The Public Competition Enforcement Review

Fifth Edition

Law Business Research

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Fifth Edition

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FOREWORD

It is immediately apparent from the reports in *The Public Competition Enforcement Review* that competition enforcement remains vigorous across the world. An overwhelming majority of authorities continue to prioritise anti-cartel enforcement and 2012 witnessed, in the United States and the EU, some of the highest cartel fines ever to be imposed in respect of individual cartels. Authorities in newer competition law regimes such as India, China and Taiwan followed suit. There was a common focus on illegal conduct within the context of trade associations and bid rigging.

The Business and Industry Advisory Committee – representing business within the framework of the OECD – and its Competition Committee regard the pursuit and elimination of 'hardcore' cartel conduct as a priority. Businesses suffer when markets are not working effectively and are victims of cartel behaviour as much as consumers and society as a whole. But caution must always be exercised to ensure that justifiable, even pro-competitive, conduct is not inadvertently swept up into an offending category. The reports for Australia, India and the United Kingdom describe developments that serve as a reminder that many commercial activities – including information exchange, price parallelism and certain trade association activities – need to be analysed in context (and not simply presumed to be anti-competitive).

International cooperation and the convergence of laws and procedures are important objectives for many of the authorities covered in this book. There is a good reason for this. Not only did the infringing companies in many of the cartels uncovered have their headquarters outside the country imposing the penalties but, more generally, globalisation – particularly the transformation of regional markets into worldwide markets – has increased the propensity for conduct and transactions to be scrutinised by numerous competition authorities in parallel. Convergence of laws and procedures holds many attractions for competition authorities and business alike. But convergence is a complex matter. The keynote article in *The Public Competition Enforcement Review*, 'Public v. Private Enforcement: Rethinking the Thirst for Competition Litigation', is a strong reminder that a thoughtful approach to convergence is always needed. There may

be a logic to aligning a new regime with the most established regimes but in practice that may not be the most appropriate approach to every aspect of the law and policy.

To ensure that the law and related procedures develop optimally, authorities must take stock of what is working (and what is not working), reflecting on achievements but also re-examining fundamentals. This *Review* makes a useful contribution to the process of reflection with its timely and authoritative comments on the past year's developments and trends. *Ex post* evaluations (where an authority evaluates whether its intervention was appropriate and achieved its objectives) are also essential. These studies are becoming more common, particularly in the merger control sphere. They can be used in well-established regimes, but also by those countries that have newly amended their rules. The reports for Brazil, China and India describe major progress in respect of merger control activity. Evaluations can ensure that improvements are made in the early years to keep the merger control regime on track. A key work stream for the OECD is looking at how *ex post* evaluations are conducted, what methodologies function best in practice and how the process can be improved. Like the competition authorities, international competition organisations such as the OECD and ICN can usefully carry out evaluations of their own measures and recommendations. The OECD is setting a good example by evaluating its own merger recommendations from 2005.

The country reports also describe a substantial amount of enforcement activity taking place in relation to abuse of dominance. The wide variety of cases being brought by different competition authorities suggests that this area is perhaps the least convergent in terms of substantive competition law. This has been the case for so long that it is not surprising but nor is it without risk. The chapter for Argentina expresses concern that dominance cases may be targeted to achieve price control objectives. In Australia, misuse of market power is identified as a key priority. The US authorities are moving away from a policy that 'favoured extreme caution' in this area and are debating the scope of appropriate enforcement against unfair methods of competition. This *Review* encapsulates the fierce debates under way. International organisations should continue to help build consensus on the key elements of an abuse of dominance case. In 2012 the OECD produced a useful report on excessive pricing discussing how to ensure that intervention is principled and evidence-based.

It is also apparent that competition authorities are continuing to address industry sectors with growing global importance, including media and communications, the high-tech sector, the digital economy and financial services. The issues are complex and the global implications of intervention can be immediate. The OECD has developed roundtable reports on all these sectors where business input is a key contribution to the debate given the fast-evolving technological environment.

Overall, the level and nature of enforcement described in the country reports demonstrates that competition authorities across the world have succeeded in 'holding the line' when budgets and even the role of competition law itself has been under fire. The chapters in this publication prove that the competition authorities did not let the rules slip in the face of economic difficulties. However, ongoing reflection is needed now

to ensure that there is a good understanding of how companies and governments respond to current economic challenges. Reflections in this post-crisis time will be essential for ensuring that business and regulators play their part in ensuring that the events leading to the global recession are not repeated. Surveying policies, objectives, enforcement and trends, *The Public Competition Enforcement Review* contributes to such reflections.

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London
April 2013

Chapter 28

UNITED STATES

Aidan Synnott and Andrew C Finch[1]

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

The Federal Trade Commission ('FTC') and the Antitrust Division of the Department of Justice ('DoJ') were active in 2012. The DoJ continued its focus on criminal cartel activity, resulting in record-setting fines. Both agencies paid significant attention to potential antitrust concerns in high-technology markets; the FTC engaged in a high-profile investigation of Google's search practices, and both agencies voiced concerns regarding the competitive risks of standard-essential patents.

ii Enforcement agenda

This year saw new leadership at both agencies. William J Baer was nominated as Assistant Attorney General for the Antitrust Division in February 2012, and he was confirmed by the Senate on 30 December 2012. Baer, experienced in private practice and a former director and adviser at the FTC, has said the DoJ's priorities will not change significantly under his watch.[2]

In September 2012, Joshua D Wright was nominated as an FTC Commissioner. A former law professor, he was confirmed by the Senate on 1 January 2013. President Obama nominated Edith Ramirez to be Chairman, effective 4 March 2013. Ramirez,

1 Aidan Synnott and Andrew C Finch are partners at Paul, Weiss, Rifkind, Wharton & Garrison LLP. The authors thank Alexandra R Clark, Mark R Laramie and Jacklyn M Siegel for their invaluable assistance in preparing this chapter.

2 See Sen. Charles E Grassley, Questions for the Record, William J Baer, Nominee, Assistant Attorney General (Antitrust), US Department of Justice, undated, available at www.judiciary.senate.gov/resources/transcripts/upload/072612QFRs-Baer.pdf.

a Commissioner since April 2010, will replace Jon Leibowitz, who announced his resignation in late January 2013.

II CARTELS

i Significant Cases

Auto parts

The DoJ's auto parts investigation yielded several guilty pleas and fines in 2012. In what is considered the 'largest criminal investigation the Antitrust Division has ever pursued',[3] the DoJ has spent considerable time and resources investigating bid rigging and price fixing in the sale of auto parts to manufacturers worldwide. The investigation has been extensive in both geographic reach and product type – guilty pleas in 2012 involved the sale of products from wire harnesses, instrument panel clusters, and electric and heater control sensors, to seatbelts, airbags and steering wheels.

In 2012, eight corporations pleaded guilty to charges of price fixing and bid rigging with respect to auto parts, yielding fines of $595.3 million. Yazaki Corporation alone paid a $470 million criminal fine, one of the largest antitrust fines ever. A number of its former employees also pleaded guilty to antitrust violations. Some have been sentenced to terms of imprisonment. Two were sentenced to 24 months each in prison – the longest prison terms imposed on foreign nationals who voluntarily submitted to US jurisdiction for the purposes of an antitrust violation.[4]

The investigation continues to broaden in scope. In November 2012, the DoJ announced the first criminal charge relating to the anti-vibration rubber parts segment of the industry. An executive at an Ohio subsidiary of a Japanese automotive supplier who had participated in a conspiracy to fix prices and rig bids for parts sold in the United States and abroad also pleaded guilty. The executive was sentenced to a $20,000 fine and imprisonment of a year and a day.[5]

Liquid crystal displays

DoJ's ongoing investigation into the liquid crystal display ('LCD') panel industry also progressed in 2012. Following an eight-week trial, Taiwan LCD producer AU Optronics Corporation, its US subsidiary, and two former top executives were found guilty of participation in a global conspiracy to fix prices of thin-film transistor-liquid crystal display panels. Two junior executives were acquitted and the jury failed to reach a verdict as to a third.[6]

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3 DoJ Division Update Spring 2012, Criminal Program, www.justice.gov/atr/public/division-update/2012/criminal-program.html (last visited Mar. 4, 2013) [hereinafter Division Update].

4 Id.

5 Press Release, Department of Justice, Ohio Automobile Parts Supplier Executive Pleads Guilty in Price-Fixing and Bid-Rigging Conspiracy (Nov. 16, 2012), available at www.justice.gov/atr/public/press_releases/2012/288861.htm.

6 Press Release, Department of Justice, Taiwan-Based AU Optronics Corporation Sentenced to Pay $500 Million Criminal Fine for Role in LCD Price-Fixing Conspiracy (Sept. 20, 2012),

The trial resulted in significant penalties. The jury found that AU Optronics' gains from the price-fixing conspiracy exceeded $500 million.[7] The DoJ sought a fine of $1 billion – twice the gains – under the Alternative Fines Act, which permits fines beyond the Sherman Act's maximum of $100 million. Although the DoJ has often negotiated large fines pursuant to this provision through plea agreements, the Antitrust Division has rarely, if ever, utilised the provision at trial.

In what one reporter called 'one of the most important antitrust events in recent history,' on 20 September 2012, Judge Susan Illston of the Northern District of California declined to adopt the DoJ's position.[8] Instead, she fined the company $500 million, stating that 'the one billion dollar fine requested by the Government, although dramatic, is simply substantially excessive to the needs of this matter.'[9] The Court also rejected the DoJ's request for the maximum sentence of $1 million in fines and 10 years in prison for each of the convicted individuals, sentencing them instead to $200,000 in fines and three years in prison.[10]

Real estate foreclosure

The DoJ has also focused on real estate foreclosure auctions, as part of the Financial Fraud Enforcement Task Force formed by President Obama in 2009. To suppress prices for the winning bidder, real estate companies have allegedly colluded to eliminate competition in auctions by paying co-conspirators in return for their cooperation and by holding 'knockoff' auctions among themselves. Having received below-market prices, winners have allegedly sold the properties at the market rate and shared the proceeds with co-conspirators. In addition to allegedly generating improper gains enjoyed for the co-conspirators, these practices have allegedly suppressed the prices of foreclosed-upon homes, negatively affecting not only the property itself, but the property values of homes in the neighbourhoods where they are located.[11]

In 2012, over 20 individuals and companies pleaded guilty to antitrust charges in connection with these schemes in California, Alabama and North Carolina. Four other individuals have been indicted for their involvement in one such scheme, and are scheduled to stand trial in November 2013 in the Eastern District of California.

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available at www.justice.gov/atr/public/press_releases/2012/287189.htm.

7 Division Update, *supra* note 3.

8 Brent Kendall, Optronics Sentencing Could Break All Sorts of Antitrust Records, Wall St. J. L. Blog (Sept. 19, 2012, 6:13 PM), http://blogs.wsj.com/law/2012/09/19/optronics-sentencing-could-break-all-sorts-of-antitrust-records (quoting John Terzaken, former director of criminal enforcement of the Antitrust Division).

9 Transcript of Sentencing Hearing at 16, *United States v. AU Optronics Corp.*, No. 3:09-cr-00110 (N.D. Cal. Sept. 21, 2012) ECF No. 963.

10 Id.

11 Division Update, *supra* note 3.

ii Trends, developments and strategies

Although the number of criminal cases filed by the DoJ declined in 2012, the criminal fines increased. In the 2012 fiscal year, the DoJ filed 67 criminal cases, an approximate 25 per cent decline in numbers. The fines nearly doubled: while the DoJ collected fines of $555 million and $524 million in 2010 and 2011 respectively, fines in 2012 reached $1.1 billion. This exceeds the DoJ's 2009 record of $1 billion.[12] But two fines alone, AU Optronics ($500 million) and Yazaki Corporation ($470 million), account for the bulk of all fines. Observers also estimate that the number of individuals sentenced to prison for antitrust violations reached a record high in 2012, with approximately 40 sentences including incarceration.[13]

iii Outlook

The DoJ's criminal enforcement efforts are expected to proceed unabated in 2013. Its investigations into the auto parts, LCD panel and real estate industries will continue, with the potential for further prosecutions and plea agreements. The DoJ is also expected to continue its participation in the global, industry-wide investigation into alleged manipulation of LIBOR interest rates. Working with many domestic and foreign agencies, the DoJ's efforts have already resulted in highly publicised settlements with Barclay's, UBS and RBS.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Agreements in restraint of trade

Horizontal restraints

e-Books

In spring 2012, after an investigation in cooperation with the European Commission,[14] the DoJ filed suit against Apple and a host of publishers over agreements respecting the pricing of e-books.[15] The Antitrust Division claims that, in response to Amazon.com's prevailing low prices for e-books, Apple and the publishers engaged in a *per se* illegal price-fixing scheme designed to raise prices. DoJ alleges Apple and the publishers conspired to

12 DoJ Criminal Enforcement Fine and Jail Charts Through Fiscal Year 2012, www.justice/gov/atr/public/criminal/264101.html (last visited Feb. 22, 2013).

13 Gibson, Dunn and Crutcher LLP 2012 Year-End Criminal Antitrust & Competition Law Update, 6 (Jan 7, 2013), available at ww.gibsondunn.com/publicatias/Documents/YearEnd-Criminal-Antitrust-CompetitionUpdate.pdf.

14 Renata B Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dept. of Justice, IP, Antitrust and Looking Back on the Last Four Years 6 (Feb. 8, 2013), available at www.justice.gov/atr/public/speeches/292573.pdf; Joseph F. Wayland, Acting Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, International Cooperation at the Antitrust Division 6-7 (Sept 14, 2012), available at www.justice.gov/atr/public/speeches/286979.pdf.

15 Complaint, *United States v. Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. April 11, 2012).

implement an 'agency' model whereby publishers and not retailers would set the retail prices for e-books.[16] Prior to the implementation of the agency model, e-books were sold on a wholesale basis: retailers purchased material from publishers and independently set prices. The Antitrust Division alleges that this wholesale model fostered competition among retailers and had the ultimate effect of driving down the price of e-books.[17] In response to these low prices, according to the complaint, the defendant publishers simultaneously entered into agency agreements with Apple pursuant to which they set the retail prices for their products and paid Apple a 30 per cent commission. The agreements also guaranteed that e-books sold through Apple were priced no higher than those sold through other outlets.[18] The government contends that this 'most favoured nation' provision gave the publishers incentives to require that other retailers also agree to the agency model – if a retailer was allowed to set the price independently, it might set a low price, which, in turn, would lower the price Apple charged, reducing the amount the publisher earned from the substantial business conducted through Apple's platform.[19] This, the Antitrust Division alleges, had the anti-competitive effect of raising the price of e-books across the board.[20] The publishers have settled with the government. Litigation against Apple continues.[21]

Joint ventures and other competitor collaborations

The agencies have reviewed several joint ventures in the past year. They recognise that joint ventures can be efficient and promote competition, and can be particularly useful for cross-border expansion.[22] Nevertheless, they believe that certain collaborations can pose significant antitrust risk,[23] and say they will challenge those that, in their analysis, unreasonably restrain competition.

16 Id. at 3-4.

17 Id. at 9-10.

18 Id. at 20-21.

19 Competitive Impact Statement at 7 n.3, *United States v. Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. April 11, 2012).

20 Complaint at 21, *United States v. Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. April 11, 2012).

21 Final Judgment as to Defendants Hachette, HarperCollins, and Simon & Schuster at 8, *United States v. Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. Sept. 6, 2012); Proposed Final Judgment as to Defendants The Penguin Group, a Division of Pearson plc, and Penguin Group (USA), Inc. at 8, *United States v. Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. Dec. 12, 2012); Proposed Final Judgment as to Defendants Verlagsgruppe Georg von Holtzbrinck GmbH & Holtzbrinck Publishers, LLC d/b/a MacMillan at 8, *United States v. Apple, Inc.*, No. 12-cv-02826 (S.D.N.Y. Feb. 8, 2013).

22 See Federal Trade Commission & U.S. Department of Justice, Antitrust Guidelines for Collaborations Among Competitors 1, 6 (2000), available at www.ftc.gov/os/2000/04/ftcdojguidelines.pdf. Indeed the enforcement agencies have recognized 'antitrust safety zones' for certain types of agreements that are presumptively lawful (e.g., collaborations involving twenty percent or less of a relevant market). Id. at 25-26.

23 Id. at 6.

For example, recognising that the proposed collaboration was unlikely to affect prices, the DoJ chose not to challenge an agreement among seven operators of nuclear electric generation plants to share personnel, know-how and best practices related to the operation of these facilities.[24] The DoJ also declined to challenge a voluntary joint-procurement arrangement among the same collaborators pursuant to which the alliance proposed to purchase certain maintenance services, waste processing services, and protective clothing, among other things.[25] In each instance, the alliance committed to implement safeguards against the sharing of competitively sensitive pricing information. With respect to the joint-procurement arrangement, the Department noted that the members of the alliance, in the aggregate, accounted for less than 20 per cent of each of the markets for the goods and services that the alliance proposed to procure jointly (i.e., the arrangement was within the 'antitrust safety zone' established by the agencies).

Similarly, the FTC chose not to challenge efforts by an association of generic pharmaceutical manufacturers to establish a programme to collect information regarding production projections and supply schedules of certain drugs in short supply.[26] The programme was proposed to assist the Food and Drug Administration ('FDA') in its efforts to alleviate critical drug shortages. The FTC noted that, while the direct exchange of such competitively sensitive information among competitors would raise clear antitrust concerns, the proposed programme was unlikely to harm competition: the data collection would be done by an independent firm, the data would be shared only with the FDA, and it would not be used for any purpose other than assisting the FDA with its analyses of drug shortages.[27]

In contrast, the FTC did challenge the efforts of a group of competing pharmacies, through a cooperative, to negotiate collectively with health insurers and managed-care organisations.[28] Here, the collectively negotiated terms included standard provisions regarding the rates at which member pharmacies would be reimbursed for dispensing drugs. Further, the cooperative allegedly instructed its members to refuse to engage in individual negotiations with payers. The FTC alleged that these practices had the effect of raising the pharmacies' reimbursement rates and were thus anti-competitive. In settling, the cooperative agreed to terminate the collective agreements and to refrain from similar agreements in the future.[29]

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24 STARS Alliance Bus. Rev. Request, B.R.L. 12-850, 2012 WL 2711485 (D.O.J. June 19, 2012).

25 See STARS Alliance LLC Second Bus. Rev. Request (Dec. 20, 2012) available at www.justice.gov/atr/public/busreview/290492.htm.

26 Generic Pharm. Ass'n Advisory Op. (Aug. 8, 2012), available at www.ftc.gov/os/2012/08/120808gphaopinion.pdf.

27 Id.

28 Complaint, *In the Matter of Cooperativa de Farmacias Puertorriqueñas ('Coopharma')*, Docket No. C-4374 (F.T.C. Nov. 6, 2012).

29 Decision and Order at 3, *In the Matter of Cooperativa de Farmacias Puertorriqueñas ('Coopharma')*, Docket No. C-4374 (F.T.C. Nov. 6, 2012).

In *United States v. Twin America, LLC*,[30] the DoJ and the New York Attorney General alleged that the formation and operation of the defendants' tour bus joint venture was anti-competitive and had the effect of raising prices for 'hop-on, hop-off' bus tours in New York City. The agencies claim that prior to the formation of the joint venture, the venturers were vigorous competitors; but, after formation, they used their combined market power to implement significant price increases for each of their brands.[31] They allege that the formation of the joint venture was, in effect, a merger to monopoly.[32]

While, in the view of the agencies in the *Twin America* case, a wholesale dissolution of the collaboration is required, the agencies are willing to entertain 'tailored resolutions' to remedy particular competitive concerns in other contexts.[33] In 2012, the DoJ (again alongside the New York Attorney General) approved the formation of a research and development joint venture among a mobile telecommunications company and several cable companies, conditioned on certain modifications to the agreement. The venture was created to develop technology to better integrate wireless and wireline products. The agencies, while recognising the potential benefits of the collaboration for consumers, were concerned that the venture could limit the incentives of the collaborators to develop technology independently.[34] The parties agreed to limit the venture's duration and to clarify their ability to innovate outside of it.[35]

Hiring practices

The DoJ has continued its pursuit of companies engaged in restrictive hiring practices in the high-technology industry. In late 2012, the DoJ filed suit against eBay alleging it had illegally entered into a 'handshake' agreement with Intuit not to recruit or hire Intuit employees, with the anti-competitive effect of lowering employees' salaries and benefits.[36] This followed a series of settlements in 2010 with Adobe Systems, Apple, Google, Intel, Intuit, Pixar, and Lucasfilm over similar practices. The litigation against eBay remains ongoing.

30 No. 12-cv-08989 (S.D.N.Y. Dec. 11, 2012).

31 Complaint at 17, *United States v. Twin America*, LLC, No. 12-cv-08989 (S.D.N.Y. Dec. 11, 2012).

32 Id. at 15.

33 See, e.g., Christine A. Varney, Assistant Att'y Gen, U.S. Dep't of Justice, Antitrust Div., Overview of 2010 Antitrust Enforcement (Oct. 7, 2010), available at www.justice.gov/atr/public/speeches/264301.pdf; Joseph J. Simons & Daniel A. Crane, Settling an Antitrust Case, in 2 Settlement Agreements in Commercial Disputes Section 31.02[A][4] (Richard A. Rosen, ed. 2011).

34 Competitive Impact Statement at 20, *United States v. Verizon Commc'ns,* No. 12-cv-01354 (D.D.C. Aug. 16, 2012).

35 Stipulation and Order at 9, 12, *United States v. Verizon Commc'ns*, No. 12-cv-01354 (D.D.C. Aug. 16, 2012). The parties also agreed to make certain modifications to other aspects of the collaboration involving the ability of the coventurers to market and sell each others' products.

36 Complaint, *United States v. eBay, Inc.*, No. 12-cv-05869 (N.D. Cal. Nov. 16, 2012). The State of California separately sued eBay over these practices. Complaint, *California v. eBay, Inc.*, No. 12-cv-05874 (N.D. Cal. Nov. 16, 2012).

Vertical restraints

Resale price maintenance

In 2007, the Supreme Court's decision in *Leegin Creative Leather Products, Inc v. PSKS, Inc*,[37] changed federal law regarding vertical price restraints. Prior to *Leegin*, agreements between manufacturers and retailers regarding minimum prices were *per se* violations of the Sherman Act under longstanding Supreme Court precedent.[38] In *Leegin*, the Court, noting that minimum resale price maintenance could have pro-competitive benefits, overturned its precedent and held that, under federal law, these arrangements were to be evaluated under the 'rule of reason' – thus requiring an inquiry into the specific competitive effects of a resale price arrangement before determining whether it was legal under the Sherman Act.[39]

The decision in *Leegin* has thrown the US system of dual sovereignty into stark relief. Enforcement authorities in certain states have maintained that, regardless of *Leegin*'s effect on federal law, their particular state antitrust law still regards resale price restraints as *per se* illegal. Indeed the New York Attorney General has recently pursued minimum resale price maintenance practices under state law, though thus far has not met with much success.[40] One can, however, expect New York and other states to remain open to challenging RPM schemes, and businesses must be mindful of the varying legal standards governing these schemes in the United States.[41]

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37 551 U.S. 877 (2007).

38 See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

39 551 U.S. at 907. Under an earlier decision of the Supreme Court, maximum resale price restrains are also to be evaluated under the rule of reason. *State Oil Co. v. Kahn*, 522 U.S. 3 (1997).

40 In *New York v. Tempur-Pedic Int'l, Inc.*, 944 N.Y.S. 2d 518 (N.Y. App. Div. 2012), the New York Attorney General brought a civil suit against a mattress manufacturer who allegedly implemented a minimum resale price maintenance programme. The challenge was brought not under the Donnelly Act (New York's main antitrust law which prohibits agreements in restraint of trade) but rather under New York's General Business Law that declares that '[a]ny contract provision that purports to restrain a vendee of a commodity from reselling such commodity at less than the price stipulated by the vendor or producer shall not be enforceable or actionable at law.' N.Y. Gen. Bus. Law Section 396-a (McKinney 2013). The Appellate Division noted that section 369-a 'does not make RPMs illegal as a matter of law' but simply renders them unenforceable. 944 N.Y.S. 2d at 519. The court further noted that the agreements in question actually related only to advertising, and '[a]dvertising agreements cannot be the subject of a vertical RPM claim, because they do not restrain resale prices, but merely restrict advertising.' Id. Finally, the court noted that the conduct in question did not constitute an agreement between the manufacturer and its retailers because 'Tempur–Pedic [merely] enacted its minimum price policy and that its retailers independently determined to acquiesce to the pricing scheme...' Id.

41 Indeed in recent years, California has entered into consent judgments enjoining RPM schemes. See Final Judgment Including Permanent Injunction, *California v. Bioelements, Inc.*, No. 10011659 (Cal. Super. Ct. Riverside Cty. Jan. 11, 2011); Final Judgment Including Permanent

Payment card acceptance rules

The DoJ's interest in payment card networks continues: the Antitrust Division and several states remain in litigation with American Express over certain rules merchants must follow if they accept American Express cards. The DoJ has alleged that, among other things, Amex prohibits merchants from offering discounts to consumers who choose to pay by another method, and that this has an adverse effect on competition by increasing costs related to payment card acceptance.[42]

Monopolisation

In 2009, following the change of administrations, the Antitrust Division withdrew its prior report on Section 2 of the Sherman Act, which deals with monopolisation. The new leadership believed that the old policy imprudently 'favored extreme caution' in Section 2 enforcement matters and was too permissive of certain monopolisation-related conduct.[43] While still relatively rare, the FTC and the DoJ have recently launched challenges related to firms' alleged abuse of dominant positions.

Notably, however, in early 2013, the FTC concluded its investigation into certain practices of Google, Inc without challenging the principal conduct it had been investigating. The FTC examined whether a change in Google's search algorithms, which had the effect of giving preference to Google's own content over that of its competitors (i.e., 'search bias'), constituted an unfair method of competition.[44] In explaining its rationale for closing its investigation, the FTC stated:

> *A key issue for the FTC was to determine whether Google changed its search results primarily to exclude actual or potential competitors and inhibit the competitive process, or on the other hand, to improve the quality of its search product and the overall user experience. The totality of the evidence indicates that, in the main, Google adopted the design changes that the FTC investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose. While some of Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common byproduct of 'competition on the merits' and the competitive*

Injunction, *California v. Dermaquest, Inc.,* No. 10497526 (Cal. Super. Ct. Alameda Cty. Feb. 23, 2010). Elsewhere, the Kansas Supreme Court has ruled that resale price maintenance schemes are *per se* illegal under Kansas state law. *O'Brien v. Leegin Creative Leather Prods., Inc.*, 277 P.3d 1062 (Kan. 2012). For a helpful summary of state resale price maintenance law, see Michael A. Lindsay, Overview of State RPM, The Antitrust Source (Aug. 2012) at i, available at www.americanbar.org/content/dam/aba/publishing/antitrust_source/aug12_lindsay_chart.authcheckdam.pdf.

42 See Complaint at 10-11, *United States v. Am. Express Co.*, No. 10-cv-04496 (E.D.N.Y. Oct. 4, 2010).

43 Press Release, Department of Justice, Justice Department Withdraws Report on Antitrust Monopoly Law (May 11, 2009), available at www.justice.gov/opa/pr/2009/May/09-at-459.html.

44 Statement of the Federal Trade Commission Regarding Google's Search Practices at 1, *In the Matter of Google, Inc.*, File No. 111-0163 (F.T.C. Jan. 3, 2013).

> *process that the law encourages... Product design is an important dimension of competition and condemning legitimate product improvements risks harming consumers.*[45]

In addition to allegations of search bias, the FTC also investigated two other areas of Google's conduct: complaints that Google effectively forced certain of its competitors to allow Google to appropriate their content with threats that the competitors would be removed from Google's search results entirely; and complaints that it restricted the ability of advertisers to advertise on both Google and competing search engines.[46] Google committed to cease this conduct.[47] The European Commission's investigation of Google remains ongoing.

The FTC did challenge exclusionary practices of the world's largest distributor of swimming pool products. According to the FTC complaint, Pool Corporation notified pool-supply manufacturers that it would refuse to deal with any manufacturer who supplied one of its start-up competitors. The manufacturers did not supply the start-up competitor, and, without access to necessary supplies, the competitor failed.[48] Pool Corporation settled with the FTC and is prohibited from engaging in the practices that were the subject of the FTC's complaint.[49]

For its part, the DoJ investigated whether Entergy Corp, a power company operating in Arkansas and the Gulf Coast, harmed competition by engaging in exclusionary conduct with respect to its rivals' access to power transmission lines.[50] The Division has indicated that changes in Entergy's business practices – specifically its plan to divest its transmission business to an independent entity and its plan to join a regional transmission organisation – would address its competitive concerns.[51]

ii Trends, developments and strategies

We expect that the agencies will continue their interest in matters related to health care and technology. With respect to health care: by mid-2013 the Supreme Court is expected to clarify the law regarding agreements between brand-name and generic

45 Id. at 2-3.

46 Id. at 3 n.2.

47 Id. Google made these commitments in a letter to the FTC, rather than in a consent order. Id.

48 Complaint at 5, *In the Matter of Pool Corp.*, No. C-4353 (F.T.C. Jan. 10, 2012).

49 See Decision and Order at 4-5, *In the Matter of Pool Corp.*, No. C-4353 (F.T.C. Jan. 10, 2012). There was some dissention among the FTCers, with one commissioner noting, among other things, that the evidence gathered by FTC staff indicated that the manufacturers' refusal to supply the upstart was a result of the manufacturers' legitimate unilateral business decisions and that evidence failed to establish any consumer injury. Dissenting Statement of J. Thomas Rosch, *In the Matter of Pool Corp.*, No. C-4353 (F.T.C. Nov. 21, 2011).

50 Press Release, Department of Justice, Justice Department Statement on Entergy Corp.'s Transmission System Commitments and Acquisition of KGen Power Corp.'s Plants in Arkansas and Mississippi (Nov. 14, 2012), available at http://www.justice.gov/atr/public/press_releases/2012/288781.pdf.

51 Id.

drug manufacturers to delay the introduction of generic drugs into the market; and it is likely that the agencies will continue to investigate, and, where appropriate, litigate cases involving 'most favoured nation' clauses in contracts between insurers and health-care providers. In technology, the agencies are likely to continue to focus on areas such as standard-essential patents.[52]

'Pay for delay'

The FTC has been active in recent years in challenging 'pay-for-delay' deals in the pharmaceutical industry. Under a typical pay-for-delay deal (also known as a 'reverse patent settlement') a brand-name drug patent holder settles its patent infringement litigation with a potential generic competitor by making a payment in return for an agreement not to sell the competing generic drug for a period of time.[53] The FTC has both mounted several challenges of its own to these agreements[54] and joined in challenges brought by private plaintiffs.[55] It has had mixed success.[56] In March 2013, the United States Supreme Court heard arguments in *Federal Trade Commission v. Actavis, Inc*, a case in which the Court has been asked to resolve whether these agreements violate antitrust laws.[57] In addition to litigation, the FTC has urged Congress to pass legislation specifically outlawing pay-for-delay deals.[58]

'Most favoured nation' agreements

The DoJ continues to police 'most favoured nation' ('MFN') agreements. These agreements are, in general, designed to ensure that a particular purchaser is given a supplier's best price – and, consequently, that other purchasers pay a price no lower for the supplier's goods or services. The Antitrust Division has a history of challenging MFN

52 See, e.g., Fiona Scott-Morton, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Antitrust Enforcement in High-Technology Industries: Protecting Innovation and Competition 5-8, 17-18 (Dec. 7, 2012), available at www.justice.gov/atr/public/speeches/290876.pdf.

53 See Simons & Crane, *supra* note 33, Section 31.04.

54 Second Amended Complaint for Injunctive and Other Equitable Relief, *Fed. Trade Comm'n v. Watson Pharms., Inc.*, No. 09-cv-00955 (N.D. Ga. May 28, 2009); Plaintiff Federal Trade Commission's First Amended Complaint for Injunctive Relief, *Fed. Trade Comm'n v. Cephalon, Inc.*, No. 08-cv-02141 (E.D. Pa. May 8, 2008).

55 See, e.g., Federal Trade Commission's Brief as Amicus Curiae, *Mylan Pharms., Inc. v. Warner Chilcott Pub. Ltd. Co.*, No. 12-cv-3824 (E.D. Pa. Nov. 21, 2012); Federal Trade Commission Brief as Amicus Curiae, *In re Lamictal Direct Purchaser Antitrust Litig.,* No. 12-cv-00995 (D.N.J. Oct. 5, 2012); Brief of the Federal Trade Commission as Amicus Curiae Supporting Appellants and Urging Reversal, *In re K-Dur Antitrust Litig.*, No. 10-2077 (2d Cir. May 18, 2011).

56 Aidan Synnott & William Michael, 2013 Antitrust Developments: United States, 1 CPI Antitrust Chron. (2013), available at www.competitionpolicyinternational.com/file/view/6848.

57 133 S.Ct. 787 (2012) (cert. granted sub nom. *F.T.C. v. Watson Pharms. Inc.*).

58 See, e.g., Press Release, Federal Trade Comm'n, Statement by FTC Chairman Jon Leibowitz Regarding Senate Judiciary Committee Mark-up of Legislation Stopping Illegal Pay-for-Delay Drug Settlements (Jul. 21, 2011), available at www.ftc.gov/opa/2011/07/pdfmarkup.shtm.

clauses in health insurance contracts,[59] and we expect it to continue to study, investigate, and in certain cases challenge MFNs. It recently reiterated its view that:

> *[a]lthough at times employed for benign purposes, MFNs can under certain circumstances present competitive concerns. This is because they may, especially when used by a dominant buyer of intermediate goods, raise other buyers' costs or foreclose would-be competitors from accessing the market. Additionally, MFNs can facilitate collusion and stabilize coordinated pricing among sellers.*[60]

In March 2013, the DoJ ended its suit against Blue Cross Blue Shield of Michigan over Blue Cross's alleged practice of including MFN clauses in contracts with hospitals requiring that the rate to other insurers be equal to or, in some instances, higher than the rates sought from Blue Cross.[61] The Department asserted that these MFN clauses harmed competition by, among other things, increasing the cost of hospital services to Blue Cross's rivals, thereby inhibiting their ability to compete with Blue Cross.[62] After the state of Michigan enacted a law prohibiting the inclusion of MFNs in contracts between insurers and health-care providers, the DoJ moved to dismiss the suit.[63]

Standard-essential patents

The agencies have recently been quite vocal about competitive concerns surrounding standards-setting organisations, and in particular issues raised by 'standard-essential patents'. The agencies recognise that industry standards are critical for innovation: they allow technologies from varied manufacturers to operate together, and thus can increase efficiency and consumer choice.[64] However, the adaptation and use of standards raise antitrust issues: the process of setting a standard often involves a collaboration among competitors, and the use of patented intellectual property in an industry standard (i.e.,

59 See, e.g., *United States v. Or. Dental Serv.*, No. 95-cv-1211 (N.D. Cal. April 10, 2005); *United States v. Delta Dental of R.I.*, No. 96-cv-113P (D.R.I. Feb. 29, 1996); *United States v. Delta Dental Plan of Ariz., Inc.*, No. 94-cv-1793 (Aug. 30, 1994).

60 Press Release, U.S. Dep't of Justice, Department of Justice, Federal Trade Commission to Hold Workshop on 'Most-Favored-Nation' Clauses (Aug. 17, 2012), available at www.justice.gov/atr/public/press_releases/2012/286144.htm.

61 Complaint at 16, *United States v. Blue Cross Blue Shield of Mich.*, No. 10-cv-14155 (E.D. Mich. Oct. 18, 2010).

62 Id. at 19.

63 Press Release, U.S. Dep't of Justice, Justice Department Files Motion to Dismiss Antitrust Lawsuit against Blue Cross Blue Shield of Michigan after Michigan Passes Law to Prohibit Health Insurers from Using Most Favourd Nation Clauses in Provider Contracts (Mar. 25, 2013), available at www.justice.gov/atr/public/press_releases/2013/295114.pdf.

64 US Department of Justice & Federal Trade Commission, Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition 33 (2007), available at www.justice.gov/atr/public/hearings/ip/222655.pdf.

the standard-essential patent) provides an opportunity for the patent holder to engage in anti-competitive conduct.[65]

While recognising the importance of protecting intellectual property interests (including the legitimate acquisition of market power),[66] the agencies have expressed concern that a patent holder may successfully establish its intellectual property as a necessary part of an industry standard (i.e., a 'lock-in') and then use this power to 'hold up' its rivals by demanding anti-competitively high royalties from firms that wish to use the now-standard technology.[67] In particular, the agencies have expressed concern that the patent holder may attempt to implement this 'hold up' by threatening to enjoin the use of its technology by its rivals in a federal district court or by obtaining an exclusionary order from the United States International Trade Commission against the importation of rivals' products, regardless of the commitment made to license the patented technology on reasonable and non-discriminatory ('RAND') terms.[68]

In early 2013, the DoJ and the United States Patent and Trademark Office issued a joint policy statement addressing standard-essential patents.[69] They opined that it was generally inappropriate for injunctions or exclusion orders to issue where patentees have voluntarily committed to license their intellectual property on RAND

65 Id. at 34-36. See also Renata Hesse, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Six 'Small' Proposals for SSOs Before Lunch (Oct. 10, 2012), available at www.justice.gov/atr/public/speeches/287855.pdf; Fiona M. Scott-Morton, Deputy Assistant Att'y Gen. for Economic Analysis, Antitrust Div., U.S. Dep't of Justice, The Role of Standards in the Current Patent Wars 5 (Dec. 5, 2012), available at www.justice.gov/atr/public/speeches/289708.pdf.

66 Id. at 8.

67 Oversight of the Impact on Competition of Exclusion Orders to Enforce Standards-Essential Patents, Statement of Joseph F. Wayland, Acting Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice 3-4 (July 11, 2012), available at www.justice.gov/atr/public/testimony/284982.pdf.

68 Oversight of the Impact on Competition of Exclusion Orders to Enforce Standards-Essential Patents, Statement of the Fed. Trade Comm'n 4-7 (July 11, 2012) (hereinafter 'FTC Statement'), available at www.ftc.gov/os/testimony/120711standardpatents.pdf. The FTC has expressed these concerns to the International Trade Commission in two recent cases. See Third Party U.S. Federal Trade Commission's Statement on the Public Interest at 2-4, *In the Matter of Certain Wireless Commc'n Devices, Portable Music & Data Processing Devices, Computers & Components Thereof,* No. 337-TA-745 (U.S.I.T.C. June 6, 2012); Third Party U.S. Federal Trade Commission's Statement on the Public Interest at 2-4, *In the Matter of Certain Gaming & Entertainment Consoles, Related Software & Components Thereof,* No. 337-TA-752 (U.S.I.T.C. June 6, 2012). See also Brief of Amicus Curiae Federal Trade Commission Supporting Neither Party, *Apple Inc. v. Motorola, Inc.*, No. 12-1548 (Fed. Cir. Dec. 14, 2012) [hereinafter FTC Brief] (urging the United States Court of Appeals for the Federal Circuit to uphold a district court's refusal to grant an injunction in respect of a RAND-encumbered standards-essential patent).

69 U.S. Department of Justice & U.S. Patent and Trademark Office, Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments (Jan. 8, 2013) [hereinafter, 'Policy Statement'].

terms and licensees have agreed to these terms.[70] The DoJ has also encouraged standard-setting organisations to address the problem in the first instance by, among other things, adopting rules limiting a patent holder's ability to seek an injunction.[71]

We expect that the agencies will continue to monitor the issue. Indeed, in resolving its Google investigation, the FTC required Google to agree to a consent order prohibiting it from seeking injunctions against competitors' use of its standard-essential patents.[72]

iii Outlook

We expect the agencies' civil enforcement activities to remain robust. At the DoJ, a new Assistant Attorney General has been confirmed, and we expect he will continue to pursue civil investigations and cases similar to those pursued by his predecessors.

At the FTC, although there has been some recent turnover, with one commissioner replaced and a new chair designated, it is likely that the FTC will continue with its current enforcement priorities. However, this will take place against the backdrop of an ongoing internal and external debate about the scope of the FTC's authority. Section 5 of the FTC Act empowers the FTC to, in general, prevent unfair methods of competition.[73] Some believe that the FTC's Section 5 powers are coterminous with the antitrust laws (i.e., that the FTC may only take action against practices that would violate the Sherman Act).[74] Others believe that it has the power to take action against a broader range of practices.[75] It remains to be seen whether the FTC will attempt to take action relying on this broader interpretation of its authority. The FTC has also signalled that, in addition to continuing to pursue structural and behavioural changes, it may become more aggressive in pursuing monetary remedies.[76]

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70 Id. at 9. The FTC has expressed similar views. See FTC Statement, *supra* note 68, at 1-2, 12. The agencies recognise that there are situations in which an exclusion order or injunction may be appropriate, such as when 'a putative licensee is unable or refuses to take a F/RAND license and is acting outside the scope of the patent holder's commitment to license on F/RAND terms.' Policy Statement, *supra* note 69, at 7. See also FTC Brief, *supra* note 68, at 9 n.8 (discussing FTC's view on circumstances in which an injunction may be appropriate).

71 Scott-Morton, *supra* note 65, at 6-7.

72 See Proposed Decision and Order, *In the Matter of Motorola Mobility LLC and Google Inc.,* File No. 121-0120 (F.T.C. Jan. 3, 2013).

73 15 U.S.C 45 (2006).

74 See Synnott & Michael, *supra* note 56, at 9-10.

75 Id.

76 See Statement of the FTC, Withdrawal of the FTC's Policy Statement on Monetary Equitable Remedies in Competition Cases (July 31, 2012), available at www.ftc.gov/os/2012/07/120731commissionstatement.pdf.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

The health-care industry in the United States has seen a significant amount of enforcement and policy attention from the government, and further developments can be expected in the near future.

i Significant cases

Supreme Court of the United States

Federal Trade Commission v. Phoebe Putney Health System, Inc

On 19 February 2013, the Court decided this case on the scope of the state action doctrine.[77] Phoebe Putney is an independent hospital, health-care and medical education network that holds a 40-year lease on the public hospital in Albany, Georgia.[78] When it wanted to acquire the only other hospital in the area, the FTC sought to block the acquisition.[79] Phoebe Putney defended the acquisition as exempt from the federal antitrust laws because it would allow it to comply with a Georgia law that mandates health services be provided to all indigent members of a community at a not-for-profit price.[80] The FTC argued that the Georgia law does not expressly allow for health-care monopolies, and that even if it did, the federal antitrust laws would prevent private parties from acquiring such monopolies.[81] The District Court and Eleventh Circuit ruled that the state action doctrine immunised the transaction. In its February 2013 decision, the Supreme Court held that the Georgia legislature 'had not clearly articulated and affirmatively expressed a policy to allow hospital authorities to make acquisitions that substantially lessen competition'.[82] The merger had already taken place when the February decision was issued, so the effect on the hospital structure at issue is unclear.[83] The case was remanded to the District Court, and the Supreme Court made clear that in the future the District Court can block the combined hospitals from taking actions that would disturb the status quo.[84]

Federal Trade Commission v. Watson Pharmaceuticals

As discussed above, on 7 December 2012, the Court granted *certiorari* in this case, where it will consider the legal standards for 'pay-for-delay' or 'reverse payment' pharmaceutical patent settlement agreements, in which settlement payment flows from a patent holder to an accused infringer as the patent holder pays potential competitors not to sell the

77 *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. ____, No. 11-1160 (2013).

78 Id. at 3.

79 Id. at 4.

80 See id. at 4-5.

81 See id. at 15.

82 *Phoebe Putney Health Sys., Inc.*, No. 11-1160, at 19.

83 See Lyle Denniston, Opinion recap: A warning about competition, SCOTUSblog (Feb. 19, 2013, 5:36 PM), www.scotusblog.com/2013/02/opinion-recap-a-warning-about-competition/

84 *Phoebe Putney Health Sys., Inc.*, No. 11-1160, at 6 n.3.

competing drugs for a period of time.[85] In this case, the Eleventh Circuit rejected the FTC's challenge to patent settlement agreements between various pharmaceutical companies.[86] In contrast to the Eleventh Circuit's holding, the Third, Sixth, and DC Circuits have been more receptive to claims that reverse payment settlements can violate the antitrust laws.[87]

Enforcement actions: judgments

West Penn Allegheny Health System

The DoJ closed its investigation into a proposed affiliation between Highmark, the western Pennsylvania Blue Cross and Blue Shield licensee, and West Penn Allegheny Health System, the second largest hospital network in the Pittsburgh area.[88] The Antitrust Division's closing statement recognised that vertical agreements such as this can reduce competition by limiting entry or expansion by third parties, but found those anti-competitive effects were unlikely in this case for several reasons.[89] Because the hospital market in Pittsburgh is highly concentrated – there is only one other significant hospital network, the University of Pittsburgh Medical Center – there is no other hospital network with which Highmark would be likely to partner in the absence of the agreement with West Penn Allegheny Health System.[90] The DoJ concluded that the affiliation may bring increased competition by providing the hospital network with a significant infusion of capital and increased incentives of market participants to compete vigorously.[91]

Blue Cross and Blue Shield of Montana

In March 2012, final judgment was entered in a civil antitrust suit that the Antitrust Division and the State of Montana filed against Blue Cross and Blue Shield of Montana and other entities in 2011.[92] The judgment requires New West, a defendant, to divest its

85 See Simons & Crane, *supra* note 33, Section 31.04.

86 *FTC v. Watson Pharms., Inc*., 677 F.3d 1298, 1315 (11th Cir. 2012).

87 See *In re K-Dur Antitrust Litig.*, 686 F.3d 197 (3d Cir. 2012) (reverse payment settlement agreement was *prima facie* evidence of an unreasonable restraint of trade); *In re Cardizem Antitrust Litig.*, 332 F.3d 896 (2d Cir. 2003) (agreement where generic manufacturer agreed with brand name manufacturer to refrain from marketing its product was *per se* violation of the Sherman Act); cf. *Andrx Pharms., Inc. v. Biovail Corp., Int's*., 256 F.3d 799, 812-15 (D.C. Cir. 2001) (allegations of exclusionary agreement with third party not to sell generic version of Cardizem could be sufficient to plead antitrust injury).

88 Press Release, Department of Justice, Statement of the Department of Justice's Antitrust Decision on its Decision to Close its Investigation of Highmark's Affiliation Agreement with West Penn Allegheny Health System (April 10, 2012), available at www.justice.gov/atr/public/press_releases/2012/282076.htm.

89 Id.

90 See id.

91 Id.

92 Final Judgment, *United States v. Blue Cross and Blue Shield of Mont*., No. 11-cv-00123 (D. Mont. Mar. 15, 2012).

commercial insurance business to a competitor insurer, PacificSource.[93] The judgment states that the purpose of the relief is to give PacificSource an opportunity to become a viable competitor in the sale of health care in Montana. The judgment also provided PacificSource with an established network of providers, and the hospital defendants agreed to contract with PacificSource for three years, on terms that are substantially similar to their existing contractual terms with New West.[94]

Cooperativa de Farmacias Puertorriqueñas

As discussed above, a final consent order was issued against Cooperative de Farmacias Puertorriqueñas in 2012.[95]

ii Trends, developments and strategies

With the Obama Administration entering a second term focused on health care, the DoJ and FTC are likely to monitor changes in the various health-care markets. As one commentator noted, '[t]wo key goals of the Obama Administration have been healthcare reform and aggressive antitrust enforcement. These goals, to the Administration, are complementary.'[96] Having released their Statement of Antitrust Policy Enforcement Regarding Accountable Care Organizations in late 2011, the DoJ and the FTC are likely to have ample opportunity to implement those policies, as health-care providers are expected to consolidate and collaborate with greater frequency.[97]

iii Outlook

We expect both agencies to continue to regard antitrust enforcement in the health-care sector as a priority. Indeed, relevant activity in the health-care space may be great enough to stretch the Antitrust Division and FTC's resources in the coming years. As one commentator put it: 'the pertinent 'question' regarding antitrust agencies is [...] whether the antitrust agencies can handle the expected volume of review that we anticipate in the next four years'.[98]

93 See ABA Section of Antitrust Law, Selected Antitrust Developments in Health Care, 19-21 (May 3, 2012).

94 Id. quoting Final Judgment, *United States v. Blue Cross and Blue Shield of Mont.*, No. 11-cv-00123 (D. Mont. Mar. 15, 2012).

95 FTC, Overview of FTC Antitrust Actions in Health Care Services and Products, 21-22 (Sept. 2012), available at www.ftc.gov/bc/healthcare/antitrust/hcupdate.pdf.

96 Matthew L. Cantor & Marlene Koury, A Watchful Antitrust Eye in Healthcare, http://about.bloomberglaw.com/practitioner-contributions/watchful-antitrust-eye-healthcare/ (last visited Mar. 5, 2013).

97 Id.

98 Id.

VI CONCLUSIONS

The Obama Administration has promised, from the outset, a 'reinvigorated' enforcement regime.[99] Whether this reinvigoration has been borne out, however, is subject to debate.[100] Nevertheless, as the economy improves from its first-term lows, one might expect that the workload of the enforcement agencies will increase.

We also expect that both the DoJ and the FTC will continue to seek ways in which to cooperate with competition enforcement authorities around the globe. Indeed, the United States has in place bilateral cooperation protocols with Australia, Brazil, Canada, Chile, China, the European Union, Germany, India (signed this past year), Israel, Japan, Mexico and Russia,[101] and has cooperated with other jurisdictions as well.[102] In particular, the agencies' close work with the European Commission continues: the auto parts, LIBOR, e-books, and Google investigations discussed above have all seen collaboration between the DoJ and the European Commission.

We will continue to watch with interest how these international efforts evolve. Indeed, several practical issues confront the principle of cross-border cooperation. For example, enforcement authorities will continue to confront legal constraints on their ability to share confidential information obtained during the course of investigations.[103] More broadly, as additional jurisdictions adopt leniency paradigms similar to the programme that has been in place in the United States, questions regarding the interaction of these programmes will need to be addressed.

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99 Senator Barack Obama, Statement for the American Antitrust Institute (Sept. 27, 2007), available at www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf.

100 See Daniel A. Crane, Has the Obama Justice Department Reinvigorated Antitrust Enforcement?, 65 Stan L. Rev. Online 13 (2012), available at www.stanfordlawreview.org/sites/default/files/online/articles/65_Stan._L._Rev._Online_13.pdf

101 See Antitrust Cooperation Agreements, www.justice.gov/atr/public/international/int-arrangements.html (last visited March 8, 2013).

102 See U.S. Department of Justice, The Antitrust Division's International Program 1-2 (Nov. 2011); Randolph Tritell & Elizabeth Kraus, FTC Office of Int'l Affairs, The Federal Trade Commission's International Antitrust Program 4 n.8. (Jan. 2012).

103 See Rachel Brandenburger, Special Advisor, International, Antitrust Div., U.S. Dep't of Justice, International Cooperation: Taking a Broader View 14 (Dec. 6, 2012).

Appendix 1

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A fellow of the American Bar Foundation, Aidan has been an associate editor of the *Antitrust Law Journal* and editorial board member of the American Bar Association's *Annual Review of Antitrust Law Developments*. He was co-chair of the New York State Bar Association Section of Commercial and Federal Litigation's Committee on Antitrust and a member of the Executive Committee of the Section. He has been a guest lecturer and speaker at New York University School of Law, the Wharton School and the University of Michigan Law School, and has published extensively in the areas of antitrust and intellectual property law. In 2012, Aidan was recognised as a leading lawyer for his work in antitrust by *Chambers USA*, *Legal 500* and *The Best Lawyers in America*.

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Andrew Finch has extensive antitrust experience, including civil and criminal government investigations, private litigation and appellate matters. His experience includes defending a major insurance company against antitrust claims brought in federal and state courts by commercial insureds alleging bid rigging, market allocation, and the improper use of broker commissions; and defending a payment card network against antitrust claims brought by a putative class of merchants in the United States that challenged the credit card interchange system as a form of price fixing in violation of the Sherman Act.

Andrew joined Paul, Weiss from the Antitrust Division of the US Department of Justice, where he served as Counsel to the Assistant Attorney General. Andrew is a member of the American Bar Association's Section of Antitrust Law and served as a vice-chair of the Section's Civil Practice and Procedure Committee.

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