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*David Turetsky, Editors*

## Editors' Note

Dear Readers,

Welcome to "Antitrust News *in Five Minutes*." We designed it to fill a gap in antitrust newsletters. We do not try to be comprehensive, and will not run long articles. Instead, we offer *quick-read* alerts on the most important antitrust developments that could affect your business. Please tell us how we can make this more useful to you.

Blackberry access: If you prefer to receive this newsletter on your Blackberry, please send an email to Steven.Levitsky@dl.com with "Blackberry" in the subject field.

If you have any questions, please call or email your Dewey & LeBoeuf lawyer or one of us.

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# Antitrust News *in Five Minutes*

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## In This Issue

- U.S. Antitrust chiefs urge common international standards for merger review (p. 2)
- DoJ emphasizes need for "procedural fairness" in antitrust reviews (p. 2)
- DoJ and FTC Support Plaintiff in Brief to U.S. Supreme Court (p. 3)
- New *Merger Guidelines* hearings announced (p. 3)
- DoJ tells court it opposes Google settlement in current form (p. 4)
- Italian Antitrust Commission targets Google (p. 5)
- Possible end to Microsoft's woes in EU (p. 5)
- Members of Congress complain about EU treatment of US companies (p. 5)
- Again, Congressional calls for McCarran-Ferguson repeal (p. 6)
- China merger clearances announced (p. 6)

## U.S. Antitrust chiefs urge common international standards for merger review

The two most senior U.S. government antitrust enforcement officials — Assistant Attorney General for Antitrust Christine Varney and FTC Chairman Jon Leibowitz — each called for greater "convergence" in international merger and monopoly enforcement.

They were joined in this sentiment by senior European competition law officials. These remarks were delivered at Fordham University's annual international antitrust conference on September 24, in a session moderated by Dewey & LeBoeuf Antitrust Practice Co-Chair Paul Victor.

Each official also talked about fostering more cooperation on remedies between Europe and the US, praised cooperation on mergers, and discussed an extension of cooperation to cartel cases. Leibowitz remarked that the FTC–DoJ dispute in the Bush Administration over the content of the Section 2 single firm conduct report, which was resolved by its withdrawal under the Obama Administration, had undermined US opportunities to work effectively with antitrust enforcers abroad.

## DoJ emphasizes need for "procedural fairness" in antitrust reviews

Speaking recently in Europe, Assistant Attorney General for Antitrust's Varney gave a major speech on "procedural fairness" which was widely perceived as reflecting the concerns of US companies about antitrust enforcement practices and procedures in the EU and Asia. She stated:

"In the context of competition law enforcement, procedural fairness concerns not only dealings among parties, third parties, and enforcers, but also the internal dealings of the enforcement agency. The interactions among parties, third parties, and enforcers are obviously important, but so, too, is an understanding of how the enforcement agency makes decisions. Knowing who within an enforcement agency makes decisions and a grasp of the timetable of likely milestones in an investigation are important steps in assuaging process concerns. Moreover, the symbolism of events,

like the ability to meet with final decision-makers, should not be underestimated. The ability to present one's case and have a fair hearing before the decision to bring an action ensures that the government decision-maker knows all the arguments against an action, while simultaneously providing the party with the confidence that all relevant arguments have been considered."

## DoJ and FTC Support Plaintiff in Brief to U.S. Supreme Court

NFL Properties granted Reebok the exclusive right nationally to stitch the logos of NFL teams and the NFL shield on clothing it has manufactured. This agreement ended American Needle's nonexclusive license.

American Needle filed an antitrust action. The NFL and its individual teams won dismissal on the ground that they are a "single entity," incapable of conspiring with one another to violate Section 1 of the Sherman Act. American Needle won cert, supported by the NFL, which for years had been making the "single entity" argument unsuccessfully in appellate courts, until this case.

After unsuccessfully opposing cert, the DoJ's brief on the merits, joined by the FTC, supports American Needle. This may reflect a more aggressive antitrust enforcement posture by the Obama Administration, since in recent years it has become rare for the government to support a private antitrust plaintiff in the Court.

On the other hand, the government cites an opinion by Judge Bork, issued when he was a federal appellate judge, as strongly supporting its approach. The Government asks that the decision be vacated and remanded for clarification of the scope of American Needle's claims and more discovery and recommends a test that would inquire, in part, whether the level of integration is like a merger and whether the teams are actual or potential competitors in the relevant market.

## New *Merger Guidelines* hearings announced

The two agencies announced last week that they intended to revise the 1992 *Merger Guidelines* after holding a series of public workshops around the country through January, 2010.

The Assistant Attorney General for Antitrust said, in a September 22 speech, that the agencies' interests were focused now in at least three areas: (1) market definition, (2) market concentration, and (3) competitive effects.

Of particular interest is the proposal to revise the inferences to be drawn from HHI thresholds in the current *Guidelines*. (HHI thresholds are purely mathematical calculations based on market share and industry concentration data, and do not include thorough examinations of how the market actually functions.)

Christine Varney said: "[W]e plan to seek public comment on the HHI thresholds that define unconcentrated markets where competitive concern is least likely, moderately concentrated markets where competitive concern is only somewhat likely, and highly concentrated markets where competitive concern is greatest. *It is no secret that today the HHI thresholds offer relatively little in the way of meaningful guidance to businesses considering merging*. We are interested in whether and how the thresholds could be made more useful."

There may be a chance for meaningful participation by members of industry. Please contact us if you are interested in particular changes or principles.

## DoJ tells court it opposes Google settlement in current form

The DoJ urged the federal judge handing the case brought against Google by copyright holders and publishers not to accept the proposed settlement as it now stands. At the same time, it didn't call for the settlement to be scuttled entirely.

The DoJ would "encourage the parties to continue negotiations to modify it so as to comply with Rule 23 [a federal law governing class-action settlements] and the copyright and antitrust laws." It added, "A global disposition of the rights to millions of copyrighted works is typically the kind of policy change implemented through legislation, not through a private judicial settlement."

Separately the judge disappointed photographers and graphic artists, ruling that it is too late for them and their trade associations to intervene. The original complaint in the case against Google arguably included photography and graphic arts while the amended complaint did not. The

photographers and artists argued that because their status is unclear, they will be hurt by the settlement.

## Italian Antitrust Commission targets Google

The Italian Antitrust Commission said it was examining whether Google was abusing its alleged "dominant position."

An Italian news publishers association complained that its members who do not share their news with Google (at no charge) are excluded from Google's search engine. The members complain that this affects their ability to compete for online advertising.

The Italian antitrust head called on Google to engage in talks with the publishers to avoid stiff fines.

## Possible end to Microsoft's woes in EU

After being hit with $2.5 billion in fines over the past five years, Microsoft may find its EU problems closer to an end.

Nellie Croes, the EU competition commissioner whose term is expiring in two months, said she would like to resolve the Microsoft case and any other significant lingering cases before leaving office.

## Members of Congress complain about EU treatment of US companies

Twenty-two members of Congress signed a letter to the DoJ and FTC complaining that the EU has misused its competition authority to protect EU companies from US competitors.

Last month, we reported on the €1.45 billion fine imposed on Intel. Other threatened or actual fines and investigations have had an impact on major US technology companies, including Microsoft, Qualcomm, IBM and Google.

The Congressional letter complains that unlike the US approach, the EU's competition analysis places too much emphasis on high market share. The Congressional letter prefers the US approach of considering the possibility of "market power" in the context of prices and consumer benefits. Where prices have dropped consistently, the letter argues, there could not be any anticompetitive harm.

The letter urged the administration to “be an advocate of the ‘American way’ both at home and in foreign jurisdictions.”

## Again, Congressional calls for McCarran-Ferguson repeal

For the fifth consecutive year, new calls have appeared in Congress to repeal parts of the McCarran-Ferguson antitrust exemption for the insurance industry.

This time, the “Health Insurance Industry Antitrust Enforcement Act” would, if enacted, repeal the exemption for the health and medical malpractice sector of the insurance industry.

Senator Patrick Leahy, chairman of the Senate Judiciary Committee, said, “There is simply no justification for health insurance and medical malpractice insurance companies to be exempt from federal laws prohibiting price-fixing. Subjecting health and medical malpractice insurance providers to the antitrust laws will enable customers to feel confident that the price they are being quoted is the product of a fair marketplace.”

## China merger clearances announced

In China the Ministry of Commerce of the PRC (“MOFCOM”), announced two antitrust concentration clearance approvals on September 28 and 29. Both approvals imposed conditions.

Readers may be interested in the details of these clearances:

**1. Pfizer’s acquisition of Wyeth**

MOFCOM issued a decision on September 29 (MOFCOM Announcement No. 77, 2009), approving Pfizer’s acquisition of Wyeth. Both Pfizer and Wyeth have a China-based business presence. MOFCOM provided insights into both its procedural and substantive approach:

- Pfizer submitted the application for concentration on June 9, 2009, along with additional information on June 11 and 14. MOFCOM accepted filing of the application on June 15.
- The preliminary examination, which was carried out by MOFCOM and ended on July 15, concluded that the concentration would restrict or exclude competition relating to animal

healthcare products. MOFCOM then decided to carry out further examination.

- The scope of examination was based on Article 27 of the Anti-Monopoly Law. MOFCOM conducted hearing, consultation and solicitation of written opinions and interviews with relevant authorities, including the chamber of commerce, competitors, upstream and downstream enterprises, etc.
- MOFCOM's stated conclusions as to the impact on competition as follows — relevant market: (i) PRC (excluding Hong Kong, Macao and Taiwan); (ii) relevant products: medicine for mankind and animal healthcare products; the buyer and seller have common products such as JIC, N6A and certain animal healthcare products; (iii) impact on the market: after the merger of the two, the market share will reach 49.4 percent; concentration level is high (Herfindahl Hirschman Index 2182); (iv) the market is difficult for access by newcomers.
- Conditions imposed by MOFCOM on the approved acquisition: (i) Pfizer must spin off the business of Respisure and Respisure One in China within six months following the MOFCOM approval to the concentration, including both the relevant tangible and intangible assets; (ii) the buyer of the spin-off business must be an independent third party approved by MOFCOM; (iii) if Pfizer fails to find the buyer within six months, MOFCOM is entitled to appoint an entrusted entity to dispose of the business; (iv) Pfizer shall have the obligation to provide reasonable technological support to the buyer during the three years following the spin-off.

### 2. GM's acquisition of Delphi Corporation

MOFCOM issued the decision approving GM's acquisition of Delphi on September 28 (MOFCOM Announcement No. 76, 2009). Both GM and Delphi have a China-based business presence. The announcement sets out the following points:

- GM submitted the application to MOFCOM on August 18, 2008, along with additional information on August 28 and 31. MOFCOM accepted the filing of the application on August 31. MOFCOM's examination was completed on September 28.
- The scope of examination was based on Article 27 of the Anti-Monopoly Law. MOFCOM conducted hearing, consultation and solicitation of written opinions and interviews with relevant authorities, including the chamber of commerce and automobile manufacturers.
- Impact on competition: (i) relevant products: the parties' products have vertical connection in China; (ii) the acquisition may adversely impact competition in both the automobile and automobile parts markets in China.
- Conditions imposed: (i) GM and Delphi shall ensure Delphi's continued supply of automobile parts to other automobile manufacturers in China without discrimination; (ii) GM shall not seek from Delphi the commercial secrets of other auto manufacturers working with Delphi, and Delphi shall not disclose the same to GM; (iii) GM and Delphi shall ensure that Delphi does not impose restrictions upon its customers if the customers are to move to other suppliers; (iv) in the future, GM's procurement of parts shall be conducted without prejudice to other parts suppliers in China.

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