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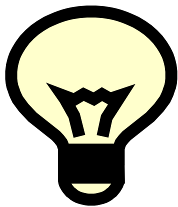

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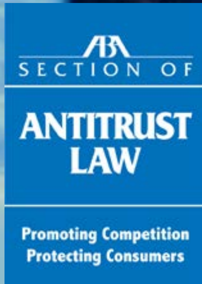



# Implications of Recent Antitrust Developments and Trends for M&A

**Daniel E. Hemli and Jacqueline R. Java**

The recovery in mergers and acquisitions activity from the global financial crisis so far has occurred in fits and starts rather than a sustained rebound. By contrast, antitrust merger enforcement, including litigated challenges to both proposed and already-consummated acquisitions, has been taking place at an almost frantic pace. This heightened enforcement activity follows on the heels of significant developments in antitrust merger law and policy, including new Horizontal Merger Guidelines (HMGs) issued by the FTC and DOJ Antitrust Division, as well as changes to the Hart-Scott-Rodino (HSR) filing requirements. The antitrust agencies have also been actively pursuing those who violate the HSR rules. Important legal and practical lessons can be gleaned from these cases.

**Increase in Merger Litigation**

The antitrust agencies recently have brought a string of lawsuits opposing M&A transactions in a variety of industries. Several of these challenges have been resolved, while the outcome of others is pending. For example:

- In October 2011, the DOJ successfully obtained an injunction to stop H&R Block from acquiring TaxAct, a competing provider of digital do-it-yourself (DDIY) tax preparation software.[1] This was the DOJ's first fully litigated merger challenge since its 2004 loss in Oracle/PeopleSoft[2] and its first contested merger victory in nine years.
- In December 2011, in another high-profile win for the DOJ, AT&T abandoned its proposed $39 billion acquisition of T-Mobile from Deutsche Telekom, four months after the DOJ filed a complaint seeking to block the deal. AT&T paid $4 billion in break-up fees to Deutsche Telekom in the form of cash and wireless assets.

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[1] *United States v. H&R Block, Inc.*, No. 11-00948, 2011 WL 5438955 (D.D.C. Nov. 10, 2011) (*H&R Block*).
[2] *United States v. Oracle Corp.*, 331 F. Supp. 2d 1098 (N.D. Cal. 2004) (*Oracle*).

- In January of this year, the FTC challenged Omnicare's hostile tender offer for rival long-term care pharmacy provider PharMerica, causing Omnicare to abandon the transaction.
- In March 2012, the FTC ruled that ProMedica Health System's already-consummated acquisition of St. Luke's Hospital in the Toledo, Ohio area was anticompetitive and ordered ProMedica to divest St. Luke's Hospital to an FTC-approved buyer, upholding a decision issued three months earlier by an Administrative Law Judge.
- In April, the FTC successfully obtained a preliminary injunction from a federal court blocking the proposed merger of two Illinois hospitals, OFS Healthcare System and Rockford Health System, with the hospitals subsequently abandoning the transaction.
- In June, the Supreme Court granted certiorari in the matter of *FTC v. Phoebe Putney Health System, Inc.*, in which the FTC, acting through the Solicitor General of the United States, petitioned for review of a federal appeals court ruling concerning Phoebe Putney Health System's acquisition of Palmyra Park Hospital in Albany, Georgia.[3]

What do these cases mean for deal makers? At a macro level, these recent challenges lay to rest any lingering doubts regarding the willingness of the antitrust agencies (especially the DOJ) to litigate a merger in court and their ability to win. In her last major speech before leaving the DOJ, the former Acting Assistant Attorney General for the Antitrust Division, Sharis Pozen, made this point bluntly, declaring that "the Antitrust Division isn't afraid to litigate, and when it does, it wins."[4] This highlights the critical importance for potential buyers and sellers of considering carefully and as early as possible the antitrust risk when contemplating a transaction.

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These cases also reaffirm that deals of any size and scope, in any industry, are potentially open to intense and costly antitrust scrutiny and challenge in court. While the AT&T/T-Mobile transaction would have been a megamerger of two large telecommunications companies with national presence, H&R Block/TaxAct was a more modest $287.5 million deal, and the challenged hospital mergers were local in scope, each covering just a single metropolitan area. (Conversely, not all large horizontal mergers will be challenged even in the current enforcement environment, as shown by the FTC's decision to close its lengthy investigation of Express Scripts' $29 billion acquisition of Medco Health Solutions in the face of significant opposition to the deal.)[5]

There are also a number of more granular takeaways:

*Market Definition is Alive and Well*

Despite the extensive debate, sparked by language in the 2010 HMGs regarding a possible de-emphasis on the role of market definition in favor of direct evidence of competitive effects,[6] it is

[3] The core issue in this case involves the scope of the state action doctrine, which immunizes anticompetitive conduct that is the intentional or foreseeable result of state or local government policy. See Petition for a Writ of Certiorari, *FTC v. Phoebe Putney Health System, Inc.*, No. 11-1160 (U.S. Mar. 23, 2012*), available at* http://www.ftc.gov/os/caselist/1110067/120323phoebeputneypetition.pdf; see also Press Release, FTC, FTC Seeks U.S. Supreme Court Review of Appeals Court Ruling in Phoebe Putney / Palmyra Park Hospital Case (Mar. 23, 2012), *available at* http://www.ftc.gov/opa/2012/03/phoebeputney.shtm.

[4] Sharis A. Pozen, Promoting Competition and Innovation Through Vigorous Enforcement of the Antitrust Laws on Behalf of Consumers, Remarks as Prepared for the Brookings Institution, April 23, 2012, available at http://www.justice.gov/atr/public/speeches/282515.pdf.

[5] Press Release, FTC, "FTC Closes Eight-Month Investigation of Express Scripts, Inc.'s Proposed Acquisition of Pharmacy Benefits Manager Medco Health Solutions, Inc.", April 2, 2012, *available at* http://www.ftc.gov/opa/2012/04/medco.shtm.

[6] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4 (2010), *available at* http://www.justice.gov/atr/public/guidelines/hmg-2010.html ("The Agencies' analysis need not start with market definition. Some of the analytical tools used by the Agencies to assess competitive effects do not rely on market definition, although evaluation of competitive alternatives available to customers is always necessary at some point in the analysis.").

clear that the government will continue to define a relevant market in litigated merger cases and courts will continue to require market definition as an essential element of a transaction's competitive assessment.[7]

The continued vitality of market definition is directly connected to market structure, which looks at the number of participants, their market shares, and market concentration. The recent DOJ and FTC challenges all involved transactions that were characterized by the government as involving four or fewer competitors in markets with high barriers to entry. The court in *H&R Block* followed prior judicial precedent in rejecting a three-to-two merger, even though the merging parties were the second and third largest players and the combined firm would still have been significantly smaller than the industry's largest firm.[8]

From a litigation strategy perspective, market structure remains critical, despite the other more sophisticated analytical tools described in the 2010 HMGs. In mergers involving markets with few participants and high concentration, the resulting presumption of anticompetitive effects provides the government with a significant tactical advantage, posing a high hurdle for transaction parties seeking to rebut the presumption. On the other hand, the likelihood of a (successful) merger challenge decreases substantially when there are at least five or six participants in a relatively fragmented market.[9]

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*Don't Forget the Geographic Market*

In many merger cases, much time is spent discussing the relevant product market, while the geographic dimension of the market is taken as a given or addressed only in a cursory fashion. Defining geographic markets can be just as important as product market definition in assessing the number of competitors and the level of market concentration.

Also, it should not be assumed that a broader geographic market will always be helpful to the merging parties. In some cases a larger geographic market can bring more firms into the picture, thereby making the elimination of a competitor through merger seem less problematic, but in other cases it can be a deal killer. In AT&T/T-Mobile, for example, the DOJ considered the competitive effects of the transaction not only in local geographic markets (consistent with its analytical approach in prior mergers of mobile wireless providers), but also at a national level. The DOJ argued that, "from a seller's perspective, the Big Four carriers compete against each other on a nationwide basis" and "enterprise and government customers generally require a mobile wireless provider with a nationwide network." By defining a national market, the DOJ in effect removed the many regional and local competitors from the analysis, reducing the number of meaningful players to four, including AT&T and T-Mobile.[10]

*Documents Will Usually Trump Other Forms of Evidence*

The 2010 HMGs introduced a new section titled "Evidence of Adverse Competitive Effects," describing the types and sources of evidence that the agencies find most informative in predicting whether a merger may substantially lessen competition.[11] The section notes that the agencies typically obtain substantial information from the merging parties and that such information can take the form of documents, testimony, or data.[12] More controversially, the 2010 HMGs place greater

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7 In *H&R Block*, Judge Beryl Howell acknowledged the argument that market definition may be superfluous if market power can be directly measured or estimated reliably. However, he then pointed out that a market definition may be legally required by Section 7 of the Clayton Act and that no modern Section 7 case has dispensed with the requirement to define a relevant product market. *H&R Block,* at *40 n.35.

8 See, for example, *F.T.C. v. Heinz*, 246 F. 3d 708 (D.D.C. 2001), where the FTC won an injunction to block a merger of the second and third largest manufacturers of jarred baby food.

9 For mergers in a few specific industries, such as oil and gas, the agencies have historically taken enforcement action at lower levels of concentration.

10 *United States v. AT&T Inc.*, Second Amended Complaint at ¶¶ 14, 19-21, Civil Action No. 11-01560 (D.D.C. September 30, 2011).

11 2010 HMGs § 2.

12 *Id.* at § 2.2.1.

emphasis than prior versions on economic theories and tests, some of which, such as the hotly debated upward pricing pressure or "UPP", are not yet widely accepted by antitrust practitioners or economists.

Despite the enhanced role of economic analysis suggested by the 2010 HMGs, the recent agency challenges demonstrate that the merging parties' own business documents, in particular those prepared in the ordinary course, are still the most probative evidence, with fact witness testimony also given substantial weight. The agencies and the courts (especially the latter) continue to believe that the best predictor of a merger's likely impact on competition is the views of the merging parties themselves as expressed in the ordinary course of business. For example, the DOJ in AT&T/T-Mobile and the FTC in Omnicare/PharMerica cited heavily in their complaints to statements in the merging parties' documents as support for the agencies' proposed market definitions and theories of competitive harm. Similarly, the court in H&R Block gave significant weight to ordinary course business documents and the testimony of key fact witnesses versus expert economic evidence (although it did also consider the latter). Economic tools and expert testimony may be used to support, but are unlikely to supplant, documents and fact testimony.

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*The Merging Parties' Products Need Not Be Closest Substitutes*

Although the *H&R Block* court's findings on unilateral effects were not essential to its conclusion that the merger was anticompetitive, the court's discussion of that topic is notable in two respects. First, Judge Howell rejected the *Oracle* court's assertion that for the government to prevail on a unilateral effects claim involving differentiated products, the merging parties must have a monopoly or dominant position in the relevant market, as evidenced by a high combined market share.[13] The court in *H&R Block* declined to impose a minimum market share threshold for proving a unilateral effects claim.[14] This approach is consistent with the 2010 HMGs, which removed the prior 1992 version's 35% combined share threshold for a presumption of anticompetitive effects in differentiated products markets.

Second, the court in *H&R Block* endorsed the position of the agencies, as expressed in the 2010 HMGs and argued by the DOJ in that case, that unilateral effects can exist even if the merging parties' products are not each other's closest substitutes, so long as they compete head-to-head.[15] The evidence in H&R Block showed that Intuit, the largest provider of DDIY tax preparation software, was the closest competitor for both H&R Block and TaxACT.

*Everyone Loves a Maverick*

In both *AT&T* and *H&R Block* the DOJ went to considerable lengths to describe the target companies, T-Mobile and TaxAct, as "maverick" competitors that played a unique disruptive role in their markets, thereby increasing the likelihood of anticompetitive coordinated effects from those mergers. The concept of a "maverick" firm is specifically discussed in the 2010 HMGs, which state that "[a]n acquisition eliminating a maverick firm . . . in a market vulnerable to coordinated conduct is likely to cause adverse coordinated effects" and provide several examples of firms that may be industry mavericks.[16]

The court in *H&R Block* was unimpressed by the "maverick" label, finding that the government had failed to "set out a clear standard, based on functional or economic considerations, to distinguish a maverick from any other aggressive competitor."[17] However, the court did attribute weight to the fact that TaxAct had an impressive history of innovation and competition in the DDIY market and

13 *Oracle*, 331 F. Supp. 2d 1098, 1123.

14 *H&R Block*, 2011 WL 5438955 at *40. The merging parties' combined share of the DDIY market was 28%.

15 *Id.* at *39. The 2010 HMGs state that "[a] merger may produce significant unilateral effects for a given product even though many more sales are diverted to products sold by non-merging firms than to products previously sold by the merger partner." 2010 HMGs § 6.1.

16 2010 HMGs §§ 2.1.5, 7.1.

17 *H&R Block* 2011 WL 5438955 at *36.

played a special role in the market that constrained prices, for example, by introducing a free-for-all offer.[18]

The decision in *H&R Block* suggests that an acquisition target need not meet some amorphous definition of a "maverick" in order for the government to prove coordinated effects are likely, so long as the target is an aggressive price competitor or innovator.

*Efficiencies Claims Continue to be a Losing Battle*

Despite the addition of a section on efficiencies to the HMGs in 1997 and the retention (with revisions) of that section in the 2010 HMGs, the government has viewed claims of merger efficiencies with significant skepticism, especially in highly concentrated markets. This already tall hurdle may have been raised even higher following *H&R Block*. The court dismissed most of the merging parties' claimed efficiencies as not merger-specific and not independently verifiable, holding that cost savings and other efficiencies premised on management's estimation and judgment rather than objective data analysis should not be credited.[19]

As a practical matter, however, it can be very difficult for an acquirer to develop a detailed efficiencies case for a proposed acquisition of a direct competitor, given the considerable legal and business constraints on pre-merger information sharing and integration planning. Ironically, those strategic combinations of competitors can often generate the greatest efficiencies, which can result in lower prices to consumers if cost savings are passed through.

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**Heightened Activity on the HSR Front**

*New HSR Filing Requirements*

On August 18, 2011, significant changes to the HSR mandatory reporting requirements took effect. The agencies' stated purpose for these changes was to streamline the HSR Form and capture new information to help the agencies conduct their initial review of a proposed transaction's competitive impact. The changes have not altered the substantive standard of antitrust review of transactions that are reportable under the HSR Act. However, the new HSR rules have had real, practical consequences for businesses contemplating transactions.

The HSR Form requires the submission of information and data regarding the transaction and the parties, together with various documents. Some of the new amendments have indeed simplified the HSR Form, such as removal of the requirement to report revenues for a "base year" in Item 5 of the HSR Form, eliminating the need for companies to dig into old financial records.[20] Other amendments, however, require new, additional information and documents to be submitted with HSR filings. For example, under new Item 4(d) of the HSR Form, parties are now required to submit with their HSR filing, subject to certain exceptions and other parameters, confidential information memoranda and materials prepared by investment bankers and other consultants relating to the target business, as well as documents evaluating or analyzing synergies or efficiencies associated with the transaction in question. These items were not always included by filing parties in Item 4(c) under the old HSR Form.

The new rules also call for more details regarding the HSR filer's corporate structure, including additional information about "associates" -- entities that are commonly managed with the acquiring party. Examples of associated entities include the general partners of a limited partner, other partnerships with the same general partner, other investment funds whose investments are managed by a common entity, and investment managers of funds. This change resulted from the antitrust agencies' perception that, under the old HSR Form, they were not receiving all of the

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[18] *Id.*

[19] *Id.* at *45-46.

[20] However, Item 5 has been expanded to require more detailed revenue information about the most recent fiscal year's revenues, including the reporting of revenue for products manufactured abroad and sold into the U.S.

information necessary for an initial antitrust review, in particular information regarding the buyer's affiliated portfolio companies (because an acquiring person previously only had to report information pertaining to entities it "controls"). This has frequently been an agency concern in transactions involving families of private equity funds or hedge funds, as well as master limited partnerships (MLPs) which are prevalent in the energy industry.

To assist the public with interpreting the new HSR rules, the FTC has conducted multiple informal training and information sessions over the past several months. During these sessions, the FTC has recognized that the burden has increased in some respects for filing parties, but also has noted that it is now easier to satisfy certain HSR requirements. The FTC has also explained that the additional information and documents mandated by the HSR changes have assisted it and the DOJ in their analyses of deals and even expedited the review process in some cases.

The FTC also has published on its website a number of helpful resources for assistance in filing the new HSR Form, including "Tip Sheets," in which the FTC addresses specific issues related to individual Items of the HSR Form, and an Interactive Associate Decision Tree, which illustrates how to identify an entity's associates.[21] Additionally, the FTC website includes many new informal interpretations providing answers to questions concerning the new rules. For those with questions beyond the scope of these resources, the staff of the FTC's Premerger Notification Office has repeatedly emphasized their willingness to answer questions via phone or email (although they have expressed a preference for email).

As a result of the new rules, businesses contemplating reportable transactions should consider whether additional time will be needed for their HSR document collection and review process. Additionally, the new concept of "associate" and its application to the HSR Form is particularly significant for businesses with complex partnership structures. In addition to allowing ample time to collect this information, it may be prudent to keep this information up-to-date after an initial filing under the new HSR rules to decrease the burden for future filings.

*Recent HSR Enforcement Actions*

While the agencies have been assisting filing parties with understanding and interpreting the new HSR rules, they have also been actively pursuing violators of the rules. In December 2011, the agencies assessed the first HSR Act penalty for failing to file where the HSR threshold was triggered by shares received as executive compensation. Then in May of this year, the DOJ charged a senior corporate executive with criminal obstruction of justice for tampering with existing company documents before they were submitted to the antitrust agencies in conjunction with an HSR merger review.

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*U.S. v. Brian L. Roberts*

On December 16, 2011, the DOJ, at the request of the FTC, filed a complaint against Brian L. Roberts, Chairman of the Board and Chief Executive Officer of Comcast Corporation (Comcast), alleging that Mr. Roberts violated the HSR Act for receiving stock of Comcast as executive compensation and acquiring additional shares through his 401(k) plan without first making a notification filing and observing the statutory waiting period. Simultaneously with the filing of the complaint, a proposed settlement was submitted, whereby Mr. Roberts agreed to pay a $500,000 civil penalty to settle the charges against him.[22]

Although Mr. Roberts had made an HSR filing to acquire Comcast stock in 2002, he failed to realize that the 2002 filing permitted the acquisition of stock for at most a five-year period following the filing (so long as he did not exceed the notification threshold). As part of his compensation as

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[21] For a listing of the FTC's Tip Sheets and other available resources, see http://www.ftc.gov/bc/hsr/hsrwhatsnew.shtm. The Interactive Associate Decision Tree is available at http://www.ftc.gov/bc/hsr/decision-tree.pdf .

[22] Press Release, FTC, FTC Obtains $500,000 Penalty for Pre-Merger Reporting Act Violations (Dec. 16, 2011), *available at* http://www.ftc.gov/opa/2011/12/brianroberts.shtm [hereinafter FTC (Dec. 16, 2011)].

Chairman and CEO, Comcast issued restricted stock units (RSUs), rights to receive voting securities at a fixed time in the future, to Mr. Roberts. After the five-year period following his 2002 HSR filing expired, Mr. Roberts acquired a total of 339,560 shares as a result of the vesting of his RSUs, as well as 3,700 shares of Comcast voting securities acquired via reinvestment of dividends and short-term interest earned by his 401(k) account. As a result of these acquisitions, Mr. Roberts crossed then-current notification thresholds set by the HSR Act. Mr. Roberts did not file notification under the HSR Act to observe the waiting period prior to consummating these acquisitions.[23] As part of the backdrop to this enforcement action, it is worth noting that, prior to 2002, Mr. Roberts twice made corrective filings relating to Comcast transactions that were not reported in a timely fashion under the HSR Act. The FTC did not seek civil penalties for those earlier violations, however it did notify Mr. Roberts that he would be "accountable for instituting an effective program for all of the entities he controls to ensure full compliance with the HSR Act's requirements."

The $500,000 penalty assessed on Mr. Roberts was significantly less than the maximum allowable penalty under the HSR Act. The FTC noted that the amount of the civil penalty was limited due to a number of factors, including "that the violation was inadvertent and technical; that it was apparently due to faulty advice from outside counsel; that [Mr.] Roberts did not gain financially from the violation; and that he reported the violation promptly once it was discovered."[24]

Counsel should educate company executives who acquire stock from their employer, whether through the vesting of RSUs or other forms of compensation, that they may need to comply with the notification and waiting period requirements of the HSR Act prior to receiving the stock.

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*U.S. v. Kyoungwon Pyo*

Counsel should also note that the antitrust agencies take very seriously their obligation to maintain the integrity of the merger investigation process and the importance placed on company documents submitted in connection with an HSR merger review. In addition to the $16,000 per day penalty available for violations of the HSR Act, in egregious situations the agencies will not limit consequences to civil penalties or the delay of a transaction.

On May 3, 2012, the DOJ announced a plea agreement with Kyoungwon Pyo, a senior executive with Hyosung Corporation (Hyosung), in which Mr. Pyo pleaded guilty to criminal obstruction of justice and agreed to serve five months in U.S. prison.[25] According to the charges filed against him, Mr. Pyo altered and directed subordinates to alter existing corporate documents before submission to the FTC and DOJ as part of HSR filings in connection with the proposed acquisition by Nautilus Hyosung Holdings Inc. (NHI), a Hyosung affiliate, of Triton Systems of Delaware, Inc. (Triton), a rival manufacturer of automated teller machines.[26] The altered documents included those discussing market shares, competition, competitors, markets and potential for sales growth or expansion into product or geographic markets (documents responsive to Item 4(c) of the HSR Form). The alterations allegedly misrepresented and minimized the competitive impact of the proposed acquisition.[27]

After the DOJ opened a routine civil investigation into the proposed acquisition, it requested additional documents from NHI. According to the DOJ, Mr. Pyo made, and directed other persons

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[23] *United States v. Brian L. Roberts*, Complaint for Civil Penalties for Failure to Comply with the Premerger Reporting and Waiting Requirements of the Hart-Scott-Rodino Act, at ¶19, Civil Action No. 11-02240 (D.D.C. Dec. 16, 2011).

[24] *Supra*, note 22.

[25] Press Release, DOJ, Hyosung Corporation Executive Agrees to Plead Guilty to Obstruction of Justice for Submitting False Documents in an ATM Merger Investigation (May 3, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/282873.htm..

[26] The plea agreement involving Mr. Pyo comes after NHI pleaded guilty in 2011 to two counts of obstruction of justice and agreed to pay a $200,000 fine. *See U.S. v. Nautilus Hyosung Holdings, Inc.*, Plea Agreement, at ¶8, Criminal Action No. 11-00255 (D.D.C. Aug. 15, 2011). The maximum penalties for obstruction of justice are a $500,000 criminal fine for corporations and twenty years in prison and a criminal fine of $250,000 for individuals.

[27] *Id.*

to make, material changes to pre-existing business and strategic plans, which misrepresented statements concerning NHI's business and competition among vendors of ATMs that were relevant and material to the DOJ's analysis of the proposed acquisition of Triton.[28]

Antitrust lawyers normally do not associate merger reviews with potential criminal charges. The DOJ has upped the ante, sending a clear signal that tampering with documents or failing to comply with HSR production obligations will be punished severely, even if such conduct does not adversely affect the government's substantive review of a transaction.[29] Acting Assistant Attorney General Joseph Wayland has stated that "[m]aintaining the integrity of the merger review and investigation process is one of [the DOJ's] highest priorities."[30] The DOJ's actions in the Hyosung case also reaffirm the critical role of documentary evidence in antitrust merger review.

The DOJ's actions in the Hyosung case also reaffirm the critical role of documentary evidence in antitrust merger review.

When preparing HSR filings under the new rules and making judgments regarding the responsiveness of specific documents to Items 4(c) and 4(d) of the HSR Form, companies and their counsel should be mindful of the potentially serious consequences of failing to comply with HSR obligations, both in the initial filing and subsequent document productions.

**Conclusion**

Given the current merger enforcement climate, including the rash of recent litigated merger challenges, firms are well advised not to wait for a specific transaction to materialize before paying attention to antitrust issues. For example, they should keep in mind that company documents, whether prepared in connection with a particular deal or in the ordinary course of business, can play a key role in the antitrust review of transactions and have a dramatic impact on the assessment of a transaction's likely competitive effects. Companies therefore should be sensitive to the implications that the content and phrasing of business documents, including emails, may have for proposed transactions. They should take basic precautions to avoid creating documents that convey misleading and inaccurate impressions and that would increase the likelihood of an antitrust investigation or challenge. Ensuring personnel are educated regarding these matters can help avoid complications in the future.

Companies also need to be mindful of the notification and waiting period requirements of the HSR Act and comply with those requirements. This includes producing responsive, non-privileged documents in HSR filings. Finally, corporate executives who intend to acquire voting stock of their employer as part of their compensation, whether through conversion of options, vesting of RSUs or other means, should consult with counsel prior to receiving such shares.

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28 *United States v. Kyoungwon Pyo*, Information, at ¶7, Criminal Action No. 12-00118 (D.D.C. May 3, 2012).

29 The DOJ did not allege that the conduct of NHI or Mr. Pyo impacted its investigation of the proposed acquisition of Triton. The parties abandoned the deal before the DOJ completed its review.

30 Press Release, DOJ, Hyosung Corporation Executive Agrees to Plead Guilty to Obstruction of Justice for Submitting False Documents in an ATM Merger Investigation (May 3, 2012), *available at* http://www.justice.gov/atr/public/press_releases/2012/282873.htm.

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# Express-Scripts: The FTC Decision

**Lauren Rackow**

**Introduction**

In April 2012, the Federal Trade Commission ("FTC") announced that it had closed its eight-month investigation of the $29 billion acquisition by Express Scripts, Inc. ("Express Scripts") of Medco Health Solutions ("Medco") without imposing any limitations on the parties.[1] This merger combined two of the three largest domestic Pharmacy Benefit Managers ("PBM"). PBMs manage prescription drug plans for employers and insurers and serve as the middlemen between the drug companies and the payors. The merger was heavily politicized, with many groups opining on the benefits and costs of the acquisition. Provided below is an analysis and discussion of the FTC's decision to not challenge the merger.

**Market Share**

The FTC stated that the merged firm would account for more than 40% of the broadest market, defined as the market for the provision of full-service PBM services to health care benefit plan sponsors, although the parties contended that the combined market share was significantly lower. The FTC found that this market was moderately concentrated with at least ten significant competitors and that the competition for accounts within this market was intense and had driven prices down.

Careful consideration of the market dynamics showed that although Medco was the leader in the PBM industry; it lost approximately one-third of its business within the last year, with many of these accounts going to CVS Caremark, the nation's second largest PBM. In addition to competition from smaller PBMs, the FTC found that the identity of market players was changing. Health insurers had made substantial investments and were expanding their PBM offerings. Many of these health plan owned PBMs were becoming viable competitors to the top three PBMs. The FTC noted that these health plans and smaller, standalone PBMs have won significant business in the PBM market.

**Unilateral Effects**

The FTC concluded that the merger was unlikely to have unilateral effects because Medco and Express Scripts were not close competitors. The bidding data produced by the parties and large, national PBM consultants suggested relatively low diversion rates between Medco and Express Scripts. The FTC concluded that Express Scripts primarily served middle-market plan sponsors and health plans, while Medco focused on high volume, large employers. Very few customers considered the parties to be their first and second choice. Because the evidence suggested relatively low diversion rates, the FTC found the merger's potential for unilateral price effects was much smaller than implied by the combined firm's market share.

Because the evidence suggested relatively low diversion rates, the FTC found the merger's potential for unilateral price effects was much smaller than implied by the combined firm's market share.

Industry dynamics further supported the view that the transaction was unlikely to produce unilateral anticompetitive effects. The evidence examined by the FTC demonstrated that health plan owned and standalone PBMs have become serious contenders for business. In the bid process, many employers included health plan owned and standalone PBMs to leverage better prices from Medco, Express Scripts, and CVS Caremark. These smaller PBMs were also winning business. Finally, the FTC found that Medco, Express Scripts, and CVS Caremark did not enjoy substantial cost savings over smaller competitors. Notably, the FTC stated that the majority of the customers interviewed regarding the merger believed that the transaction would be competitively neutral or pro-competitive.

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[1] *Statement of the Federal Trade Commission Concerning the Proposed Acquisition of Medco Health Solutions by Express Scripts, Inc.*, FTC File No. 111-0210 (April 2, 2012).

### Coordinated Effects

The FTC found that the merger was also unlikely to result in coordinated effects. Although the analysis for coordinated effects is more qualitative than the analysis for unilateral effects, the FTC found that many of the same reasons the merger was unlikely to give Express Scripts unilateral power over price applied to the analysis of coordinated anticompetitive effects.

The FTC observed that price coordination was unlikely because price competition in the PBM market was multifaceted and opaque. Each PBM contract included numerous, different pricing components, which were difficult to compare. The PBMs only learned of their competition for contracts after bids had been accepted, complicating any potential attempt to coordinate since competitors would be unknown.

The FTC observed that price coordination was unlikely because price competition in the PBM market was multifaceted and opaque.

Although the FTC stated that the allocation of customers was a more plausible theory than price coordination, it found customer allocation highly unlikely. It determined customer allocation was unlikely because CVS Caremark's recent successes suggested that it would find competing vigorously to be more profitable and smaller standalone PBMs and emerging health plan owned PBMs did not have an incentive to join a customer allocation arrangement because they recently made substantial investments in additional capacity. Ultimately, the FTC found that significant competition was present in the relevant markets with no indication that this dynamic would change after the merger.

### Monopsony Power/Specialty Drug Market

The Commission noted that the merger was not likely to confer monopsony power upon the combined firm to enable it to pay lower reimbursement rates to pharmacies in a way that would injure competition. Most critically, the FTC noted that the transaction would produce a combined firm with a smaller share of retail pharmacy sales, approximately 29%, than is generally necessary for monopsony power. The FTC also found that the data demonstrated little correlation between PBM size and the reimbursement rates paid to retail pharmacies.

In the specialty pharmacy market, the FTC found that the combined firm would likely not have the power to demand more exclusive distribution arrangements from manufacturers. The specialty pharmacy market is less concentrated than the overall market for PBM services. The FTC further noted that the manufacturers are the entities seeking exclusive arrangements and exclusive arrangements are for only a small percentage of specialty drugs.

### Commissioner Julie Brill's Dissent

Commissioner Julie Brill dissented and issued a separate statement.[2] Commissioner Brill viewed the transaction as a merger to duopoly and concluded that the remaining participants were fringe—not significant—players. She asserted the market was susceptible to coordinated effects in the form of customer allocation. She also argued that Medco was positioned to play a maverick role in the marketplace, despite its position as the largest firm in the market for PBM services, because Medco recently lost a number of high profile contracts.

### Conclusion

The Express Scripts-Medco merger illustrates that market share analysis may not be the decisive element of merger review in every case and may comprise only a portion of the overall analysis of the competitive impact of a prospective merger. The FTC demonstrated here that it will examine the actual role of all participants in the market and the dynamic between manufacturers, middlemen, and retailers through a thorough review of economic data, interviews, and general understanding. Particularly, the FTC demonstrated an openness to examining the potential change in market participants in the health care industry. The Express Scripts-Medco merger may serve as

[2] *Statement of Commissioner Julie Brill Concerning the Proposed Acquisition of Medco Health Solutions (MEDCO) by Express Scripts, Inc. (ESI)*, FTC File No. 111-0210 (April 2, 2012).

an example of the Commission's move away from a focus on market definition and concentration in accord with the 2010 Horizontal Merger Guidelines.[3]

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[3] *Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission (August 19, 2010).

# Canada's Updated Abuse of Dominance Enforcement Guidelines

**Peter Franklyn, Shuli Rodal and Matthew Anderson**

## A. Introduction

On March 12, 2012, the Canadian Competition Bureau ("Bureau") published revised draft guidelines ("Revised Draft Guidelines") on the abuse of dominance provisions (section 78 and 79) of the Canadian *Competition Act* ("the Act") for public consultation. The fact that the Bureau has resumed efforts to update its guidance on these important provisions in Canadian competition law is a positive development, as existing guidance is out of date in a number of material respects. However, a number of concerns have been expressed by members of the business and legal community about the tone and substance of the Revised Draft Guidelines. Most significantly, the Revised Draft Guidelines adopt an expansive interpretation of the scope of the abuse of dominance provisions that departs from the established case law and the accepted economic framework in certain key respects, while at the same time providing almost no practical guidance on how these principles will be applied.

The period for public consultation on the Revised Draft Guidelines closed on May 22, 2012. Numerous comment letters were submitted to the Bureau, including by the American Bar Association, Canadian Bar Association and other stakeholders, many recommending revision and clarification of the Revised Draft Guidelines. While it remains to be seen whether the Bureau will be prepared to revisit its approach in the Revised Draft Guidelines following the comments received, the release of the Revised Draft Guidelines has put the business community on notice that in addition to using the abuse of dominance provisions to address clear abuses by dominant firms, the Commissioner of Competition ("Commissioner") may be prepared to use these provisions to challenge a broader range of conduct to address concerns about the level of competition in a market.

## B. Background

The abuse of dominance provisions in sections 78 and 79 of the Act are enforced exclusively by the Commissioner. On application by the Commissioner, the Competition Tribunal ("Tribunal") can impose remedies if it finds that a dominant firm or group of firms engages in a "practice of anti-competitive acts" resulting in a substantial lessening or prevention of competition. Sections 78 and 79 do not create an "offence." Rather, they specify "reviewable conduct" and authorize the Tribunal to review such conduct.

The Revised Draft Guidelines are intended to update the Bureau's 2001 *Enforcement Guidelines on the Abuse of Dominance Provisions* (the "2001 Guidelines"), which are out of date in a number of material respects. The Bureau initiated a process several years ago to update the 2001 Guidelines, primarily to reflect developments in jurisprudence including the 2006 judgments of the Federal Court of Appeal in *Commissioner of Competition v. Canada Pipe*. In January 2009, draft *Updated Enforcement Guidelines* were released for public comment (the "2009 Draft Guidelines"). The 2009 Draft Guidelines updated the general framework but also added a very detailed discussion and appendices addressing many of the specific practices that may raise concerns, such as exclusivity rebates and bundled pricing. While certain elements of the 2009 Draft Guidelines were controversial, the proposed appendices dealing with specific business practices were welcomed as much-needed guidance on where to draw the line between aggressive competition and anti-competitive conduct.

While the public consultation process in 2009 was extensive, no further action was taken by the Bureau to finalize updated guidance until the recent release of the Revised Draft Guidelines. The delay in finalizing the updated guidance was attributed in part to the Bureau's having ongoing

enforcement actions under the abuse of dominance provisions, as well as the fact that the penalties for contravening the abuse of dominance provisions were raised substantially only weeks after the Bureau released its 2009 Draft Guidelines. In March 2009, the Act was amended to permit the Tribunal, where an abuse of dominance is established, to order payment of administrative monetary penalties ("AMPs") of up to $10 million for a first order and $15 million for a subsequent order.

**C. The Revised Draft Guidelines – Principal Implications for Business**

The general description in the Revised Draft Guidelines of the three part framework for enforcement of the abuse of dominance provisions (i.e., dominance, anti-competitive conduct and market impact) is for the most part not controversial. For example, the Revised Draft Guidelines recognize that dominance, which equates to market power (defined as the ability to profitably maintain prices above a competitive level for a significant period of time), is not in and of itself sufficient to warrant intervention under the Act. Rather, it is only when there is a practice of anti-competitive acts that has impacted or may substantially impact competition in a market that the Tribunal may impose remedies for abuse of dominance.

The Revised Draft Guidelines also clarify the market share "safe harbours" for unilateral dominance and introduce a "traffic light" system pursuant to which:

- market shares under 35% will generally not prompt further examination by the Bureau;
- market shares between 35-50% will not give rise to a presumption of dominance, but may be examined by the Bureau depending on the circumstances; and
- market shares over 50% will generally prompt further examination by the Bureau.

The Revised Draft Guidelines also increase the safe harbor threshold for a group of firms alleged to be jointly dominant to 65% (up from 60% in the 2001 Guidelines). While these clarifications are helpful, it should be noted that these safe harbor thresholds remain well below the market shares at which the Bureau has taken enforcement action in the past.

On the other hand, however, certain aspects of the Bureau's enforcement approach as described in the Revised Draft Guidelines are controversial and introduce significant uncertainty as to the circumstances in which the Commissioner will seek to challenge a firm's conduct as an abuse of dominance. Three key ways in which the Revised Draft Guidelines increase uncertainty are described below.

On the other hand, however, certain aspects of the Bureau's enforcement approach as described in the Revised Draft Guidelines are controversial and introduce significant uncertainty as to the circumstances in which the Commissioner will seek to challenge a firm's conduct as an abuse of dominance.

1. Absence of detailed guidance will have significant implications for in-house counsel

While the 2009 Draft Guidelines suggested a willingness to provide detailed guidance on the application of the abuse of dominance provisions to common business practices, and for the first time set out the Bureau's approach to assessing bundled rebates, the Revised Draft Guidelines contain very little detail on when common business practices such as exclusivity and loyalty rebates, bundled pricing and rebates and denying competitors access to inputs or facilities, will give rise to competition concerns. The Revised Draft Guidelines also provide no guidance on when the Commissioner may seek an order from the Tribunal for the payment of AMPs, thereby raising the possibility that AMPs may be sought whenever concerns under the abuse of dominance provisions arise.

In addition to the absence of detailed guidance, it is also uncertain whether the Bureau will be prepared to provide individual firms with meaningful opinions on the implications of proposed conduct under the Act. In this regard, the Act permits a person to apply to the Commissioner for a binding written opinion on the applicability of any provision of the Act to a proposed practice or conduct. However, the Commissioner has recently indicated that written opinions will not provide substantive assessments related to competitive effects or defences. Rather, written opinions will only address *whether* one or more provisions of the Act apply to the proposed arrangement,

practice or conduct. It is, therefore, uncertain what type of opinion the Commissioner may be prepared to issue regarding the application of the abuse of dominance provisions.

With the absence of detailed guidance on when specific market practices will give rise to concerns and in light of the high stakes for engaging in conduct that is found to be anticompetitive, internal risk assessments will take on increased importance. In these circumstances, in-house counsel may increasingly be called upon to provide a view on the compatibility of proposed conduct with the abuse of dominance provisions of the Act.

> With the absence of detailed guidance on when specific market practices will give rise to concerns and in light of the high stakes for engaging in conduct that is found to be anti-competitive, internal risk assessments will take on increased importance.

2. <u>Even firms that do not have market power may face potential enforcement action</u>

(a) Joint Dominance

The Act expressly contemplates that the Bureau may invoke the abuse of dominance provisions against firms that are not individually dominant but which exercise "joint dominance". However, the Act provides no guidance on what is required to establish that firms are jointly dominant. The 2001 Guidelines took a narrow view of joint dominance, making clear that "something more" than mere conscious parallel conduct was required. The 2009 Draft Guidelines created uncertainty by suggesting that mere parallel conduct could be sufficient to support a finding of joint dominance.

The Revised Draft Guidelines leave considerable uncertainty regarding the Bureau's approach to joint dominance and particularly whether the Bureau will seek to use the abuse of dominance provisions as a tool to impose changes in markets characterized by parallel conduct amongst firms that are not individually dominant. In this regard, the Revised Draft Guidelines state that "[s]imilar or parallel conduct by firms is not sufficient, on its own, for the Bureau to consider them to hold a jointly dominant position" but then enumerate four factors that the Bureau will consider in determining whether firms are jointly dominant, namely:

(i) whether their collective market share exceeds 65%;

(ii) the presence of barriers to entry or expansion;

(iii) evidence of a lack of inter-firm competition; and

(iv) any other relevant factors.

With respect to the third factor, the Revised Draft Guidelines state in a footnote that evidence of coordinated behaviour between firms is "potentially probative, although not strictly necessary" to establish joint dominance. Without further elaboration on the nature of the linkage required between firms allegedly acting in parallel, significant uncertainty remains regarding the circumstances in which the Bureau may allege joint dominance.

(b) Future Market Power

The Revised Draft Guidelines indicate that the Bureau will be prepared to scrutinize the conduct of a single firm under the abuse of dominance provisions where that firm does not currently have market power but may attain market power as a result of its conduct. In this regard, the Revised Draft Guidelines state that the Bureau will not generally pursue allegations of abuse of dominance if a firm does not have market power, "or is not expected to obtain market power through the alleged anti-competitive conduct within a reasonable period of time." This approach is controversial because unlike section 2 of the *Sherman Act*, the language of the abuse of dominance provisions does not appear to contemplate application to attempted monopolization.

In addition to the uncertainty created by the suggestion that the Bureau will be prepared to enforce provisions of the Act in circumstances beyond those provided for in the Act, the Revised Draft Guidelines provide no real guidance on the circumstances in which smaller firms need to be concerned about engaging in aggressive competition.

3. Actions that are not directed at competitors may still constitute an abuse of dominance

The abuse of dominance provisions require a finding that a person or persons have engaged in a "practice of anti-competitive acts". Section 78 of the Act enumerates a non-exhaustive list of conduct that is considered an "anti-competitive act". In its 2006 decision in *Canada Pipe*[1], the Federal Court of Appeal held that an anti-competitive act is defined by reference to its purpose, and the requisite anti-competitive purpose is an intended negative effect on a competitor that is "predatory, exclusionary, or disciplinary".

While the Revised Draft Guidelines (briefly) acknowledge the decision in *Canada Pipe*, rather than expand on what the Bureau considers to be conduct that is intended to be "predatory, exclusionary, or disciplinary" vis-à-vis a competitor, they focus on the one example of an anti-competitive act included in section 78 of the Act (buying up products to prevent erosion of existing price levels) noted by the Federal Court of Appeal as not directed at a competitor. Based on this exception, the Revised Draft Guidelines conclude that "[w]hile many types of anti-competitive conduct may be intended to harm competitors, the Bureau considers that certain acts not directed at competitors could still be considered to have an anti-competitive purpose." However, no further guidance is provided on the type of competitive harm the Bureau is seeking to address.

**D. Conclusion**

While it remains to be seen whether the Bureau will be prepared to revisit its guidance on enforcement of the abuse of dominance provisions in response to comments received on the Revised Draft Guidelines, the updated guidance is a clear signal that, consistent with her prior public statements and enforcement approach in other areas, the Commissioner is prepared to take an expansive approach in her enforcement of the abuse of dominance provisions of the Act. However, while the Revised Draft Guidelines may well signal aggressive and active enforcement of the abuse of dominance provisions, it is unlikely there will be a significant increase in the number of formal enforcement actions undertaken in Canada as the Bureau will continue to be limited by the need to carefully allocate its resources.

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[1] *Canada (Commissioner of Competition) v. Canada Pipe Co.*, 2006 FCA 233 (*Canada Pipe*).

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# Contracts that Reference Rivals – the Latest Guidance from the DOJ

**Tarak Anada**

The lack of law and policy governing vertical contracts leaves practitioners and managers with insufficient guidance on whether a particular business practice involving such contracts will run afoul of the antitrust laws. On April 5, 2012, Dr. Fiona Scott-Morton, Deputy Assistant Attorney General of the United States Department of Justice – Antitrust Division, gave a speech presented at Georgetown University Law Center entitled "Contracts that Reference Rivals."[2] Dr. Scott-Morton's speech was designed to provide some guidance to practitioners concerning the legality of various types of vertical contracts.

The specific type of vertical contracts that Dr. Scott-Morton, the Antitrust Division's Chief Economist, focused on in her speech are contracts that reference rivals ("CRRs"), which are contracts between a buyer and a seller that refer to, and for which the terms may depend on, information outside the buyer-seller relationship, such as information from other transactions to which one of the contracting firms is a party. As Dr. Scott-Morton notes, "those references [in the CRRs] may be either explicit or implicit, and may have price terms, non-price terms, terms pertaining to the buyer's rivals, or terms pertaining to the seller's rivals".[3] Based on the fact that CRRs can result in more horizontal information sharing than other types of vertical contracts, Dr. Scott-Morton's position is that CCRs "deserve additional scrutiny" and "absent a compelling business justification, practitioners may wish to avoid them". Dr. Scott-Morton's overview and perspective on CRRs may be helpful and informative to antitrust practitioners required to evaluate the antitrust risks associated with such contracts.

Over the years, the Antitrust Division of the DOJ has investigated many types of CRRs, and CRRs have been extensively studied by economists. Dr. Scott-Morton began her speech by providing an overview of the economic analyses that may be applied to CRRs. In particular, Dr. Scott-Morton noted that "[e]conomic literature indicates that the settings where CRRs are most likely to harm consumers and competition involve dominant firms possessing market power and a high market share. But some economic models show a competitive harm even when numerous similar firms, none of which is dominant, employ a CRR." Specifically, economic models have shown that CRRs may nonetheless result in harm to price, innovation or entry even in the absence of a dominant firm.

Economic literature indicates that CRRs are most likely to harm consumers and competition when they involve dominant firms possessing market power and a high market share.

The type of economic model used to analyze CRRs depends on the type of harm that the CRR is thought to cause. For example, harm from higher prices can be illustrated with a simple static snapshot of the competitive situation. Harm from "exclusion," however must be analyzed in a dynamic model, which takes into account that a potential entrant might change its characteristics as a result of the CRRs, such as scale.

With these economic principles in mind, Dr. Scott-Morton highlighted and discussed certain types of CRRs that may raise competitive issues in certain scenarios.

### Exclusive Dealing and Market Share Discounts

Dr. Scott-Morton cited studies about the competitive effects of market share discount and exclusive dealing CRRs. These studies, according to Dr. Scott-Morton, suggest that in a setting where the entrant needs to make substantial sales to a "branded" buyer in order to establish its product's quality in the marketplace, a CRR could prevent the branded buyer from

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[2] *Available at* http://www.justice.gov/atr/public/speeches/281965.pdf.

[3] A classic example of a CRR is a purchase agreement that gives the buyer a discount if it purchases a certain percentage of its needs from one seller. Thus, the price the buyer pays for purchases from one seller are linked to its purchases from rival sellers.

purchasing enough of a new entrant's product to establish the product's quality reputation in the market. In the absence of such a quality reputation or signal, the new entrant is left unable to expand its product line to compete with the other products of the incumbent. Another study of market share discounts cited by Dr. Scott-Morton demonstrates that they can allow the dominant firm to reduce output while also restricting the buyer's ability to purchase rivals' products – essentially functioning like a tax on the rivals' goods. The incumbent can therefore increase the cost of trading between the rival and its customers, and drive up sales of its own product.

As Dr. Scott-Morton notes, the Department of Justice and the Federal Trade Commission have brought numerous enforcement actions based on these theories of competitive harm. For example, the Third Circuit upheld the DOJ's challenge to Dentsply's practice of refusing to sell to distributors that carried other manufacturer's products on the grounds that this type of conduct prevented competitors' sales "below the critical level necessary . . . to pose a real threat to Dentsply's market share".[4] In another case, the DOJ challenged United Regional's contracts which offered two sets of prices to insurers: a lower price if the insurer dealt exclusively with United Regional, and a significantly higher price if the insurer also did business with one of its competitors.[5]

Although Dr. Scott-Morton noted the potential harm that may come from market share discount and exclusive dealing CRRs, she also noted that such CRRs are not necessarily anticompetitive in all contexts and "have the potential to enable efficiencies". Efficiencies that may arise from such contracts include enabling an incumbent to achieve economies of scope or scale or introduce new products or manage demand more efficiently.

**Most Favored Nation clauses and Network Contracts**

Most-favored nation provisions (MFNs) and network provisions have also been the subject of significant economic analysis and antitrust enforcement activity. Dr. Scott-Morton notes that although consumers often believe that MFNs are beneficial to them, studies show that MFNs ultimately result in higher prices, which may hurt individual buyers. For example, in a static model that features either an oligopoly or a fragmented market with a significant share covered by the MFN, the MFN can result in higher prices. A buyer may seek to take surplus inventory off of a seller's hands for a low price. Normally, the seller would find the offer attractive, but under an MFN contract, the low price offered by the buyer must be extended to everyone in the market with price protection. This reduces the seller's incentive to lower the price, and can result in higher equilibrium prices. Dr. Scott-Morton notes that this is particularly likely when the buyer covered by the MFN has a higher market share.

According to Dr. Scott-Morton, MFNs can also be shown to cause harm in a dynamic model, such as one in which the incumbent has some advantage that the entrant initially lacks, such as a known brand or reputation for quality. In such a scenario, the entrant must give consumers a reason to purchase its product. Typically, the entrant offers a lower price as an incentive. However, when an MFN is in place, the incumbent is contractually entitled to the low price of the new entrant. Thus, the entrant can never create the necessary advantage relative to the incumbent firm and entry is effectively blocked.

Just as with exclusive dealing and market share discount CRRs, Dr. Scott-Morton notes that MFNs may, in certain contexts, enable the realization of efficiencies. For example, Dr. Scott-Morton notes that the use of MFNs may allow the "transaction prices to reflect current market conditions in a setting with very volatile prices where efficient investments depend on that price". However, Dr. Scott-Morton refers to such efficiencies as "unusual", suggesting that such situations may be rare.

[4] See *United States* v. *Dentsply Int'l, Inc.,* 399 F.3d 181 (3d Cir. 2005).

[5] See *United States* v. *United Regional Health Care System*, No. 7:11-cv-00030 ¶ 64, (N.D. Tex. Feb. 25, 2011).

In addition to MFN clauses, Dr. Scott-Morton refers specifically to network CRRs and discusses the DOJ's views as to the economic harm that may be associated with such contracts. In the healthcare setting, entities often enter into network CRRs known as “guaranteed inclusion” or “product participation parity” provisions. A guaranteed inclusion provision requires that an insurer offer Hospital A the chance to join a particular plan if it has made the same offer to Hospital B. When Hospital A and Hospital B are rival providers, this type of CRR prevents Hospital B from taking the insurer’s share away from Hospital A by offering a lower price. Similarly, these provisions also restrict the ability of the insurance company to differentiate itself with a narrow network or to credibly commit to moving market shares.

A product participation parity contract between a health care provider and Insurer B specifies that if the provider join Insurer A’s “bronze plan,” it must agree to join Insurer B’s “bronze plan” as well. This sort of restriction naturally hurts Insurer A’s ability to differentiate itself in the marketplace with its network vis-à-vis the protected Insurer B. Furthermore, agreements at potentially lower prices between providers who might be willing to accept terms with one insurer, but not another, are now prevented.

**Conclusion**

In conclusion, given the DOJ's position that CRRs "have been and remain the active subject of government enforcement", it is prudent for business people and antitrust practitioners to identify and evaluate any such CRRs for any anticompetitive effects and possible efficiencies. Where efficiencies may be realized, it may also be prudent to consider whether such efficiencies can be achieved by any other means.

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