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Recent Activities

Supreme Court Wants Government's View on 3M

The United States Supreme Court seeks the government's views on whether to review a monopoly maintenance case against 3M Corporation. (*3M Co. v. LePage's Inc., U.S.*, No. 02-1865, 10/6/03).

The case is noteworthy because an *en banc* United States Court of Appeals for the Third Circuit held that a finding of illegal monopoly maintenance can be made even if a monopolist's prices are above its costs. Basically, the Third Circuit upheld a treble damages award against 3M based on a finding of exclusionary conduct consisting of bundled rebate programs and exclusive dealing. The Third Circuit reinstated a 1999 jury verdict for LePage's Inc., which ordered 3M to pay LePage's Inc. $68 million in damages for illegally monopolizing sales of transparent tape with its Scotch brand and a variety of discounts and bundled rebates.

LePage's claimed that 3M violated Section 2 of the Sherman Act by using monopoly power in the branded transparent tape market to gain a competitive advantage in the unbranded, or "private label" transparent tape market. LePage's cited a variety of 3M's marketing tactics, including 3M's program of bundled rebates and discounts, which were designed to thwart competition. The jury found that LePage's suffered $22.8 million in damages, which were trebled to $68.4 million.

3M introduced transparent tape with its "Scotch" product over 70 years ago and dominated the transparent tape market in the United States with a market share above 90% until the early 1990s. In fact, 3M conceded in the course of the litigation that it has a monopoly in the transparent tape market. In the late 1980s and early 1990s, however, "private label" transparent tape began to make significant inroads into that market, particularly with the growth of large chains like Wal-Mart, Staples and

OfficeMax, which began offering tape with their names on the label, supplied by companies such as LePage's. By 1992, LePage's gained an 88% share of the small market for private-label tape, and these sales of private label tape were beginning to cut into sales of 3M's branded tape.

Thus, 3M responded by marketing its own private label tape. LePage's claims that 3M engaged in a series of anticompetitive acts aimed at curbing the availability of low-priced transparent tape. Basically, 3M began offering "bundled" or "package" rebates to its Scotch tape customers: if customers increased their sales of various 3M product lines by specified percentages, these rebates were awarded. The availability and the size of the rebates depended on the customers' purchase volumes of multiple product lines, including "Post-It" notes and packaging products. In addition, LePage's alleged that 3M offered to some of LePage's customers large lump-sum cash payments, promotional allowances and other cash incentives to encourage them to enter into exclusive arrangements.

3M claimed that the programs offered customers convenience because the customers could deal with less invoices, less shipments, and less packaging. According to LePage's, however, the program was anticompetitive because it stifled the growth of private label manufacturers and prevented them from gaining or maintaining a large volume of sales. LePage's thus contended, and the jury agreed, that 3M was abusing monopoly power in branded tape to squeeze LePage's out of the private label tape market under Section 2 of the Sherman Act.

A divided panel of the Third Circuit reversed the District Court's judgment on LePage's Section 2 claim. *LePage's Inc. v. 3M*, Nos. 00-1368 and 00-1473 (3d Cir. Jan. 14, 2002). The Third Circuit then granted LePage's motion for rehearing en banc and vacated the panel opinion. 3M then petitioned the Supreme Court for a petition of certiorari.

There are two essential elements of a monopolization claim: (1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. The first element was easily met because 3M conceded that it had a monopoly. Thus, the Third Circuit focused on whether 3M willfully maintained its monopoly in the transparent tape market though exclusionary conduct without a valid business justification, primarily by bundling its rebates and entering into contracts that expressly or effectively required exclusive dealings.

The Third Circuit held that 3M's bundled rebate program was structured in such a way that LePage's customers had incentives to stop purchasing from LePage’s and purchase exclusively from 3M to obtain the maximum rebate, which the Third Circuit found to be extremely generous. The Third Circuit found that LePage's introduced powerful evidence that could have led the jury to believe the rebates and discounts to retailers such as Kmart and wholesalers like Sam's Club were designed to induce them to award business to 3M and stop dealing with LePage's. Evidently, some of 3M's rebates were "all or nothing" discounts, which in effect foreclosed LePage's from dealing with its customers. To maximize substantial discounts, some of LePage's largest customers started dealing with 3M exclusively. The Third Circuit held that with this type of evidence, a jury could reasonably find that 3M's exclusionary conduct violated Section 2 of the Sherman Act.

While there were procompetitive aspects to the rebate program, such as simpler invoices and single shipments, the Third Circuit found that LePage's relations and discussions with individual chains indicated that LePage's lost business because of the bundled rebates and exclusive dealing arrangements.

Now that the case has made it to the Supreme Court, 3M and LePage's are framing the issue differently. 3M characterizes the question to be reviewed as whether a "dominant firm's discounted but above-cost prices for volume purchases, of either individual products or multiple products, may be condemned as unlawful under Section 2 of the Sherman Act based on the incentive such low prices offer to shift purchases away from smaller rivals." LePage's claims that the Supreme Court should review two questions: (1) Did the Third Circuit correctly reject "3M's legal theory that after *Brooke Group*, no conduct by a monopolist who sells its product above cost -- no matter how exclusionary the conduct -- can constitute monopolization in violation of Section 2 of the Sherman Act"; and (2) "whether certiorari review is foreclosed by 3M's failure, in its question presented, to address the Court of Appeals' holding that 3M's exclusive dealing practices independently support the jury verdict in this case".

3M argues in its brief that the Third Circuit's decision conflicts with the U.S. government's position in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, which was argued October 14 before the court. 3M says that the government does not want to “chill” firms nationwide from selling more for less. The Third Circuit's decision, the brief contends, is a retreat from the bright-line principle that above-cost pricing provides a safe harbor. 3M maintains that the possibility of an exclusive dealing charge will prevent large companies with a single product from offering attractive pricing and will deter any number of large multi-product firms from offering discounts to customers buying a bundle of different products even when the package as a whole is above cost, when all individual components of the bundle are above cost, and when there is and can be no 'tying' claim based on using a monopoly to foreclose sales in a competitive market. 3M also maintains that the government's brief in *Verizon* is urging the Supreme Court to adopt an *Aspen Skiing*-based standard for predation, which basically means that Section 2 does not require dominant firms to avoid sales in order to allow small rivals to survive. (*Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985)).

LePage's maintains in its brief in opposition that the Third Circuit applied settled law that does not conflict with *Brooke Group* or decisions in other circuits, that 3M's exclusive dealing practices independently support the Third Circuit's decision, that there is no reason for the Court to hold 3M's petition pending its decision in *Trinko*, and that the Third Circuit's decision "will not inhibit price cuts or other pro-competitive conduct." LePage's claims that the Third Circuit's ruling should be upheld because the decision applies only to businesses with monopoly power that take steps to maintain that power, substantial evidence of 3M's anticompetitive intent to eliminate private label tape was presented, 3M's anticompetitive intent had no legitimate business justification, and customers and distributors did not like the restrictions that foreclosed competition.

The Supreme Court's decision on these issues will be significant because it will either indicate that a monopolist must be cautious in implementing a discount or rebate program that may have exclusionary or foreclosure effects, or that a monopolist has a clear bright line safe harbor on which to rely when offering discounts and rebates on bundled and single products.

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The Commission Strikes Back: The FTC Task Force Report on the State Action Doctrine

Under principles of federalism and state sovereignty, courts have long held that local governments and certain private actors are exempt from the antitrust laws when the state itself has made a policy decision to displace competition and authorize conduct that would otherwise violate the antitrust laws. This "state action" doctrine had its genesis in the 1943 Supreme Court decision, *Parker v. Brown*, 317 U.S. 141 (1943). It has been applied in recent years to shield from the antitrust laws conduct such as exclusive contracts for local services like cable television or airport taxi services, denials of zoning permits, hospital acquisitions of competitors, and to uphold rules of a state accountancy board rule barring CPAs from selling securities.

One of the current enforcement priorities of the FTC is to examine various antitrust immunities and exemptions, including the state action doctrine. The purpose is to determine whether such exemptions are being applied by courts in a manner consistent with competition policy generally. In September of 2003, the FTC's Task Force on State Action issued its Report ("Report") and concluded that in many instances the courts have applied the doctrine too broadly. The Report makes a series of specific recommendations as to how the state action doctrine should be properly applied, and the steps the FTC will take, such as filing *amicus* briefs, and legislate intervention, to return the doctrine to its proper scope.

While the Report comes with the usual admonition that it represents only the views of the Task Force itself (all FTC staffers), the Commission did authorize its issuance by a 5-0 vote. There is little doubt that one can expect the Commission to pursue actions consistent with the Task Force recommendations, and in some cases it already has. *See, e.g.*, *Indiana Movers*, FTC Docket No. C-4077. The focus of the Report, however, is on what the authors think the law should be, not what it is, as some courts have already rejected positions taken in the Report.

By way of background, while the state itself (*i.e.*, legislature, Supreme Court, *etc*.) is protected by the state action doctrine, local government entities are not unless they act pursuant to a state policy which "clearly articulates" a policy to displace competition. *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). In addition, for private actors, the state must also "actively supervise" their conduct. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) (active supervision required for private parties but not local government entities). One recommendation of the Report is that various "hybrid" government entities, such as hospital boards or state accountancy boards, should be treated as private parties subject to the active supervision requirement.

Many courts have held that such hybrid entities are to be treated as government entities not subject to the active supervision requirement. *See, e.g., Earle v. State Board of Certified Public Accountants*, 139 F. 3d. 1033, 1042 (5th Cir. 1998). The Report concedes this is appropriate in some cases, but notes that the examination of the public/private distinction by courts is "not as rigorous as it might be." The Report recommends that there be a more rigorous analysis of structure, membership, decision-making apparatus and openness to the public of such quasi-government entities before concluding no active supervision is required. Where the decision-making personnel of the company is composed largely of private parties who may compete with each other, such as lawyers and accountants, the Report suggests that the entity be treated as a private party despite its public status.

A related recommendation in the Report is that, where the local government entity itself is a market participant -- engages in commercial activities like those offered by private entities -- the court should impose an active supervision requirement even though *Town of Hallie* specifically exempted public entities from such a requirement. Most courts have rejected the market participant exception, but the issue usually arises in the context of whether there is any such exception to the state action doctrine at all, not whether the active supervision requirement should be imposed. *See* Antitrust Law Development (5th Ed.), p. 1222. Those courts rejecting the market participant exception do so on the basis that most local government "proprietary" functions also have a public purpose and to create a market participant exception would largely eliminate the state action immunity for local governments entirely. In *Town of Hallie* itself, for example, the municipality was engaged in the sewage treatment business and would itself have been a market participant.

That gets us to the active supervision itself. The Report notes that the courts have provided little guidance in this area. In its 1992 *Ticor* decision, dealing with whether the filing of collectively determined insurance rates were immune from price fixing claims under the state action doctrine, the Supreme Court held there was no immunity for private parties from such price fixing claims due to the failure to meet the active supervision requirement. *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992). While noting that state regulators must play a "substantial role" for active supervision to be present, the *Ticor* court provided little specific guidance as to what is required for active supervision, and suggested that it may vary based upon the gravity of the offense describing the alleged price fixing there as "pernicious" conduct that is *per se* illegal. Lower courts have not filled this void.

The Report's proposal to fill this vacuum, however, may be an example of where the cure may be worse than the disease. It proposes a rather wooden three-part test already adopted in the *Indiana Movers* case - there must be an adequate factual record, a decision on the merits, and a specific assessment of how the private action comports with substantive standards established by the legislature. When viewed in the context of daily decisions by water districts and airport authorities, however, this is an onerous set of standards that may not be practical or workable. Moreover, the Report appears to apply the same standard to rule of reason conduct as to conduct which is *per se* illegal, although there are some oblique references to a "tiered approach" in some cases. A more relaxed standard, implicitly suggested by *Ticor*, should suffice for rule of reason conduct such as exclusive contracts or vertical restraints.

The Report is likewise critical of existing law with respect to the clear articulation requirement. The Report emphasizes that, as originally developed in *Parker* and its progeny, clear articulation required that the state intended to displace competition in the area in which the anticompetitive conduct by local government occurs, usually in the form of a statute passed by the legislature. In *Town of Hallie*, however, the court held that the anticompetitive conduct at issue there -- a refusal to supply sewage treatment services to unannexed areas -- was protected by the state action doctrine even though not expressly authorized by the legislature. Stating that the statute was not "neutral" as to competition, the court held that the anticompetitive conduct was the "foreseeable result" of the statute since it did empower the city to refuse to serve unannexed areas. The "foreseeable" standard was reiterated by the Supreme Court in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), where it held that it was foreseeable that authority given a city to regulate land use and buildings would result in zoning restrictions on billboard advertising.

In recent years, a number of courts have used this "foreseeability" test to conclude that a general grant of authority to a local government entity to act in a specific area, such as providing taxi service at airports or to own and operate hospitals, is sufficient to meet the clear articulation standard. The Report criticizes these decisions, and describes them as "conflating" a general authorization of conduct with a specific intent to displace competition. It recommends a return to the principle that the authorizing statute must also evince an intent to displace competition with respect to the particular conduct at issue, a recommendation that does have some judicial support. *See generally Surgical Care Center of Hammond v. Hospital Service District No. 1*, 171 F.3d 231 (5th Cir. 1999).

In dealing with the clear articulation issue, or any other issue for that matter, the Report does not address the Local Government Antitrust Act ("LGAA"). 15 USC § 34-36. The LGAA was passed in response to the *City of Boulder* decision, which denied immunity on the basis that a general authorization statute did not articulate a state policy to displace competition with respect to the award of cable television franchises. *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). Although the LGAA bars only damages claims against local governments, not those for injunctive relief, it appears to apply even if there is no legislation that clearly articulates a policy to displace competition.

Another section of the Report is its recommendation that courts consider "spillover" effects on citizens of other states in determining whether the alleged conduct is protected by the state action doctrine. Citing the original *Parker* decision as an example, the Report notes that in the affected market there (production and sale of raisins), the benefits of the higher prices were concentrated in the state enacting the law displacing competition but the costs spilled overwhelmingly into other states. When such "spillover" effects are present, argues the Report, courts should consider this in their state action analysis, presumably to limit its application.

The Report concedes that this spillover effect has been largely ignored by the courts, and is founded mainly on various scholarly articles. Given the fact that virtually every industry and market today is an interstate one, this spillover concept is really an attack on the principles of federalism and state sovereignty that form the basis for the state action doctrine in the first place. One also wonders how a court would formulate a spillover rule (e.g., how much must go out of state before you lose state action protection?) and the evidentiary hearings that would be necessary to determine whether such a rule should apply in specific cases.

For those lawyers dealing with state action immunity issues, the Report provides guidance concerning existing law and the enforcement intentions of the Commission. Given the current status of the law and the existence of substantial protectionist sentiment where "local control" is an issue, as exemplified by the LGAA, the Commission has an uphill battle.

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Air France and KLM Announce Landmark Deal to Create Europe's Leading Airline

In a move announced on September 30th, Air France and KLM Royal Dutch Airlines are teaming up to create Europe's leading airline. Uniting the continent's second- and fourth-largest carriers, the new alliance would surpass British Airways, which grossed $12.4 billion in revenue last year. The first major cross-border airline merger in decades, this landmark deal involves the two airlines forming a holding company to be called Air France-KLM. The need for consolidation in Europe's airline industry has long been understood by its participants. An environment in which too many airlines are chasing two few passengers has only been exacerbated by plunging revenues due to the 9/11 terrorist attacks, wars in Afghanistan and Iraq, as well as the outbreak of severe acute respiratory syndrome ("SARS"). Whether the proposed alliance is an appropriate step towards curing the industry's troubles remains to be seen, as analysts, experts, and competing airlines are not all in accord. Moreover, the deal must first be approved by both European and American regulatory agencies, arguably no small feat, especially in the wake of British Airways' botched merger with American Airlines in 2001.

According to the share swap arrangement, Air France shareholders will receive one share in the new holding company for each Air France share. They will own approximately 81% of the combined company, of which the French government's stake would be diluted from 54.4% to 44%. In contrast, KLM shareholders will receive 11 new shares for every 10 shares of KLM, as well as warrants for additional shares that are good until early 2008. To protect KLM's landing rights under existing agreements, a majority of the voting rights, though not the equity, in the KLM subsidiary would be held for three years by the Dutch government and two Dutch foundations, keeping it technically Dutch. The deal values KLM at 16.74 euros a share, or 784 million euros ($913 million), a 40% premium over KLM's closing price prior to the announcement of the deal and a whopping 77% premium over the average share price in the previous three months. In response to the announcement, shares in KLM rose by more than 12% while Air France shares fell 4%. Such a response was not surprising, with KLM's debt in the order of $6.96 billion.

Air France-KLM would be the world's largest carrier by revenue, with a combined 19.2 billion euros ($22.4 billion). It would serve a combined 58.8 million passengers a year and 226 destinations worldwide, operating a fleet of 540 aircraft and employing about 106,000 people. In terms of revenue passenger kilometers, the airline would rank third globally, behind American Airlines and United Airlines.

Under the new alliance, Air France and KLM would continue to operate as separate airlines, remaining independently managed and preserving their distinct identities. Thus, although a single committee would be in charge of global strategy, each airline would retain its own logo, brand, and hub (Charles de Gaulle Airport near Paris for Air France and Schiphol Airport in the Netherlands for KLM). The takeover deal, however, has implications that go beyond these two national carriers and directly impacts additional airlines across the globe. While KLM would certainly join SkyTeam, a six-member marketing alliance led by Air France and Delta, its American partner Northwest Airlines would likely follow suit. In addition, Continental Airlines, which earlier this year formed a code-sharing alliance with Delta and Northwest and is itself among KLM's code-share partners, has also expressed hopes of joining SkyTeam by the spring.

The Air France-KLM merger may mark the beginning of a transformation of the European airline industry, which will increasingly resemble its U.S. counterpart with fewer, larger carriers competing on more routes and restraining fares. Certain executives and industry analysts suggest that in emphasizing long-haul routes, the merger would spur the growth of short-haul flights of newer discount carriers like Ryanair and EasyJet. This would add downward pressure on Europe's traditionally high air fares. Air France chief executive Spinetta further argues that the merger could mean more frequent flights, lower fares, and more choice in destinations for the flying public. In fact, the resulting greater corporate efficiency "will mean reducing costs and, I think, better fares in terms of competition" with other carriers.

Competitors are less than optimistic. Ryanair, the afore-mentioned no-frills airline based in Ireland, scoffed at the deal, predicting passengers will suffer rather than benefit. In a statement Ryanair contended that "[a]irline alliances and mergers result in the coordination of schedules, the reduction of capacity and the elimination of competition, which inevitably increases air fares." Other rivals of the two airlines have called for regulators to scrutinize the merger and any related alliances for anticompetitive issues. As Jeff Angel, a spokesman for British Airways, put it, "[w]e're encouraging regulators to give it the same scrutiny that was given British Airways and American Airlines when we applied for antitrust immunity."

Air France-KLM's hopes of regulatory approval may perhaps ultimately lie in distinguishing the current deal from the unsuccessful merger between British Airways and American Airlines. Those two airlines eventually aborted attempts at an alliance when the Department of Transportation ("DOT") required them to surrender 224 of their lucrative landing slots at London's Heathrow Airport to other U.S. carriers. KLM's landing rights, just like those of most other airlines, depend on its remaining majority-owned by the citizens of its country of registration. Thus the unique configuration of the current deal, in which a combined holding company acts as a corporate umbrella over two separate airlines with two separate nationalities.

However, it is precisely this "non-merger merger" structure of the deal that makes some analysts skeptical about its suggested benefits. The collaboration reportedly hopes to cut costs by combining their sales teams, negotiating a joint position on catering and ground-handling partners, buying aircraft together and converging IT applications. The expected savings of 385 million euros to 495 million euros a year is far from impressive, especially considering KLM's plans to cut 650 million euros of costs on its own. Coupled with a conditional guarantee that KLM jobs would be preserved for five years and no mention of job cuts by Air France, the alliance leads some to question from where, specifically, the savings will come.

Even so, most recognize the merger as an important first step in securing the future of the airline industry. They expect similar deals to follow, with British Airways and Lufthansa likely seeking to preserve market share through comparable alliances. Presently, British Airways leads the oneworld alliance along with American Airlines, while Lufthansa and United Airlines head the top-ranked Star Alliance.

Still, various competitive issues will probably be examined, including the group's dominant position on certain routes, such as Amsterdam-Paris and Amsterdam-Lyon, as well as on the transatlantic axis after the broadening of SkyTeam with the likely entry of Continental and United (KLM's U.S. partners). Air France and KLM claim that their combination will not reduce competition across the North Atlantic, where they have no overlapping routes. Nevertheless, most expect the examination of the deal by regulatory agencies in Washington (the DOT advised by the DOJ) to be much more challenging than that in Europe, where in July, 2002, the EU Commission approved a partnership between Deutsche Lufthansa AG and Austrian Airlines AG, a deal that experts say raised greater competition concerns than the present one does. According to Andrew Lobbenberg, an aviation analyst at ABN Amro, the Dutch bank that acted as financial advisor to KLM in providing a fairness opinion for the deal, there was "a 75% probability" of the deal going ahead.

Air France and KLM submitted the merger and related marketing partnerships to European and American regulators for approval at the end of October. They expect responses six to eight weeks thereafter. The takeover is expected to be launched in the first half of March 2004, with completion by mid-April.

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FTC Gives Online Appliance Exchange the Nod

In a letter to counsel dated October 10, 2003, FTC staff stated that the agency will not challenge the formation of an online business-to-business ("B2B") exchange and catalog founded by six distributors of replacement parts for home appliances. The Partslinx site will serve a variety of functions, including a directory that will allow customers to look up needed replacement parts and determine the distributor in their area. Customers that are local in nature can then visit the individual distributor's website (as linked from the Partslinx site) and order parts for either pickup or local delivery. FTC staff noted that the resulting sales transaction would take place between the individual Partslinx distributor and the customer with no other involvement by the collective members of the exchange. As a result, staff considered this particular aspect of the site as not posing any anticompetitive risks.

On the other hand, the exchange's plans for serving national business customers appeared to be a bit more problematic in nature to FTC staff. According to the FTC's business review letter, sales to national accounts via the Partslinx exchange would be coordinated jointly. The process in deciding how to price products to national accounts would require the disclosure of what is otherwise considered confidential strategic and marketing information - including future pricing plans. Moreover, Partslinx proposed to have prices for products sold to national accounts be decided and negotiated collectively. In addition to the disclosure of confidential, sensitive information, FTC staff noted a concern that such activities could potentially result in anticompetitive price fixing.

FTC staff noted that it appeared that Partslinx members did not seem to compete in sales to national accounts to "any meaningful extent." In addition, staff took note of the Partslinx members' assertion that the exchange will bring a new service to customers and would result in substantial consumer efficiencies. For instance, because customers would have access to the inventory of a collective group of Partslinx members, they would have a broader range of choices. Furthermore, growth in online sales might enable Partslinx members to reach customers without having to make substantial expenditures into "brick-and-mortar" retail locations, and therefore lowering the cost of doing business. As such, staff stated that the Bureau of Competition had "no present intention" to challenge the Partslinx exchange. However, the letter noted staff concerns with the exchange of confidential marketing and strategic plans.

The federal regulatory agencies have generally not challenged the formation of online B2B exchanges, even when founding members occupy a large collective market share. The first B2B analyzed by the agencies was the Covisint exchange, formed by the "Big Three" domestic automotive manufacturers, which was analyzed as a merger. FTC staff noted in its letters to Covisint founders that because that exchange was "in the early stages of its development and has not yet adopted bylaws, operating rules, or terms for participant access...", they could not determine whether or not it would have anticompetitive effects. *In re Covisint, Inc.*, FTC File No. 001-0127. Similarly, the DOJ's Antitrust Division opted not to challege the Orbitz collaboration between major airline carriers after an extended investigation. According to a July 31, 2003 press release, the DOJ's investigation revealed that the collective formation of Orbitz by major airline carriers did not result in higher fares or restrict the online airticket distribution market.

However, this does not mean that the formation of B2Bs will automatically withstand regulatory scrutiny, since both the FTC and the DOJ will take a very close look at the purpose and organization of the exchanges, and analyze each one on a case-by-case basis. At the present time, the agencies are particularly familiar with the arguments articulated by counsel relating to the effects of proposed exchanges, as well as the potential efficiencies. As such, the Partslinx business review letter provides additional insight into the lessons that the agencies have learned over the past couple of years.

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White Collar Crime Continues as a Priority for the Antitrust Division

The Antitrust Division continues to send a strong message to corporations and corporate executives engaged in price-fixing and market allocation schemes. In fact, investigations of the carbon products industry and the military moving and storage industry have resulted in indictments.

Electrical and Mechanical Carbon Products Industry

On October 15, a Philadelphia federal grand jury returned a superseding indictment against Ian P. Norris, the former Chief Executive Officer of The Morgan Crucible Company plc ("Morgan"), a United Kingdom corporation, adding the charge of price fixing on electrical and mechanical carbon products to the previous charges of obstructing the grand jury investigation of a price-fixing conspiracy, which were returned on September 24.

The price-fixing charge involves six types of electrical and mechanical carbon products: (1) carbon current collectors; (2) carbon brushes sold to original equipment manufacturers for automotive applications; (3) traction-transit carbon brushes; (4) industrial carbon brushes for use in battery-operated vehicles; (5) carbon brushes sold to original equipment manufacturers for use in consumer products; and (6) mechanical carbon products for use in pump and compressor industries. According to the charge, from late 1989 until at least May 2000, Mr. Norris engaged in a price-fixing conspiracy that was carried out in the United States for periods that varied by product market segment.

According to the superseding indictment, the conspirators carried out the price-fixing conspiracy by: participating in meetings and conversations in Europe, Mexico, and Canada to discuss the prices of electrical and mechanical carbon products sold in the United States and elsewhere; agreeing, during those meetings and conversations, to charge prices at certain levels and otherwise increase or maintain prices of the relevant carbon products sold in the United States and elsewhere; and discussing and exchanging price quotations to certain customers so as not to undercut the price of a competitor.

Military Moving and Storage Industry

Gosselin World Wide Moving, N.V. (“Gosselin”), a moving and storage company, and Marc Smet, its managing director, have been charged with participating in a conspiracy to rig bids and to defraud the U.S. government in connection with a scheme to raise rates charged to the Department of Defense ("DOD") to move household goods belonging to military and civilian DOD personnel from Germany to the United States.

A criminal complaint, which was filed under seal in the U.S. District Court in Alexandria, Virginia, on October 8, was made public at Mr. Smet's initial appearance before a U.S. Magistrate Judge in Honolulu on October 15. The charges in the two-count criminal complaint are the first to arise from an ongoing federal antitrust investigation of bid rigging, fraud, bribery, and tax-related offenses by companies participating in the military moving and storage industry.

According to the complaint, the DOD, in recent years, has spent more than $100 million annually to move the household goods of its military and civilian personnel from Germany to the United States. Allegedly, Gosselin and Mr. Smet conspired with others to eliminate competition, fix prices, and rig bids for the transportation of military household goods from Germany to the United States during a six-month period in 2002. Moreover, Gosselin and Mr. Smet are charged with eliminating competition, fixing prices, and rigging bids in violation of the Sherman Act.

The ongoing investigation is being conducted by the Antitrust Division's National Criminal Enforcement Section.

Summary

The charges against high ranking executives demonstrate the Antitrust Division's resolve to prosecute individuals and corporations that harm American consumers by choosing to collude rather than compete.

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RECENT ACTIVITIES

DOJ ANTITRUST HIGHLIGHTS

- On October 29, the DOJ announced that the nation's two largest frozen-juice can manufacturers, Sonoco Products Company and Pasco Beverages Company, agreed to abandon their proposed can-making equipment deal after the Antitrust Division expressed concerns that the deal could be anticompetitive. Allegedly, the transaction would have merged the only two owners of equipment used to make spiral-wound composite cans used to package frozen juice concentrate.

- On October 27, Bank of America Corp. announced its proposed merger with FleetBoston Financial Corp., of Boston, to create the second largest banking company in the world with a combined $933 billion in assets. The merger will create a new Bank of America serving 33 million consumers and 2.5 million businesses, and holding 9.8 percent of U.S. banking deposits. The deal is worth $47 billion. It will be the largest consumer bank and top lender to small banking businesses in the United States. The Antitrust Division is expected to review the merger.

- The Antitrust Division, the District of Columbia, Connecticut, Illinois, Louisiana, Massachusetts, New York, Ohio, and Texas filed a civil lawsuit to block First Data Corporation's ("First Data") proposed $7 billion acquisition of Concord EFS Inc. on October 24. The State of Pennsylvania was later added to the complaint. According to the complaint, Concord and First Data own STAR and NYCE, the largest and third-largest PIN debit networks in the United States, respectively. These networks enable consumers to purchase goods and services from merchants through PIN debit transactions by swiping their bank card

Recent Activities

DOJ Antitrust Highlights *(Continued)*

at a merchant's terminal and entering a Personal Identification Number ("PIN"). PIN debit networks provide an increasingly important method of payment for consumers and retailers because PIN debit is the least expensive, most efficient, and most secure form of card payment. The main issue in the merger will be market definition because if the Antitrust Division's market definition is correct, the merger of two of the three largest PIN debit networks will lead to higher prices to merchants, forcing them to pass on those price increases to consumers throughout the United States in the form of higher prices for general merchandise. While many observers believe that a divestiture of NYCE would be a good starting offer for a settlement that would avoid litigation, First Data and the Antitrust Division have claimed that no concrete settlement offer to divest NYCE has ever been made. Therefore, First Data forced the Antitrust Division to sue rather than settle the case, and First Data has vowed to vigorously defend the lawsuit in court. The trial is set for December 15.

- On October 24, it was reported that the National Association of Realtors, a trade association for the nation's real-estate agents, disclosed that the Antitrust Division is examining its Internet policies. These include a contentious new industry rule that will give brokers the option of restricting Internet-based competitors from posting certain real estate listings online. The rule was approved by the association last May and is scheduled to take effect January 1. Industry critics and consumer advocates have contended that the new rule is anticompetitive. The Antitrust Division confirmed that it is investigating the potential competitive impact of certain rules involving the display of residential real-estate listings data over the Internet. The government's interest ratchets up the pressure on the association and its members. The National Association of Realtors has said its policies relating to Internet use of property listings are lawful and appropriate and that it is cooperating with the Antitrust Division's inquiry. The association contends that its new rule will actually increase the amount of property information available to consumers online, by reducing uncertainties within the industry about what can and cannot be displayed.

- On October 17, the Antitrust Division announced through a business review letter that it would not challenge proposed changes in the procedures for a consortium of primarily independent and smaller owners of cable television systems to jointly purchase national cable network programming. The business review letter was addressed to counsel for the consortium and the National Cable Television Cooperative Inc. ("NCTC"). NCTC was formed in 1985 as the Mid-America National Cable Television Cooperative Inc., primarily for the purpose of achieving efficiencies in the purchase of cable programming. At that time, the Division issued a favorable business review for the consortium. NCTC has stated that modification of its original procedures could result in greater efficiencies for its members. Currently, NCTC, unlike a large multiple system operator, cannot guarantee any volume of participation in a contract, as its members decide whether to participate only after the contract has been negotiated. Members who

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DOJ Antitrust Highlights *(Continued)*

choose to participate in the modified joint purchasing program may be required to commit in advance to purchase programming at price levels they identify. The business review letter states that NCTC's proposed procedures will not facilitate price collusion among NCTC's members in the sale of multichannel video programming distribution ("MVPD") services because those cable systems do not compete with each other in the sale of MVPD services to consumers. The letter goes on to state that the new procedures may result in lower programming costs to members that will then be passed on to consumers. The letter also explains that the likelihood that collusion will occur in any overlapping areas served by the remaining NCTC members is small.

- The Antitrust Division announced on October 14 that it entered into a settlement decree with Waste Management Inc., which requires the company to sell certain waste hauling assets before completing its purchase of Allied Waste Industries Inc.'s assets in Broward County and Palm Beach County, Florida. The Division was concerned that the deal as proposed would have lessened competition and resulted in higher prices for small container commercial hauling services in Broward County. Small container commercial hauling involves the collection of waste from commercial establishments such as retail stores, offices, and restaurants, and the shipment of the collected waste to disposal sites. The Antitrust Division alleged that in Broward County, Waste Management and Allied are two of only three significant firms that provide this service. Under the proposed settlement agreement, Waste Management must divest small container commercial hauling assets on certain routes in Broward County. In addition, Waste Management is required to notify both the Antitrust Division and the State of Florida if, during the next four years, it proposes to acquire small container commercial hauling assets in Broward County.

- On October 12, Smithfield Foods, the largest pork producer and processor in the United States, outbid Cargill Inc. for the right to acquire the pork division of Farmland Industries for $367.4 million. Smithfield's acquisition of Farmland will further consolidate the pork producing industry. As a result of the acquisition, Smithfield will produce approximately 30% of the pork sold in the United States. In July, some farm groups and politicians opposed Smithfield's initial bid for Farmland's pork division because they believed the purchase might give Smithfield too much buying power over small hog farmers in certain geographic areas and in the United States as a whole. The Antitrust Division reviewed Smithfield's bid and decided to take no action on the monopsony theory because the staff found that many other pork processors would continue to operate in a number of regional geographic areas in the United States, generally, and in the Midwest, specifically. The staff found that hog farmers ship their hogs for slaughter up to an average distance of about 300 miles. Thus, the staff concluded that a number of large regional markets within the United States existed for the sale of hogs to pork producers. In these regional markets and in the Midwest, in particular, the staff found that a number of processors would continue to compete

RECENT ACTIVITIES

DOJ Antitrust Highlights (*Continued*)

for the purchase of hogs. Opponents of the deal argue that hogs cannot be transported 300 miles, so the regional markets should be smaller and, if the government were to analyze a smaller geographical market, the number of hog processors available to purchase hogs would be significantly reduced.

- On October 2, the Antitrust Division filed an *amicus* brief in a private action addressing liability under Section 8 of the Clayton Act. The brief was filed in *Reading International v. Oaktree* in the Southern District of New York. The brief addressed whether a business whose deputized representatives serve simultaneously as directors or officers of two competing corporations may violate Section 8 of the Clayton Act. The Antitrust Division argued that the United States has long taken the position that a corporation or other business entity may violate Section 8 of the Clayton Act, if its deputies serve as directors or officers of competing corporations barred from sharing directors or officers under the statute and contended that Oaktree's contrary position, that a corporation, acting through its agents, may achieve precisely the coordinated management of competing firms that the statute is designed to outlaw, is inconsistent with the statutory language, the statutory purpose, legal precedent, and the longstanding interpretation of the United States. Therefore, the Division concluded that the Section 8 claim should not be dismissed on the ground that a business entity may not violate Section 8 through its deputized representatives' service as directors or officers of competing corporations.

For more information on any of these activities, please contact Andre Barlow at (202) 218-0026 or abarlow@sheppardmullin.com.

FTC ANTITRUST HIGHLIGHTS

- On October 31, the FTC accepted three proposed consent orders against three state movers associations that settle charges of anticompetitive conduct in the collective filing of tariff provisions in Alabama, Mississippi and New Hampshire. Under the proposed consents, the Alabama Trucking Association ("ATA") and the Movers Conference of Mississippi ("MCM") have agreed to stop filing tariffs containing collective intrastate rates. Similarly, the New Hampshire Motor Transport Association ("NHMTA") will stop filing tariffs containing rules that call for automatic increases in intrastate rates. The Commission previously had filed administrative complaints against ATA and MCM, but removed them from administrative litigation to allow for the consent order negotiations. The Commission, on October 31, announced for the first time the NHMTA complaint. The FTC reviewed these matters carefully prior to the filing of complaints to see if the associations' conduct was protected by the state action doctrine. In each case, the FTC determined that

Recent Activities

FTC Antitrust Highlights (*Continued*)

the conduct was not protected because the states' oversight fell below the state action doctrine's active supervision component. All three proposed orders allow the association to seek to modify their terms to permit collective action if they can demonstrate that the state action defense would apply. The orders terminate in 20 years.

- On October 28, after years of hearings on antitrust and intellectual property issues, the FTC issued its long-awaited Report on how to promote innovation by trading the proper balance of competition and patent law and policy. A forthcoming second report by the FTC and the Antitrust Division of the DOJ will make similar recommendations for antitrust law. In particular, the FTC's Report proposes legislative and regulatory changes to improve patent quality. Specifically, the Report recommends:

    - Creating a new administrative procedure that will make it easier to challenge a patent's validity at the U.S. Patent and Trademark Office ("PTO") and allowing courts to find patents invalid based on a preponderance of the evidence, without having to find that clear and convincing evidence compels that result.

    - Legislative limits on the award of treble damages for willful patent infringement. The FTC's recommended change would allow firms to read patents to learn about new innovations and to survey the patent landscape to assess potential infringement issues, yet would retain a viable willfulness doctrine that protects both wronged patentees and competition. The Report also outlines several steps it will take to increase communication between the antitrust enforcement agencies (FTC, DOJ) and the PTO.

  Shortly after the October 28 issuance of the FTC Report, "To Promote Innovation: The Proper Balance of Competition and Patent Law and Policy," Chairman Muris addressed the annual meeting of the American Intellectual Property Law Association and discussed the Report's findings and recommendations. The Chairman's comments can be found at http://www.ftc.gov/opa/2003/10/murisaipla.htm.

- On October 27, Chairman Muris addressed Fordham University's Annual Conference on International Antitrust Law and Policy and discussed the role of competition policy in attacking public restraints on trade. Chairman Muris emphasized that restraints imposed by governments are as important a focus of competition policy as private restraints on trade. Indeed, Chairman Muris agreed antitrust policy should address both restraints in order to be effective, since both public and private restraints can rob the marketplace of its vitality. Chairman Muris' speech can be found at http://www.ftc.gov/opa/2003/10/murisfordham.htm.

Recent Activities

FTC Antitrust Highlights *(Continued)*

- On October 16, both Chairman Muris and Commissioner Thompson met with the Organization of Economic Cooperation and Development ("OECD") in Paris to discuss the intersection of competition and consumer protection. Commissioner Thompson chairs the OECD Committee on Consumer Policy. Chairman Muris emphasized that competition policy and consumer protection policy together enhance consumer welfare by fostering a vigorous, competitive marketplace that gives consumers greater chance and greater availability of quality products at competitive prices. Price advertising and the globalization of markets are two striking examples of the intersection of competition and consumer protection where consumers have benefited with the bargaining power to shop around for the lowest prices, which in turn encourages firms to compete for consumers on a worldwide basis. Both Chairman Muris and Commissioner Thompson urged greater cooperation and information sharing among OECD members and its members' enforcement agencies.

- On October 15, the FTC accepted a proposed consent order that will allow GenCorp Inc. ("GenC") to proceed with its $133 million acquisition of Atlantic Research Corporation ("ARC"), provided GenC divests ARC's in-space liquid propulsion business within six months of completing the deal. GenC is a technology-based manufacturing company headquartered in Rancho Cordova, California. Through its Aerojet-General Corporation subsidiary, GenC researches, develops, manufactures, and sells propulsion products and systems for space and defense applications. Sequa, the parent company of ARC, is a diversified industrial company that produces a broad range of products, including propulsion based products. ARC is a leading supplier of liquid and solid fuel propulsion products and systems. According to the FTC's proposed complaint, combining GenC and ARC would violate Section 7 of the Clayton Act and Section 5 of the FTC Act in four different types of in-space propulsion thrusters: (1) monopropellant thrusters; (2) bipropellant apogee thrusters; (3) dual mode apogee thrusters; and (4) bipropellant attitude control thrusters. To protect competition pending divestiture, the FTC will enforce an Order to Hold Separate to ensure that no competitively sensitive information is transferred between GenC and ARC's in-space liquid propulsion business and to ensure that GenC maintains that business as a competitively viable entity.

For more information on any of these activities, please contact Robert W. Doyle, Jr. a (202) 218-0030 or rdoyle@sheppardmullin.com.

Recent Activities

FTC CONSUMER PROTECTION HIGHLIGHTS

- As of 8:00 a.m. on November 3, the National Do Not Call Registry had registered more than 51,000 complaints against telemarketers who continue to call them. More than 33,000 telemarketing organizations have accessed the Registry, with 650 telemarketers downloading all area codes in the Registry. On average, each telemarketer retrieved about 45 area codes from the total national database of 317 area codes.

- On October 30, Howard Beales, Director of the FTC's Bureau of Consumer Protection, ("BCP") testified before the Subcommittee on Regulatory Reform and Oversight of the U.S. House of Representatives Committee on Small Business that solving the problem posed by unsolicited e-mail advertisements, or "spam," will not easily be cured by a single approach. According to Beales, the spam problem will require a blend of different investigatory and enforcement techniques. Beales' testimony noted the detrimental effect that spam has on businesses, and small businesses in particular. The FTC has already established a Federal/State Spam Task Force to strengthen cooperation with other state and federal agencies to overcome some of the obstacles preventing effective prosecution and enforcement.

- On October 29, the FTC hosted a day-long workshop to discuss the results of a nationwide survey regarding the marketing of entertainment violence to children. Workshop panels included members of entertainment industry groups, rating and labeling organizations, retailers and retailer trade associations, parent and consumer advocacy groups, and other interested parties. The FTC released the results of its national "mystery shopper" study, which employed 13 to 16-year-olds who, unaccompanied by a parent, attempted to purchase age-restricted movie tickets, movies on DVD, music recordings, and electronic games at 899 theaters and stores in 39 states. The Office of Juvenile Justice and Delinquency Prevention at the Department of Justice funded the survey. Of the teenage shoppers, 69 percent were able to buy M-rated games; 83 percent were able to buy explicit-labeled recordings; and 36 percent were able to purchase tickets to R-rated shows. Moreover, 81 percent of the teen shoppers were successful in purchasing R-rated movies on DVD.

- On October 23, the FTC issued its second quarterly summary announcement detailing the agency's continued enforcement against telemarketing fraud. The summary describes case developments in 25 federal court cases between July and October 2003.

- On October 16, the FTC announced a nationwide ad campaign to alert consumers on avoiding scams related to the posting of federal and postal jobs. Ads for these scams are often found in newspapers and offer to help job seekers find and apply for federal jobs for a fee. The FTC's campaign includes placement of paid advertisements in U.S. newspapers. The FTC has also created a website geared towards helping consumers avoid these scams, located at www.ftc.gov/jobscams. The FTC recommends that job seekers check directly with the U.S. Postal Service in order to determine the true availability and status of jobs with that agency.

Recent Activities

FTC Consumer Protection Highlights *(Continued)*

- On October 14, BCP staff commented on the proposed final U.S. Food and Drug Administration (FDA) rule concerning trans fatty acids in nutrition labeling, consumer research to consider nutrient content and health claims, and possible related footnote or disclosure statements on labels. The comment was filed at the FDA's request in the comment period for the agency's final rule on this subject. BCP staff supported the adoption of the rule as well as the importance of consumer research before mandating footnote disclosure accompanying the trans fat listing on the Nutrition Facts panel.

- On October 9, the FTC and Ireland's Office of Director of Consumer Affairs ("ODCA") announced that they signed a memorandum of understanding to facilitate enhanced law enforcement cooperation in the consumer protection area between the two agencies. With the emergence of the Internet, consumers are engaging in cross-border transactions more extensively than ever. Consequently, a greater need for cross-border law enforcement cooperation exists. The memorandum of understanding with Ireland is similar to those already in existence between the FTC and Canada, Australia, and the United Kingdom.

For more information on any of these activities, please contact June Casalmir at (202) 218-0027 or jcasalmir@sheppardmullin.com.

INTERNATIONAL ANTITRUST HIGHLIGHTS

- On October 10, General Electric Co. ("GE") agreed to buy British biotech and medical imaging company Amersham plc for $9.47 billion. GE said it would pay a 45% premium to the company's share price. The purchase will not dilute GE's earnings next year and will add one cent to earnings per share in 2005. Amersham makes dyes and chemicals for use with x-rays and MRI scans, as well as chemicals and equipment for use with drug and disease research. GE makes everything from light bulbs to jet engines. Last month, it also announced a definitive agreement to merge its NBC broadcast division with the media activities of the French company Vivendi Universal SA, forming a company worth $43 billion.

- It was announced on October 9 that Ameritrade Holding Corp. was seen as the most likely merger partner for Toronto-Dominion Bank's U.S. discount brokerage, which has been exploring a deal with a handful of competitors. Ameritrade, Charles Schwab Corp. and E*Trade Group Inc. began holding separate discussions with the bank this summer about a business combination with TD Waterhouse USA ("TD"). One of the main issues confronting TD is control: namely, how to bolster the bank's U.S. presence through a joint venture and at the same time retain a controlling stake in the larger company. Ameritrade, based in Omaha, Neb., is deemed by many to be the best fit for TD Waterhouse.

RECENT ACTIVITIES

International Antitrust Highlights *(Continued)*

- British Sky Broadcasting Group Plc ("BSkyB"), Rupert Murdoch's U.K. pay-television company, announced on October 7 that it had sold its 9.9 percent stake in Manchester United Plc, the world's biggest soccer club, for about $104 million. Cubic Expression Co. Ltd., an investment company owned by Irish investors J.P. McManus and John Magnier, bought the stake owned by BSkyB, but had no plans to make a bid for the soccer club. British newspapers reported that United, England's most successful soccer team in the past decade, may receive bids from overseas investors.

- On October 6, Scottish & Newcastle announced that the auction for its pubs estate had been won by Spirit, the pubs group. The deal will enable Spirit to become the country's largest managed pub owner, overtaking Mitchells & Butlers. The purchase will add 1,406 outlets, including Chef & Brewer, Premier Lodge and John Barrass sites, to an existing portfolio of 1,072, including Two For One and Tom Cobleigh brands. The combined group, to be renamed Spirit Amber, will employ 46,000 people.

- Shares in Yukos, Russia's biggest oil company, responded to mounting speculation on October 3 that Exxon Mobil ("Exxon") was poised to take a 25 percent stake in the company. Yukos' shares rose 4 percent as a result, helping to lift the Moscow share market to record levels. In New York, volumes surged in Exxon, with 1.8 million shares traded as a report surfaced that a government official, Sergei Generalov, chairman of the Investors Rights Commission, had named Exxon as the buyer of 25 percent in the merged Yukos-Sibneft for $17.5 million.

- The European Commission ("EC") concluded on October 1 that five chemical companies operated a cartel in the sorbates market between 1979 and 1996. The firms include: Hoechst AG; Chisso Corp.; Daicel Chemical Industries Ltd; Nippon Synthetic Chemical Industry Co Ltd; and Ueno Fine Chemicals Industry Ltd. Sorbates are widely used chemical preservatives that prevent the development of molds, bacteria, and other micro-organisms in foods. They are also used for the coating of cheese wrapping paper or in cosmetics. The EC staff conducted an extensive investigation and showed that, between the end of December 1978 and Oct. 31, 1996 (Nov. 30, 1995 for Nippon), Hoechst, Chisso, Daicel, Nippon, and Ueno operated a cartel and agreed on prices and allocated volume quotas. In 1995, the five companies controlled about 85 percent of the sorbates market in the European Economic Area .

- On September 24, Randgold Resources, the goldminer listed on the London Stock Exchange, announced a $1.8 billion takeover offer for Ashanti Goldfields of Ghana, trumping a rival bid from South Africa's AngloGold. The bid values Ashanti at $13.18 per share, which is 23 percent higher than Randgold's indicative offer of $1.46 billion in August, and $700 million more than an agreed all-share offer from AngloGold, a division of Anglo American. Randgold said it would offer one share for every two Ashanti shares, the same terms as its indicative offer announced last month, but at a higher value because of the rise in the group's

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International Antitrust Highlights *(Continued)*

stock. The goldminer believes its proposal represents a genuine and attractive alternative to the transaction currently proposed by AngloGold. Ashanti, however, which is twice Randgold's size, continued to recommend the merger with AngloGold.

- Legislation passed by the European Parliament on September 23 will give the EC new powers to investigate cartel conduct in the airline sector. Exercising executive powers established under EU treaties, the EC would be able to demand information, launch dawn raids, and impose financial penalties on airlines infringing EU competition rules. Under current EU law, the EC, as the EU's executive body, is empowered to wield its full investigative powers only in relation to airline operations within the EU.

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FCC ANTITRUST HIGHLIGHTS

- On October 14, AT&T dropped its objections to WorldCom Inc.'s reorganization plan, which removed a significant obstacle to WorldCom's emergence from Chapter 11. AT&T's objections were based on allegations that WorldCom illegally routed domestic calls through Canada and onto AT&T's network, which helped WorldCom transfer millions in access fees to AT&T. While the matter has been dropped in bankruptcy court, AT&T said it would continue to pursue its federal racketeering and fraud suit against WorldCom in the U.S. District Court in Alexandria, Virginia.

- On October 10, the FCC put News Corp.'s proposed acquisition of Hughes Electronic Corp., parent company of DirecTV Inc., on hold. The commission indicated that it needed more information from the parties and was discussing the merger details with the DOJ. Concerns over News Corp.'s ability to use DirecTV to raise the price of programming for both cable and satellite consumers have been raised by Cox Communications Inc., among others. Members of the Senate's Antitrust Subcommittee have echoed these fears and have expressed a desire for several regulatory conditions that are designed to protect consumers and competition to be placed on the acquisition.

- Qwest Communication Inc.'s Section 271 Application to provide long-distance service to Arizona received approval from the DOJ on October 9. In concluding that Qwest had opened its local markets in Arizona to competition, the DOJ's recommendation started the 90 day clock at the FCC. The 1996 Telecommunications Act requires the FCC to give substantial weight to the DOJ's findings, however, the final decision lies with the commission itself.

Recent Activities

FCC Antitrust Highlights *(Continued)*

- On October 8, GE.'s NBC signed a deal to acquire Vivendi Universal Entertainment, creating a new kid on the cable-television block named NBC Universal. The new entity will combine NBC broadcast network, the NBC cable channels, which include Bravo, MSNBC, CNBC, Spanish-language broadcaster Telemundo and Vivendi Universal's USA Network, Sci Fi Channel and Trio cable networks.

- An October 6 decision by the U.S. Court of Appeals for the Ninth Circuit ruled that the FCC's categorization of cable-modem service as "information services" was too narrow. The Court of Appeals found that cable broadband service providers were also providing "telecommunication services." The FCC's categorization does not require the owners of the high-speed infrastructure to open their networks to competitors. The appellate court's decision could require the owners to share their networks since they would be subject to regulation as a "common carrier". FCC Chairman Michael Powell has directed the agency's general counsel to appeal the ruling.

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