2012 ANTITRUST YEAR IN REVIEW

INTERNATIONAL ANTITRUST LAW COMMITTEE

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M. & M. BOMCHIL ABOGADOS

MESSAGE FROM THE COMMITTEE CHAIRS

The goal of the International Antitrust Law Committee is to publicize global developments in and provide a forum for discussion and analysis of competition law. The Committee is comprised of members from around the world, making up an international network of competition/antitrust practitioners and government officials. We take a leading role in policy development, frequently providing comments and input to assist competition agencies and government officials worldwide in the formulation and enforcement of their competition laws.

One of our Committee's principal functions is to keep our Committee and Section members informed about significant international competition law developments. We do this through regular reports on our Committee listserve, brown bags and teleconferences, presentations at the Section's Spring and Fall meetings, and through our "Hot Topics" bulletins and Committee newsletter.

Another major component of our outreach effort is our annual analysis and summary of key antitrust developments in jurisdictions around the world. We do this through two vehicles: the International Section's comprehensive "Year in Review" publication and through our committee's own Year in Review Monograph, the 2012 edition of which you are now reading.

The "Year in Review" requires substantial time and effort on the part of the contributors and editors. We are indebted to our 2012 editors, Marcelo den Toom, Claire Green, Matthew Hall and Sandy Walker, and to all of the authors for their excellent contributions to this project.

Given the substantial lead time required to prepare this publication, we are already looking ahead to the 2013 edition. The 2012 Year in Review covers 32 jurisdictions. We would encourage all those who might be interested in contributing to this publication to contact us. You can also visit the International Antitrust Law Committee's website at http://www.abanet.org for more information about this and other of our activities.

Mark Katz
Davies Ward Philips & Vineberg LLP
mkatz@dwpv.com

Susana Cabrera
Garrigues LLP
Susana.Cabrera@garrigues.com

EDITOR'S NOTE

This "Year in Review" is a compilation of the latest antitrust/competition law developments in 32 key jurisdictions worldwide. Each contribution offers commentary on significant developments taking place across a number of areas, including legislation, mergers, cartels and anticompetitive practices, abuses of dominant position and court decisions.

This is the International Antitrust Law Committee's 7th edition of "Year in Review", which debuted in 2006.

The 2012 Year in Review is the culmination of countless hours of work on the part of our authors and our editorial team including Claire Green, Matthew Hall and Sandy Walker. I am extremely grateful for their dedication and commitment in producing this volume.

I also extend thanks to M. & M. Bomchil's marketing department for its help in making this work more attractive to read.

I trust this publication will allow readers to realize the true international dimension of competition law, as the issues that arise in this area and the way they are dealt with across jurisdictions are strikingly similar.

Sincerely,

Marcelo den Toom

Marcelo den Toom
(Chief Editor)
Partner,
M. & M. Bomchil
Buenos Aires, Argentina

Claire Green
(Regional Editor)
Senior Legal Counsel,
Qantas Airways Limited
Sydney, Australia

Matthew Hall
(Regional Editor)
Partner,
McGuire Woods LLP
Brussels, Belgium

Sandy Walker
(Regional Editor)
Partner,
Dentons Canada
Toronto, Canada

AUTHORS

AUSTRALIA | Minter Ellison
Paul Schoff and Karina Groshinski, with the assistance from Eric White

AUSTRIA | Freshfields Bruckhaus Deringer LLP
Dr. Axel Reidilinger | **bpv Hügel Rechtsanwälte OG |**
Dr. Heinrich Kühnert

BELGIUM | De Gaulle Fleurance & Associés
Bruno Lebrun and Laure Bersou

BRAZIL | Mattos Muriel Kestener Advogados
Maria Cecilia Andrade and Ana Carolina Estevão

CANADA | Dentons Canada LLP
Sandy Walker

CHILE | Carey y Cía Abogados
Claudio Lizana and Lorena Pavic

CHINA | Jones Day
Peter Wang and Yizhe Zhang

COLOMBIA | Gómez Pinzón Zuleta Abogados S.A.
Mauricio Jaramillo Campuzano and Nataila Franco Ocampo

DENMARK | Plesner
Gitte Holtsoe, Martin Andreas Gravengaard, Louise Tandrup Christensen and Asbjoern Godsk Fallesen

EUROPEAN UNION | Covington & Burling LLP
Michael Clancy and Laurie-Anne Grelier

FINLAND | Roschier Attorneys Ltd.
Ami Paanajärvi

FRANCE | Cleary Gottlieb Steen & Hamilton LLP
François Brunet and Eric Paroche

GERMANY | Latham & Watkins LLP
Susanne Zuehlke and Dr. Tobias Kruis

HUNGARY | KNP LAW Nagy Koppany Varga and Partners
Dr. Kornelia Nagy-Koppany, Dr. Annamaria Klara and Dr. Abigel Csurdi

INDIA | Dhall Law Chambers
Vinod Dhall

ISRAEL | Fischer Behar Chen Well Orion & Co.
Adv. Tal Eyal-Boger and Shira Gillat

ITALY | Gianni, Origoni, Grippo, Cappelli & Partners
Alberto Pera and Michele Carpagnano, with the contribution of Michela Furlan

JAPAN | Anderson Mori & Tomotsune
Shigeyoshi Ezaki, Vassili Moussis and Kiyoko Yagami

MEXICO | SAI Consultores S.C.
Lucia Ojeda Cárdenas

NEW ZEALAND | Russel McVeagh
Sarah Keene

THE NETHERLANDS | Freshfields Bruckhaus Deringer LLP
Winfred Knibbeler and Nima Lorjé

NORWAY | Advokatfirmaet Haavind AS
Anne Beate Saga Hammerstad, Nina Melandsø and Trygve Norum

PERU | Bullard Falla Ezcurra
Alfredo Bullard G and Alejandro Falla

PORTUGAL | Garrigues
João Paulo Teixeira de Matos

RUSSIA | Alrud
Vassily Rudomino, Ludmila Merzlikina and Elena Kazak

SOUTH AFRICA | Norton Rose
Heather Irvine and Lara Granville

SOUTH KOREA | Kim & Chang
Youngjin Jung and Gina Jeehyun Choi

SPAIN | Garrigues LLP
Susana Cabrera, Konstantin Jörgens and Álvaro González

SWEDEN | Advokatfirman Vinge KB
Johan Karlsson and Helena Höök

SWITZERLAND | CMS von Erlach Henrici Ltd.
Dr. Patrick Sommer, Stefan Brunnschweiler and Amr Abdelaziz

UNITED KINGDOM | McGuireWoods LLP
Matthew Hall

UNITED STATES | Proskauer Rose LLP
John R. Ingrassia, Alicia J. Batts and Courtney Devon Taylor

UNITED STATES

By John R. Ingrassia, Alicia J. Batts, and Courtney Devon Taylor of Proskauer Rose LLP

Riding the momentum from successful efforts in 2011 to block the proposed merger between AT&T and T-Mobile, in 2012 antitrust enforcers continued to focus aggressively on what the Department of Justice has termed "pocketbook industries" - telecommunications and other high-technology services, financial services, healthcare and agriculture.

LEGISLATIVE DEVELOPMENTS

In August, the FTC proposed an expansion of the HSR reporting requirements for certain pharmaceutical licenses.[504] Under the proposed rule, patent holders that retain the exclusive right to manufacture a product covered by the patent for a licensee will be subject to premerger reporting requirements, resulting in approximately 30 additional transactions per year being subject to review.[505] The proposed rules received limited comments, the most substantive being on behalf of the Pharmaceutical Research and Manufacturers of America ("PhRMA"), which urged the FTC not to adopt the proposed rules. PhRMA argued that, in contravention of the powers granted to the FTC by the HSR Act and the principles of non-discrimination in antitrust enforcement, the proposed rules burden only the pharmaceutical industry. The final rule has not been adopted as of January 2013.

MERGERS

On the merger front, the Eleventh Circuit issued two key decisions – *Phoebe Putney Health Systems*[506] and *Polypore International*.[507]

In *Phoebe Putney*, the Circuit Court affirmed a lower court decision holding that the merger of two private hospitals, likely creating a monopoly, was immune from antitrust scrutiny under the "state-action doctrine."[508]

After the Georgia legislature invested hospital authorities with general powers to purchase or lease health care facilities and operate hospital networks, the Hospital Authority of Albany-Dougherty County acquired Phoebe Putney Memorial Hospital, which it then leased to its subsidiary Phoebe Putney Health System.[509] Subsequently, the Hospital Authority purchased Phoebe Putney Memorial's only competitor, Palmyra Park Hospital.[510]

The FTC sought to enjoin the merger of the two private hospitals on the grounds that it created a monopoly in the service area.[511] Both the District Court and the Court of Appeals held in favor of the respondents, finding that the Georgia legislature had clearly articulated an intent to displace competition in hospital services by investing hospital authorities with general powers to purchase health care facilities,

504 Premerger Notification; Reporting and Waiting Period Requirements, 77 Fed. Reg. 50,057-58 (Aug. 20, 2012) (to be codified at 16 C.F.R. pt. 801).
505 Id.
506 FTC v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369 (11th Cir. 2011), cert. granted, 133 S. Ct 28 (U.S. 2012).
507 Polypore Int'l, Inc. v. FTC, 686 F.3d 1208 (11th Cir. 2012).
508 Fed. Trade Comm'n v. Phoebe Putney Health Sys., Inc., 663 F.3d 1369 (11th Cir. 2011), cert. granted, 133 S. Ct. 28 (2012).
509 Petition for Writ of Certiorari at 2-4, FTC v. Phoebe Putney Health Sys., Inc., No. 11-1160 (March 23, 2012), 2012 WL 985316 [hereinafter Phoebe Putney Petition for Writ of Certiorari].
510 Id. at 2-4.
511 Id. at 8.

as it was reasonably foreseeable that such hospital acquisitions could result in a monopoly or have anticompetitive effects.[512] The decision was appealed to the Supreme Court on grounds that it is inconsistent with precedent, and was heard this term.[513]

In *Polypore International*, the Circuit Court upheld an earlier FTC divestiture order against battery components manufacturer Polypore International after it acquired its competitor, Microporous.[514] The FTC found that the transaction not only substantially lessened existing competition, but also prevented potential competition with respect to products into which the target was trying to expand.[515]

At issue were North American markets for separators used in three types of batteries– deep cycle, motive, and starter light ignition ("SLI"). Through its Daramic Division, Polypore primarily manufactured separators for use in SLI batteries and split the SLI market with a company named Entek. Microporous did not sell in the SLI market.

In the late 2000s Microporous began researching entry into the SLI market. Daramic engaged in multiple behaviors to stifle Microporous' entry, such as: (i) threatening to terminate supply to its largest customer's European facilities if the customer did business with Microporous; (ii) making price concessions to keep a customer's business; (iii) drafting memoranda referencing Microporous' activity in the SLI market as a "real threat;" and (iv) freezing prices in 2009. Further, Daramic's President listed Microporous as the top company that Daramic could acquire to "eliminate price competition," and Polypore's 2008 budget projected that it must reduce prices if it did not acquire Microporous.

In September 2008, seven months after Polypore acquired Microporous for USD76 million, the FTC issued an administrative complaint and an administrative law judge subsequently found that the acquisition was reasonably likely to substantially lessen competition in the four relevant markets – deep cycle, motive, SLI and uninterruptible power source. The FTC ordered the divestiture of all acquired assets, including Microporous' plant in Austria.

On appeal, Polypore argued in part that the Commission improperly relied on *Philadelphia National*[516] in treating Microporous as an actual competitor (rather than a potential competitor) although it had never sold products in the SLI market. The Eleventh Circuit analyzed the Supreme Court decision in *United States v. El Paso Natural Gas Co.*,[517] which had substantially analogous facts but involved actual competition rather than potential competition.[518] Based on that analysis, the Eleventh Circuit explained that the Commission did not err in its decision.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

The DOJ continued partnering with the FBI to investigate price-fixing and bid-rigging in the Japanese automobile parts industry. The auto parts investigation is the largest criminal investigation in the Antitrust Division's history, in both scope and volume of commerce affected.[519] According to the DOJ, certain companies and executives coordinated price adjustments to U.S. automobile manufacturers and also allocated the supply of product on a model by model basis, resulting in sales of parts to

512 See generally FTC v. Phoebe Putney Health Sys., Inc., 793 F. Supp. 2d 1356 (M.D. Ga. 2011), aff'd, 663 F.3d 1369 (11th Cir.), cert. granted, 133 S. Ct. 28 (U.S. 2012).
513 Phoebe Putney Petition for Writ of Certiorari, supra note 6.
514 Polypore Int'l, Inc. v. Fed. Trade Comm'n, 686 F.3d 1208, 1218-19 (11th Cir. 2012).
515 Id. at 1219.
516 United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).
517 United States v. El Paso Natural Gas Co., 376 U.S. 651 (1964).
518 The El Paso Court did not expressly use the term "actual competitor," however its meaning was clear. Further, in United States v. Marine Bancorporation, Inc., 418 U.S. 602, 623 (1974), the Supreme Court later explained that El Paso involved actual competition rather than potential competition.
519 Press Release, Department of Justice, Remarks as Prepared for Delivery by Acting Assistant Attorney General Sharis A. Pozen at the Briefing on Department's Enforcement Action in Auto Parts Industry (Jan. 30, 2012).

manufacturers at supra-competitive prices.

To date, nine companies and 11 executives have either pled guilty or agreed to plead guilty.[520] In total, the companies have been sentenced to pay more than USD790 million in criminal fines, with Yazaki Corporation paying USD470 million, the second largest fine in U.S. history for antitrust violations. Executives who pled guilty to the scheme were sentenced to criminal fines and jail sentences[521] ranging from a year and a day to two years. The two year sentences are the longest terms of imprisonment ever imposed on foreign nationals voluntarily submitting to U.S. jurisdiction for antitrust violations of the Sherman Act.[522]

The DOJ also continued its criminal investigation into, and prosecution of, executives involved in municipal bond bid rigging schemes.[523] At issue is whether certain financial providers and insurance companies deprived public entities seeking to reinvest municipal bonds proceeds of competitive interest rates. Thus far, a total of 20 individuals have been charged in the DOJ's municipal bonds investigation. Nineteen have either pled guilty or been convicted. One company – CDR Financial Products ("CDR") – has also pled guilty.[524]

An executive and former executive from CDR pled guilty to participating in separate bid rigging and fraud schemes.[525] Sentencing is scheduled for 2013.[526] After a month long trial, a federal jury convicted three former executives of General Electric Co. (GE) affiliates for their participation in separate schemes between 1999 and 2006. Two of the executives were sentenced to prison terms of 36 months and USD50,000 criminal fines. The third executive was sentenced to a 48 month prison term and a USD90,000 criminal fine. Following a separate three week trial, a federal jury found three former UBS AG executives guilty of conspiracy and fraud charges related to activity between March 2001 and November 2006. Sentencing for the convicted UBS AG executives is scheduled for March 2013.[527] In both the GE and UBS AG trials, the Government relied on cooperating witnesses and used as evidence audio recordings purportedly incriminating the defendants. Visa and MasterCard settled a seven year lawsuit which alleged that they unlawfully prevented merchants from passing along credit card swipe fees to customers and conspired to create interchange fees for credit card transactions.[528] Under the proposed settlement, Visa and MasterCard agreed to pay roughly USD6 billion to the merchant class and agreed to reduce their interchange fees for eight months. Although the settlement was preliminarily approved by the judge, certain merchants have objected, claiming that it is inadequate because it will not dissuade Visa and MasterCard from abusive practices in the future.

ABUSES OF A DOMINANT POSITION

In what was possibly the most high-profile litigation of the year, the DOJ filed a civil lawsuit against Apple and five of the six largest publishers of trade books in the United States alleging that they conspired to fix

520 Press Release, U.S. Dep't of Justice, Japanese Automobile Parts Manufacturer Agrees to Plead Guilty to Price Fixing and Obstruction of Justice (Oct. 30, 2012), http://www.justice.gov/opa/pr/2012/October/12-at-1298.html.
521 Id.
522 Id.
523 Financial institutions and insurance companies offer municipal bonds to state and local governments as a way for those municipalities to raise money for public projects.
524 See Plea Agreement, No. 09-Cr-1058 (S.D.N.Y. Dec. 30, 2011), ECF No. 379.
525 Press Release, Department of Justice, CDR Financial Products Executive and Former Executive Pled Guilty in New York to Bid-Rigging and Fraud Conspiracies Related to Municipal Bond Investments (Jan. 9, 2012).
526 See Defendants' Letter to Hon. Harold Baer, No. 09-Cr-1058 (S.D.N.Y. Aug. 6, 2012), ECF No. 403.
527 See Defendants' Letter to Hon. Kimba Wood, No. 10-Cr-1217 (S.D.N.Y. Nov. 5, 2012), ECF No. 293.
528 In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig., No. 05-md-1720 (JG)(JO), 2012 U.S. Dist. LEXIS 153637 (E.D.N.Y. Oct. 24, 2012). This case did not arise from, and is unrelated to, the Durbin Amendment to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, which granted the Federal Reserve the power to regulate debit card (as opposed to credit card) and interchange fees. The Durbin Amendment requires banks with over USD10 billion in assets to charge debit card swipe fees that are no more than "reasonable and proportional to the actual cost" of processing the transaction.

the prices of e-books.[529] Sixteen states (the "States") and certain U.S. territories also filed a *parens patriae* action with similar allegations.[530] According to the Complaints, Apple and the publishers agreed to an "agency model"[531] – whereby publishers set the prices and retailers received commission – to prevent retail price competition among e-book sellers.[532] In September, three of the publishers entered into a court-approved settlement with the DOJ that did not require monetary payments or the admission of liability or wrongdoing, but required the adoption of certain business and compliance practices,[533] such as terminating: (i) their agency agreements with Apple; (ii) all contracts with e-book retailers that restrict the retailers' ability to set the retail price of an e-book and refraining from entering such agreements for two years; and (iii) all contracts that include a "Price MFN" for both retail and wholesale prices, and refraining from entering into such contracts for five years.[534] In mid-December, a fourth publisher, currently in talks to merge with a publishing company unrelated to the litigation, reached a settlement with the DOJ containing the same provisions as the other three settling publishers.[535] The proposed settlement remains subject to court approval. Three of the publishers also entered into a proposed settlement with the States for USD69 million in addition to the adoption of business practices, such as terminating their existing agency agreements with certain retailers and requiring the publishers to grant retailers such as Amazon and Barnes & Noble the freedom to reduce the prices of their eBook titles.[536] Apple and one publisher continue to litigate with the DOJ, and Apple and two publishers continue to litigate with the States.

COURT DECISIONS

In *In re American Express Merchants Litigation*, upon a second remand from the Supreme Court, the Second Circuit held for the third time that an arbitration clause with a class action waiver was unenforceable because, as a practical matter, it precluded plaintiff merchants from asserting federal antitrust claims.[537] The Second Circuit considered whether the arbitration clause was enforceable in light of the decision in *AT&T Mobility LLC v. Concepcion*,[538] which held that the Federal Arbitration Act ("FAA") "preempted California common law deeming most class-action arbitration waivers in consumer contracts unconscionable."[539] The Second Circuit explained that *Concepcion* and *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*,[540] a 2010 case considering the effect of the FAA on an arbitration clause, together stand for the proposition that parties cannot be required to arbitrate disputes in class-action arbitration unless they have agreed to do so. The two cases do not consider the issue of whether a class action waiver is unenforceable where the plaintiffs have demonstrated the fiscal impracticality of pursing individual claims. The court emphasized in its decision that "each [class

529 Complaint at 2, United States v. Apple, Inc., 2012 WL 1193295 (S.D.N.Y April 12, 2012) (No. 12 Civ. 2826).
530 Complaint, Texas v. Penguin Grp. (USA) Inc., No.1:12-cv-00324 (W.D. Tex. April 11, 2012).
531 This, as opposed to the more traditional "wholesale model," whereby a publisher sells books to a distributor at a set price and permits the distributor to then establish its own retail prices.
532 Apple Complaint I, supra note 25; Apple Complaint II, supra note 26.
533 United States v. Apple, Inc., No. 12 Civ. 2826, 2012 WL 3865135 (S.D.N.Y Sept. 5, 2012); Press Release, U.S. Dep't of Justice, Justice Department Reaches Settlement with Three of the Largest Book Publishers and Continues to Litigate Against Apple Inc. and Two Other Publishers to Restore Price Competition and Reduce E-book Prices (Apr. 11, 2012), http://www.justice.gov/opa/pr/2012/April/12-at-457.html.
534 Settlement, supra note 29, at 9; Press Release, Department of Justice, Justice Department Reaches Settlement with Three of the Largest Book Publishers and Continues to Litigate Against Apple Inc. and Two Other Publishers to Restore Price Competition and Reduce E-book Prices (Apr. 11, 2012).
535 Penguin Settles DOJ's E-Books Price-Fixing Case, Law 360 (Dec. 19, 2012).
536 Press Release, Md. Attorney Gen., AG Gansler Secures $69 Million Agreement with Major U.S. Publishers Over E-book Price-Fixing Allegations (Aug. 29, 2012), http://www.oag.state.md.us/Press/2012/082912a.html.
537 In re Am. Express Merch. Litig., 667 F.3d 204 (2d Cir. 2012), cert. granted, 133 S.Ct. 594 (2012).
538 AT&T Mobility LLC v. Concepcion, 131 S. Ct 1740 (U.S. 2011).
539 In re Am. Express Merchs. Litig., 667 F.3d at 212.
540 Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 130 S.Ct 1758 (U.S. 2010).

action] waiver must be considered on its own merits, based on its own record, and governed with a healthy regard for the fact that the FAA "is a congressional declaration of a liberal federal policy favoring arbitration agreements". The Supreme Court granted certiorari in November and will consider the issue this term. The Court is expected to provide needed clarity to determine under what circumstances class action waivers are enforceable in the federal antitrust context.

Proskauer Rose LLP
www.proskauer.com
1001 Pennsylvania Avenue, NW
Suite 400 South
Washington DC 20004-2533
USA
T: +1 202 416 6869
F: +1 202 416 6899