 of the EC Treaty between 1995 and 2004.

The products and services

The conducts found illegal in the decision related to **elevators** and **escalators,** as well as the provision of **maintenance** and **modernisation services** for these products.

There are three main types of elevators: *i)* hydraulic elevators, which are elevator systems which lift an elevator car using a hydraulic ram; *ii)* roped elevators which are geared; the elevator car is raised and lowered by traction steel ropes; and iii) roped elevators which are gearless; in gearless elevators the machine room is either much smaller or there is no need for a separate machine room at all ("machine-room-less" elevators). There are various and commonly known applications for elevators such as, for example, low-rise, mid-rise and high-rise buildings, residential or office, hospitals or services, transport or freight. There are different applications for escalators, either for commercial (shopping malls, office buildings, hotels) or transport purposes (airports, railway stations, subway systems). Elevators and escalators have a relatively long life span of 20 to 50 years.

Maintenance services are provided with varying content. Generally, undertakings provide monitoring and prevention services (for example, active information to elevator and escalator owners and building managers about upcoming maintenance requirements), as well as repair services and replacements of spare parts. Modernization services require more intervention and replacement of parts than maintenance, but substantially less than the installation of an entirely new product. While elevators are typically modernized, escalators are generally not. Services generate the majority of profits in the elevator and escalator sector. The vast majority of elevators and escalators installed in the Member States affected by the infringement are serviced by the undertaking responsible for the installation.

The market value was ca. € 250 million in Belgium, ca. € 580 million in Germany (*excluding* the services market), ca. € 32 million in Luxembourg and ca. € 410 million in the Netherlands in 2003.

The infringements

The Commission initiated the investigation on its own initiative ("*ex-officio*") in early 2004 using information brought to its attention. Three rounds of inspections (Belgium, and Germany: January 2004; Belgium, Germany and Luxemburg: March 2004 and the Netherlands: April 2004) and a large number of leniency applications under the 2002 Notice on immunity from fines and reduction of fines in cartel cases (the "Leniency Notice")[2] confirmed that cartels operated in Belgium, Germany, Luxemburg and the Netherlands. The infringements covered both new installations and services, except in Germany where the evidence would suggest that only new installations were covered.

It is worth noting, from a perspective of efficient administration, that the Commission addressed its objections relating to the four cartels in one

([1]) The content of this article does not necessarily reflect the official position of the European Communities. Responsibility for the information and views expressed lies entirely with the authors.

([2]) OJ C 45, 19.2.2002, p. 3.

single Statement of Objections, considering that all four cartels displayed **common elements** such as:

— KONE, Otis, Schindler and ThyssenKrupp were all involved in the infringements in each of the four Member States;
— The cartels covered the same products and services in each Member State at issue, with the exception of Germany where — to the knowledge of the Commission — services were not part of the cartel agreements;
— The managers responsible for the subsidiaries involved (and participants in the cartels) were sometimes simultaneously or successively responsible for several Member States;
— The periods of infringement largely overlapped;
— The method for the allocation of projects concerning the sale and installation of elevators and escalators was similar, sometimes identical (regarding, for example, the principles governing market and customer sharing, the maintenance of "status quo" in market shares, the structure of the meetings, compensation schemes, use of project lists);
— The method for the allocation of projects concerning maintenance and modernization was similar, sometimes identical, in Belgium, Luxembourg and the Netherlands (for example, the principles governing customer sharing, establishment and maintenance of contacts, communication methods and compensation schemes).

The Statement of Objections was notified to the parties in October 2005.

The periods of infringement are:

— from 9 May 1996 to 29 January 2004 in Belgium (over seven years);
— from 1 August 1995 to 5 December 2003 in Germany (over eight years);
— from 7 December 1995 to 9 March 2004 in Luxembourg (over eight years); and
— from 15 April 1998 to 5 March 2004 in the Netherlands (over five years).

In particular, the following infringements were committed in one, several or all of the Member States concerned:

— agreement(s) to share elevator and escalator sales and installations;
— agreement(s) on the allocation of public and private tenders and other contracts for the sale and installation of elevators and escalators in accordance with each undertaking's pre-agreed shares of sales;
— agreement(s) on the allocation of projects for the sale and installation of new elevators and/or escalators in accordance with the principle that existing customer relationships should be respected;
— agreement(s) not to compete with each other for maintenance contracts for elevators and escalators already in operation and agreement(s) on bidding patterns for those contracts;
— agreement(s) not to compete with each other for maintenance contracts for new elevators and escalators and agreements on bidding patterns for those contracts; and
— agreement(s) not to compete with each other for modernization contracts.

The infringements' main features also included exchange of commercially important and confidential market and company (internal) information including bidding patterns and prices. The participants met regularly to agree to the above restrictions and they monitored their implementation. There is evidence that the companies were aware that their behaviour was illegal and they took care to avoid detection: their employees usually met in bars and restaurants, travelled to the countryside or even abroad and used pre-paid mobile phone cards to avoid tracking.

Considering the above, the Commission concluded that the addressees of the decision participated in four separate single and continuous infringements of Article 81 of the Treaty in Belgium, Germany, Luxembourg and the Netherlands. Each of the four infringements covered the whole territory of a Member State.

Calculation of the fines

In assessing the gravity of the infringement, the Commission took account of its nature, its actual impact on the market, where this could be measured, and the size of the relevant geographic market. The infringements were all considered to be very serious in nature, in accordance with the Guidelines on the method of setting the fines imposed pursuant to Article 15(2) of Regulation 17 and Article 65(5) of the ECSC Treaty ([3]).

In setting the starting amount of the fine for each undertaking, the Commission took into account their respective turnover in Belgium, Germany, Luxembourg and the Netherlands in 2003, being the last full year of the infringements (2000 for Schindler in Germany, the year it exited that cartel). In this way four separate starting amounts were set and four separate calculations were carried out.

([3]) OJ C 9, 14.1.1998, p. 4

As there was considerable disparity between each undertaking's turnovers for the products and services concerned in Belgium, Germany, Luxembourg and the Netherlands, the undertakings were divided into different groups for each Member State. In this manner, the Commission took into account the effective economic capacity of the undertakings to cause significant damage to competition in the cartelised industry.

Several undertakings claimed some or all of the following attenuating circumstances: early termination of the infringement, a minor/passive role, the absence of an effective implementation of the practices, the implementation of compliance programmes and absence of benefit. These claims were all rejected as being unfounded.

Sufficient deterrence

In order to set the amount of the fine at a level which ensures that it has sufficient deterrent effect, the Commission considered it appropriate to apply a multiplication factor to the fines imposed. Accordingly and in line with previous decisions, the Commission decided to multiply the fines for ThyssenKrupp and Otis. The fines were further increased as a function of the duration of the infringement committed by each legal entity, by 10% for each full year of duration and by 5% for each 6 month-period.

Repeated infringement

ThyssenKrupp was considered to have committed a repeated infringement, since two entities controlled by Krupp and/or Thyssen (before these two undertakings merged in 1999) had already been addressees of a previous Commission decision concerning cartel activities in Alloy Surcharge ([4]). The fact that the undertaking has repeated the same type of conduct shows that the first penalties did not prevent it from committing new infringements. The basic amount of the fine to be imposed on ThyssenKrupp was thus increased by 50%.

Application of the 2002 Leniency Notice

KONE, Otis, ThyssenKrupp and Schindler all submitted applications under the Leniency Notice. They co-operated with the Commission at different stages of the investigation with a view to receiving favourable treatment under the Leniency Notice.

([4]) See Joined Cases T-45/98 and T-47/98 *ThyssenKrupp Stainless and ThyssenKrupp Acciai speciali Terni v Commission ("Alloy Surcharge")* [2001] ECR II-3757, and Joined Cases C-65/02 P and C-73/02 P, ThyssenKrupp Stainless and *ThyssenKrupp Acciai speciali Terni v Commission,* judgment of July 14 2005.

Point 8(a) — Immunity

Otis was granted full immunity under point 8(a) of the Leniency Notice concerning the cartel in the Netherlands since it enabled the Commission to carry out inspections in the Netherlands.

Point 8(b) — Immunity

In respect of the infringements in Belgium and Luxembourg, KONE's submission enabled the Commission to find an infringement of Article 81 of the Treaty. Hence, KONE qualified for full immunity from the fine in respect of these infringements.

Point 23 (b), first indent (reduction of 30-50%)

The evidence submitted by Otis relating to the cartels in Belgium and Luxembourg represented significant added value with respect to the evidence already in the Commission's possession, strengthening the Commission's ability to prove the infringement. In addition, Otis has terminated its involvement in the infringements and therefore was granted a 40% reduction of the fine for both infringements. Similarly, KONE's submission in relation to the cartel in Germany, as well as ThyssenKrupp's submission in relation to the cartel in the Netherlands, represented significant added value within the meaning of the Leniency Notice. Therefore, the Commission granted KONE a 50% reduction of the fine in respect of the infringement in Germany and ThyssenKrupp a 40% reduction of the fine in respect of the infringement in the Netherlands.

Point 23 (b), second indent (reduction of 20-30%)

The evidence submitted by Otis relating to the cartel in Germany represented significant added value with respect to the evidence already in the Commission's possession, strengthening the Commission's ability to prove the infringement. Otis was granted a 25% reduction of the fine for the infringement in Germany. Similarly, in respect of the infringement in Belgium, ThyssenKrupp's submission represented a significant added value for which it was granted a 20% reduction of the fine.

Point 23 (b), third indent (reduction of up to 20%)

The evidence submitted by Schindler relating to the cartel in Germany represented significant added value with respect to the evidence already in the Commission's possession, strengthening the

Commission's ability to prove the infringement in Germany. Under these circumstances, Schindler was granted a 15% reduction of the fine in respect of the infringement in Germany.

Conclusion

The aggregate fine imposed in this case is the largest ever fine imposed by the Commission for cartel violations. A strong warning was again issued against a repeat offender. Competition Commissioner Neelie Kroes commented on this case by stating: *"It is outrageous that the construction and maintenance costs of buildings, including hospitals, have been artificially bloated by these cartels. The national management of these companies knew what they were doing was wrong, but they tried to conceal their action and went ahead anyway. The damage caused by this cartel will last for many years because it covered not only the initial supply but also the subsequent maintenance of lifts and escalators — for these companies the memory of this fine should last just as long."* At the same time, by granting full immunity from fines to KONE (in respect of the cartel in Belgium and Luxembourg) and Otis (in respect of the cartel in the Netherlands) and substantial reductions of fines, the Commission is offering an incentive to future leniency applicants to come forward and actively cooperate.

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Antitrust Enforcement and Compliance: *In re Vitamins Antitrust Litigation*

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Snapshot of the Proceedings

- Allegation: Bulk vitamin cartel from 1990-98
  - Vitamin use in animal feed and human consumption
  - Nature of cartel
- DOJ launched investigation in 1997
- Plaintiffs filed direct and indirect actions in federal and state courts around the country
- Certain defendants cooperated, others agreed to plead guilty in 1999
- Government levied fines of over $875 MM in US, €855 in Europe
- Civil settlements exceeded the fines

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How Initiated?

- Customer complaints, particularly in oligopolies
- Started with grand jury investigation of other food additive products, like lysine, citric acid and high fructose corn syrup
  - Government interviews: March 1997 citric acid interview of Roche's Dr. Kuno Sommer

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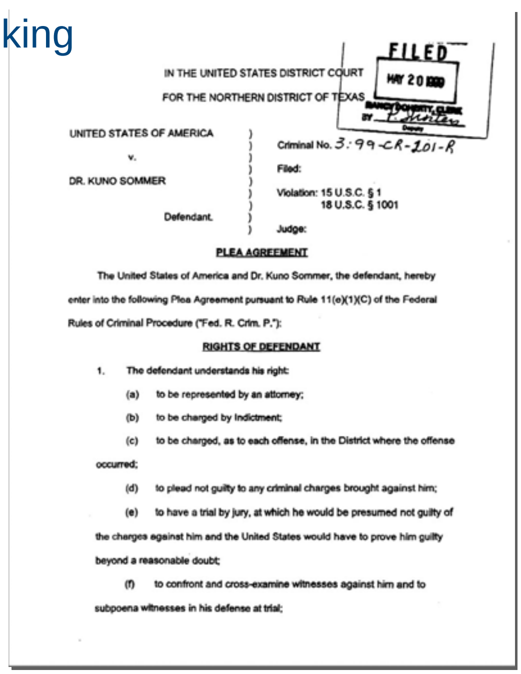
Trash Talking



FILED

MAY 20 1999

NANCY DOHERTY, CLERK

BY P. [illegible] Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA) Criminal No. 3:99-CR-101-R

v.) Filed:

DR. KUNO SOMMER) Violation: 15 U.S.C. § 1; 18 U.S.C. § 1001

Defendant.) Judge:

PLEA AGREEMENT

The United States of America and Dr. Kuno Sommer, the defendant, hereby enter into the following Plea Agreement pursuant to Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure ("Fed. R. Crim. P."):

RIGHTS OF DEFENDANT

1. The defendant understands his right:

(a) to be represented by an attorney;

(b) to be charged by Indictment;

(c) to be charged, as to each offense, in the District where the offense occurred;

(d) to plead not guilty to any criminal charges brought against him;

(e) to have a trial by jury, at which he would be presumed not guilty of the charges against him and the United States would have to prove him guilty beyond a reasonable doubt;

(f) to confront and cross-examine witnesses against him and to subpoena witnesses in his defense at trial;

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Trash Talking - 2

(d) Substantial quantities of vitamins affected by this conspiracy were sold by Roche and other conspirators to customers in the Northern District of Texas.

COUNT TWO
18 U.S.C. § 1001

5. Had this case gone to trial, the United States would have presented evidence to prove the following facts:

(a) on or about March 12, 1997, the defendant appeared for an interview by law enforcement officials of the United States Department of Justice, Antitrust Division, who were investigating a matter within the jurisdiction of the United States Department of Justice, a department of the United States;

(b) on or about March 12, 1997, the defendant did knowingly and willfully make and cause to be made false, fictitious and fraudulent statements and representations as to material facts to law enforcement officials in a matter within the jurisdiction of the United States Department of Justice, a department of the United States;

(c) on or about March 12, 1997, the defendant stated and represented to law enforcement officials of the United States Department of Justice, Antitrust Division, that: there was no conspiracy among the world's leading vitamins manufacturers, including his own corporate employer, Roche; that the defendant had never participated in meetings, conversations, or agreements to fix, increase, and maintain prices, or allocate sales volumes of, or customers for, certain vitamins with any representative of any other manufacturer of vitamins. The defendant stated and represented that he was not aware of any meetings or

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conversations among other representatives of Roche and any other vitamin manufacturer relating to any agreements or conspiracy to fix, increase, or maintain prices, or allocate sales volumes and customers in the vitamin industry;

(d) in truth and in fact, the defendant then and there knew that he, and other employees of Roche, had regularly communicated and met on at least a quarterly basis with competitors, and discussed and agreed to fix, increase, and maintain prices, allocate volumes of, and customers for, certain vitamins manufactured by the defendant's employer, Roche, and its corporate co-conspirators, which products were sold in the United States and elsewhere.

POSSIBLE MAXIMUM SENTENCE

6. The defendant understands that the maximum penalty which may be imposed against him upon conviction for a violation of:

(a) the Sherman Antitrust Act (15 U.S.C. § 1) charged in Count One is:

(i) a term of imprisonment for three (3) years (15 U.S.C. § 1);

(ii) a fine in an amount equal to the greatest of (1) $350,000 (15U.S.C. § 1), (2) twice the gross pecuniary gain derived from the crime, or (3) twice the pecuniary loss caused to the victims of the crime (18 U.S.C. § 3571(d)); and

(iii) a mandatory term of supervised release of not more than one (1) year following any term of imprisonment. If the defendant violates the conditions of supervised release, the defendant could be imprisoned for the entire term of supervised release (18 U.S.C. § 3583(b)).

(b) the False Statements Statute (18 U.S.C. § 1001) charged in Count

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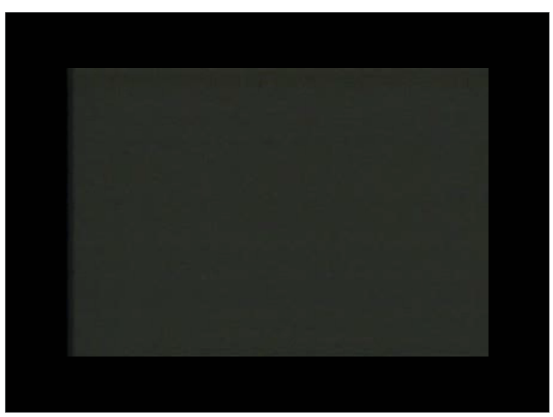
Smile, You're On ….

- *Lysine:* Secret Tapes (video displayed during live program)



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Direct Evidence Of Agreement: Scorecards
Per Se Offense – No Excuses

Lysine Scoresheet

		1994/1–12																
		Budget		Sales Results													Share	Progress
		Q'ty	Share	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep	Oct.	Nov.	Dec.	Total	(%)	(%)
N.America	AJVOR	17,900	26.1%	1,503	1,095	1,518	1,486	1,751	0	0	0	0	0	0	0	7,353	25.0%	41%
	ADM	28,800	42.0%	2,568	2,177	2,596	2,436	2,072								11,851	40.3%	41%
	K	15,000	21.9%	1,350	1,072	1,432	1,395	1,508								6,755	23.0%	45%
	M	6,800	9.9%	840	587	497	930	526								3,380	11.5%	50%
	CSA	0		0	34	0	34	0								68	0.2%	#DIV/0!
	Others	0														0		
L.America	AJVOR	3,300	14.3%	89	245	405	296	509	0	0	0	0	0	0	0	1,544	17.2%	47%
	ADM	6,500	28.3%	558	409	413	412	516								2,307	25.7%	35%
	K	11,500	50.0%	829	777	1,125	852	1,116								4,699	52.3%	41%
	M	1,700	7.4%	170	51	17	123	68								429	4.8%	25%
	CSA	0		0	0	0	0	0								0		#DIV/0!
	Others	0														0		
Europe	AJVOR	43,800	47.7%	2,835	2,404	3,183	2,662	3,021	0	0	0	0	0	0	0	14,105	42.7%	32%
	ADM	18,000	19.7%	1,107	1,290	1,042	1,076	1,398								5,913	17.9%	33%
	K	10,600	11.6%	1,158	812	1,014	967	850								4,801	14.5%	45%
	M	10,200	11.2%	711	1,031	918	773	868								4,301	13.0%	42%
	CSA	9,000	9.8%	897	797	745	748	753								3,940	11.9%	44%
	Others	0														0		
Asia, Oceania, etc.	AJVOR	20,400	31.4%	2,037	2,573	1,889	1,979	1,676	0	0	0	0	0	0	0	10,154	34.8%	50%
	ADM	13,200	20.3%	1,124	1,372	1,262	667	855								5,280	18.1%	40%
	K	8,300	12.8%	377	1,108	527	652	477								3,141	10.8%	38%
	M	15,100	23.2%	1,528	1,198	1,742	1,260	1,613								7,341	25.2%	49%
	CSA	8,000	12.3%	619	595	705	703	640								3,262	11.2%	41%
	Others	0														0		

		1994/1–12																
		Budget (Yearly)		Sales Results													Share	
		Q'ty	Share	Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep	Oct.	Nov.	Dec.	Total	(%)	
Total	AJVOR	84,000	33.9%	6,464	6,317	6,995	6,423	6,957	0	0	0	0	0	0	0	33,156	33.0%	39%
	ADM	67,000	27.0%	5,357	5,247	5,313	4,585	4,839	0	0	0	0	0	0	0	25,351	25.2%	38%
	K	48,000	19.5%	3,714	3,769	4,098	3,866	3,949	0	0	0	0	0	0	0	19,396	19.3%	42%
	M	34,000	13.7%	3,249	2,867	3,174	3,086	3,075	0	0	0	0	0	0	0	15,451	15.4%	45%
	CSA	17,000	6.9%	1,516	1,426	1,450	1,465	1,383	0	0	0	0	0	0	0	7,270	7.2%	43%
	Others			0	0	0	0	0	0	0	0	0	0	0	0	0		
	Total	248,000	100.0%	20,299	19,626	21,630	19,455	20,213	0	0	0	0	0	0	0	100,624	100.0%	41%

		Budget (Monthly)		Sales Results (VS monthly Budget)													
		Q'ty		Jan.	Feb.	Mar.	Apr.	May	Jun.	Jul.	Aug.	Sep	Oct.	Nov.	Dec.	Total	
Total	AJVOR	7,000		92.3%	90.2%	99.9%	91.8%	99.4%								39.5%	
	ADM	5,583		95.9%	94.0%	95.2%	82.3%	86.7%								37.8%	
	K	3,833		96.9%	98.3%	106.9%	100.9%	103.0%								42.2%	
	M	2,833		114.7%	101.2%	112.0%	108.9%	108.5%								45.4%	
	CSA	1,417		107.0%	100.7%	102.4%	104.8%	98.3%								42.8%	
	Others	0															
	Total	20,667		98.2%	95.0%	101.8%	94.1%	97.8%								40.6%	

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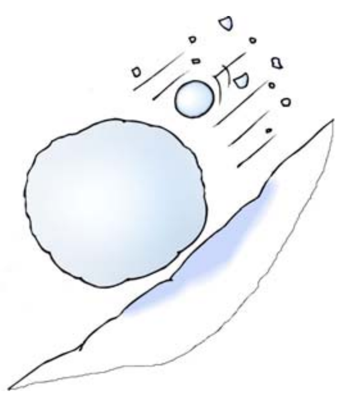
Picking Up Speed

- More tools under the Patriot Act
- Increasing amnesty/leniency applications



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What’s Left?

- Guilty pleas became *prima facie* evidence of liability
- What was left?
  - Affected plaintiffs
  - Affected defendants
  - Scope of conspiracy
  - Fact and amount of damages
- These were the remaining subjects for the civil litigation

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Additional Complications: Defending the Action

- Traditional civil litigation, but typically brought by your customers
  - Costs to company
  - Customer relations issues

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Global Impact

- Proliferation of actions
  - Cooperation among enforcement agencies
  - Filing of civil actions in Canada and Europe
  - Filing of civil actions here based upon European law

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Empagran: The Internationalization of Civil Actions

- District Court dismissed due to lack of subject matter jurisdiction (2001)
- Court of Appeals reversed and refused to rehear en banc (2003)
  - Jurisdiction conferred for claim if damage occurred to *someone* in the US
- Supreme Court granted certiorari and vacated Court of Appeals‘s decision – Steve Shapiro argued for all defendants (2004)
  - Government Amici: develop national law

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- Development of national law has encouraged plaintiffs' lawyers to establish offices in Europe
- Our colleagues in Europe have developed substantial expertise in the area

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ARTICLES

Empagran and the Globalization of the Sherman Act

*Andrew S. Marovitz**

On January 17, 2003, a divided panel of the D.C. Circuit Court of Appeals issued a groundbreaking decision that, if it stands, will greatly expand foreign plaintiffs' ability to bring Sherman Act treble damages lawsuits in US courts based upon injuries suffered wholly overseas. The three-judge panel in *Empagran S.A. v F. Hoffman-LaRoche, Ltd*[1] held that the Foreign Trade Antitrust Improvements Act of 1982 (the "FTAIA")[2] authorizes the exercise of subject matter jurisdiction even when a particular plaintiff's claim arises from the *foreign* effect—not the domestic effect—of the anticompetitive conduct.

Empagran may dramatically increase US antitrust exposure faced by multinational corporations, especially those that primarily transact business abroad. The panel's decision to throw open US courthouse doors to treble damage antitrust actions filed by parties claiming to have been injured overseas raises a host of questions for corporations and lawyers alike.

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1 315 F.3d 338 (D.C. Cir. 2003).

2 Pub. L. No. 97-290, Title IV, 96 Stat. 1233, 1246 (1982), codified at 15 U.S.C. §6a. The full text of the FTAIA, 15 U.S.C. §6a, is as follows:

"**§ 6a. Conduct involving trade or commerce with foreign nations**

Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –

(1) such conduct has a direct, substantial, and reasonably foreseeable effect–
   (A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
   (B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and

(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.

If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph (1)(B), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States."

Empagran and the vitamins litigation

In 1997, the Antitrust Division of the United States Department of Justice launched an investigation into price-fixing in the bulk vitamin marketplace. By the end of that year, after the Department of Justice made its investigation public,[3] private American plaintiffs began filing lawsuits in federal and state courts seeking to recover damages for purported overcharges that they paid for bulk vitamins or vitamin-containing products in the United States. American plaintiffs, including thousands of class members and hundreds of opt-outs, ultimately brought lawsuits against the world's vitamin manufacturers.

In 1999, the largest of these manufacturers pled guilty in the United States to violating Section 1 of the Sherman Act and agreed to pay record fines totaling approximately $875 million.[4] Seven of those manufacturers agreed that same year to pay more than $1 billion to settle the federal class actions consolidated in the United States District Court for the District of Columbia, and later settled nearly all of the indirect class actions brought in various states around the country.[5] All the while, companion investigations and private litigation proceeded in Europe, Canada, Australia, Korea and other nations. Competition authorities in these jurisdictions imposed heavy fines; the European Commission's fines alone exceeded €855 million.[6]

Against this backdrop, plaintiffs filed *Empagran*. Plaintiffs in *Empagran* are five companies located in Australia, Ecuador, Panama and Ukraine that claim to have purchased bulk vitamins outside the United States from an alleged cartel comprised primarily of European and Asian vitamin manufacturers. They allege that the cartel—whose conduct ultimately led to the guilty pleas in the United States and the fines here and overseas—caused plaintiffs to pay supracompetitive prices for purchases they made from vitamin suppliers around the world, all in violation of s.1 of the Sherman Act, 15 U.S.C. §1. Plaintiffs sought damages for all of their overseas purchases and injunctive relief pursuant to ss.4 and 16 of the Clayton Act, 15 U.S.C. §15, 26.

Because these foreign plaintiffs based their action on overseas vitamins purchases having no nexus to US commerce, defendants moved to dismiss the entire matter on grounds of lack of subject matter jurisdiction and standing. First, defendants argued, subject matter jurisdiction in such cases is proscribed by the FTAIA, which provides that US antitrust laws "shall not apply to conduct" involving trade or commerce with foreign nations unless "such conduct has a direct, substantial, and reasonably foreseeable effect" on United States trade or commerce *and* "such effect gives rise to a claim" under the US antitrust

3 See *Division is Probing Vitamin Industry for Possible Anticompetitive Practices*, 73 Antitrust & Trade Reg. Rep. (BNA) 490 (November 20, 1997).

4 *See* Press Release, US Department of Justice, *Canadian Vitamin Company Agrees to Plead Guilty for Role in International Vitamin Cartel* (September 29, 1999) (tallying earlier fines), *www.usdoj.gov/atr/public/press_releases/1999/3726.htm*. Rhone-Poulenc, SA's co-operation, which the French pharmaceutical and vitamins manufacturer offered pursuant to the Antitrust Division's Corporate Leniency Program, spared it from criminal prosecution or fines. See Press Release, US Department of Justice, *F. Hoffmann-LaRoche and BASF Agree To Pay Record Criminal Fines for Participating in International Vitamin Cartel* (May 20, 1999), *www.usdoj.gov/atr/public/press_releases/1999/2450.htm*.

5 *e.g.*, *$1.1 Billion Settlement in Vitamin Price-Fixing Action*, Andrews Antitrust Litigation Rep., November 1999, at 15.

6 *Competition Authority Welcomes Record Fines on Vitamins Cartel* (November 21, 2001) (available at *www.tca.ie/press/42.pdf*).

laws. Because plaintiffs were injured (if at all) only by the cartel's effects on foreign commerce, their claim cannot satisfy the requirements of the FTAIA. Secondly, plaintiffs could not demonstrate that injuries based on wholly foreign sales are of the type that US antitrust laws were designed to address; they therefore lack the necessary antitrust injury to state a claim.

United States District Chief Judge Thomas Hogan granted defendants' motion to dismiss, ruling that plaintiffs' alleged damages, suffered overseas, did not arise from the domestic effects of the challenged conduct and therefore were not cognizable under the Sherman Act.[7] Having dismissed the case on grounds of subject matter jurisdiction, the district court declined to address antitrust injury. But a divided panel of the D.C. Circuit reversed. It reasoned that, to establish Sherman Act jurisdiction, the FTAIA requires only that plaintiffs allege violative conduct and that "the conduct's harmful effect on United States commerce must give rise to 'a claim' by someone, even if not the foreign plaintiff who is before the court."[8] The panel determined that the payment of supracompetitive prices in the international marketplace for price-controlled vitamins is the type of conduct that American antitrust laws were designed to prevent, and that plaintiffs therefore possessed the requisite antitrust injury to bring their action in the United States. Despite other countries' legal regimes prohibiting anticompetitive conduct, the panel deemed its ruling necessary to ensure adequate deterrence of international cartel activity. Judge Karen Henderson dissented. She disagreed with the majority's expansive interpretation of the FTAIA's text and legislative history and characterized as "peculiar" the notion that a court may exercise claims asserted by a foreign plaintiff based on hypothetical claims by some other domestic plaintiff.[9]

In February, defendants petitioned the Court of Appeals for rehearing and for rehearing *en banc*, in response to which the Court took the unusual step of inviting the Office of the Solicitor General to express the views of the United States on the matter. In its Brief for the United States and the Federal Trade Commission, the Solicitor General urged the Court to grant defendants' request for rehearing and to reinstitute the dismissal of the action.[10] On September 11, 2003, by a 4–3 vote, the Court declined to rehear the case. Defendants are expected to petition the United States Supreme Court for certiorari.

Empagran deepens a pre-existing circuit split: whether the "gives rise to a claim" requirement of the FTAIA authorizes US courts to exercise subject matter jurisdiction when the particular plaintiff's claim arises exclusively from the foreign effects of the anticompetitive conduct. Nearly every district court that has considered this language has ruled that it does not grant such authority, reasoning that there must be a sufficient nexus between the claim's effect on domestic commerce and the actual injury suffered by that plaintiff to satisfy the requirements of subject matter jurisdiction and antitrust injury

7 2001 W.L. 761360 (D.D.C. June 7, 2001).
8 315 F.3d 338, 341 (D.C. Cir. 2003).
9 *ibid.* at 360–361.
10 See Solicitor General's Brief at 6–8 (March 24, 2003), at *www.usdoj.gov/atr/cases/f200800/200866.pdf*.
11 *See*, *e.g. Sniado v Bank Aus., AG*, 174 F. Supp. 2d 159 at 170 (S.D.N.Y. 2001) (dismissing for lack of subject matter jurisdiction); *Ferromin Int'l Trade Corp v UCAR Int'l, Inc*, 153 F. Supp. 2d 700 at 704–705 (E.D. Pa. 2001) (same); *Eurim-Pharm GmbH v Pfizer Inc*, 593 F. Supp. 1102 at 1107 (S.D.N.Y. 1984) (same); *In re Microsoft Corp. Antitrust Litig.*, 127 F. Supp. 2d 702 at 716 (D. Md. 2001) (dismissing for lack of standing); *Galavan Supplements, Ltd v Archer Daniels Midland Co*, 1997 W.L. 732498, at *4 (N.D. Cal. November 19, 1997) (same); *de Atucha v Commodity Exch., Inc*, 608 F. Supp. 510 at 518 (S.D.N.Y. 1985) (same).

or standing.[11] The Fifth Circuit reached that same conclusion in *Den Norske Stats Oljeselskap AS v Heeremac Vof*, a decision that received public support from the United States Solicitor General.[12] The Second Circuit reached the opposite conclusion in *Kruman v Christie's Int'l PLC*,[13] in which the court (like the D.C. Circuit in *Empagran*) reinstated overseas price-fixing claims that previously had been dismissed on FTAIA grounds. Unlike the D.C. Circuit in *Empagran*, however, the Second Circuit did not decide whether the foreign plaintiffs possessed the requisite antitrust injury to pursue their US case, and simply remanded the matter back to the district court for further proceedings on that question. Defendants in *Kruman* petitioned the Supreme Court for certiorari, but the case settled before the petition was considered.[14]

The *Empagran* decision cannot be squared with the express language of the FTAIA or its legislative history. Its policy rationale—that other jurisdictions' competition laws are insufficient to deter overseas cartels—will have far-reaching implications for international and domestic litigants.

The Sherman Act cannot properly be read to impose liability for purely foreign injuries

The restrictive language of the FTAIA does not support the *Empagran* panel's expansive application of the Sherman Act. The text of the FTAIA proceeds from the premise that the Sherman Act "shall not apply" to non-import trade or commerce with foreign nations "unless" two conditions are satisfied.[15] First, the conduct must have a "direct, substantial, and reasonably foreseeable effect" on US Commerce. §6a(1). Secondly, "such effect" must "give[…] rise to a claim" under the Sherman Act. §6(a)(2). The second condition reveals the restrictive nature of the FTAIA. It confirms that the Sherman Act may be applied to trade with foreign nations only in the case of "a person engaged" in such trade "in the United States" and "only for injury to export business in the United States." In other words, Congress excluded from the reach of the Sherman Act conduct that does not produce "direct, substantial, and reasonably foreseeable" effects on US commerce, and then in the next breath authorized the filing of *only* those claims that arise from such effects. This statutory language, while inartful, cannot reasonably be construed to expand the reach of the Sherman Act.

The panel relied entirely upon the presence of the word "a" before the word "claim," concluding that the presence of that indefinite article rendered the statute ambiguous[16] and permitted the Court to rely upon policy views about the importance of deterrence to construe the statute. This interpretation transformed a restrictive amendment, which had been written to cabin the reach of the Sherman Act, into a major expansion of US antitrust law. After all, the FTAIA was enacted during a period of antitrust *contraction*

12 241 F.3d 420, 429–31 (5th Cir. 2001), *cert. denied*, 534 US 1127 (2002). The Solicitor General's Brief opposing the grant of certiorari in that case may be found at *www.usdoj.gov/atr/cases/f200800/200866.pdf*.

13 *Kruman v Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

14 Press Release, Sotheby's, *Auction Houses Settle International Antitrust Litigation* (March 11, 2003), *www.shareholder.com/bid/news/20030311-103604.cfm*.

15 See above, n.2.

16 See 315 F.3d at 349 ("[W]e find that the language does not clearly resolve the question whether 'a claim' means the plaintiff's claim.").

within the 1982 Reagan Administration amid concern that overreaching enforcement would harm US competitiveness in the marketplace. As the head of the Antitrust Division prior to enactment explained, the FTAIA was intended to resolve uncertainties "in favor of denying jurisdiction" over "conduct affecting wholly foreign commerce."[17] Another court of appeals that recently considered the reach of the FTAIA concluded that "the legislative history shows that jurisdiction stripping is what Congress had in mind in enacting the FTAIA."[18]

Injuries occurring "exclusively in foreign markets . . . are not of the type Congress intended to prevent through the [FTAIA] or the Sherman Act."[19] Leading commentators have explained that the 1982 amendments made clear that "the concern of the antitrust laws is protection of *American* consumers and *American* exporters, not foreign consumers or producers."[20] The FTAIA, according to the Seventh Circuit, "limits the power of the United States courts (and private plaintiffs) from nosing about where they do not belong."[21] And the Solicitor General, speaking on behalf of the United States and the Federal Trade Commission, recognized that "there is no indication" in the FTAIA or its legislative history that the antitrust laws extend to "foreign plaintiffs suing to recover for alleged overcharges paid in foreign transactions for foreign goods."[22]

Notwithstanding the statutory text, the legislative history,[23] and canons of construction holding that federal law is presumed not to apply extraterritorially unless such an intent is "clearly manifested,"[24] the panel ruled that "suits by foreign purchasers harmed solely by a conspiracy's foreign effects are necessary to protect US commerce from global conspiracies."[25] But that proposition assumes that the United States is the only country willing and able to deter anticompetitive conduct. That assumption is not warranted by the actual facts. The fines imposed by the European Commission in this very case exceeded €855 million;[26] fines on top of that were levied by enforcement authorities in Canada, Australia, Korea and other jurisdictions.[27]

In light of this vigorous enforcement activity, it is no longer appropriate to assume that the United States is the only antitrust sheriff in town. The panel's focus on deterrence

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17 John H. Shenefield, "Thoughts on Extraterritorial Application of the United States Antitrust Laws" 52 Fordham L. Rev. 350 at 364 (1983).

18 *United Phosphorus, Ltd v ANGUS Chem. Co*, 322 F.3d 942 at 951 (7th Cir. 2003).

19 *Turicentro, S.A. v American Airlines, Inc*, 303 F.3d 293, 307 (3d Cir. 2002).

20 Areeda & Hovenkamp, *IA Antitrust Law* (2nd ed., Aspen Law & Business, 2000), para.272h, at 358–59 (emphasis added); see *Pfizer Inc. v Government of India*, 434 U.S. 308 at 314 (1978) (recognizing that the "foremost concern" of the US antitrust laws is "the protection of Americans"). It also is consistent with bedrock principles of antitrust injury and standing. See, *e.g. Phillips Petroleum Co v Shutts*, 472 U.S. 797 at 804 (1985) ("a litigant must normally assert his own legal interests rather than those of third parties").

21 *United Phosphorus*, 322 F.3d at 952.

22 Solicitor General's Brief at 10 (March 24, 2003) (*www.usdoj.gov/atr/cases/f200800/200866.pdf*); see n.10. (quoting *Statoil*, 241 F.3d at 429 n.28 ("Nothing is said about protecting foreign purchasers in foreign markets.")).

23 The House Report makes clear that claims made under the Sherman Act must be based upon conduct having "a substantial nexus to this country" and that "the 'effect' providing the jurisdictional nexus must also be the basis for the injury alleged under the antitrust laws." H.R. Rep. No.97 686, at 10–12, reprinted in (1982) U.S.C.C.A.N. 2487, 2495–97. It discusses the protection of foreign purchasers' rights "in the domestic marketplace," not in overseas marketplaces, *ibid*.

24 *Sale v Haitian Centers Council, Inc*, 509 U.S. 155 at 188 (1993).

25 315 F.3d at 356.

26 See above n.6, and accompanying text.

27 These amounts do not include the multitude of private lawsuits filed in Europe, Canada and Australia seeking private damages.

overlooks other nations' current success in enforcing their competition laws and, instead, harkens back to 1978, when the Supreme Court in *Pfizer, Inc v Government of India* permitted the Indian government to sue after it had entered American commercial markets[28]:

> "[I]f foreign plaintiffs were not permitted to seek a remedy for their antitrust injuries, persons doing business both in this country and abroad might be tempted to enter into anticompetitive conspiracies affecting American consumers in the expectation that the illegal profits they could safely extort abroad would offset any liability to plaintiffs at home."[29]

When *Pfizer* was decided in 1978, fewer than 30 countries had enacted antitrust laws.[30] Now, according to Acting Assistant Attorney-General R. Hewitt Pate, almost "all of the nearly 100 antitrust regimes in the world now ban cartels either civilly or criminally."[31] And since 1998, the European Commission has imposed fines exceeding $100 million in eleven cases.[32] Thus, the world of antitrust enforcement has changed markedly since the Supreme Court decided *Pfizer*. An expansive application of American law simply cannot be justified any longer on the ground that global conspiracies will go undeterred unless the Sherman Act is afforded universal application.

If not overturned, *Empagran* will threaten international cooperation in antitrust enforcement

While the panel majority in *Empagran* sought to justify its holding on grounds of deterrence, the actual result of the decision is likely to be just the opposite. Detecting international cartels is difficult. Accordingly, a number of competition authorities, including the US Department of Justice, currently encourage conspirators to disclose the existence of cartels by offering the first cooperating participant amnesty from criminal prosecution.[33] The Antitrust Division of the Department of Justice believes that this policy "has proven indispensable in government antitrust enforcement; it is the number one source of leads for breaking up international cartels—including the vitamins cartel that is the subject of this case—that continue to injure American consumers."[34]

Empagran threatens to dry up this well of information. While "first-in" applicants can receive amnesty, they are *not* entitled to immunity from civil prosecution either in the

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28 *Pfizer, Inc v Government of India*, 434 U.S. 308 at 318 (1978) (permitting maintenance of action when foreign government "enters our commercial markets as a purchaser of goods or services").

29 *Empagran*, 315 F.3d at 355 (quoting *Pfizer*, 434 US at 315).

30 See ABA Section of Antitrust Law, *Competition Laws Outside the United States* 13 (2001).

31 R. Hewitt Pate, *The DOJ International Antitrust Program – Maintaining Momentum* at 6 (February 6, 2003), speech presented to the American Bar Association Section of Antitrust Law 2003 Forum on International Competition Law, New York, NY (available at *www.usdoj.gov/atr/public/speeches/200736.pdf*) (hereinafter "Pate Speech").

32 Since 2000, fines imposed by the European Commission have included over $855 million in the *Vitamins* case (decision COMP/37.512 of November 21, 2001), $478 million in the *Plasterboard* case (decision COMP/37.152 of November 27, 2002), $313 million in *Carbonless Paper* (decision COMP/36.212 of December 20, 2001) and $218 million in *Graphite Electrodes* (decision COMP/36.490 of July 18, 2001) (all of which are available at *www.europa.eu.int/comm/competition/antitrust/cases*).

33 *See* Department of Justice Corporate Leniency Policy, available at *www.usdoj.gov/atr/public/guidelines/lencorp.htm*.

34 Solicitor General's Brief at 12; see n.10.

United States or abroad. Exposing these applicants to potential joint and several liability for treble damages *based upon worldwide sales* radically changes a company's calculus in determining whether it is willing to cooperate with the government. The Solicitor General recognized this problem, and (on behalf of the very antitrust enforcement agencies with the greatest interest in deterring anticompetitive conduct) predicted that extending the reach of the Sherman Act to worldwide claims would discourage voluntary reporting and make antitrust enforcement even more difficult:

> "The rule adopted by the majority, however, would effect a sea change in the number and type of private actions permitted under the Sherman Act. We are aware of no other country whose antitrust laws provide for treble damages. By permitting suits for treble damages by overseas plaintiffs whose injuries arise from overseas conduct, the majority's decision, if allowed to stand, would create a potential disincentive for corporations and individuals to report antitrust violations and seek leniency under the Corporate Leniency Policy or, when amnesty under the policy is unavailable, to cooperate with prosecutors by plea agreement. The panel's decision thus threatens to impair the ability of the government to seek criminal penalties, and of private parties (whether located here or overseas) to seek treble damages for injuries stemming from a conspiracy's anticompetitive effects on commerce *in the United States*. Such a decrease in effective enforcement of the antitrust laws, therefore, has the potential to weaken deterrence – the opposite of what the panel intended."[35]

Empagran, in short, may undermine the leniency program's "major role in cracking the majority of the international cartels that the Division has prosecuted."[36]

The United States is not alone in its reliance upon amnesty and leniency-type programs to enforce its antitrust laws. Successful programs have been developed and administered by the European Commission, Canada, the United Kingdom, Korea and a growing number of nations. Many of those antitrust enforcers have adopted amnesty and leniency policies that are closely aligned with each other, so that they can work together to enjoin and prevent global cartels. That co-operative effort may be imperiled by *Empagran*.

Amnesty is not the only issue. Sovereignty is another. *Empagran* would permit US courts to apply US antitrust laws to foreign conduct and foreign effects without regard to the competition laws of the foreign nations where that conduct and those effects occurred. While more than a hundred sovereign countries have adopted laws to protect competition, "significant policy differences" exist.[37] Civil remedies and methods of prosecution differ in each country. Many countries criticize our treble damages regime as "one of the most unacceptable aspects of US regulatory law,"[38] a policy choice that should not simply be brushed off by US courts hearing foreign matters brought by foreign plaintiffs based upon conduct causing foreign effects.[39] More than a dozen countries are

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35 Solicitor General's Brief at 13 (emphasis in original); see n.10.

36 Pate Speech at 6–7.

37 ABA Section of Antitrust Law, *Competition Laws Outside the United States* 13–14 (2001).

38 Hannah L. Buxbaum, "The Private Attorney General in a Global Age: Public Interests in Private International Antitrust Litigation" 26 Yale J. Int'l L. 219 at 251 (2001); *see Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc* 473 U.S. 614 at 629 (1985) (rejecting "parochial concept that all disputes must be resolved under our laws and in our courts").

39 The absence of treble damages did not prevent the European Commission from imposing fines exceeding €855 million on the world's largest vitamin manufacturers. See above, n.6 and accompanying text. To the contrary, the absence of the availability of treble damages, before *Empagran*, likely made the fines possible.

so hostile to private treble damages actions that they have enacted "blocking statutes" to prevent the enforcement of US antitrust judgments for treble damages.[40] Some of these statutes—in particular, the United Kingdom's—contain "claw back" provisions permitting an antitrust defendant to recover the amount paid in excess of actual compensation pursuant to a judgment. Foreign courts similarly have declined to enforce American judgments with respect to punitive damages awards, because they are "contrary to public policy."[41] These countries would regard *Empagran*'s extension of US antitrust jurisdiction as antagonistic to their fundamental competition law policies.

Not only do these countries reject the application of the Sherman Act to conduct that rightfully falls within their regulatory ambits, but they also resist the importation of American-style discovery to their disputes. Extensive party-controlled discovery can be particularly problematic for many foreign countries. Some of these nations' blocking statutes (discussed above) were enacted not only to prevent punitive damages awards but also to prevent the application of US discovery techniques in foreign countries.

Indeed, a number of European governments vigorously oppose the expansive use of US discovery in their territories and argue that the Hague Convention on the Taking of Evidence Abroad ("Hague Evidence Convention") should govern evidence gathering.[42] "Many of the nations that participated in drafting the [Hague] Convention regard nonjudicial evidence taking from even a willing witness as a violation of sovereignty," and some view such discovery as a threat to basic substantive rights guaranteed by their constitutions.[43] In light of these general objections to the use of US discovery techniques in their countries, the *Empagran* majority's decision—which might make US discovery tools more available to foreign plaintiffs whose claims have nothing to do with US commerce—will appear particularly offensive to other countries.

In addition, permitting foreign private plaintiffs to act as "private US attorneys general" by bringing cases for purely foreign injuries would subvert the comity determinations made by regulatory authorities. The *Antitrust Enforcement Guidelines for International Operations* (April 1995) of the United States Department of Justice and the Federal Trade Commission[44] detail the extensive comity analysis undertaken by those agencies in order to determine whether to bring international antitrust enforcement actions. As the agencies themselves explain, "[i]n enforcing the antitrust laws, the Agencies consider international comity. Comity itself reflects the broad concept of respect among co-equal sovereign nations and plays a role in determining 'the recognition which one nation

40 Blocking legislation, decrees, and rules from these countries include the United Kingdom's Protection of Trading Interests Act of 1980, Canada's Foreign Extraterritorial Measures Act of 1985, Australia's Foreign Proceedings (Excess of Jurisdiction) Act of 1984, the French Penal Code Law No. 80-538, 1980 J.O. 1799, 1980 D.S.L., Philippine Presidential Decree No. 1719, and certain provisions of the Japanese and Korean Civil Procedure Acts that may be used to prevent full enforcement of US antitrust judgments.

41 See*, e.g.* Decision of the German Federal Court, BGHZ, 118, 312 (313), Judgment of June 4, 1992.Indeed, as recently as July the German Federal Constitutional Court issued a preliminary injunction against the service of a $17 billion US lawsuit (*Lieber v Bertelsmann AG*, No.03 CV1093 (S.D.N.Y., complaint filed February 19, 2003)) upon Bertelsmann.

42 See, *e.g. Société National Industrielle Aérospatiale v United States District Court*, 482 U.S. 522 at 529 n.11 (1987) (noting amicus brief submitted by Government of France arguing that the Hague Convention is the "EXCLUSIVE MEANS OF DISCOVERY IN TRANSNATIONAL LITIGATION AMONG THE CONVENTION'S SIGNATORIES UNLESS THE SOVEREIGN ON WHOSE TERRITORY DISCOVERY IS TO OCCUR CHOOSES OTHERWISE.") (capitals in original).

43 *ibid.* at 558 n.13 (Blackmun J., concurring in part and dissenting in part); 558 and n.14 (discussing position of Federal Republic of Germany in diplomatic protests and amicus brief filed in *Société National Industrielle Aérospatiale*) (Blackmun J., concurring in part and dissenting in part).

44 Available at *www.usdoj.gov/atr/public/guidelines/internat.htm*.

allows within its territory to the legislative, executive or judicial acts of another nation.' Thus, in determining whether to assert jurisdiction to investigate or bring an action, or to seek particular remedies in a given case, each Agency takes into account whether significant interests of any foreign sovereign would be affected."[45] These interests go well beyond a conflict in applicable law:

> "In deciding whether or not to challenge an alleged antitrust violation, the Agencies would, as part of a comity analysis, consider whether one country encourages a certain course of conduct, leaves parties free to choose among different strategies, or prohibits some of those strategies. In addition, the Agencies take into account the effect of their enforcement activities on related enforcement activities of a foreign antitrust authority. For example, the Agencies would consider whether their activities would interfere with or reinforce the objectives of the foreign proceeding, including any remedies contemplated or obtained by the foreign antitrust authority."[46]

These sensitive factors require careful calibration. Instead, the *Empagran* panel simply assumed that US interests are paramount and that US enforcement authorities and plaintiffs' attorneys are the only actors capable of identifying and deterring international cartels.

If not overturned, *Empagran* will transform the D.C. Circuit into a new world court for price-fixing claims

Finally, apart from the international consequences, the local implications of the panel's decision in *Empagran* are enormous. The D.C. Circuit will become an available forum for the filing of international antitrust claims based on purely foreign injuries. US courts are particularly attractive for foreign antitrust plaintiffs. An expansive interpretation of the FTAIA would permit "any entities, anywhere, that were injured by any conduct that also had sufficient effect on United States commerce [to] flock to United States federal court for redress, even if those plaintiffs had no commercial relationship with any United States market and their injuries were unrelated to the injuries suffered in the United States."[47] This concern is not merely hypothetical. International class actions have been brought in US courts by or on behalf of victims of the Marcos regime, Holocaust claimants and alleged victims of South African apartheid.[48]

Numerous factors make United States courts particularly attractive to foreign antitrust plaintiffs. American law typically does not require a losing plaintiff to reimburse the fees incurred by a prevailing defendant. Instead, the Sherman Act raises the specter of treble damages against antitrust defendants, as well as reimbursement of plaintiffs' attorney

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45 *ibid.* at § 3.2 Comity (footnotes omitted).

46 *ibid*.

47 *Den Norske Stats Oljeselskap AS v HeereMac VOF*, 241 F.3d 420 at 427–28 (5th Cir. 2001) (footnote omitted), *cert. denied sub nom. Statoil ASA v HeereMac VOF*, 534 US 1127 (February 19, 2002).

48 See *Hilao v Estate of Marcos (In re Estate of Marcos Human Rights Litig.*, 94 F.3d 539 (9th Cir. 1996); *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164 (S.D.N.Y. 2000); *Khulumani v Barclays Nat'l Bank Ltd*, filed November 12, 2002 (E.D.N.Y.); *Digwamaje v Bank of America*, 02 CV 6218 (First Amended Complaint filed September 27, 2002) (see *www.daimlerchrysler.com/investor/reports/annual02/download/pdf/other_notes_129_e.pdf*) (description of action).

fees. It bars the use of a pass-on defense, so that plaintiffs can sue for and recover three times the amount of the overcharge that they paid even if they "passed-on" every penny of the overcharge to their customers and thereby suffered no actual loss.[49] Party-controlled, wide-ranging discovery, liberal class action mechanisms, rules of joinder, the availability of depositions, jury trials and other characteristics of the American judicial system make the United States an attractive forum for foreign claimants. As the Solicitor General explained in its *amicus* brief, the *Empagran* decision "threatens to burden the federal courts in the United States with suits seeking to recover for injuries sustained abroad and arising exclusively from foreign conduct and foreign anticompetitive effects."[50] Overseas witnesses, foreign language documents and American juries unfamiliar with divergent economic conditions will only increase the hardship for all parties and cause greater delay in justice for litigants with claims that properly belong in US courts.

Conclusion

The D.C. Court of Appeals's decision in *Empagran* already has caused a stir in Europe, which has a keen interest in regulating and prosecuting violations of its own competition laws, and which has little desire to delegate that function to private parties bringing suit in the United States. However well intentioned, the panel's decision in *Empagran* threatens to impair global antitrust enforcement efforts and to frustrate the high degree of cooperation recently achieved among various competition authorities worldwide.

49 *Hanover Shoe, Inc v United Shoe Machinery Corp*, 392 U.S. 481 (1968).
50 Solicitor General's Brief at 13 (March 24, 2003) (*www.usdoj.gov/atr/cases/f200800/200866.pdf*).

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Civil Litigation in the U.S.: Ground Rules

- Private Right of Action has existed since 1890
  - Automatic Treble Damages
  - Plaintiff's Right to Attorney Fees
- Amnesty can limit private damages to single damages
  - Antitrust Criminal Penalty Enhancement and Reform Act of 2004, H.R. 1086
- Class Actions are permitted
- Suits may be commenced in both federal and state courts
  - Class Action Fairness Act of 2005 ("CAFA"), 28 U.S.C. § 1332

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Civil Litigation in the U.S.: Ground Rules

- Indirect Purchasers may not sue under federal law, but may sue under the laws of about half the states
  - *Illinois Brick Company v. State of Illinois*, 431 U.S. 720 (1977)
- Non-U.S. claimants may not sue under U.S. law unless injured by something injuring U.S. competition
  - Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a
  - *F. Hoffmann-La Roche Ltd. v Empagran S.A.,* 542 U.S. 155 (2004)
- May non-U.S. claimants sue in the U.S. under non-U.S. law?

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Civil Litigation in the U.S.: Today's Three-Ring Circus

- "Shoot first, ask questions later." Complaints begin to be filed at the first disclosure.
- "Off to the races"
  - Direct purchaser actions
  - Indirect purchaser actions
  - State court actions
  - States suing as *parens patriae*
  - States suing for injury to the state economy
  - States suing for injury to themselves

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Civil Litigation in the U.S.: Today's Three-Ring Circus

- U.S. plaintiffs suing under U.S. law
- Non-U.S. plaintiffs suing under U.S. law
  - *Empagran*
- Non-U.S. plaintiffs suing under non-U.S. law
  - Jurisdiction
  - Comity
  - Forum Non Conveniens

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Civil Litigation in the U.S.: Juggling Both Civil and Criminal Exposure

- Tension between civil litigation and criminal enforcement
  - Plaintiffs typically demand copies of subpoenas served by government enforcers and copies of everything produced to government enforcers
  - Enforcers commonly object to conducting depositions in private litigation while grand juries are still convened
  - Amnesty enrollees have duty to cooperate

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Meanwhile,

What is happening with private litigation in Europe?

Are "Class Actions" In The EU Fact Or Fiction?

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EU Support for Private Litigation

- Damages actions not yet part of the "culture"
  - Obstacles
  - Lack of incentive
- But the environment is changing
  - EU/UK legislative proposals
  - Global antitrust co-operation/leniency

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EU Support for Private Litigation: Current Position

- Commission comparative study 2004
- Similar lack of actions in other EU jurisdictions
- No EU-wide consistency in approach; variety of obstacles
- *Manfredi* holding: conditions for exercise of right to claim damages for breach of EU competition law to be determined by national rules

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EU Support for Private Litigation: Increased Emphasis On Private Enforcement

- Commission Green Paper 2005
  - *"Private as well as public enforcement of antitrust law is an important tool to create and sustain a competitive economy"*
  - Aims:
    - To stimulate debate
    - To increase effectiveness of right to claim damages for breach of EU competition law

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EU Support for Private Litigation: Increased Emphasis On Private Enforcement

- White Paper – 2008
- "A competition culture, not a litigation culture"

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EU Support for Private Litigation: Increased Emphasis On Private Enforcement

- EU Competition Commissioner Neelie Kroes:
  - The goals of reform will be to 1) compensate victims and 2) deter future anticompetitive activity. (European Report, 9.3.07)
  - At present "many injuries are left uncompensated," a situation "unjust, incompatible with our Community law, and at odds with our shared competitiveness objectives." (Id.)
  - Proposals to come will be based on "truly European solutions" and "grounded in our European legal traditions and cultures." (IHT 19/03/07)
  - She'll consider *double* damages, "but only if it's proven that single damages aren't enough to get the victims to court." (Id.) *Treble* damages are out of the question.
  - Consumer interest groups will be the preferred claimants: "This kind of representative action empowering groups that truly represent the interests of consumers is closer to the heart of European traditions." (Id.)

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Influence of U.S.: Efforts to Export "U.S.-Style" Litigation

- THE YANKEES ARE COMING, THE YANKEES ARE COMING!
- U.S. lawyers are scouring Europe for allies and alliances
  - Michael Hausfeld recently opened a London office to pursue, among other things, cartel enforcement. He talks of a "crusade to export America's legal system around the world." (Legal Week 5/4/07)
  - Schiffrin & Barroway last year cemented a strategic alliance with Winheller Attorneys at Law, a Frankfurt firm. (Id.)
  - Lawrence G. Scarborough of Bryan Cave says European businesses must be prepared for US plaintiff-side lawyers. (Wary Europe Moves Closer, National Law Journal 12/5/06)

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"a crusade to export America's legal system around the world"

Michael Hausfeld

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So, How to Manage Private Litigation in the New Global Environment?

- **Class Actions** – How to defeat certification
- **Indirect Purchasers** – How to disqualify remote claimants
- **Damages** – How to exclude experts and defeat damages claims
- **Jurisdiction** – How to exclude foreign claimants
- **Attorney Fees** – How not to pay them

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Class Actions

- How to defeat class certification
  - Ensure that the forum is as favorable to the defendant as possible
    - Removal to federal court
    - File motions to transfer
  - Seek early dismissal of the class petition
  - Limit or bifurcate discovery
    - Postpone expensive merits discovery until after class certification phase
  - Qualify appropriate experts
    - E.g., economists, statisticians, law professors

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Indirect Purchasers

- **How to disqualify remote claimants**
  - Move the class action to federal court (*e.g.,* CAFA)
    - *Illinois Brick Co v Illinois* held that only direct purchasers from a manufacturer are "injured" in their business or property within the meaning of Section 4 of the Clayton Act
      - Applies even if direct purchasers passed an illegal overcharge on to consumers (indirect purchasers) of the product
    - In most cases, consumer class actions do not overcome the *Illinois Brick* hurdle

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Damages

- **How to exclude experts and defeat damage claims**
  - Section 4 of the Clayton Act provides that persons injured "in [their] business or property by reason of" an antitrust violation may recover three times their damages.
  - Settle early with potential class members
    - Offer fair compensation to those injured by an adjudicated antitrust violation
  - Limit private damages to single damages through the DOJ amnesty program – seek amnesty as soon as a violation is detected

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Jurisdiction

- **How to exclude foreign claimants**
  - Preclude foreign claimants not injured as a result of a violation injuring U.S. competition
    - *Empagran*
    - Foreign Trade Antitrust Improvements Act of 1982 ("FTAIA"), 15 U.S.C. § 6a
    - Defeating claims under non-U.S. laws
      - ***Air Cargo***

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Attorney Fees

- **How not to pay them**
  - Trial by a follow-on plaintiff involves not a matter of whether the defendant is liable, but only whether the class members are injured, and if so, how much should be awarded.
  - Settle directly with customers prior to initiation of a Complaint
    - Several jurisdictions preclude defendants from communicating with potential class members once a Complaint is initiated – effectively guaranteeing that any settlement will involve payment of attorney's fees
    - Most courts hold that a defendant may communicate with and settle claims of potential class members prior to class certification

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Victimized?

What if Your Company is a Victim?

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What if Your Company is a Victim?

Key Questions are:

- – How to investigate?
- – Where to complain?
- – Whether to sue?

Where to sue?

- – Potential recovery
- – Attorney fees
- – Exposure to pass-on claims

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What if Your Company is a Victim?

- What if there is already a representative lawsuit?
  - Whether to retain separate counsel?
  - Whether to opt out?
  - Whether to settle?
    - Money
    - Other consideration

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What if Your Company is a Victim?

- Where to recover?
  - Amount
  - Attorney fees
  - Exposure to pass-on claims
  - Tax implications

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What if Your Company is a Victim?

- Wisdom of suing a supplier
- Alternative dispute resolution

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Conclusion

Global Issues + Global Enforcement + Amnesty + E-Discovery + Shrinking U.S. Jurisdiction = Global Litigation

Key: Managing vs. Reacting

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One more thing…

- In tough economic times, there is a greater temptation to engage in unilateral conduct to foreclose competitors
  - Exclusive dealing, tying, bundling
  - Refusals to deal or license
  - Predatory pricing
- Remember: The antitrust laws are not suspended during recessions

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After the Raid … Now What?

The Role of Statements of Objection in U.S. Civil Antitrust Litigation

By: Britt M. Miller & Brian J. Dunn[1]

Congratulations, you have just been raided by the European Commission ("EC"). If your luck holds, and you do business in the United States, you have likely also been served with a subpoena by the U.S. Department of Justice ("DOJ"). Within a few weeks, possibly a few months, you will be sued by civil plaintiffs in the U.S. for alleged antitrust violations stemming from the very same "suspicious" conduct that led to the dawn raid and the subpoena.

The law in the United States relating to what, if any, use can be made of the results of a DOJ investigation and prosecution in a civil lawsuit is relatively established (and hence, beyond the scope of this commentary). What is less clear, and what is likely to spur a host of contentious litigation and legal commentary over the next few years, is what use, if any, can be made of the results of a dawn raid, more particularly a "Statement of Objections" ("SO"),[2] in U.S. civil antitrust litigation.

As discussed below, given an SO's incredibly preliminary nature—a characterization given SOs by the EC itself—and the highly inflammatory (and unproven) nature of the allegations contained therein, U.S. law would seem to favor their exclusion as evidence on the grounds that they are inadmissible hearsay and unduly prejudicial.

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[1] Britt M. Miller is a partner in Mayer Brown LLP's Chicago office where she focuses on antitrust litigation and complex commercial litigation. Brian J. Dunn is an associate in the Chicago office's litigation practice. *See* www.mayerbrown.com for more information.

[2] A report by the EC's Directorate-General of Competition setting forth its preliminary views on complaints of anticompetitive activity based upon its preliminary investigation. *See* Brief for the Commission of the European Communities as Amicus Curiae Supporting Petitioner at *7, *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

The Role of the Statement of Objections in EC Investigations

The EC's Directorate-General of Competition (the "Directorate") is charged with enforcing the European Community's competition laws and regulations, set out, in part, in Articles 81 and 82 of the Treaty Establishing the European Community ("Treaty").[3] Acting upon a third party complaint or its own initiative, the Directorate first commences a preliminary investigation into the allegations of wrongdoing[4] during which it "may take into account information provided by a complainant, and it may seek information directly from the target of the complaint."[5]

Upon completing its preliminary inquiry, the Directorate then issues a written decision as to whether or not it intends to pursue the complaint. If the Directorate declines to proceed, its decision, if challenged, is subject to judicial review by the Court of First Instance and, ultimately, the Court of Justice for the European Communities.[6] If the Directorate decides to continue the investigation, however, its initial allegations are memorialized in an SO, and the "targets" are put on notice that they are under formal investigation. As the EC recently explained in a submission to the U.S. Supreme Court, "Typically, [the Directorate] initiates proceedings by serving the target with a formal 'statement of objections' that outlines [the Directorate's] *preliminary* views that infringement of the competition laws has occurred, and

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[3] Directorate General for Competition – Mission Statement, *available at* http://ec.europa.eu/dgs/competition/index_en.htm; Treaty Establishing the European Community, arts. 81-82, Dec. 24, 2002, 2002 O.J. (C 325) 64.

[4] *See* Council Regulation No 1/2003, art. 7(1), Jan. 4, 2003, 2003 O.J. (L1) 1.

[5] Brief for the Commission of the European Communities, supra note 2, at *6.

[6] Lucio Lanucara, *The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses*, 9 Ind. J. Global Legal Stud. 433, 453 (2002); Brief for the Commission of the European Communities, *supra* note 2, at *7.

advises the target of [the Directorate's] intention–subject to hearing out the target–to recommend a decision adverse to it."[7] (Emphasis added). Put more formally:

> A Statement of Objections is a formal step in Commission antitrust investigations in which the Commission informs the parties concerned in writing of the objections raised against them. The addressee of a Statement of Objections can reply in writing to the Statement of Objections, setting out all facts known to it which are relevant to its defence against the objections raised by the Commission. The party may also request an oral hearing to present its comments on the case.
>
> The Commission may then take a decision on whether conduct addressed in the Statement of Objections is compatible or not with the EC Treaty's antitrust rules. Sending a Statement of Objections does not prejudge the final outcome of the procedure.[8]

In short, far from resolving an antitrust complaint, much less constituting "evidence" of any wrongdoing, an SO is simply another weapon in the EC's investigative arsenal—one used to put the relevant parties on notice of what is being alleged against them. Indeed, the Directorate's release of an SO precedes the investigation subject's first formal opportunity to present its own evidence—including potentially exculpating evidence—to the EC.

After an SO is issued, the investigative target has the right to request a non-adversarial hearing in front of an independent hearing officer to present evidence on the issues raised in the Directorate's statement.[9] Following a review of the evidence provided at any hearing(s), the Directorate then decides whether to recommend a finding of infringement or an abandonment of the investigation—a decision that ultimately rests with the EC, and, like the Directorate's initial

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7 Brief for the Commission of the European Communities, *supra* note 2, at *7.

8 Press Release, European Commission, Competition: Commission confirms sending of a Statement of Objections regarding an alleged cartel for the sale of bananas (July 27, 2007), *available at* http://ec.europa.eu/comm/competition/cartels/what_is_new/news.cfm; Press Release, European Commission, Antitrust: Commission confirms sending Statement of Objections to alleged participants in a [sic] air freight cartel (December 21, 2007), *available at* http://ec.europa.eu/comm/competition/cartels/what_is_new/news.cfm (last visited Feb. 22, 2008).

9 *See* Council Regulation No 1/2003, art. 27, Jan. 4, 2003, 2003 O.J. (L1) 1.; Council Regulation 2842/98, arts 10-14, Dec. 12, 1998, 1998 O.J. (L 354) 21;

decision whether to proceed to formal investigation, is subject to review by the Court of First Instance and the Court of Justice.[10]

Statements of Objection In U.S. Civil Actions

Statements of Objection Are Inadmissible Hearsay Federal Rule of Evidence 803(8)(C)

In this era of alleged international cartels, it is not surprising that U.S. plaintiffs, with increasing frequency, are seeking to use European allegations of anticompetitive conduct in civil antitrust suits in U.S. courts. Some have even sought to admit into evidence SOs from European-focused investigations which may have little, if anything, to do with U.S. commerce (which is the only commerce to which the U.S. antitrust laws apply).[11]

Notwithstanding the fact that SOs plainly are hearsay—*i.e.*, out-of-court statements offered in evidence to prove the truth of the matter asserted—plaintiffs have argued that these statements are admissible pursuant to Fed. R. Evid. 803(8)(C)—the hearsay exception for public records and reports.[12] This argument necessarily fails, however, as SOs are neither: (1) "factual findings resulting from an investigation," nor do they (2) indicate any degree of "trustworthiness" (as the term is used in the rule).

First, an SO is not a "finding" of any kind, much less a report of "factual findings resulting from an investigation." Rather, it is merely a statement of "preliminary views" which is a procedural predicate to a more formal, and thorough, investigation.[13]

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[10] Brief for the Commission of the European Communities, *supra* note 2, at *7.

[11] *See, e.g.*, *Information Resources, Inc. v. The Dun & Bradstreet Corp.*, 1998 WL 851607, at *1 (S.D.N.Y. Dec. 8, 1998) (admitting a Statement of Objections pursuant to Fed. R. Evid. 803(8)(C), which provides a hearsay exception for reports setting forth factual findings resulting from an investigation)

[12] Fed. R. Evid. 803(8)(C) states: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . . (8) Records, reports, statements, or data compilations, in any form, of public offices or agencies setting forth . . . factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

[13] Brief for the Commission of the European Communities, *supra* note 2, at *7.

Given the dearth of precedent applying Rule 803(8)(C) to SOs, the treatment of analogous interim reports is instructive. In *Rambus, Inc. v. Infineon Technologies AG*, for example, the court found that an initial decision by the Federal Trade Commission ("FTC") dismissing a monopolization complaint did not constitute "factual findings" because of the decision's "lack of finality and the presence of an ongoing appeal."[14] Similarly, in *United Air Lines, Inc. v. Austin Travel Corp.*, the Second Circuit affirmed a trial court's exclusion of various government reports, including a Department of Justice ("DOJ") Report on the computerized reservation systems industry, finding that in light of the "interim or inconclusive nature of the reports . . . the court was entirely within its discretion when it refused to consider them."[15]

An SO is even less final than an initial decision by the FTC or a DOJ report. Not only is the Directorate's recommendation in an SO subject to review by the EC (whose decision, in turn, can be appealed to the Court of First Instance and Court of Justice), but an SO has never been fully vetted, is not a complete record of all of the relevant facts, and is not even the Directorate's final recommendation. As noted above, after the Directorate issues an SO, its investigation continues and the investigation's targets are given the opportunity to file a written response, submit additional facts, and take part in a formal, independent hearing—all of which can, and often do, alter the Directorate's preliminary views set forth in the SO.

Second, SOs generally lack the level of "trustworthiness" required for 803(8)(C) to apply because they are very preliminary in nature and are issued prior to a hearing or the presentation of potentially exculpatory evidence. As the court in *Coleman v. Home Depot, Inc.* made clear: when analyzing whether a report contains the trustworthiness required by Fed. R. Evid.

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14 222 F.R.D. 101, 108 (E.D. Va. 2004).

15 *United Air Lines, Inc. v. Austin Travel Corp.*, 867 F.2d 737, 743 (2d Cir. 1989); *see also Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1140 (5^{th} Cir. 1983) ("If the document is not sufficiently final it may not constitute a 'factual finding' . . . under the exception to the hearsay rule in Fed. R. Evid. 803(8)(C).")

803(8)(C), courts must consider "'[t]he finality of the agency findings, *i.e.*, the state of the proceedings at which the findings were made (whether they are subject to subsequent proceedings or *de novo* review), and the likelihood of modification or reversal.'"[16] Similarly, in its notes to Rule 803(8), the advisory committee explicitly identifies the issue of "whether a hearing was held and the level at which conducted" as a factor for determining the admissibility of reports.[17] For SOs, no hearings are held until after the Statements are distributed. As the EC itself explains, it is the issuance of the SO that triggers the investigation subject's right to set out all facts relevant to its defense in writing and at a hearing.[18] "Sending of a Statement of Objections does not prejudge the final outcome of the procedure" because a hearing has not yet occurred and the investigation is far from complete.[19] In short, given that SOs are issued so early in the EC's review process and because the recommendations contained therein are subject to modification or reversal by the Directorate, the EC, the Court of First Instance, and the Court of Justice, they are anything but final and hence, anything but "trustworthy."

In the only published decision of which we are aware admitting an SO pursuant to Fed. R. Evid. 803(8)(C)—*Information Resources, Inc. v. The Dun & Bradstreet Corp.*—the court failed to conduct the above analysis and arguably disregarded relevant precedent. In its brief opinion, the court found that the SO was admissible under Fed. R. Evid. 803(8)(C) because it set forth "factual findings resulting from an investigation made pursuant to authority granted by

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16 *Coleman v. Home Depot, Inc.*, 306 F.3d 1333, 1342 n.4 (3d Cir. 2002) (quoting *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1147 (E.D. Pa. 1980)).

17 Fed. R. Evid. 803(8) advisory committee's notes (also listing "the timeliness of the investigation," "the special skill or experience of the official" and "possible motivation problems").

18 Press Release, Competition: Commission confirms sending of a Statement of Objections regarding an alleged cartel for the sale of bananas, *supra* note 8.

19 *Id.*

law."[20] This, despite the fact that the court acknowledged that no hearing was held on the SO's findings and that it was not a final decision by the EC.[21] Citing *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), and *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d 1475 (D.C. Cir. 1991), the court nonetheless found that these circumstances did not indicate that the SO lacked trustworthiness.[22] Neither case, however, supports the court's decision. Unlike SOs, the government report at issue in *In re Japanese Electronic Products* was prepared after the parties "had an opportunity to make written submission[s] and oral arguments."[23] The agency report at issue in *In re Korean Air Lines* also was a "final report."[24]

Notably, the EC's own exclusion of SOs as "evidence" in its civil proceedings further supports a finding of inadmissibility of such material in U.S. courts. Only EC "rulings" on agreements, decisions or practices under Articles 81 or 82 of the Treaty can be used by individuals or companies impacted by the relevant anticompetitive activity as "evidence that the behavior took place and was illegal" when suing in member countries' courts.[25] Likewise, when the EC rejects a complaint, its assessments "constitute facts which Member States' courts or competition authorities may take into account in examining whether the agreements or conduct in question are in conformity with Articles 81 and 82."[26] An SO, however, is neither a "ruling"

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20 *Information Resources, Inc. v. The Dun & Bradstreet Corp.*, 1998 WL 851607, at *1 (S.D.N.Y. Dec. 8, 1998).

21 *Id.*

22 *Id.*

23 *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d at 268.

24 *In re Korean Air Lines Disaster of September 1, 1983*, 932 F.2d at 1481-82.

25 Press Release, European Commission, Antitrust: Commission fines synthetic rubber producers € 34.2 million for price fixing cartel (January 23, 2008), *available at* http://ec.europa.eu/comm/competition/cartels/what_is_new/news.cfm (last visted Feb. 24, 2008).

26 *See Commission Notice on the handling of complaints by the Commission under Articles 81 and 82 of the EC Treaty*, at § 79, April 27, 2004, 2004 O.J. (C 101) 65.

nor a "rejection" by the EC such that it cannot be used in the EU's own courts as evidence of any wrongdoing or lack thereof.[27]

One might wonder how one even could argue that SOs are admissible when U.S. criminal indictments are routinely excluded from evidence as they are clearly "hearsay, since the only purpose is to offer the documents for the truth of the statements contained in them."[28] Indictments "are far less probative than the admissible evidence that is available to the parties … and the general purposes of the Rules of Evidence and the interests of justice would in fact be undermined, instead of served, by admitting the documents."[29] If an indictment, which, although preliminary, has at least has been heard by a Grand Jury, is not admissible,[30] why, then, should an SO, which is less complete and less probative, be admissible? The answer: it should not.

Statements of Objection Are Unfairly Prejudicial to Civil Defendants
Federal Rule of Evidence 403

Even were the analysis under Rule 803 not dispositive, SOs should still be excluded under Fed. R. Evid. 403. Under Rule 403, relevance is not the only criterion of admissibility.[31] When the prejudicial effect of evidence substantially outweighs its probative value, the evidence must be excluded.[32] Such is the case with SOs. At trial, a jury—likely unfamiliar with the preliminary nature of an SO and the fact that it does not "prejudge the final outcome" of the EC's

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27 Indeed, while the Commission has identified certain antitrust determinations as factual evidence that may be used during civil proceedings in the courts of its European member countries, we are unaware of any instance in which the EC has stated than an SO is admissible evidence.

28 *In re WorldCom, Inc. Securities Litig.*, No. 02 CIV 3288, 2005 WL 375315, at * 9 (S.D.N.Y. Feb. 17, 2005); *see also Scholes v. African Enterprise, Inc.*, 854 F. Supp. 1315, 1324 (N.D. Ill. 1994) (indictments not evidence) (citing *United States v. Garcia*, 562 F.2d 411, 417 (7th Cir. 1977) (same)).

29 *WorldCom*, 2005 WL 375315, at *9.

30 *Id.* (an indictment is "a charging instrument[] that reflect[s], if anyone's state of mind, that of the Grand Jury and prosecutor based on the evidence presented to the Grand Jury").

31 Fed. R. Evid. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."); *Rambus, Inc.*, 222 F.R.D. at 109.

32 Fed. R. Evid. 403.

proceedings[33]—would likely give undue weight to an SO because it is issued by the EC's Directorate, a governmental entity, imbued with a presumed level of knowledge and authority.[34] Indeed, just as in *Rambus*, where the court held that admission of the FTC's decision would impair the jury's ability to reach its own determination, so, too, could the admission of SOs.[35]

Moreover, admitting the Directorate's preliminary views into evidence cannot be cured by defendants' "'right to present evidence tending to contradict or diminish the weight'" of those views.[36] Once this unfairly prejudicial "evidence" is admitted, the proverbial bell cannot be unrung.

* * * * * *

As the advisory committee to the Federal Rules of Evidence notes, determining whether Fed. R. Evid. 803(8) applies to "evaluative" reports, such as SOs, is "controversial."[37] And as EC investigations continue to take center stage in civil antitrust disputes on this side of the Atlantic, the controversy is sure to increase. A robust analysis of the purpose of SOs, the EC's own treatment of them, and established precedent applying the Federal Rules of Evidence, however, should aid U.S. courts in ensuring that SOs are not unfairly introduced into evidence in American litigation.

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33 Press Release, Competition: Commission confirms sending of a Statement of Objections regarding an alleged cartel for the sale of bananas, *supra* note 8.

34 *See Williams v. Nashville Network*, 132 F.3d 1123, 1129 (6th Cir. 1997) (affirming decision to exclude an Equal Employment Opportunity Commission's finding of probable cause because "a jury would attach undue weight to this type of agency determination").

35 *Rambus, Inc.*, 222 F.R.D. at 110; *see also United States v. MacDonald*, 688 F.2d 224, 230 (4th Cir. 1982) (affirming decision to exclude Army's investigative report because of undue risk that it would "undermine the exclusive province of the jury").

36 *Information Resources, Inc.*, 1998 WL 851607, at *1 (*quoting Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 168 (1988)).

37 Fed. R. Evid. 803(8) advisory committee's notes.

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Antitrust Enforcement and Compliance:
Antitrust Today and Tomorrow - The New Administration and the Economic Downturn

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At This Moment in History There Are Two Drivers of Antitrust Enforcement

1. New Antitrust Leadership at DOJ & FTC
2. Realities of Economic Downturn

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New Leadership

- Generally Antitrust Is Not Political
  - This Election Is Different
  - DOJ's 2001-09 Enforcement Record Was Weak
    - No Monopolization Cases
    - Very Few Merger Cases
    - Good Cartel Enforcement, But . . .

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New Leadership: What Can We Expect?

- President Obama Campaigned On Antitrust Policy
- AAG – Designate Varney Has An Enforcement Record
- Lack of Enforcement Over Eight Years Means Major Changes

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New Leadership:
What Can We Expect?

- Potential Limitations
  - Courts, Including The Supreme Court, Have Moved Illegally Pendulum Dramatically
  - Economic Crises May Temper Aggressive Enforcement on Some Issues

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New Leadership:
New Enforcement?

- Monopolization Will Be Investigated
  – DOJ Section 2 Report Will be Withdrawn
  – DOJ-FTC Collaborative Approach
  – Dominant Firm Not Given Benefit of Doubt

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New Leadership:
New Enforcement?

- Monopolization: Likely Targets
  – Financial Institutions
  – Pharmaceuticals
  – Standard Setting
  – Tying and Bundling

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New Leadership:
New Enforcement?

- Mergers
  – President Obama: “Step Up Review of Merger Activity.”
  – Backlash from Bush Policies
  – More Merger Challenges

    But

  – More Failing Company Situations

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New Leadership: New Enforcement?

- Cartels
  - Bright Point of Bush Enforcement
  - Heavy Reliance on Leniency Applications
  - No Major New Investigations Recently
  - Pick Up The Pace Through Investigations Independent of Leniency

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Antitrust in the Economic Downturn

- Economic Downturns Are the Breeding Ground For Antitrust Conspiracies
  - Executives Focus on Short-Term Gains
  - When Gains Are Not Possible, Collusion Becomes A Temptation

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Antitrust in the Economic Downturn

- Collusion Is "The Quick Fix"
- Collusion Can Often Provide Gains and Profitability During The Downturn
- Historically, Major Cartels Arise In Times of Recession
  - Vitamins
  - Air Cargo
  - Citric Acid

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Antitrust in the Economic Downturn

- Unlike During Past Recessions, Detection Has Increased
  - Leniency Makes Self Reporting Very Attractive
  - Multiple Enforcers Are Investigating Today
  - Penalties – Corporate and Individual Are Huge
    - ACPERA – 10 Years in Prison
      - $100,000,000 in Fines

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Antitrust in the Economic Downturn

- Most Importantly
  - Enforcers Know That Economic Downturns Are Breeding Grounds for Collusion
  - New Administrative Will Be Energized and Creative

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Compliance: How Do You Prepare for New Enforcement In An Economic Crises

- Review And Revise Compliance Program
  - Expect More Vigorous Section 2 Enforcement
  - Expect Tougher Merger Review
  - Expect More Vigorous and Stepped-Up Cartel Enforcement
  - Expect Multijurisdictional Coordinated Investigations

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Compliance: This Is The Time To Look For Cartels

- Let Executives Know There Is No Tolerance For Cartel Conduct
- Offer Executives Leniency Within The Company To Root Out Cartels
- Compliance Mini-Audits Drive Home Seriousness of The Effort

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Compliance: The Best Training

- Train for Senior Executives Intensively
  - Practical Issues
  - Subtle Meanings
- Review The Language Executives Use
- Teach Executives When To Expect In An Antitrust Investigation
  - Raids
  - Drop by Visits

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Compliance: The Best Training

- Train The Procurement Staff
  - Protect The Company From Being A Victim

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Preparing for the Next Four Years

- Expect More Intensive and Creative Investigations
- Review and Revise Compliance Programs to Anticipate Or Avoid New Investigations
- Focus Executives' Attention on the Seriousness of the Conduct – and Personal Accountability

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Antitrust Compliance in the Age of Multi-Jurisdictional Leniency: New Ideas and New Challenges

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Not since Kurt Eichenwald's *The Informant*[1] chronicled Mark Whitacre's involvement with the global lysine price-fixing scheme has an antitrust investigation generated as much international intrigue and notoriety as the marine hose cartel. On 30 April 2007, thousands of industry professionals flocked to Houston, Texas to discuss technological developments in the oil and natural gas industry at the Offshore Technology Conference. Among the attendees were eight executives travelling from France, Italy, Japan and the United Kingdom – all of whom made the fateful decision to attend a 1 May cartel meeting in one of the hotel's conference rooms. Unbeknownst to these eight executives, one of the conspirators had already broken rank and reported the misconduct to the US Department of Justice (DoJ). With the help of this amnesty applicant, the DoJ obtained arrest warrants and set an elaborate trap for the other members of the cartel, wiring the executives who initiated the meeting and planting hidden cameras in the conference room. The DoJ's quiet tenacity paid off as they memorialised a full-blown cartel meeting on video.

The eight executives were awakened by federal marshals pounding on their hotel room doors in the early morning hours of 2 May. For the 'Marine Hose 8' – most of whom did not speak fluent English – being placed under arrest and having their belongings seized in the middle of the night must have been a harrowing experience. After submitting to interrogation by federal enforcers, the executives were sent to a federal detention centre for pre-trial and holdover inmates in Houston, known as the 'Death Penalty Capital' of the US because approximately 4 per cent of the country's current death row inmates are tried in Harris County, Texas.[2] Most of the Marine Hose 8 remained in jail for several hours – some significantly longer – until bail was posted. Meanwhile, the arrests, and concurrent dawn raids throughout Europe, became headline news, causing consternation and embarrassment to the executives and their employers.

The arrest was the first chapter in a long saga for the Marine Hose 8. According to the terms of their bonds, all eight executives had to surrender their passports and remain within the US during the investigation. Even the first executives to plead from Trelleborg Industrie SAS in Clermont Ferrand, France would be detained in the US for eight-and-a-half months before beginning their prison sentences. Because these executives were arrested on US soil and did not have to surrender voluntarily, the DoJ was emboldened to seek sentences comparable to those imposed on US citizens. Moreover, none of their time spent in the US cooperating with enforcers would count toward time served. Given that the DoJ only started imposing short prison sentences on non-US executives in 1999,[3] the detention of the Marine Hose 8 represents a dramatic shift in policy.

The British executives embroiled in the marine hose cartel received even harsher sentences. After months of negotiations with the DoJ and the UK Office of Fair Trading (OFT) and public prosecutors, defence counsel brokered a deal that would allow the executives to return to the UK to face trial once they had been sentenced in the US. According to the terms of their plea agreements, if the UK sentences matched or exceeded the US sentences, then the three executives could serve their sentences in a UK prison. In the event that the UK sentences were lower than those stipulated in the US plea agreements, the executives agreed to return to the US to serve the remainder of their sentences. On 11 June 2008, a UK Crown Court judge imposed the first prison sentences for cartel offences pursuant to section 188 of the Enterprise Act of 2002 upon three British executives. Much to the surprise of legal commentators who predicted the UK court would hand down lower sentences,[4] Judge Geoffrey Rivlin meted out sentences between 30 and 36 months – significantly more than the 20 to 30 month sentences that the executives received in the US.[5] The steep sentences were accompanied by a warning from the judge that future sentences for cartel offences would be even higher. In wake of Judge Rivlin's ruling, two of the three British defendants have decided to appeal.[6]

The companies that employed the Marine Hose 8 face daunting consequences as well. The DoJ has opened a criminal investigation, and the European Commission has issued a Statement of Objections against the companies. As a result, the companies are likely to pay tens of millions of dollars in criminal and administrative fines. Other enforcement agencies – including some that previously refrained from prosecuting even hard-core offences – have indicated that they will follow suit.[7] The companies must also face private damages actions in the US and attempt to stave off the threat of treble damages. Adding insult to injury, the companies will expend staggering sums of money defending themselves and the employees who need counsel during the course of the investigation. In the case of the Marine Hose 8, the companies will also pay housing costs and living expenses for the employees detained in the US until they either plead guilty or are exonerated and return home.

The marine hose investigation – and, in particular, the UK sentencing – heralds a new era of international cartel enforcement. Non-US executives who violate antitrust laws on either side of the Atlantic will increasingly face prison sentences commensurate with those imposed upon US wrongdoers because antitrust enforcers in Europe and elsewhere have signalled that they might prosecute hard-core violations with the same vigor as their US counterparts. Additionally, countries relatively new to antitrust enforcement have shown an increased willingness to extradite foreign executives who flout US laws from abroad. As demonstrated by the most recent ruling in the extradition case of Ian Norris, the former chief executive officer of Morgan Crucible, the mere fact that the cartel activity was not a criminal offence in the wrongdoer's home country will no longer shield him or her from the consequences of his or her actions – particularly if obstruction of justice charges are also looming.[8]

In sum, the marine hose investigation underscores the importance of frequent and up-to-date compliance training for all companies operating in a global marketplace. While the Marine Hose 8 likely knew that their meetings and conduct were improper and illegal, they probably never dreamed that they could be detained, arrested and held in the US indefinitely and sentenced to serious jail time for their actions. Standard compliance training could not – and did not – prepare them for what they faced in Houston. During this era of heightened enforcement, effective compliance training must (i) engage senior executives and sales teams separately; (ii) explain the real-life scenarios that may get them in trouble; (iii) train them on what to do if the worst happens and the investigators visit; (iv) present the high personal costs of non-compliance; and (v) institute internal policies – including a leniency programme – that reinforce the company's commitment to eradicating cartel activity, both as a seller and a buyer.

When it comes to compliance training, know your audience

Most compliance programmes start from the flawed premise that cartels originate within the sales force of the company. As evidenced by the major cartel prosecutions of the past 10 years, illicit price-fixing and market allocation strategies are first crafted among the 'principals group' – the CEOs or general managers of the various corporations – and then executed by 'working groups', such as the sales teams dealing with accounts and customers on a daily basis.[9] An effective compliance programme will acknowledge the 'two tiers' of cartel activity and tailor the training accordingly. Senior management and sales teams should have separate training sessions – both to ensure that each group focuses on the dilemmas they are most likely to encounter and to encourage frank and honest dialogue about the issues.

'Thou shall not' prohibitions are meaningless – discussion of the hard issues and subtle meanings is essential

Admonishing executives not to discuss pricing with competitors is meaningless – most already know that such conversations are verboten and merely repeating the mantra exacerbates impatience and boredom with the training. The more compelling questions arise in gray areas of competitor contacts. Assume an executive tells the decision makers at rival companies that he will stop discounting next month because he thinks it is the best way to solve the market's problems, and the others in the room say nothing in response. Shortly after this discussion, discounting is eliminated in the market. Many executives would characterise the exchange as competitive intelligence rather than a communication about pricing by a competitor. But in an era where corporations are bringing questionable conduct to the enforcers in search of corporate leniency (and, in the US, single damages in civil treble damage actions), there is a risk that an executive eager to please both superiors and the enforcers will say that everyone in the room understood exactly what the comment meant, and reached an understanding to stop discounting. A series of sophisticated and nuanced hypotheticals such as this one can help the senior executive to understand the limited evidence necessary to prove an agreement and advise senior management what to do when these all-too-common situations occur. Finally, compliance training must also open the executives' eyes to the reality that their competitors would turn on a dime and implicate their partners in crime in order to avoid jail and other penalties.

Watch your language: unwittingly, your words may get you into trouble

In merger, cartel and monopolisation cases, victory or defeat can hinge on the words that the corporate executive uses to communicate thoughts and ideas. The era of instant messaging and e-mail has created a false sense of security, and communications that were once carefully guarded have become increasingly spontaneous, informal and unfiltered. Enforcement agencies, cognisant that a quick off-the-cuff remark may cause embarrassment or prove their claims, often demand that scores of electronic documents be produced even during a routine investigation.

Not surprisingly, most executives do not understand that certain buzzwords, even if completely innocuous, may conjure images of conspiracy for antitrust enforcers or plaintiffs' counsel. Ambiguous vocabulary must be used with care (or avoided entirely) in any communication – internal or external – about pricing or markets. Using real-life examples from actual cases or the companies' own files is an effective way to emphasise that documents often remain indelibly etched on the corporation's servers and back-up tapes for the indirect benefit of skillful enforcers and plaintiffs' counsel.

Be prepared for antitrust investigations – know what to expect

Companies and their employees should be prepared for an antitrust investigation before it happens – particularly because enforcers leverage the element of surprise to their advantage. In the US, the Antitrust Division routinely makes unannounced visits to senior executives at their homes. Similarly, the non-US executive may be detained and questioned upon entry into the United States. The vast majority of corporate executives in these situations agree to be interviewed without preparation or the assistance of counsel. Why? The executives believe they will 'look guilty' if they refuse to talk or they will be 'taken to headquarters for interrogation' if they do not cooperate. Unfortunately, these interviews often result in the shaken executive succumbing to the pressure in a variety of ways – namely, lying to government investigators, accidentally omitting information or even exaggerating facts to sound more sinister. Whatever the response, the executive places him or herself under a cloud of suspicion that will make future interactions with investigators more difficult or give rise to obstruction of justice charges.

Compliance training should define in basic terms what powers the enforcers have at their disposal during an investigation, as well as an individual's right to defer the meeting until he or she has had an opportunity to refresh his or her recollection and consult an attorney. In this era where the Antitrust Division prosecutions and investigations often culminate in allegations of false statements or evidence tampering, knowing what not to do during an the investigation is critical.[10] Unannounced dawn raids are the primary vehicle by which European and many Asian enforcers obtain evidence and they are occasionally used in the US when a court sanctions a search warrant. Companies, particularly those with operations in Europe and Asia, should prepare employees for dawn raids by enforcement officials. Virtually every employee in the organisation, including in-house counsel, senior executives, information technology specialists and administrative personnel will have a role to play if a raid is conducted, and they should know how to execute the appropriate response in order to protect themselves and their corporations from additional problems – and to learn as much about the substance of the investigation as they can during the raid.

Compliance training should bring to life the consequences of unlawful behaviour

Finally, effective compliance training must capture the attention of the audience. A brief, perfunctory statement that there will be 'consequences' is a disservice to the executives and employees who take time out of their busy schedules to attend the seminar. The likelihood of harsh jail sentences and the loss of position, reputation and lifestyle must be made clear and immediate to deter others who might otherwise justify cartel participation as merely doing business or succumb to the pressure of increasing the bottom line no matter what. The leader of the compliance training must make the ruinous consequences of cartel activity come to life. The more detail provided, the better – for example, 'The CEO of X company was caught, pled guilty and served 18 months in a US prison for allocating markets. The structure of that market was virtually identical to ours.' To the extent that non-US executives and employees comprise the audience, they should be advised of the steep penalties imposed upon non-US nationals in the US DRAM, air cargo and marine hose investigations.

The company should establish policies that offer every incentive – and reduce every barrier – to reporting cartel activity, such as a company leniency programme pegged to the principles of the US leniency policy.[11] Under the programme we propose, if an executive or employee reports conduct that violates the antitrust laws and the company receives amnesty from an enforcement agency, the informant will be protected from termination, demotion and financial penalties. These safeguards would afford an opportunity for corporate executives to come clean if they are involved in anti-competitive conduct, thus potentially limiting the company's risk and costs. We urge companies to consider this corporate leniency programme as a pillar of its corporate governance structure.

As to the others who participated in or condoned cartel activity but did not self-report, the company must leave no doubt that serious penalties, including but not limited to immediate termination and automatic forfeiture of corporate benefits such as stock options and retirement and severance packages, will result. This policy should be described in the corporate ethics code, reiterated at compliance meetings and written into employment contracts. Despite the company's best efforts, some will deny the seriousness of cartel activity unless their own self-interest is at stake.

At the conclusion of the session, each person should receive a wallet card with contacts and basic information about what to do during an investigation – a 'cheat sheet' if he or she has concerns about potentially anti-competitive conduct or is approached by government officials. Employees should be told repeatedly to call the numbers provided to discuss questionable conduct, report wrongdoing (having received thorough instruction on the advantages of self-reporting) or advise company counsel of unexpected contacts from government officials. The wallet card serves as both a resource and a reminder of the company's commitment to eradicating cartel behaviour long after the training is completed.

Train your purchasing agents to make certain you are not an antitrust victim

While compliance training is usually viewed by corporate officials as a cost – albeit a necessary one – careful study of the corporate procurement process can produce tangible benefits to the corporation in its dealings with suppliers. We propose that compliance training should educate sales and procurement officials about what to look for to determine whether the company's suppliers may be colluding or participating in a cartel. 'Compliance in reverse' teaches employees how to detect suspect patterns in pricing and bidding practices, questionable statements or behaviour by vendors and market conditions that raise the indicia of collusion.[12] Giving employees a clearly articulated incentive to look for harmful conduct can provide tangible cost savings and even windfalls for the corporation and its shareholders.

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As cartel enforcement has become more aggressive and leniency more pervasive, multi-national corporations need to place even greater emphasis on strong compliance policies. The saga of the marine hose cartel illustrates that rather than implementing traditional programmes as remedial measures, companies should adopt bold and innovative programmes, and view this investment as the necessary cost of doing business in a global marketplace. As evidenced by rapidly increasing criminal and administrative fines, the specter of treble damages, prosecution, incarceration and termination of senior executives and tarnished goodwill, where unlawful cartel activity is concerned, an ounce of prevention is truly worth a pound of cure.

Notes

1 See Kurt Eichenwald, *The Informant: A True Story* (Broadway Books 2001).

2 See Amnesty Int'l USA, One County, 100 Executions: Harris County and Texas – A Lethal Combination, 20 July 2007, available at www.amnesty.org/en/library/asset/AMR51/125/2007/en/dom-AMR511252007en.pdf.

3 See Donald C Klawiter, 'Please Show This to Senior Executives: Risks of Antitrust Investigations in the Courtroom and the Bedroom', *Competition Law Int'l* at 33 (October 2006).

4 See, eg, Enforcers' Marine Hose Deal Described as a 'Scam', *Global Competition Review*, 27 March 2008, available at www.globalcompetitionreview.com/news/news_print.cfm?item_id=6538.

5 See 'Marine Hose Three Sentenced', *Global Competition Review*, 11 June 2008, available at www.globalcompetitionreview.com/news/news_print.cfm?item_id=6854.

6 See 'Marine Hose Executives Appeal', *Global Competition Review,* 10 July 2008, available at http://www.globalcompetitionreview.cin/news/news_print.cfm?item_id=6983.

7 See, eg, Japan Fair Trade Comm'n, 'Cease and Desist Order and Surcharge Payment Order Against Marine Hose Manufacturers', 22 February 2008, available at www.jftc.go.jp/e-page/pressreleases/2008/February/080222.pdf; Ministry of Justice, Secretariat of Economic Law, Competition Div., SDE Opens Formal Proceedings to Investigate Alleged International Cartel to Rig Bids, Fix Prices, and Allocate Markets for Sales of Marine Hose, 12 November 2007, available at www.mj.gov.br/services/DocumentManagement/FileDownload.EZTSvc.asp?.

8 See, eg, Caroline Byrne, 'Ex-Morgan Crucible Chief Loses Extradition Ruling', 28 July 2008, available at www.bloomberg.com/apps/news?pid=20601102&sid=a6lVNKJ6NMeQ&refer=uk.

9 See William J Kolasky, Deputy Assistant Attorney General, Antitrust Division, US Department of Justice, 'Antitrust Compliance Program: The Government Perspective', 12 July 2002.

10 The Antitrust Division has increased the number of actions for obstruction of justice and false statements – either by separate criminal charges or sentencing enhancements for antitrust charges.

11 See Donald C Klawiter and Jennifer M Driscoll, 'A New Approach to Compliance: True Corporate Leniency for Executives', *Antitrust*, Vol. 22, No. 3, Summer 2008, pages 77 to 82.

12 For a brief primer on detection issues see, 'Price Fixing, Bid Rigging and Market Allocation Schemes: What They Are and What To Look For, An Antitrust Primer', US Department of Justice, Antitrust Division website, www.usdoj.gov/atr/public/guidelines/primer-ncu.htm.

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Mayer Brown LLP is an international firm that is in the ranks of the 'GCR 20' competition practices. The firm has over 70 competition specialists in offices in the United States, England, Belgium, Germany and China. *Chambers 2008* has described the practice as being 'definitely in the ascendancy'. The antitrust practice has substantial experience in international cartel and other enforcement actions, merger control and civil litigation matters. Because of its international reach, the practice can handle coordinated multi-jurisdictional investigations and proceedings involving the United States, Europe and Asia seamlessly and efficiently. Because of its strong litigation group that includes highly experienced trial and appellate lawyers, the firm was named as the number one antitrust litigation firm by Competition 360 and its lawyers have argued successfully three recent major US Supreme Court cases – *Empagran*, *Weyerhaeuser* and *Credit Suisse*. Because of its experience in many recent cases and investigations in multiple jurisdictions, the antitrust practice provides the most comprehensive and innovative compliance training and guidance to its clients. Because of the strong participation in competition bar and international policy activities, the group's lawyers are at the center of the policy debate in jurisdictions around the world.

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Cartel Enforcement Today:

The Perils of The Economic Downturn

Donald C. Klawiter [*]

These are dangerous times for corporate executives. In times of economic downturn and financial dislocation, the temptation for corporate executives to embrace a short-term fix to raise prices and allocate markets is almost irresistible. An historical review of economic downturns provides powerful testimony that the major global cartels, ranging from lysine and citric acid to vitamins and graphite electrodes, had their origins at moments of economic stress when executives sought the easy—and illegal—solution to their financial woes.[1] Similarly, the more recent "fuel surcharge cartels" were the result of dramatic increases in the price of oil which drastically affected profitability for airlines and other shippers.[2] Agreements to raise or stabilize prices or eliminate discounts are the

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[1] *See United States v. Archer Daniels Midland Company*, Criminal Information, (N.D.IL., Oct. 15, 1996), found at http://www.usdoj.gov/atr/cases/f0900/0965.htm; *United States v. F. Hoffman-LaRoche Ltd.*, Criminal Information, 3:99-CR. 184-R (N.D. Tx., May 20, 1999) found at http://www.usdoj.gov/atr/cases/f2400/2452.htm.

[2] *See United States v. British Airways PLC*, Plea Agreement, Cr. No. 07-183 JDB (D.D.C. Aug. 23, 2007) found at http://www.usdoj.gov/atr/cases/f225500/225323.htm; *United States v. Korean Air Lines Co.*

easiest and most convenient short-term solutions to reductions in demand and market slowdowns. They are usually "justified" in the executives' minds both because of profitability drops that affect the executive's performance and compensation and employment drops that affect the future of those who work for them. The executives believe that they only need to take drastic steps for a short time and that they are doing it for the greater good. They also believe fervently that their competitors will support them since it is not in anyone's interest to "turn in" the cartel that is saving jobs and keeping the industry viable.

In earlier economic crises, corporate executives appeared less worried about the personal and corporate consequences of their illegal behavior. They saw it as a rational solution, believing that the worst that could happen would be a corporate slap on the wrist. Yet the global antitrust enforcement actions following the last major downturn in the early 1990s completely changed the dynamic—and the consequences for seeking such short-term solutions. Unfortunately, not all of today's corporate executives know or understand the dramatic shifts in antitrust enforcement and how enforcement actions will affect them if they fall into the historical pattern of the quick fix. The corporate executives of today, weighing the short-term benefits of cartel behavior as a solution to the economic downturn, confront three developments that have dramatically transformed cartel enforcement.

First, cartel behavior today—even short-term behavior—is far more likely to be detected and prosecuted. This is primarily because of the development of the U.S.

Ltd., Plea Agreement, Cr No. 07-184 JDB (D.D.C. Aut. 23, 2007) found at http://www.usdoj.gov/atr/cases/f225500/225524.htm.

leniency program and those of jurisdictions around the globe. Leniency programs are the most successful vehicles for the detection and punishment of cartels ever devised by the enforcement community.

In the United States, the corporate leniency policies of 1978 and 1993 were intended to destabilize cartels by providing serious incentives for corporations and executives to report their illegal conduct. Under the U.S. policy, the first corporation to provide evidence of its wrongdoing where the U.S. Department of Justice ("DOJ") does not already have evidence to make a credible case will not be charged criminally, will pay no fine, and will receive immunity for its cooperating executives. If the corporation cooperates with the civil plaintiffs, it may also receive the benefit of paying single damages rather than treble damages in civil damage cases. Interestingly, when it was first announced, the 1993 policy only had limited success and minimal appeal. It was only when the DOJ started to command substantial corporate fines that leniency seemed to become a serious consideration for corporations. Until 1996, the highest fine ever obtained was $10 million, the statutory maximum at the time. When the DOJ obtained a $100 million fine from ADM in 1996 and other companies began to agree to huge fines, the leniency dynamic changed and corporations began to flock in, increasing the number of international cartel cases dramatically. After the U.S. policy became successful, jurisdictions around the world began to imitate the U.S. policy and establish their own leniency programs. Canada, the European Commission, numerous European member states, Korea, Japan, Australia, Brazil, and many other jurisdictions implemented leniency programs and have had great success in detecting and punishing national and international cartels.

The DOJ also initiated a complementary program called "amnesty plus." That program encouraged corporations that were being investigated and prosecuted in one market to look at their other operations and report illegal conduct in other markets. In that situation, not only would the corporation receive full leniency for the additional product, it would also receive a break on its fine for the first product. Several corporations brought multiple cases to the DOJ's attention under this program. Other jurisdictions have also adopted variations of "amnesty plus" in response to the great success of the program in the United States.

Detection today is far more likely because corporations around the world are seeking the benefits of leniency programs. The lesson to today's executive seeking a solution to his current market problem is that you cannot trust your competitors to keep the cartel secret. If competitors are confronted with inquiries from their compliance officers and outside counsel, they will undoubtedly give up others to save themselves. Executives need to understand that their competitors are not going to risk jail to save them. The leniency culture is predicated on saving yourself from high fines, jail, and hefty damages—and that means turning in your friends and competitors. While this culture did not exist during previous downturns when competitors stuck together, it certainly exists today.

Second, individual executives face a high likelihood of serving jail time if they participate in cartel conduct. The clear policy trend in the U.S. and in other jurisdictions has been to increase individual accountability and create greater deterrence by prosecuting executives and sending them to jail. This is especially the case for non-U.S. executives. The recent marine hose investigation is the most prominent example. The DOJ became aware of the cartel through a leniency applicant and secretly videotaped a prearranged meeting of competitors at an industry convention in Houston. The next morning, eight executives—all from outside the U.S.—were arrested in their hotel rooms and held pending disposition of their cases in the U.S. Thus far, the cooperating executives have been sentenced to jail terms of 14 to 30 months in the U.S. and up to 36 months in the U.K.

Similarly, today's corporate plea agreements routinely “carve out” a number of senior executives of the pleading company who remain subject to prosecution and jail sentences, despite their cooperation. In some recent plea agreements, the number of “carve outs” has ranged as high as ten executives from one corporation. This is a substantial shift from a time when one individual from a corporate defendant would be selected to serve a very short prison sentence. Many of the executives who are being prosecuted today are those at the top of the corporation, including CEOs. As a consequence, the number of senior officials who lose their jobs and their benefits has increased dramatically, both because they are convicted of a felony and because of dramatic shifts in corporate accountability following the scandals of the late 1990s.

Finally, the DOJ is making aggressive use of efforts to bring international executives within the jurisdiction of the United States for trial. The DOJ has initiated extradition proceedings, registered defendants on the INTERPOL Red Notice, and set up border watches into the U.S. to stop and detain executives they seek to prosecute. This is a very different dynamic than executives experienced in earlier downturns when they knew that they could simply stay out of the United States and be safe from apprehension and prosecution. Executives considering short-term cartels to solve their financial problems need to be aware of these new and effective tools.

Third, international cartel behavior today is likely to be investigated and prosecuted by multiple jurisdictions that are cooperating closely with each other. The fuel surcharge investigations of the airline industry, which followed the substantial increases in oil pricing, were initiated on a single day in February, 2006. Several jurisdictions coordinated their resources and began their enforcement actions in sequence, initiating investigations one after the other from Asia to Europe to North America. Similarly, in the marine hose investigation, the DOJ engineered a covert investigation, in conjunction with enforcement agencies around the world, which resulted in a videotaped meeting and the arrest of eight non-U.S citizens in the U.S. The United States, the European Commission, the United Kingdom, Japan, Australia, and Brazil have all initiated investigations of the marine hose market. Cartel investigations have become truly global enterprises and those who participate in cartel conduct today should anticipate multiple investigations and penalties from enforcers far beyond their national borders. This was unimaginable at the time of earlier economic downturns.

Although short-term solutions relating to price and market share are a great temptation for corporate executives trying to achieve profitability and stability for their corporations, engaging in even a short-term cartel is enormously more dangerous than it was in the 1990s. The likelihood of detection because of leniency programs, the virtual certainty that individuals will be charged criminally, jailed, and fired from their positions and the fact that multiple investigations will be initiated and multiple penalties will be assessed in jurisdictions around the world are staggering considerations for any corporation in the U.S. or around the globe. This is a time, therefore, for corporations to enhance their antitrust compliance programs by making certain that executives understand how dangerous the cartel option is for the company's long-term future and for their careers—short- and long-term. Compliance today means candid explanations of how an executive should conduct himself—how he can be pulled into illegal behavior and how he can get himself out. Today's cartel cases are no longer just overt agreements to set a specific price, they are much more sophisticated and nuanced arrangements affecting market shares, discounts, and other sales arrangements.

Compliance training should advise the executive of the power of leniency and why the executive cannot trust his competitor. Whether an executive is prosecuted will often depend on his interaction with the person who will become the leniency applicant and how that individual interprets their conversations or action. If an executive does not affirmatively tell his competitor that he will not discuss prices or discounts, the competitor can easily assume agreement—and disclose that as part of a leniency application. Executives need to be vigilant in ways they would not have imagined in earlier downturns—and compliance training must be very sophisticated and interactive. The executive also needs to know the consequences of his conduct—he needs to be aware that his career will end abruptly if he is caught violating the antitrust laws, but if he reports improper conduct he could be spared such treatment.[3] Compliance training needs to focus on today's conditions so the executive understands how dangerous it is to even think about the quick fix with the competitors.[4] Because human nature is ever hopeful for the quick, short-term solution, the best time for rigorous antitrust compliance training is when corporate executives feel the world is collapsing around them. Sophisticated compliance training today is a way for corporations and their executives to avoid repeating the mistakes of the past—and the severe penalties and consequences of current enforcement.

[3] For a discussion of a corporate policy to encourage executives to report their improper conduct, *see* Donald C. Klawiter and Jennifer M. Driscoll, *A New Approach to Compliance: True Corporate Learning for Executives*, ANTITRUST 77 (Summer 2008).

[4] For a description of how to present compliance training to senior executives, *see* Donald C. Klawiter and Jennifer M. Driscoll, *Antitrust Compliance in the Age of Multi-Jurisdictional Leniency: New Ideas and New Challenges*, 2009ANTITRUST REVIEW OF THE AMERICAS, 21.

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Antitrust Enforcement and Compliance: Overview of Merger Review Process

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U.S. Merger Review Process

- Purpose of U.S. Federal Merger Review:
  - Proposed Mergers, Acquisitions and Joint Ventures are reviewed by Department of Justice (DOJ) & Federal Trade Commission (FTC).
  - Review focuses on whether proposed transaction will confer "Market Power" upon newly merged company.
  - Agencies look to see:
    - Will newly merged company have ability to raise prices above competitive levels;
    - Decrease quality or output below competitive levels; or
    - Eliminate competition.

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U.S. Merger Review Process

- DOJ and FTC use their 1992 *Horizontal Merger Guidelines* to make this assessment.
- Merger Guidelines focus on following factors:
  - Defining relevant market(s) – product (parties' overlapping products and close substitutes) and geographic (local, regional, national or global?);
  - Effect of merger on market concentration – analyze market shares of merging parties and competitors and the resulting level of concentration;
  - Likelihood of anticompetitive effects – higher prices, reduced quality or innovation;
  - New entry or expansion by existing market participants – timely, likely and sufficient to deter anticompetitive effects; and
  - Merger-specific efficiencies.

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Hart-Scott-Rodino Review Process

- DOJ and FTC review most mergers under Hart-Scott-Rodino Act ("HSR Act" or "Act"), 15 U.S.C. § 18a.
  - Passed in 1976 to deal with "midnight mergers" closed by parties before government could investigate.
  - Requires parties to acquisitions of assets, voting securities, controlling interests in noncorporate entities (partnerships, LLCs) meeting certain dollar thresholds to submit premerger notification forms to FTC and DOJ and observe statutory waiting period – usually 30 days – before closing.
  - Allows FTC/DOJ to challenge proposed deals – e.g., agencies may seek to enjoin proposed transactions in court.

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Hart-Scott-Rodino Review Process

- HSR Act jurisdictional dollar thresholds:
  - Size-of-persons threshold: "person" on one side of transaction with $130.3 million or more in total assets or annual net sales and person on other side with $13 million or more in total assets or annual net sales ("person" is ultimate parent on each side–assets and sales based on most recent, fully consolidated financials).
  - Size-of-transaction threshold: transaction valued at more than $65.2 million.
- Transactions valued in excess of $260.7 million are reportable regardless of size of persons.
- Act has many exemptions – e.g., acquisitions in ordinary course of business, real estate, foreign assets and entities.
- Blunt Instrument – 80+% of reportable transactions – no investigation.

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Hart-Scott-Rodino Review Process

- When HSR filing is required, each party must submit copies of premerger notification form to both DOJ and FTC:
  - Timing – anytime after execution of letter of intent or agreement.
  - Information required – financial statements, SEC filings, revenue by NAICS Code, lists of subsidiaries and minority shareholder interests.
  - Parties' NAICS Codes overlap – identify geographic areas in which overlapping products are sold.
  - Item 4(c) – requires submission of documents prepared by or for officers or directors that evaluate proposed transaction with respect to competition, markets and other similar issues.
  - Acquiring person is required to pay filing fee – can range from $45,000 to $280,000, depending on value of transaction.

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Early Termination

- Parties can request early termination (ET) of 30-day waiting period.
  - Generally granted in 2-3 weeks if no substantive issues.
  - Disadvantage to ET – names of parties published on FTC web site, Federal Register – but ET is requested on 80+% of filings.
  - ET not requested – if no substantive issues, period expires without public disclosure.

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Agency Investigations

- Once filing is made – DOJ and FTC determine whether preliminary investigation is warranted.
  - In 2007, approximately 1 in 7 HSR filings resulted in preliminary investigations.
  - Factors going into decision:
    - Agencies' familiarity with industry.
    - Role played in that industry by merging parties – degree of overlap that appears to exist between parties and degree of competition they face based on HSR filings.
    - Information included in Item 4(c) documents, including statements indicating an anticompetitive intent (e.g., "If we do this deal we can raise prices 20%, high entry barriers will prevent new competition," etc.).

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Agency Investigations

- If there is an investigation, only one agency actually will review transaction.
- Determination of which agency will investigate is made through "clearance process."
- In general, agencies complete this process in first 10-days or so after HSR filing is submitted – is based on past history, expertise (Rx – FTC, airlines – DOJ).
- In some cases – extended clearance battles (AOL/Time Warner – 45 days, Pacific Enterprise/Enova – 5 months).

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Agency Investigations

- Reviewing agency will assign investigation to particular shop or section.
- Staff attorney from investigating shop/section will contact parties' counsel with request for basic information, including:
  - List of Top 10-20 customers – agency will call these customers to determine their reaction to transaction – major factor in whether transaction will be challenged.
  - Recent strategic and marketing plans.
  - Win/loss reports.
  - Information about manufacturing capacity.
  - Other transaction-related documents not provided with filing.
  - Interview company executives.
- Parties may make written submissions, in-person presentations, hire economist to address agency economist concerns.

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Second Request

- End of 30-day period, agency concludes no problem – period terminated or expires.
- End of 30-day period, agency continues to have concerns – will issue "request for additional information" commonly known as "second request" (issued in 2%-4% of HSR filings).
- Second request – subpoena requesting a broad range of documents/data.
- Responding – often very burdensome, time-consuming, expensive. (Parties can avoid by withdrawing filing, re-filing to give agency extra time; no fee if buyer re-files within 48 hours of withdrawal).
- Proliferation of e-mail, other electronic documents/data has increased production costs significantly, may require engaging electronic discovery consultant.
- Compliance can take 1-2 months or 6-8 months <u>or more</u> depending on complexity of parties, transaction – can cost several million dollars.

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Second Request

- Information typically requested in second request:
  - Organizational charts
  - Detailed descriptions of each relevant product
  - Product brochures
  - Business plans
  - All documents relating to competition in relevant product and geographic markets
  - Documents regarding entry and planned expansions
  - Detailed data regarding sales and prices
  - All documents relating to proposed transaction

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Second Request

- Parties usually negotiate to narrow request – limit number of custodians, time period covered.
- Once parties believe they have provided reviewing agency with sufficient information, can certify “substantial compliance” with request.
- Agency decides if parties have complied – may lead to disputes.
- Compliance triggers a second statutory waiting period – usually 30 days.
- During second request process – reviewing agency’s attorneys and economists may request additional information not covered by request, depose company executives.
- Parties may make additional submissions (e.g., white papers), presentations, meet with agency attorneys and economists.

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Second Request

- Because of burdens imposed by second request, parties may choose not to comply.
  - Instead, parties can work with agency to produce narrower set of information.
  - Agency may offer to defer compliance and conduct “quick look” review focused on key issues, such as market definition or entry – if satisfied will close investigation; if not, parties must comply with request.
- Problem with avoiding compliance – eliminates time constraints on government, can lead to prolonged investigations, greater expense if compliance later is necessary.

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Second Request Reforms

- FTC and DOJ reforms attempt to streamline review process:
  - Parties can elect a "Process and Timing Agreement" option:
    - Limits number of employees whose files are searched to 30-35;
    - Limits time period covered by request to 2 years;
    - Requires the preservation of fewer back-up tapes and maintenance of a reduced privilege log.
  - Reforms may reduce second request compliance burden, but come with tradeoffs:
    - Must make employees available for interviews;
    - Waive objections;
    - If transaction challenged must agree to extended discovery period (generally a 60-day to 6-month discovery period for FTC and 4 to 6 months for DOJ);
  - Parties and counsel need to consider whether reduced production burden is worth it.

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Second Request

- End of second request waiting period:
  - Agency concludes no problem – can grant early termination or allow waiting period to expire, enabling parties to close.
  - After approval agency can come back to challenge transaction – very rare.
  - Agency wants more time – required to go to court but parties usually agree to extension (e.g., agree not to close without prior notice).
  - Agency staff recommends challenging transaction — can appeal up the line (DOJ — front office, Assistant Attorney General; FTC—Bureau of Competition Director, Commissioners) — if appeal fails, agency will go to court to seek preliminary injunction ("PI," if granted usually ends deal), or parties may abandon transaction.
  - Litigation for permanent relief (may be combined with PI) – DOJ must seek permanent injunction in court, FTC can use administrative process – if litigated can add months to process. Government has lost major cases in recent years (**DOJ** – Oracle/PeopleSoft; **FTC** – Arch Coal, Foster, and Whole Foods [Court of Appeals now has reversed District Court denial of PI, FTC proceeding administratively, Whole Foods seeking to enjoin FTC process]).

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New FTC Adjudication Procedures

- FTC has proposed changes to its Rules that would expedite adjudicative proceedings.
  - Comment period will last until February 12, 2009.
- Past: generally, adjudicative proceedings brought by FTC only after preliminary injunction issued by federal court.
- Changes will include, *inter alia*,
  - Parallel preliminary injunction and adjudicatory proceedings.
  - Tighter timetables (including less time to answer a complaint; 210 hours for a hearing, unless Commission allows otherwise).
  - Commissioners acting as ALJ's.
  - Commission authority over dispositive pretrial motions.

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Possible Objections to New Procedures

- Changes attempt to address concern that FTC Administrative Process takes too long for parties to continue with deal if they prevail, but proposed changes raise new concerns:
  - Bias of Commissioner serving as ALJ.
  - Commission presiding over outcome-determinative proceedings (discovery and dispositive motions) is unfair.
  - Expediting procedures gives FTC staff time advantages over merging parties.
  - Burden of two parallel proceedings puts additional pressure on merging parties to abandon transaction (see, e.g., Inova/Prince William Health System, Inc.).

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Consent Decrees

- Any point in process – parties can negotiate consent decree (in 2007 32% of second requests ended in challenges or requests for consent).
- Negotiated between parties and reviewing agency to resolve agency concerns.
- Usually involves divestiture of subsidiaries or divisions, assets (plants, stores), license of patents or other intellectual property.
- Allows parties to conclude deal without it being challenged in court.
- Upon approval by agency is placed on public record for comment (DOJ decree – 60 days, FTC decree – 30 days) – parties permitted to close during comment period, comments rarely result in changes.

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Merger Review Outside of HSR Process

- If HSR filing is not required:
  - DOJ and FTC may learn of deal through customer or competitor complaints, press reports.
  - Agencies have authority to review any proposed or consummated merger they believe will have anticompetitive effects.
  - If transaction is challenged absent HSR filing – agencies are not constrained by HSR time limitations – investigation may take longer, particularly if agency has to prioritize HSR investigations.
  - Parties can close at any time but may not be in their interests to close over agency objections – creates ill will, government could seek an injunction – parties more likely to work to convince agency no problem.

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State Merger Review

- State Attorneys General may investigate merger even if it is subject to HSR review. Particularly when merger:
  - Raises issues of local concern.
  - Has significant impact on consumers.
  - Involves politically "hot" industry:
    - Hospitals
    - Health insurance
    - Supermarkets
    - Oil refineries, gas stations, etc.
- Generally, federal agencies take lead.
  - If local issues are prevalent, however, state can play pivotal role:
    - *Wal-Mart Stores v. Rodriguez*, 23 F.Supp.2d 395 (D.P.R. 2002).
      - Puerto Rico sought P.I. despite FTC consent order (grocery stores)

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Multi-Jurisdictional Merger Review

- Transactions may be subject to premerger notification requirements in other countries.
- Today, more than 80 countries have merger control statutes.
- Most significant foreign jurisdiction for U.S. companies re merger control – European Union (EU).

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European Union

- Unlike HSR filings, initial filings under EU Form CO require parties to provide detailed descriptions of products and markets.
- Generally, merger review by EU will produce same result as in U.S.
- There have been conflicting results, however:
  - GE/Honeywell (Approved by DOJ but rejected by EU).
  - Sony/BMG (approved by FTC; initially approved by European Commission, later reversed and remanded by Court of First Instance; later approved again by Commission).

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European Union: A filing in the EU is required when:

- Merged companies' worldwide turnover would exceed €5 billion;

And

- Combined EEA-wide turnover of at least two companies individually exceeds €250 million.

OR

- Post-transaction worldwide turnover would exceed €2.5 billion;

AND

- Post-transaction EEA-wide turnover of at least two companies would exceed €100 million;

AND

- Post-transaction turnover would exceed €100 million in at least three member states;

AND

- In each of these three member states, turnover of at least two of parties to deal exceeds €25 million.

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Individual Countries

- If EU premerger filing is not required, merger laws of individual member countries apply:
  - Germany - probably European country in which U.S. companies are required to file most often.
- Outside of Europe – Canada, Mexico, **Brazil**, Argentina, South Africa, Israel, South Korea – countries in which U.S. companies frequently must file.
- China recently enacted merger reform that requires premerger approval of transactions exceeding certain threshold – where deal involves US target, may require filing at same time as HSR but with substantive market discussion like EU Form CO.

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Counsel's Guide to HSR

What You Should Know About the Hart-Scott-Rodino Act

Counsel's Guide to HSR
What You Should Know About the Hart-Scott-Rodino Act

By Scott P. Perlman, Jay S. Brown, K. Shiek Pal

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For any attorney with a client contemplating a merger or acquisition, familiarity with the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a (the "HSR Act" or the "Act"), is essential. Failure to understand and comply with the requirements of the HSR Act can result in delays in consummating a transaction, make eventual compliance more burdensome and, in the case of noncompliance, result in significant civil fines and possible recission of the transaction. The purpose of this brochure is to provide a brief overview of the requirements of the HSR Act and the implementing regulations that have been promulgated by the Federal Trade Commission ("FTC"). *See* 16 C.F.R. §801 et seq. While by no means a comprehensive review, this brochure should help inform counsel of important deadlines in the HSR process and the scope of his or her client's compliance burden.

What is the HSR act?

The HSR Act requires parties to a merger or acquisition that meets certain dollar thresholds to file premerger notification reports with the Federal Trade Commission and the U.S. Department of Justice, and to wait statutorily prescribed periods before consummating the transaction. The HSR Act is designed to give the federal agencies time to conduct antitrust reviews of the proposed acquisition and, if deemed appropriate, to challenge the transaction under Section 7 of the Clayton Act, 15 U.S.C. §18, before the transaction is consummated. The fact that a transaction raises no possible antitrust issue does not, in and of itself, exempt the transaction from the Act. Any transaction meeting the Act's threshold requirements triggers a filing unless one of several specific exemptions applies.

Which transactions require HSR filings?

Filing Thresholds. In general, there are two thresholds that must be satisfied before a transaction is reportable under the HSR Act—the "size of the persons" test and the "size of the transaction" test.[1] The "size of the persons" test refers to the size of the parties to the transaction. Generally, the test is satisfied where there is, on one side of the transaction, a "person" with $130.3 million or more in total assets or annual net sales and, on the other side of the transaction, a "person" with $13.0 million or more in total assets or annual net sales. *See* 15 U.S.C. §18a(a)(2). Where the acquired person is not engaged in manufacturing, the threshold applicable to that person is $13.0 million in total assets or $130.3 million in annual net sales. *See id.*

The "person" for purposes of this test is the ultimate parent of the entity making the acquisition or the entity whose assets or voting securities are being acquired, and includes any other entities controlled, directly or indirectly, by that ultimate parent. For purposes of the Act, "control" is defined as, (i) with respect to a corporation or other entity that issues voting securities, holding 50 percent or more of the outstanding voting securities, or having a contractual right to designate 50 percent or more of the board of directors, or (ii) with respect to a partnership, limited liability company ("LLC"), or other noncorporate entity, having the right to 50 percent or more of its profits or assets upon dissolution. *See* 16 C.F.R. §801.1(b).

Annual net sales and total assets of a "person" are those appearing on the ultimate parent's last regularly prepared, consolidated annual statement of income and expense, and on its last regularly prepared, consolidated balance sheet. *See* 16 C.F.R. §801.11.

The "size of the transaction" test refers to the value of voting securities or assets held as a result of the acquisition. A merger or acquisition is reportable only if the buyer will, as a result of the transaction, hold assets or voting securities of the seller, or any combination of the seller's assets and voting securities, valued at more than $65.2 million. *See* 15 U.S.C. §18a(a)(2). Transactions valued at more than $260.7 million are reportable regardless of the size of the persons.

Assets must be valued at the higher of the acquisition price or fair market value. *See* 16 C.F.R. §801.10. In an asset acquisition, the acquisition price includes the value of any consideration paid for the assets plus the value of any assumed liabilities. *See id.* at §801.10(c)(2).

The fair market value must be determined by the board of directors of the acquiring person's ultimate parent, or the board's designee, acting in good faith. *See id.* at §801.10(c)(3).

The rules for valuing voting securities differ depending on whether the securities are publicly traded. If the securities are traded on a national securities exchange or are authorized to be quoted on an interdealer quotation system of a national securities association registered with the U.S. Securities and Exchange Commission (the "SEC"), the voting securities are valued at the higher of the market price or the acquisition price. *See id.* at §801.10(a)(1). If the securities are not traded on such exchanges (e.g., for a private, closely held corporation), the voting securities are valued at the acquisition price, if determined, or the fair market value. *See id.* at §801.10(a)(2).

Note that acquisitions of "nonvoting" securities (i.e., securities that do not confer the right to vote for the board of directors or similar body) are not covered by the HSR Act. *See* 15 U.S.C. § 18a(c)(2).

Secondary Acquisitions. Whenever, as a result of an acquisition, an acquiring person obtains control of a corporate or noncorporate entity that holds voting securities of another issuer that the entity does not control, the indirect acquisition of the other issuer's voting securities is considered a "secondary acquisition" that is separately reportable if it independently meets the Act's jurisdictional thresholds. *See* 15 U.S.C. §801.4. Note that secondary acquisitions of noncontrolling interests in noncorporate entities (e.g., an indirect acquisition of a 30 percent interest in a partnership as a result of acquiring control of the corporation or unincorporated entity that holds that interest) are not reportable, because acquisitions of interests in noncorporate entities are reportable only if they confer control.

Which acquisitions are exempt from the HSR act?

The HSR Act and the regulations implementing the statute provide that many acquisitions meeting the "size of the persons" and "size of the transaction" tests are nonetheless exempt from the Act's premerger filing and waiting period requirements. Some of the more frequently invoked exemptions from the HSR Act are described below.

The "Investment Purposes Only" Exemption. The HSR Act provides that any person may acquire up to 10 percent of an issuer's voting securities (regardless of the value of those securities) without making a premerger filing if the acquisition is "solely for the purpose of investment." 15 U.S.C. §18a(c)(9); *see also* 16 C.F.R. §802.9. The exact scope of the "investment purposes only" exemption is unclear, but it is not available to a party that seeks to acquire control of the issuer, intends to influence the basic management decisions of the issuer (e.g., by holding a management position with the issuer) or intends to obtain a seat on the issuer's board of directors (including by exercising a right to nominate or appoint a director). An acquiring party may intend to vote its shares and still have an "investment only" intent. A party may acquire stock subject to the investment only exemption and then change its investment intent. No filing would be required for previously acquired stock. A filing would be required before any further acquisitions. *See* 16 C.F.R. §802.9, ex. 3. This exemption also is not available if the acquiring person is a competitor of the issuer. *See* FTC Informal Staff Opinion Letter #9201002 (January 10, 1992).

The "Ordinary Course of Business" Exemption. Section 18a(c)(1) of the HSR Act exempts acquisitions of goods or realty transferred in the ordinary course of business. *See* 15 U.S.C. §18a(c)(1).

Upon this statutory basis, Rule 802.1 exempts acquisitions of: (i) new goods; (ii) inventory and supplies held for consumption, resale or lease; (iii) used durable goods held solely for resale or lease; (iv) used durable goods, where those goods have been or will be replaced by the seller within six months of the transaction; or (v) durable goods used by the seller solely to provide management and administrative support services for its business operations, where the seller has contracted in good faith with another person to obtain services substantially similar to those provided by the goods being sold. *See* 16 C.F.R. §802.1.

Rule 802.1 specifically excludes from the exemption acquisitions of goods as part of an acquisition of all or substantially all the assets of an "operating unit." *See* 16 C.F.R. §802.1(a). An "operating unit" is defined as "a business undertaking in a particular location or for particular products or services." Id. An "operating unit" may be a single store or production facility and need not be a separate legal entity. *See id.*

Property Exemptions

Non-income Producing Property. Pursuant to Section 18a(c)(1) of the HSR Act, Rule 802.2 exempts the acquisition of several types of real property described below. *See* 16 C.F.R. §802.2. Likewise, Rule 802.5 provides a broad exemption for acquisitions of investment rental property. *See id.* at §802.5. Note that, with respect to each of the exemptions contained in Rules 802.2 and 802.5, the acquisition of any assets not covered by the particular exemption remains subject to the HSR Act as if those assets were being acquired separately and will be reportable if valued at more than $65.2 million, unless another exemption applies.

New Facilities. The acquisition of new facilities is exempt from the reporting requirements of the HSR Act. *See* 16 C.F.R. §802.2(a). A new facility is one that has produced no income and was either constructed by the seller for resale or held by the seller solely for resale. *See id.* Also exempt are acquisitions from lessors by lessees that have had sole and continuous use of a facility since it was new. *See id.* at §802.2(b).

Unproductive Real Property. Likewise, acquisitions of unproductive real property are exempt from the HSR Act. *See* 16 C.F.R. §802.2(c). In general, unproductive real property is real property, including natural resources and improvements (but excluding equipment), that has not generated total revenues in excess of $5,000,000 in the previous 36 months. *See id.* at §802.2(c)(1). This does not include (i) facilities that have not yet begun operation; (ii) facilities that were in operation any time in the previous 12 months; or (iii) real property that is adjacent to or used in connection with productive real property that is included in the acquisition. *See id.* at §802.2(c)(2).

Office and Residential Property. Acquisitions of office and residential property are exempt. *See* 16 C.F.R. §802.2(d). To qualify, the property must be used "primarily" for office or residential purposes. *See id.* at §802.2(d)(2). Although the Rule does not define "primarily," the comments accompanying the Rule indicate that the FTC will interpret this term to mean that at least 75 percent of the space in the property being sold is used for offices and/or residences. *See* 61 Federal Register ("Fed. Reg.") 13666, 13676 (1996). In making this calculation, the total space being measured should consist of real property, the acquisition of which is not exempted by any other provision of the HSR Act or Rules. For example, any portion of the building consisting of retail rental property, the acquisition of which is exempt under Rule 802.2(f), should not be included. Assets incidental to the ownership of office and residential property (e.g., cash, prepaid taxes or insurance, rental receivables, and common areas) also are covered by the exemption. *See* 16 C.F.R. §802.2(d)(2). Note that, if the acquisition includes a business that is conducted on the property, the value of the portion of the property used by that business is not exempt. *See id.* at §802.2(d)(3).

Hotels and Motels. Acquisitions of hotels and motels, including improvements such as golf, health, restaurant, and parking facilities, are exempt. *See* 16 C.F.R. §802.2(e). This exemption does not cover the acquisition of a ski facility, however. *See id*; *see also* 61 Fed. Reg. at 13676. This exemption also covers acquisitions of assets incidental to the ownership and operation of a hotel or motel, including management contracts and licenses to use trademarks. *See id.* Comments accompanying the Rule, however, state that acquisition of a hotel management business or the trademark itself, such as in the acquisition of one hotel chain by another, would not fall within this exemption. *See* 61 Fed. Reg. at 13677. Those assets would have to be separately valued and aggregated with any other nonexempt assets in order to determine whether the $65.2 million threshold has been exceeded and a filing is required. *See id.* The FTC's Premerger Notification Office ("PMNO") has taken the position, however, that acquisition of a management company used solely to manage the property being acquired is included in the exemption. Finally, any hotel that includes a gambling casino is excluded from this exemption. *See* 16 C.F.R. §802.2(e)(2).

Recreational Land. Acquisitions of recreational land, including assets incidental to the ownership of such land, are exempt. *See* 16 C.F.R. §802.2(f). Such acquisitions would include the purchase of land used primarily as a golf, swimming or tennis club facility. *See id.* According to comments accompanying the Rules, and consistent with Rule 802.2(e), recreational land does not include ski facilities, multipurpose arenas, stadiums, racetracks, and amusement parks. *See* 61 Fed. Reg. at 13677.

Agricultural Property. Acquisitions of agricultural property, including assets incidental to the ownership of agricultural property, are exempt. *See* 16 C.F.R. §802.2(g). Agricultural property does not include slaughtering, processing or packing facilities, or property adjacent to or used in connection with such facilities. *See id.* at §802.2(g)(1). While "associated agricultural assets," such as inventory (e.g., livestock, eggs, and crops), structures that house livestock raised on the property, fertilizer, and animal feed, were included in the exemption when it was enacted in 1996, such associated agricultural assets were removed from the exemption effective April 2002 and are now separately reportable. *See* 67 Fed. Reg. 11898 (2002).

Retail Rental Space & Warehouses. Acquisitions of retail rental space (including shopping centers) and warehouses, including assets incidental to the ownership of such properties, are exempt from the Act. *See* 16 C.F.R. §802.2(h). This exemption will not apply, however, where the acquisition includes a business that is conducted on the property. *See id.* Such acquisitions might include the acquisition of a department store located in a shopping center or a wholesale distribution business conducted in a warehouse. In such cases, the value of the portion of the property used by that business is not exempt, though this exemption still will apply to the remaining portions of the property that qualify for the exemption (e.g., other portions of the shopping center not used by the department store).

Investment Rental Properties. Acquisitions of investment rental properties (i.e., real properties that will be held solely for rental or investment purposes) and assets incidental to the ownership of such properties (e.g., cash, prepaid taxes and insurance, and rental receivables) are exempt. *See* 16 C.F.R. §802.5. Rentals must be to parties not controlled by the buyer, other than rental of space for the sole purpose of maintaining, managing or supervising the operation of the property. *See id.* Note that the intent of the buyer, rather than the current use of the property, controls the availability of this exemption.

REIT Exemption. While not codified in the HSR regulations, PMNO has applied Section 18(a)(c)(1) to exempt certain acquisitions by Real Estate Investment Trusts ("REITs") that are consistent with a REIT's special tax status under the Internal Revenue Code, including the acquisition by one REIT of another REIT. This exemption does not apply, however, to the acquisition of a REIT by a non-REIT, which is governed by Rules 802.2 and 802.5, as well as Rule 802.4, which is discussed below.

Carbon-Based Mineral Reserves. Acquisitions of reserves (or rights to reserves) of oil, natural gas, shale or tar sands are exempt if their value does not exceed $500,000,000. *See* 16 C.F.R. §802.3(a). Similarly, acquisitions of reserves (or rights to reserves) of coal are exempt if their value does not exceed $200,000,000. *See id.* at §802.3(b). The exemption covers associated exploration and production assets, as long as those assets are dedicated to the reserves in question. *See id*. at §802.3(a),(b). The exemption does not apply to any pipeline or pipeline system or processing facility that transfers or processes oil and gas after it passes through the meters of a producing field located within reserves being purchased, or to any pipeline or pipeline system that receives gas directly from wells for transportation to a natural gas processing facility or other destination. *See id*. at §802.3(c).

Voting Securities or Noncorporate Interests in Entities Holding Certain Assets the Acquisition of Which is Exempt. The exemptions provided by 16 C.F.R. §§802.2, 802.3 and 802.5, discussed above, apply only to acquisitions of assets. Rule 802.4, however, also exempts acquisitions of the voting securities or noncorporate interests in any entity that holds assets, the direct acquisition of which is exempted by the Act or the Rules, including exemptions that apply to real estate, certain foreign assets, cash, acquisitions made in the ordinary course of business, and acquisitions made solely for the purpose of investment, so long as the entity does not hold more than $65.2 million in nonexempt assets. *See* C.F.R. §802.4. For purposes of this Rule, the assets of all issuers and unincorporated entities controlled by the acquired entity are included in determining if the limitation for nonexempt assets is exceeded. *See id.*

Acquisition of Stock Options, Warrants, and Convertible Voting Securities. Acquisitions of stock options, warrants and convertible voting securities are generally exempt from the filing requirements of the HSR Act. While options, warrants and convertible voting securities are defined as "voting securities" under the Act, *see* 16 C.F.R. §801.1(f), acquisitions of voting securities that do not confer present voting rights are exempt. *See* 16 C.F.R. §802.31. However, the exercise of an option or warrant, or the conversion of a convertible security, is considered an acquisition within the meaning of the Act and is reportable if, as a result of the conversion, the acquiring person will hold voting securities of an issuer valued at more than $65.2 million. *See* 16 C.F.R. §801.32.

Acquisitions by Securities Underwriters. Acquisitions of voting securities by a securities underwriter—in the ordinary course of the underwriter's business and in the process of underwriting—are exempt. *See* 16 C.F.R. §802.60.

Intraperson Transactions. An acquisition in which the acquiring and at least one of the acquired persons are the same by virtue of a controlling interest in voting securities or noncorporate interests is exempt. The FTC applies the exemption in the same manner to both corporate and noncorporate entities. Thus, a transfer of voting securities, assets, or noncorporate interests between two corporate or noncorporate subsidiaries in which the acquiring person has a controlling interest (50 percent or more) is exempt. The exemption also applies if at least one of the acquiring persons is the same as the acquired person. For example, if A and B each own 50 percent of corporation C, and A contributes assets to C valued in excess of the statutory threshold, A is exempt from filing because it is both an acquiring and acquired person, but B must file because it is an acquiring person but not an acquired person. *See* 16 C.F.R. §802.30.

Stock Dividends and Splits; Reorganizations. Rule 802.10 exempts acquisitions of voting securities pursuant to stock splits and pro rata stock dividends. Rule 802.10 also exempts acquisitions of interests in unincorporated entities or voting securities where an entity is being converted into a new entity if (a) no new assets will be contributed to the new entity as a result of the conversion, and (b) either (i) the transaction does not increase the acquiring person's per centum holdings in the new entity relative to its per centum holdings in the original entity, or (ii) the acquiring person controlled the original entity.

Acquisition of Noncorporate Interests in Financing Transactions. There is an exemption for acquisitions of noncorporate interests that confer control of a new or existing unincorporated entity where the acquiring person is contributing only cash for the purpose of providing financing, and the terms of the financing agreement are such that the acquiring person will no longer control the entity after it realizes its preferred return. *See* 16 C.F.R. 802.65.

Acquisition of Non-U.S. Interests. A number of exemptions also are available with respect to acquisitions of foreign assets or the voting securities of foreign issuers. In general, applicability of these exemptions is determined by the extent to which the transaction has a connection to U.S. commerce. *See* 16 C.F.R. §§802.50, 802.51.

Acquisitions of Foreign Assets. A transaction in which a U.S. or non-U.S. person is acquiring assets located outside the United States is exempt if (a) there are no sales in or into the United States attributable to the assets, or (b) U.S. sales are attributable to the assets, but the acquiring person will not hold assets of the acquired person to which more than $65.2 million in U.S. sales are attributable as a result of the transaction. *See* 16 C.F.R. §802.50(a).

Where the foreign assets being acquired had more than $65.2 million in sales in the most recent fiscal year, the acquisition is nevertheless exempt if:

both the acquiring and acquired persons are foreign;

- the aggregate sales of the acquiring and acquired persons in or into the U.S. were less than $143.4 million in their respective most recent fiscal years;
- the aggregate total assets of the acquiring and acquired persons located in the U.S. are less than $143.4 million; and
- the transaction is not valued at more than $260.7 million. *See* 16 C.F.R. §802.50(b).

Acquisitions of Voting Securities of a Foreign Issuer by a U.S. Person. A transaction in which a U.S. person is acquiring voting securities of a foreign issuer is exempt unless the issuer, including all entities it controls, (a) holds assets located in the United States having an aggregate fair market value of over $65.2 million (not including cash, government-issued securities and certain other investment assets), or (b) made aggregate sales in or into the United States of over $65.2 million in its most recent fiscal year. *See* 16 C.F.R. §802.51(a).

Acquisitions of Voting Securities of a Foreign Issuer by a Foreign Person. A transaction in which a foreign person is acquiring voting securities of a foreign issuer is exempt unless the transaction will (a) confer control of the issuer, and (b) the issuer either (i) holds assets located in the United States that have an aggregate fair market value of over $65.2 million (not including cash, government-issued securities and certain other investment assets); or (ii) made aggregate sales in or into the United States of over $65.2 million in its most recent fiscal year. *See* 16 C.F.R. §802.51(b)(1). If controlling interests in multiple foreign issuers are being acquired from the same ultimate parent, the assets located in the U.S. and sales in or into the U.S. of all the issuers must be aggregated to determine whether either $65.2 million threshold is exceeded. *See* 16 C.F.R. §802.51(b)(2).

Where the thresholds of 802.51(b)(1) are exceeded, the acquisition is nevertheless exempt if:

- both the acquiring and acquired persons are foreign;
- the aggregate sales of the acquiring and acquired persons in or into the U.S. were less than $143.4 million in their respective most recent fiscal years;
- the aggregate total assets of the acquiring and acquired persons located in the U.S. are less than $143.4 million; and
- the transaction is not valued at more than $260.7 million. *See* 16 C.F.R. §802.51(c).

Finally, certain acquisitions to or from foreign governments, and certain foreign banking transactions are exempt. *See* 16 C.F.R. §§802.52 (foreign governments) and 802.53 (foreign banking).

Acquisitions by Creditors. Certain acquisitions by a creditor, including acquisition of collateral or receivables, foreclosures, loan work-outs, acquisitions upon default, and acquisitions in connection with the establishment of a lease financing, are exempt if the acquisition constitutes a bona fide credit transaction entered into in the ordinary course of the creditor's business. *See* 16 C.F.R. §802.63. Similarly, an acquisition made by an insurer pursuant to a condition in a contract of insurance relating to fidelity, surety or casualty obligations is exempt if made in the insurer's ordinary course of business. *See id.*

Acquisitions by Institutional Investors. Acquisitions of voting securities by certain institutional investors (including, but not limited to, banks, bank holding companies, savings and loans, trust companies, insurance companies, investment companies registered with the SEC, finance companies, broker-dealers, pension trusts, and certain nonprofits) are exempt, provided a number of conditions are met, including that the acquisitions are made in the ordinary course of business, solely for the purpose of investment, will not result in the acquiring person controlling the issuer, and will result in the acquiring person holding 15 percent or less of the voting securities of the issuer. *See* 16 C.F.R. §802.64.

This exemption does not apply if the acquisition is of the voting securities of an institutional investor of the same type as any included in the acquiring person, or if an entity within the acquiring person that is not an institutional investor holds any voting securities of the issuer whose voting securities are to be acquired. *See id.*

When are acquisitions by newly formed entities, formation of corporations and noncorporate entities, and acquisitions of noncorporate interests exempt?

Acquisitions by Newly Formed Entities. Under certain circumstances, an acquisition by a newly formed entity valued between $65.2 million and $260.7 million does not require premerger filings under the HSR Act because the newly formed entity does not satisfy the "size of the persons" test. As noted above, for acquisitions in this range, one party to the acquisition must be a $13.0 million "person" and one party must be a $130.3 million "person" in order for the acquisition to be reportable. If the buyer does not have $13.0 million in annual net sales or total assets, no acquisition by that entity can trigger a filing.

Because acquisitions by a corporation, partnership, or other noncorporate entity (e.g., LLC) are considered to be acquisitions by the individual or firm, if any, that controls the corporation or noncorporate entity, the initial question when determining the size of a newly formed entity is whether there is a "controlling person." The assets and sales of any "person" that controls or is controlled by the entity must be included in calculating the size of a newly formed entity.

A corporation or other entity that issues voting securities is controlled by any shareholder that holds 50 percent or more of the corporation's voting securities, or by any individual or firm with the contractual right to designate at least 50 percent of the corporation's board of directors. *See* 16 C.F.R. §801.1(b).

A partnership or other noncorporate entity (i.e., an entity that does not issue voting securities) is controlled by any person who has a right to 50 percent or more of the entity's profits or assets upon dissolution of the entity. *See id.* Thus, a general partner in a limited partnership is not deemed to control the partnership for HSR Act purposes unless the general partner has a right to 50 percent or more of the partnership's profits or assets.

The difference in the control tests for corporations and noncorporate entities may have some bearing on the structure of an acquisition. For instance, a partnership acquisition vehicle is sometimes preferred because a general partner can retain wide discretion over partnership decisions without being held to "control" the partnership for HSR purposes. But an acquisition may not be structured in a particular way solely to avoid an HSR filing. *See* 16 C.F.R. §801.90. Any transaction entered into for the purpose of avoiding an HSR filing will be disregarded, and the FTC will apply the HSR Act and rules to the substance of the transaction in determining whether a filing is required. *See id.*

Note that, for both the corporation and noncorporate entity tests, where the voting securities or noncorporate interests are held by a natural person, holdings by spouses and minor children must be aggregated in determining whether the 50 percent threshold has been met. *See* 16 C.F.R. §801.1(c)(2).

Assuming that a newly formed entity is not controlled by any individual or firm, and that it controls no other entities, the next question is whether the newly formed entity has $13.0 million in assets (a new entity formed solely through contributions of cash would not have annual sales; on the other hand, a new entity may have annual sales where it is formed in whole or part through the contribution of one or more previously existing entities). The amount of assets of a newly formed entity is determined by reference to the entity's last regularly prepared balance sheet. A newly formed entity that has no regularly prepared balance sheet must prepare an initial balance sheet to determine whether the entity meets the $13.0 million size of the person's test.

Money borrowed to make an acquisition is not an asset in determining whether the $13.0 million test is met. *See* 16 C.F.R. §801.11(e). Thus, if a group of executives forms an acquisition corporation to make a leveraged buyout and that corporation has no assets other than cash to be used for the acquisition, the acquisition corporation would have no assets for HSR purposes, it would not meet the "size of persons" test, and no premerger filing would be required before the buyout is consummated. As noted above, this exemption would not apply to any transaction valued in excess of $260.7 million because the "size of persons" test would not apply to such a transaction.

Formation of Corporations. The formation of a corporation (as opposed to an acquisition by a newly formed corporation) can trigger the notice and waiting period requirements of the HSR Act. Concerns arise when unrelated parties of substantial size form and take back stock in a corporation with significant assets. *See* 16 C.F.R. §801.40. In evaluating whether the formation of a corporation is reportable, all assets contributed to the new corporation by the parties forming it are counted in calculating the size of the corporation, even those assets that will be used to make the corporation's first acquisition. *See id*. Therefore, it is possible that the formation of a new corporation being used to make an acquisition will be reportable, even though the acquisition itself will not be reportable under the exemption described above. In many instances, however, parties forming a new corporation to make an acquisition will contribute only cash in exchange for the stock they are taking back. When that is the case, formation of the corporation will be exempt under Rule 802.4 because the only assets held by the newly formed corporation will be exempt assets. *See* Rules 801.21 and 802.4.

Formation of Noncorporate Entities and Acquisitions of Noncorporate Interests. The formation of a partnership or other noncorporate entity (e.g., LLC), or an acquisition of ownership interests in an existing partnership or noncorporate entity, are reportable if (a) the formation or other acquisition results in at least one acquiring person obtaining a controlling interest in the noncorporate entity (i.e., a right to 50 percent or more of the entity's profits or assets upon dissolution), and (b) the interest that the acquiring person will hold is valued at more than $65.2 million, and the size of the persons' test, if applicable, is satisfied. *See* 16 C.F.R. §801.50 and 801.2(f). The value of the noncorporate interests acquired is the acquisition price of the interests if determined or, if the acquisition price is undetermined, the fair market value of those interests. *See* 16 C.F.R. 801.10(d). Additionally, fair market value will be used to value the acquisition of interests in a noncorporate entity when the acquiring person already holds interests in that unincorporated entity. *See id*. The total assets of a newly formed entity are determined in accordance with Rule 801.40(d), which provides that the assets of a newly formed corporation are any assets persons contributing to the formation of the corporation have agreed to contribute at any time, plus the value of any amount of credit or any obligations of the corporation that persons contributing to the formation of the corporation have agreed to extend or guarantee at any time.

What are the requirements when a premerger filing must be made?

If a premerger filing is required, the buyer and seller must make separate filings. In a stock acquisition in which the buyer is buying stock from holders other than the issuer, such as a tender offer, the buyer must notify the issuer at the time the buyer files of the buyer's acquisition plans and of the issuer's obligation to make a filing. *See* 16 C.F.R. §803.5.

In their respective filings, the parties must provide information about the transaction (including copies of any signed letter of intent or purchase agreement), copies of documents filed with the SEC (including most recent proxy statement and Forms 10-K, 10-Q and 8-K), most recent annual audit report and most recent regularly prepared balance sheet, consolidated revenue figures broken down by lines of business using the Department of Commerce North American Industrial Classification System ("NAICS") Codes, information about subsidiaries, minority shareholders, and minority shareholdings in unaffiliated entities, a description of any geographic area of line of business overlap, and any competitive studies prepared by or for an officer or director of the acquiring or acquired person (or any of that person's subsidiaries) for purposes of evaluating the acquisition.

Filings are submitted to the FTC and the Antitrust Division of the Department of Justice. The buyer's filing with the FTC must be accompanied by a filing fee, the amount of which depends on the value of the transaction. For transactions valued at less than $130.3 million, a $45,000 fee is due; for transactions valued between $130.3 million and $651.7 million, a $125,000 fee is due; and for transactions exceeding $651.7 million in value, a $280,000 fee is due.

Filings are kept confidential. The agencies will not publicly disclose the contents of a party's filing or even disclose its contents to the other party to the transaction. The filings are not subject to disclosure under the Freedom of Information Act. On rare occasions, however, filings may be made available by the FTC or Department of Justice in response to a request by a Congressional committee or in the course of an administrative or judicial proceeding. *See* 15 U.S.C. §18a(h).

The two agencies' sole task is to determine whether the proposed transaction is anticompetitive. As a matter of practice, the agencies divide responsibility for conducting substantive antitrust reviews, and parties must deal with only one of the two.

The premerger waiting period

The HSR Act requires that parties to a transaction observe a statutory waiting period—usually 30 days—before closing their transaction. The 30-day waiting period does not start until both parties have filed. Where stock is purchased from a party other than the issuer (except cash tender offers), the 30-day waiting period begins after the agencies have received the buyer's filing. If the acquisition is a cash tender offer, the waiting period expires 15 days after the buyer files. In all transactions, the waiting period does not begin until the buyer has paid the filing fee. *See* 16 C.F.R. §803.10. If the final day of the waiting period falls on a weekend or legal holiday, the waiting period does not expire until the end of the next business day.

The mandatory waiting period may be terminated early if both agencies agree that the transaction poses no antitrust concerns. *See* 16 C.F.R. §803.11. Early termination notifications are published in the Federal Register. *See id.* The Federal Register listing includes the names of the ultimate parents of the buyer and seller, the name of the particular entity whose assets or voting securities are being acquired, the transaction number assigned to the acquisition by the FTC, and the date on which early termination was granted. Similar information becomes available on the FTC web site as early as the day following the grant of early termination.

Either agency may extend the initial 30-day waiting period by issuing a request for additional information (a "second request") to the parties for the purpose of conducting a more in-depth antitrust review of the transaction. The second request waiting period adds an additional 30 days to the waiting period (10 days in the case of a cash tender offer), which begins running only after the parties have complied with the second request. Second requests, which are essentially subpoenas, generally are very broad, and compliance can take several months. The agencies have the discretionary authority to waive burdensome or irrelevant portions of second requests. If the reviewing agency insists on certain information that the parties claim would be unduly burdensome to produce, or a dispute arises with respect to whether the parties have substantially complied with the request, the parties may appeal to the Director of the Bureau of Competition at the FTC or the Deputy Assistant Attorney General for Mergers at the Antitrust Division of the Department of Justice. The agencies cannot extend the second request waiting period, but may attempt to obtain a court-ordered injunction preventing closing of the transaction. In addition, the parties may agree not to close the transaction until the reviewing agency has completed its review. If there is a genuine antitrust issue raised by a proposed transaction, the parties may wish to consider negotiating with the reviewing agency and providing additional information before a second request is issued. If, at the end of the second request period and any extension, the reviewing agency determines that the transaction will violate the antitrust laws, and the parties indicate that they still plan to go forward, the agency may seek an injunction barring consummation of the transaction. Alternatively, the acquiring party may attempt to negotiate a consent agreement with the reviewing agency, under which the proposed transaction would be modified in a manner that addresses the reviewing agency's concerns (e.g., by divesting assets or licensing patents).

What are the penalties for noncompliance with the HSR act?

Fines of up to $11,000 per day may be imposed against "any person" who fails to comply with the HSR Act. Fines of up to $11,000 per day also may be assessed against officers, directors, or partners of entities in violation of the HSR Act. *See* 15 U.S.C. §18a(g).

A court may order divestiture of illegally acquired voting securities or assets or "grant other equitable relief as the court in its discretion determines necessary or appropriate." *Id.* Requested remedies may include rescission of the transaction.

Only the government may sue to enforce the HSR Act. Private parties may complain to the FTC and Department of Justice about alleged violations, but private parties may not enforce or obtain damages under the HSR Act. *See Hammermill Paper Co. v. Icahn*, No. 80-47-B, 1980 Dist. LEXIS 17041 (W.D. Pa. Apr. 24, 1980).

Endnotes

1 In 2000, Congress amended the HSR Act to amend the size of the transaction test. See 66 Federal Register 8680 (2001). Those amendments also indexed the HSR thresholds to adjust annually according to the change in Gross National Product. Current threshold figures can be obtained at the FTC's website, www.ftc.gov.

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Antitrust Enforcement and Compliance: Recent Merger Activity at the US Enforcement Agencies

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Dual U.S. Antitrust Enforcement: Who Has You Covered?

- Computer hardware
- Health care
- Pharmaceuticals & biotech
- Satellite manufacturing and launch
- Retail
- Grocery manufacturing
- Chemicals
- Distilled spirits

- Computer software
- Health insurance
- Agritech
- Satellite & other broadcasting
- Advertising
- Cosmetics & hair care
- Telecommunications
- Beer

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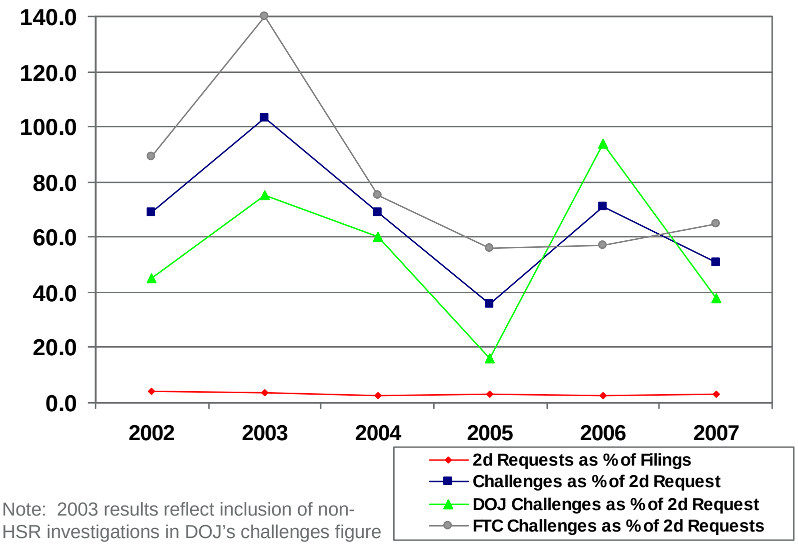
Trends in US Merger Investigations

(Second Requests and Challenges by Fiscal Year, Oct. 1 – Sept. 30)



Note: 2003 results reflect inclusion of non-HSR investigations in DOJ's challenges figure

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Few DOJ Litigated Merger Challenges

- Since *U.S. v. Oracle* in 2004, only two:
  - *U.S. v. Microsemi Corp.,* No.1:08 CV 1311 (E.D. Va., filed Dec. 18, 2008)
    - Military and aerospace transistors and diodes
    - Deal consummated in July 2008; not HSR-reportable
    - TRO motion pending
  - *U.S. v. Daily Gazette Co.*, No. 2:07-cv-0329 (S.D. W. Va., filed May 22, 2007)
    - Involved Daily Gazette's consummated acquisition of its only competitor
    - Papers already were operating under a joint operating agreement
    - Depositions underway (each side allowed 25); trial set for Oct. 19

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FTC's Merger Actions: On a Roll in Part III?

- *Chicago Bridge & Iron,* Docket No. 9300
  - FTC decision blocking deal affirmed by 5th Cir.
- *Evanston Northwestern Healthcare Corp*., Docket No. 9315
  - Post-merger challenge; FTC rejected divestiture as remedy – "may reduce or eliminate the resulting benefits for a material period of time."
  - Remedy: separate negotiating teams to deal with managed-care organizations
- *Equitable Resources, Inc*, Docket No. 9322
  - Acquisition of Peoples Natural Gas from Dominion Resources abandoned while appeal from dismissal of PI action was pending
- *Foster*, Docket No. 9323
  - Acquisition by Western Refining, Inc. of Giant Industries, Inc., a competing refiner
  - FTC dismissed complaint after 10th Cir. affirmed denial of PI
- *Inova Health System Foundation*, Docket No. 9326
  - Transaction abandoned after PI granted

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FTC's Merger Actions: Pending Actions

- *Whole Foods Markets, Inc., Docket No. 9324*
  - PI proceeding currently on remand from DC Circuit; Part III trial set for April 6
  - Stayed on Jan. 28 until Feb. 5 to allow Whole Foods to consider potential consent order
- *FTC v. Ovation Pharmaceuticals,* Civ. No. 08-6379 (D. Minn., filed Dec. 16, 2008)
  - Consummated acquisition; two Commissioners would have challenged earlier deal that **did not reduce number of competitors**
  - Same commissioners would have sought **disgorgement**
  - FTC seeks trial in July; defendants want May trial date

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Federal Trade Commission – DOJ Antitrust Division
Allocation of Industries

Computer hardware	**Computer software**
Health care	**Health insurance**
Pharmaceuticals & biotech	**Agrotech**
Airplane and automobile manufacturing	**Airlines and other transportation services**
Petroleum refining and distribution	**Electrical energy distribution**
Satellite manufacturing and launch	**Satellite & other broadcasting**
Retail	**Advertising**
Grocery manufacturing	**Cosmetics & hair care**
Chemicals	**Telecommunications**
Distilled spirits	**Beer**

Sources: Memorandum of Agreement Between the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice Concerning Clearance Procedures for Investigations (signed March 5, 2002, later abrogated), available at **http://www.usdoj.gov/atr/public/10170.htm**, and historical observations.