ABA Section of Antitrust Law

Corporate Counseling Committee

In-House Counsel Antitrust Update (March/April 2007)

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PRESENTATION OUTLINE

1. **Competition Laws Under Review**
2. **Anticompetitive Agreements**
3. **Unilateral Conduct/Abuse of Dominance**
4. **Mergers**
5. **Antitrust Immunity**

COMPETITION LAWS UNDER REVIEW

COMPETITION LAWS UNDER REVIEW:
United States

- **Antitrust Modernization Commission issued its report (April 2, 2007)**
  - AMC concluded overall that antitrust laws are fundamentally "sound"
  - Topics include:
    - merger enforcement
    - exclusionary conduct
    - antitrust and patents
    - civil and criminal remedies
    - international antitrust enforcement
    - immunities and exemptions
    - regulated industries

COMPETITION LAWS UNDER REVIEW:
United States

➢ AMC Report – Key Conclusions

- Eliminate inefficiencies resulting from dual federal enforcement
- Repeal of *Robinson-Patman Act*
- No change recommended to the statute providing for treble damages
- Congress should overrule *Illinois Brick* and *Hanover Shoe* to extent necessary to allow direct and indirect purchasers to recover for their injuries
- Purchases made outside the U.S. from sellers outside the U.S. should not give rise to a cause of action in the U.S. courts
- Statutory immunity from antitrust law should be disfavoured

COMPETITION LAWS UNDER REVIEW:
United States

- **Joint FTC/DOJ Report, *"Antitrust Enforcement and Intellectual Property Rights: Promoting Innovation and Competition"* (April 17, 2007)**
  - Antitrust liability for mere unilateral, unconditional refusals to license patents will not play a meaningful part of antitrust enforcement
  - Rule of reason analysis applied to:
    - conditional refusals to license
    - joint negotiation of licensing terms by standard-setting organization
    - intellectual property licensing agreements
    - cross-licensing and patent pools
    - practices that have the potential to extend the market power conferred by a patent beyond its expiration
  - Antitrust-IP Guidelines will continue to guide the agencies' analysis of intellectual property tying and bundling

COMPETITION LAWS UNDER REVIEW:
Canada

- **"Competition policy review"**
  - Announced March 19, 2007
  - 3-5 person panel to study and report by 2008

- **Bureau enforcement priorities**
  - Cartels, mergers, abuse of dominance, professions and internet fraud

- **Telecom specific administrative monetary penalties (AMPs) and agency budget allocation**

COMPETITION LAWS UNDER REVIEW: EU

- **Final Commission Report finds major competition barriers in retail banking sector**
  - Widespread barriers which unnecessarily raise the cost of retail banking services
  - Particular concerns were identified in the markets for payment cards and payment systems
  - Concerns identified in retail banking
  - Enforcement action will be taken where appropriate

COMPETITION LAWS UNDER REVIEW: EU

- **Commission Interim Sector Report on the business insurance sectors released**
  - Comment period ends April 10, 2007 – final report expected September 2007
- **Public consultation launched on draft Merger Guidelines for companies in a vertical or conglomerate relationship (non-horizontal mergers)**
  - Comment period ends May 12, 2007

COMPETITION LAWS UNDER REVIEW:
Asia Pacific

➢ Japan

- JFTC seeking comments on amendment to merger guidelines

➢ Australia

- Guidelines issued on compliance with Oilcode, binding on participants in the petrol wholesale, retail and distribution industry

➢ New Zealand

- High Court ruled foreign defendants in off-shore Wood chemicals cartel with effects in New Zealand are subject to action under the *Commerce Act* – decision has been appealed

ANTICOMPETITIVE AGREEMENTS

ANTICOMPETITIVE AGREEMENTS:

Leegin Creative Leather Products, Inc. v. PSKS, Inc.

- **U.S. Supreme Court hearing (March 26, 2007)**
  - Issue: should vertical minimum resale price agreements continue to be *per se* illegal or should they be subject to rule of reason?
  - In support of rule of reason: Leegin (defendant), DOJ and FTC (majority), group of 23 economists
  - In support of *per se* rule: PSKS (plaintiff), 37 states, 2 FTC commissioners, Consumer Federation of America

ANTICOMPETITIVE AGREEMENTS:

Leegin Creative Leather Products, Inc. v. PSKS, Inc.

- **Justices Ginsburg, Stevens, Kennedy, Souter, Breyer, Roberts question rule of reason approach**
  - Dealers can't agree on a minimum price – why should manufacturer be permitted to do so?
  - No consensus among economists – some predict that reversal of *per se* rule would lead to higher prices
  - Congress active in area – repealed "fair trade" laws which permitted States to make RPM *per se* legal – intent to return to common law *per se* illegality?
  - Did *per se* illegality of RPM foster discount retailers?
  - Reversal may risk massive reorientation in retail economy

ANTICOMPETITIVE AGREEMENTS:

Leegin Creative Leather Products, Inc. v. PSKS, Inc.

- **Justices Scalia, Alito, Kennedy, Roberts question *per se* rule**
  - Low price is not the only goal of antitrust
  - RPM fosters supply of non-price features (e.g., warranties, showrooms) and greater consumer choice
  - Where is the harm in RPM if defendant is not dominant?
  - Low price retailers did not file *amicus* briefs – not concerned?
  - *Per se* rule is inflexible ("cookie cutter" approach)
  - What was congressional intent in repealing fair trade laws – intent to return to common law including its ability to evolve with new learning?
  - *Colgate* doctrine is an acceptable means to maintain prices – why not allow a more efficient means?

ANTICOMPETITIVE AGREEMENTS:
United States

- **MSG class action (8th Cir.)**
  - Further application of *Empagran – Sherman Act* not applicable to export or foreign conduct unless it has a direct, substantial and reasonably foreseeable effect on U.S. domestic commerce and the domestic effect gives rise to the foreign plaintiffs' claim
  - Alleged higher U.S. prices as a result of cartel were not the direct cause of plaintiffs' injuries
  - Action dismissed for lack of jurisdiction
  - Consistent with most other post-*Empagran* decisions

ANTICOMPETITIVE AGREEMENTS:
United States

- **FTC issued CIDs to Bristol-Myers Squibb and Sanofi-Aventis regarding proposed patent litigation settlements with Apotex re sale of blood thinner Plavix (April 4, 2007)**
  - Proposed payment to Apotex for delayed entry of generic version
  - DOJ already has related criminal investigation against Bristol-Myers

ANTICOMPETITIVE AGREEMENTS: EU

- **Elevator/escalator cartel – largest ever EU fine**
  - €992,312,200 total industry fines
  - €479,669,850 fine for ThyssenKrupp (50% increase for repeat offender)

- **Commission fines members of beer cartel (April 18, 2007)**
  - Fines of €273,783,000 for Dutch brewers Heineken, Grolsch and Bavaria
  - InBev received no fines as they provided decisive information about the cartel under the Commission's leniency programme

ANTICOMPETITIVE AGREEMENTS:
EU

- **Statement of objections to record companies and Apple (April 13, 2007)**
  - Restrictive agreements – customers can buy music from iTunes' on-line store only in their country of residence

ANTICOMPETITIVE AGREEMENTS:
UK

- **Construction industry bid-rigging investigation (March 22, 2007)**
  - 57 raids
  - 37 leniency applications
  - OFT offered "fast track" discount (not leniency) to remainder who will admit participation

ANTICOMPETITIVE AGREEMENTS:
Canada

- **Draft information bulletin on search and seizures (April 16, 2007)**
  - Comment period ends July 12, 2007

- **Upcoming developments**
  - Draft information bulletin on "Sentencing and Leniency"
  - Roundtable discussions on amendments to conspiracy provision
  - Revised Immunity Bulletin

UNILATERAL CONDUCT/ ABUSE OF DOMINANCE

UNILATERAL CONDUCT:
International Focus

- **Continued focus worldwide concerning unilateral conduct/abuse of dominance**
  - Joint FTC/DOJ hearings on unilateral conduct
  - EU re-examining its approach to abuse of dominance (Art. 82) and recently published a discussion paper
  - ICN Working Group discussing goals and standards of enforcement by antitrust agencies worldwide for unilateral conduct
  - AMC report contains recommendations for unilateral conduct cases

UNILATERAL CONDUCT:
AMC Report

➢ AMC Report – key conclusions

- Standards for applying section 2 to exclusionary conduct should be clear and predictable in application, administrable, and designed to minimize over-deterrence and under-deterrence
- Additional clarity in standards for application of section 2 is desirable
- Such clarity may be achieved through development of case law – not necessary to amend section 2
- Lack of clear standards for bundling (as reflected in *3M/LePage*) could discourage pro-competitive or competitively neutral behaviour and thus may harm consumer welfare

UNILATERAL CONDUCT:
AMC Report

- To establish that bundled rebates or discounts violate section 2, plaintiffs should be required to prove each of the following elements:
  - after allocating all discounts and rebates attributable to the entire bundle of products to the competitive product, the defendant sold the competitive product below its incremental cost for the competitive product
  - the defendant is likely to recoup these short-term losses
  - the bundled discount or rebate program has had or is likely to have an adverse effect on competition

UNILATERAL CONDUCT:
Canada Pipe

➢ Competition Tribunal decision

- Issue: Whether Canada Pipe's loyalty-based discount program contravened *Competition Act's* abuse of dominance and exclusive dealing provisions
- Tribunal held that Canada Pipe possessed market power in relevant market (cast iron pipe and related products) but rejected Commissioner's arguments that:
  - Canada Pipe's discount program and/or its acquisitions constituted a practice of anti-competitive acts
  - the discount program had resulted in substantial prevention or lessening of competition
- Commissioner appealed successfully to Federal Court of Appeal

UNILATERAL CONDUCT:
Canada Pipe

➢ Court of Appeal decision

- FCA found that Tribunal did not apply correct legal tests for "anti-competitive act" and "substantial lessening or prevention of competition"
- Majority refused to grant Canada Pipe's cross-appeal on findings of market power on grounds of deference
- Matter sent back to Tribunal for reconsideration
- Canada Pipe applied for leave to appeal to the Supreme Court of Canada – if Supreme Court agrees to hear case, will be an opportunity to provide guidance on appropriate standards for abuse of dominance enforcement in Canada – if not, case will go back to Tribunal for re-determination applying FCA's tests
- A decision with respect to leave is expected within the next few weeks

UNILATERAL CONDUCT:
Virgin/British Airways

➢ European Court of Justice decision

- Dismissed British Airways' appeal from the Court of First Instance
- Confirmed need to determine whether impugned scheme had an exclusionary effect and consider whether the negative effects are counterbalanced or outweighed in terms of advantages for market and consumers
- Specifically rejected BA's arguments that CFI had failed to properly consider the absence of any impact on BA's competitors or BA's economic justification for its incentive program

UNILATERAL CONDUCT:
The Road Ahead

➢ International convergence?

- Significant amount of discussion concerning unilateral conduct/abuse of dominance by antitrust agencies – may see more international convergence on "best practices"
- EU has signalled need to re-consider its enforcement approach and adopt effects-based approach seen in U.S. and Canada

➢ Increased enforcement activity?

- In Canada, recent criticism of Competition Bureau for comparative lack of enforcement action – Bureau has committed to bring more abuse cases
- AMC report may spur U.S. authorities to bring more cases in this area

RECENT MERGER CASES
AND POLICY DEVELOPMENTS

RECENT MERGER CASES:
United States

- **Telecom consent decrees approved under *Tunney Act* (March 29, 2007)**
  - SBC/AT&T
  - Verizon/MCI
  - Decrees provide for divestitures of certain local fiber-optic network facilities to protect competition in the market for facilities-based local private line service to certain business customers in various metropolitan areas
- **Western Refining/Giant Industries**
  - FTC request for TRO granted (April 13, 2007)
- **Recent DOJ Consent Decrees**
  - Amsted Industries/FM Industries (April 18, 2007) – divestitures in railroad car cushioning industry
  - Cemex/Rinker (April 4, 2007) – divestitures in concrete/aggregates industry

RECENT MERGER CASES:
European Union

- **Sony/BMG**
  - March 1, 2007 – European Commission announces Phase II investigation in its re-examination of its original July 2004 decision clearing the merger
    - July 2006 – CFI annulled original Commission decision due to inadequate analysis of evidence
  - Potential guidance on collective dominance

- **Ryanair/Aer Lingus**

RECENT MERGER CASES:
Canada

➢ Labatt/Lakeport (March 28, 2007)

- Commissioner (Competition Bureau) sought a section 100 order (30-day temporary injunction) to prevent closing of Canadian beer merger pending completion of review
- First contested case under the revised s. 100
- Competition Tribunal denies s. 100 order
  - ability to remedy potential competition problems is not substantially impaired
  - parties close merger at their own risk with no "hold separate" order in place
- Implications:
  - once statutory waiting period expires (42 days in case of "long-form" pre-merger notification), parties can close transaction unless Commissioner succeeds in obtaining an injunction
  - however, parties must still consider whether to close without positive clearance – Commissioner can still challenge for up to 3 years

➢ Recent consent agreements

- Johnson & Johnson/Pfizer (December 20, 2006)
  - example of Canadian remedy in international merger
- SWP/JRI (March 28, 2007)

MERGER POLICY DEVELOPMENTS:
United States

➢ AMC Report (April 2007)

- No statutory change recommended for section 7 of the *Clayton Act*
- Agencies and courts should give greater weight to certain fixed-cost efficiencies, such as research and development expenses, in dynamic innovation-driven industries with low marginal costs
- FTC and DOJ should increase transparency
  - issue closing statements to explain reasons for no enforcement action
  - increase retrospective studies of enforcement decisions
  - further study of market performance versus concentration
- Agencies should update Merger Guidelines to explain how they evaluate non-horizontal mergers and merger impact on innovation
- Agencies should resolve HSR clearance disputes within 9 days

MERGER POLICY DEVELOPMENTS:
Canada

➢ *Ex post* remedies review

- Competition Bureau examining the effectiveness of past merger remedies
- In line with EU, FTC reviews

➢ Examination of efficiencies

- Bureau examining the role of efficiencies in merger review and the application of the efficiencies defence of the *Competition Act*
- Bureau examining the role of dynamic efficiencies in mergers

ANTITRUST IMMUNITY:
Credit Suisse v. Billing

ANTITRUST IMMUNITY:
Credit Suisse v. *Billing*

- **U.S. Supreme Court hearing on March 27, 2007**
  - Question presented: whether, in a private damages action under the antitrust laws challenging conduct that occurs in a highly regulated securities offering, the standard for implying antitrust immunity is the potential for conflict with the securities laws or, as the Second Circuit held, a specific expression of congressional intent to immunize such conduct and a showing that the SEC has power to compel the specific practices at issue

ANTITRUST IMMUNITY:
Credit Suisse v. *Billing*

➢ Context

- Class action antitrust claim against investment firms alleging conspiracy to inflate price of securities in IPO offerings during stock market boom of 1990s
- Defendants argued that law suit should be dismissed because SEC's "pervasive regulation" of securities industry displaces application of antitrust laws

Credit Suisse v. *Billing:*
Lower Court Decisions

- **United States District Court of the Southern District of New York**
  - Dismissed claim
  - Held that defendants' conduct was impliedly immune from antitrust liability due to SEC's broad general authority to regulate IPO allocation and underwriter commission practices
- **Second Circuit Court of Appeals**
  - Reversed dismissal and reinstated law suit
  - Held that antitrust laws should apply unless Congress specifically expresses intent to grant immunity to particular conduct at issue
  - No evidence that SEC had ability to, or would, compel agreements of type alleged or that any provision of securities law would be rendered "nugatory" if antitrust laws applied

Credit Suisse v. *Billing:*
Lower Court Decisions

- **SEC and DOJ took opposing positions before 2nd Cir.**
  - SEC: SEC has pervasive regulatory authority over the syndicated offering process, including determining the appropriate balance of competition with other public interest and investment protection considerations, and is actively exercising that authority. Immunity from antitrust laws is necessary in order to permit regulatory regime to function as envisaged by Congress
  - DOJ: Antitrust immunity applies to challenges to syndication and related practices expressly or implicitly approved by SEC under securities laws. But enforcement of antitrust laws creates no conflict with, or impediment to, SEC's ability to regulate and enforce securities laws with respect to conduct that is in clear violation of securities laws and that SEC has never approved or even considered approving

Credit Suisse v. *Billing:*
USSC Hearing

➢ SEC and DOJ reconciled before USSC

- Neither approach of the district court nor that of 2nd Cir. adequately accommodates interests of securities regulatory scheme and antitrust laws
- To give proper effect to both "critically important statutory schemes", antitrust immunity should be extended to collaborative conduct specifically authorized under securities regime and to those activities that are "inextricably intertwined" with permitted collaboration

Credit Suisse v. *Billing:*
USSC Hearing

- **Key issue for Justices**
  - How to design standard that avoids exposing securities industry to treble damage antitrust claims for conduct that SEC might believe is permissible or even favors
- **Not clear to Court that Government's proposed test for antitrust immunity provides adequate answer**
  - Concerns expressed about how to administer standard in practice
  - How is district court to decide if collaborative conduct is authorized or prohibited under securities laws, given that conduct could be ambiguous and characterized in variety of ways?
  - How is a court to determine what type of behavior is "inextricably intertwined" with authorized conduct?
  - Solicitor General suggests that might be appropriate to focus on conduct that "cuts across" IPOs

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George Addy is the partner leading the firm's Competition & Foreign Investment Review Group. He was head of the Mergers Branch of the Competition Bureau from 1989-1993 and was appointed by Cabinet to head the Competition Bureau in 1993, a position he held until 1996.

George is a Director of the Canadian Chamber of Commerce and chairs its Policy Committee. He is a member of the CBA, ABA and IBA and is an active member of numerous committees dealing with sectoral, legal and business issues. As a Vice-Chairman and member of the Executive Board of the Business and Industry Advisory Committee (BIAC), he continues to ensure that a private sector perspective is included in policy development initiatives undertaken by the OECD.

George is internationally recognized as leading lawyer in the field of competition law. He has spoken widely and published extensively in Canada, the United States and abroad on the subjects of competition law, trade practices and the interface between competition policy and trade policy. He is the co-author of the first Canadian loose-leaf service on competition law, *Competition Law Service*, published by Canada Law Book Limited. He has also made submissions and testified before House of Commons and Senate Committees on competition policy, financial services, communications, transport and other legislative matters.

His practice covers all aspects of competition law, including strategic advice and representation before competition authorities in Canada and abroad in relation to cartels, mergers, acquisitions, joint ventures, and abuse of dominance and other reviewable trade practices.

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Anita Banicevic is a partner in the Competition & Foreign Investment Review Group. She advises domestic and international clients on many aspects of Canadian competition law, including mergers, pricing and distribution practices, misleading advertising, as well as abuse of dominance and criminal conspiracy investigations. She has experience advising clients in a wide variety of industries, including airlines, building materials, consumer products, financial institutions, natural resources, pharmaceuticals, real estate, retail and transportation.

She has played a key role in obtaining the requisite *Competition Act* and *Investment Canada Act* clearance for a number of major transactions, and has been involved in complex competition litigation matters heard by the Competition Tribunal and Federal Court of Appeal. In particular, Anita has represented clients in a number of abuse of dominance and criminal conspiracy investigations by the Competition Bureau as well as settlement negotiations with the Bureau.

Anita is currently a non-governmental adviser to the International Competition Network and is also a member of both the Canadian Bar Association and American Bar Association.

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John Bodrug is a partner in the Competition & Foreign Investment Review Group. He has extensive experience in all aspects of competition law, and has represented and advised corporations across a range of industries. He also regularly represents companies that are the subject of inquiries under the criminal provisions of the *Competition Act*, including both in the context of contested matters, resolutions short of proceedings, and immunity or leniency agreements.

John acted as a special counsel for the Director of the Competition Bureau in the Competition Tribunal proceedings relating to the Interac shared electronic financial services network under the *Competition Act*.

John is internationally recognized, ranking among the world's top 45 competition lawyers under the age of 45 in a worldwide survey by the *Global Competition Review*. He is a co-editor of *Competition Law of Canada* (Juris Publishing), a leading text on Canadian antitrust law, and has written numerous articles in the field of competition law.

John is a member of the Executive of the National Competition Law Section of the Canadian Bar Association. He is also a non-Governmental Advisor to the International Competition Network and a member of the American Bar Association.

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Richard Elliott is a partner in the Competition & Foreign Investment Review Group. His practice is focused on advising Canadian and foreign-based clients on all aspects of Canadian competition law, including mergers, abuse of dominance and cartels, as well as on the application of the *Investment Canada Act*.

Richard has held positions at Canada's Competition Bureau and has worked at a U.S. and European law firm specializing in antitrust law.

Richard is internationally recognized in the field of competition law and is included in Chambers Global *The World's Leading Lawyers for Business* and *PLC Which Lawyer? Yearbook*. He has spoken and written widely on competition law subjects. His teaching experience includes serving as a lecturer in competition law at Queens University in Kingston, Ontario and as a visiting professor in international trade law at the Université de Moncton, New Brunswick.

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Mark Katz is a partner in Competition Law & Foreign Investment Review Group. He advises domestic and international clients on a wide variety of competition law matters such as mergers and acquisitions, criminal cartel investigations, joint ventures, abuse of dominance, distribution and pricing practices, misleading advertising and compliance. He also has appeared at every level of court in relation to competition matters, up to and including the Supreme Court of Canada and has acted as counsel on several leading cases before the Competition Tribunal, including the first abuse of dominance and merger cases heard by that body. Mark also provides advice with respect to the application of the *Investment Canada Act*.

Mark is internationally recognized in the practice of competition law. For example, he is included in Chambers Global *The World's Leading Lawyers 2007* under competition/antitrust and is recognized as "a true stalwart of the practice".

Mark is a member of the Canadian, American and International Bar Associations. He has authored a wide variety of articles and conference papers on competition law matters and has contributed to a number of texts and treatises in the area. Mark has also authored policy briefs for clients on a variety of matters, including amendments to Canada's *Competition Act*.

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