ORRICK

ANTITRUST AND COMPETITION NEWSLETTER

FALL 2011

Welcome

Dear Friends and Colleagues:

First, we're thrilled to share the news that the *Financial Times* has named Orrick, Herrington & Sutcliffe among the top five most innovative law firms in the United States in its recently published **2011 FT Law 25: Most Innovative US Law Firms**. This ranking recognizes firms that consistently "create transformative solutions for clients" and is based on client feedback and independent research. This achievement is a testament to the market leadership of our clients, whom we sincerely thank for entrusting us with their most innovative matters.

In this issue of our newsletter, we recap the most important recent developments on the global antitrust and competition landscape, with special attention devoted to China, whose Anti-Monopoly Law continues to evolve in interesting ways.

We hope you find this issue of our newsletter informative and useful. If you have suggestions about topics you would like us to address in the future, please click the "Feedback" link and send us your thoughts.

Best regards,

Bob Rosenfeld

Chair, Antitrust and Competition Group

What's Inside

Developments

Europe

European Court of Justice Issues Its Judgment in the 'Pub Landlady' Case

On Oct. 4, 2011, the European Court of Justice (ECJ) held that exclusive distribution agreements that prohibit television viewers from watching live broadcasts in countries other than where the decoder card was first sold are contrary to EU law.

In 2006, an English pub landlady was fined for screening live English Premier League (PL) matches using a decoder card purchased in Greece. On referral from the UK High Court, the ECJ held that such exclusivity arrangements constitute a violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU). Moreover, national legislation, which banned the use of overseas satellite decoder cards, could not be justified on the basis of protecting intellectual property rights or otherwise and, therefore, violated EU rules protecting the freedom to provide services across the EU.

The ECJ also held that the PL could not claim copyright in the matches themselves since these were not classifiable as works within the meaning of the EU Copyright Directive. Importantly, however, the court ruled that other features of the broadcast, including logos, on-screen graphics or the PL anthem, would be covered by copyright. This ruling gives content owners some ability to put in place measures to limit cross border sales of decoder cards in the EU.

European Commission Publishes New Best Practices Guidelines in Antitrust Proceedings

On Oct. 17, 2011, the European Commission published its new guidelines for best practices in antitrust proceedings ("Guidelines"). These are aimed at increasing interaction with parties during antitrust proceedings and strengthening the mechanisms for safeguarding procedural rights of parties under investigation. Key improvements introduced in the Guidelines include:

- Informing parties at the Statement of Objections stage of the relevant parameters for the calculation of fines.
- Extending state of play meetings to cartel cases and to complainants (previously only available in abuse of dominance cases).
- Enhanced access to "key submissions" of complainants or third parties, such as the nonconfidential version of the complaint, and economic studies, will be

granted prior to the Statement of Objections.
- Publishing the rejection of complaints, either in full or as a summary.

The submission and assessment of economic evidence has been clarified. The Guidelines now contain recommendations regarding the presentation and content of economic and econometric data to facilitate the assessment of such data by the Commission, as well as provide guidance on how to respond to Commission requests for large sets of quantitative data.

The role of the Hearing Officer has been extended to cover the entire antitrust procedure and includes the power to intervene in the investigative phase of an antitrust proceeding and not only the last stage of the proceedings. For example, parties now can call upon the Hearing Officer in the investigative phase if they feel they should not be compelled to reply to questions that might force them to admit an infringement. More significantly, a party that claims legal professional privilege can now ask the Hearing Officer to review a document and express a view on whether the document is privileged and, therefore, should not be seen by the Commission.

The Guidelines apply to pending cases (where procedural steps still remain to be taken) and to all future cases. In practice, the Commission already applies several of these principles to its investigations; however, by including these practices in its Guidelines, the Commission enhances clarity and increases predictability in antitrust investigations.

EU and U.S. Celebrate 20 Years of Competition Cooperation

On Oct. 14, 2011, European Union Competition Commissioner Joaquín Almunia, U.S. Federal Trade Commission Chairman Jon Leibowitz, and Sharis Pozen, head of the Antitrust Division of the U.S. Department of Justice, met to mark 20 years since the signing of the 1991 EU-U.S. Bilateral Cooperation Agreement. The 1991 agreement provided for mutual notification of enforcement activities affecting EU and U.S. interests, exchange of nonconfidential information and regular meetings of the agencies.

Furthermore, either EU or U.S. competition authorities can request that the other investigate potentially anticompetitive conduct in its jurisdiction that may affect the requesting jurisdiction. The Oct. 14 meeting adopted revised EU-U.S. Best Practices on merger cooperation, which provide more detail on issues regarding timing, collection of evidence and definition of remedies. This greater level of cooperation is believed to be in the interests of merging parties, who are less likely to confront inconsistent remedies in the two jurisdictions. The Best Practices on cooperation in merger investigations are not legally binding; instead, they provide a framework for cooperation between the EU and U.S. in merger situations.

European Competition Lawyers' Forum Responds to the EU Commission Draft Guidance on Quantifying Harm in Damages Actions

The EU Commission recently published Draft Guidance on the quantification of harm in actions for private damages based on breaches of Article 101 or 102 of the TFEU. This Draft Guidance follows from the Commission's 2005 Green Paper on private damages actions, which highlighted the obstacles faced by claimants in quantifying the harm suffered as a result of anticompetitive behavior. The Draft Guidance outlines several economic theories for quantifying damages. The Commission confirms there is no "one size fits all" test and recognizes that different methods will be applicable to different cases. Recognizing once again the need for private enforcement of EU Competition law, the Commission suggests that the Guidance should help national courts in their dealings with damages actions brought before them. In the consultation process, concerns were raised that national courts may lose sight of the fact that the Guidance is not in any way binding in national damages actions and the Commission was encouraged to clarify this in the final Guidance. The Commission will now incorporate the feedback it has received into its final Guidance.

United States

New Third Circuit Ruling Increases Risk of U.S. Antitrust Litigation for Foreign Companies

In *Animal Science Products, Inc. v. China Minmetals Corp.* (3d Cir. Aug. 17, 2011) (decision available **here**), the Third Circuit overruled prior case law and held that the Foreign Trade Antitrust Improvements Act (FTAIA) does not impose a jurisdictional bar on antitrust claims involving trade or commerce with foreign nations, but rather merely sets forth required elements of an antitrust claim involving foreign trade. This technical distinction has real-world consequences, because it will likely make achieving early dismissal of some U.S. antitrust claims against foreign companies more difficult—slightly so or very much so, depending on the circumstances. The decision also sets forth factors that inform the analysis of whether foreign firms' conduct is directed at U.S. import trade and thus within an FTAIA exemption and subject to U.S. antitrust law. *See* **Orrick Client Alert** (Aug. 22, 2011) for a more detailed discussion.

Ninth Circuit Articulates New Standard for Evaluation of Profit Sharing Agreements Among Competitors

Profit sharing agreements among competing firms have long been thought to be anticompetitive because they tend to reduce firms' incentives to advertise, discount and provide quality service. In *State of California, ex rel. Kamala D. Harris v. Safeway, Inc.*, ___ F.3d ___, 2011 WL 2684942 (9th Cir. July 12, 2011) (*en banc*) (decision available **here**),

the Ninth Circuit advanced the law in this area, ruling that certain profit sharing agreements are neither *per se* illegal nor subject to a "quick look" analysis, but rather must be analyzed under the full rule of reason. The decision opens the door to the wider use of such agreements in appropriate circumstances. Although the court decided the issue in the context of a labor dispute, it also determined that such agreements, although potentially lawful, are not immunized by the non-statutory labor exemption to the antitrust laws.

DOJ and FTC Issue Joint Policy Statement Regarding Accountable Care Organizations

On Oct. 20, 2011, the Antitrust Division of the Department of Justice and the Federal Trade Commission issued the final version of a joint policy statement detailing how the agencies will enforce U.S. antitrust laws with respect to new **Accountable Care Organizations (ACOs).** An ACO is an organization of health care providers that jointly offer services to reduce costs and improve the quality of patient care. Under the Affordable Care Act, ACOs will serve Medicare fee-for-service beneficiaries under the Medicare Shared Savings Program. Because some ACOs also may participate in Shared Savings Programs in commercial markets, there is a potential for them to violate the antitrust laws. The agencies issued a proposed policy statement in March 2011 and accepted comments from the public. The final Policy Statement provides guidelines to help ACOs avoid liability under the antitrust laws. It describes (1) the ACOs to which the Policy Statement applies; (2) when the agencies will apply rule of reason treatment to those ACOs; (3) an antitrust safety zone; and (4) additional antitrust guidance for ACOs that operate outside the safety zone, including a voluntary expedited antitrust review procedure for newly formed ACOs. A copy of the final Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program is available **here**.

Regional Focus: China

China's Anti-Monopoly Law (AML) continues to evolve since it went into effect in 2008. Recent developments offer some guidance on how future matters will be handled. Highlights of China's latest antitrust and competition issues over the past six months include:

China Anti-Monopoly and U.S. Antitrust Agencies Sign Memorandum of Understanding

On July 27, 2011, China's three anti-monopoly enforcement agencies—National Development and Reform Commission (NDRC), Ministry of Commerce (MOFCOM) and State Administration for Industry and Commerce (SAIC)—signed a Memorandum of Understanding (MOU) with the U.S. Federal Trade Commission (FTC) and the Department of Justice (DOJ) to further promote communication and cooperation among the agencies in the two countries. The MOU provides for periodic high-level consultations among all five agencies as well as separate communications between individual agencies. Specific areas of cooperation include, among others, (1) exchange of information about competition law enforcement and policy developments; (2) training programs, workshops and other means to enhance agency effectiveness; (3) provision of comments on proposed laws, regulations and guidelines; and (4) cooperation on specific cases or investigations when in the agencies' common interest.

China's Local Administration of Industry and Commerce Departments Sign Regional Cooperation Agreement for Enforcement of Anti-Monopoly Law

On Aug. 3, 2011, six of China's provincial and regional Administration of Industry and Commerce (AIC) Departments (Xinjiang, Shanxi, Gansu, Qinghai, Ningxia and Xi'an) signed a regional cooperation agreement for the enforcement of the AML and the Anti-Unfair Competition Law. The cooperation agreement aims to improve cooperation between the six AICs on the enforcement of the AML and the Anti-Unfair Competition Law in general, and specifically in trans-regional cases. The agreement provides for the AICs to establish cooperation mechanisms, such as data exchanges, to notify each other of ongoing investigations, to commission joint surveys and to hold annual meetings to share experiences. Under the agreement, the AICs will also focus on investigating and dealing with unfair competition issues—in particular, widespread alleged illegal activities in key industries, commodity markets and regions—and they will conduct joint law enforcement activities.

China's First Enforcement Action of Abuse of Administrative Power Under the AML

On July 27, 2011, China's State Administration for Industry and Commerce (SAIC) published information on China's first anti-monopoly case regarding abuse of administrative power to eliminate or restrict competition. The Guangdong AIC conducted investigations after three vehicle global positioning system (GPS) operators filed a complaint alleging that a municipal government abused its administrative power by issuing administrative orders that (1) required all targeted vehicles to upload real-time monitoring data to a specified municipal platform operated by a private company and to pay a service fee to that platform of no more than 30 yuan per vehicle, and (2) required traffic police departments to forbid vehicles that failed to comply from passing annual vehicle examinations. The Guangdong AIC concluded that these orders constituted an abuse of administrative power under the AML, and recommended that the Guangdong Provincial Government (GPG) correct the abuse. The GPG then ruled that the orders violated the AML and constituted an abuse of administrative power.

MOFCOM's Promulgation of M&A Security Review Rules

On Aug. 25, 2011, the Ministry of Commerce (MOFCOM) promulgated the final version of the Implementing Rules for Security Review System on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors ("Implementing Rules"), replacing the provisional rules issued on March 4, 2011. Under the Implementing Rules, transactions involving enterprises in the fields of national defense security, agricultural products, energy and resources and other areas with a bearing on national security—and which will be acquired and controlled by foreign investors—will be required to undergo a security review. Transactions ruled to have potential or significant impact on national security may be blocked.

The requirements for filings under Article 5 of the Implementing Rules go beyond those of an anti-monopoly filing for a concentration of undertakings in some aspects, and include the following: application and introduction of the transaction; identification documents and basics of the foreign investors; basic introduction and documents of the merged domestic enterprise; documents of the foreign investment enterprise to be set up post-transaction; share transaction documents; asset transaction documents; and documents on the potential control of the foreign investors over the target.

The Implementing Rules remain largely the same as the provisional rules with the significant addition of Article 9, the anti-circumvention provision. Article 9 emphasizes that whether an M&A deal falls within the scope of national security review should be assessed by the substance and the actual impact of the deal, and any foreign investors are

prohibited from escaping the security review via shareholding entrustment, trust, multiple-level reinvestment, leasing, loans, agreement control, overseas transaction or other ways.

MOFCOM's Promulgation of Competitive Assessment in Anti-Monopoly Review Rules

On Aug. 29, 2011, MOFCOM promulgated the Interim Provisions on Assessment of the Impact of Concentration of Undertakings on Competition ("Interim Provisions"). The Interim Provisions discuss the unilateral effects and the coordinated effects of horizontal concentrations and the potential impact of non-horizontal concentrations on the up/downstream or associated markets to be considered in MOFCOM's assessment of a transaction. Articles 5 through 12 identify six factors to be considered, including the following:

- Article 5: Market shares, market structure and whether the business operators who are party to the concentration will gain or increase market control as a result of the concentration.
- Article 6: Herfindahl-Hirschman Index and CRn index are clearly mentioned, but no specific index thresholds above which a concentration is considered as anticompetitive are provided. This reflects a case-by-case approach of MOFCOM, at least for the time being.
- Articles 7–11: In analyzing the impact of the concentration of undertakings on market entry, technological progress, consumers, other relevant undertakings and the development of national economy, the Interim Provisions note the potential negative impact of concentration, and at the same time, acknowledge the potential positive side.
- Article 12: Near-bankruptcy (the failing firm defense) and countervailing buying power are two of the catch-all factors to be considered. The latter is newly added in the Interim Provisions.

Events, Articles and Honors

Antitrust and Competition Events

September 2011
International Bar Association's 15th Annual Competition Conference
Florence, Italy – Sept. 16 and 17, 2011
Orrick partner **Philippe Rincazaux** co-chaired a session focusing on "Challenges Posed by the Growing Internationalization of Cartel Investigations."

Law Seminars International Panel on Antitrust Issues in the Pending AT&T/T-Mobile Merger
Teleconference – Sept. 20, 2011
Orrick partner **David Smutny** was a featured speaker on this panel designed to update practitioners on key issues around this high-profile merger.

October 2011
Pharmaceutical Security Institute Semi-Annual Meeting
McLean, Va. – Oct. 20, 2011
Orrick partner **Robert Reznick** spoke about EU-U.S. privacy issues before the semi-annual meeting of PSI, the drug industry's anti-counterfeiting trade group.

International Bar Association Annual Conference
Dubai, UAE – Oct. 30 to Nov. 4, 2011
Orrick partner **Philippe Rincazaux** participated in a panel discussion on "Antitrust Issues in Investments, Joint Ventures and Long-Term Infrastructures in the Oil and Gas Industry."

November 2011
BIICL Seminar on Competition Damages Actions: Practice and Pitfalls
London, England – Nov. 16, 2011
Orrick partners **Ted Henneberry** and **Douglas Lahnborg** spoke at the British Institute of International and Comparative Law's (BIICL's) Competition Damages Actions: Practice and Pitfalls seminar. Ted chaired this event, and Orrick sponsored it.

Orrick Seminar: Unfair Commercial Practices: Unstable Balance Between Companies and Consumers?
Rome, Italy – Nov. 16, 2011
Orrick partner **Alessandro De Nicola** as well as **Michele Bertani**, Orrick special counsel and professor of business law at Università degli Studi di Foggia, discussed unfair commercial practices, competition regulation and consumer protection with leading Italian antitrust, business and political authorities at Orrick's Rome office.

Recent Antitrust and Competition Publications

Orrick partner **Philippe Rincazaux** and associate trainee David Dubois contributed an article titled "**Appreciability Cannot Be Assessed Only From the Characteristics of the Undertakings**," (in French) published in May 2011 in the law journal *Concurrences*.

Orrick partners **Richard Goldstein**, **Douglas Lahnborg** and **Robert Reznick** wrote "**New Regulatory Actions Underscore Global Antitrust/Competition Risk of Altering Product Offerings in Light of Imminent Generic Competition**," an Orrick Pharmaceutical Law & Industry Report, on July 22, 2011.

Orrick partners **Elizabeth Cole**, **Ted Henneberry** and of counsel **Veronica Lockyer** wrote "**Asia in Focus: U.S. and China Sign a Memorandum of Understanding on Antitrust Cooperation**," an Orrick Asia in Focus and Antitrust and Competition Alert, on Aug. 9, 2011.

Orrick of counsel **Howard Ullman** wrote "**Profit Sharing Agreements and Non-Statutory Labor Exemption in *State of California v. Safeway***," an article in the September 2011 edition of *The Antitrust Counselor*, the newsletter of the American Bar Association Section of Antitrust Law's Corporate Counseling Committee.

Orrick partner **Kathryn Edwards** and of counsel **Howard Ullman** wrote "**Consumer Advertising Misrepresentation Claims Under California's Section 17200 Becoming More Difficult to Dismiss**," an Orrick Consumer Protection Update, on Aug. 29, 2011. It also appeared in ***The Recorder*** on Sept. 5, 2011.

Orrick partners **Richard Goldstein**, **Robert Reznick**, **Douglas Lahnborg**, **Yoshihiro Takatori**, **Robert Pé** and of counsels **Howard Ullman** and **Veronica Lockyer** wrote "**New Appellate Court Ruling Increases Risk of U.S. Antitrust Litigation for Foreign Companies**," an Orrick Antitrust and Competition Alert, on Aug. 22, 2011. It also appeared in ***Competition Law360*** on Sept. 29, 2011.

Recent Antitrust and Competition Honors

The annual *Global Competition Review 100* recently ranked Orrick's Antitrust and Competition Group as "highly recommended."

Chambers UK 2012 has ranked Orrick partner **Douglas Lahnborg** as a "notable practitioner" who was backed by "strong support" from colleagues and clients. The edition noted that he provides "clear, constructive advice in driving the issues forward," and quoted clients as saying they appreciate his "rapid understanding of our business needs."

The Legal 500 UK recognized Orrick partner **Douglas Lahnborg** as a leading lawyer and noted that he provides "clear, constructive advice," is "tight into the process" and "drives the issues forward."

U.S. News and World Report's Best Firms in America rankings for 2012 placed Orrick's Antitrust and Competition practice in National Tier 2. The magazine's Best Lawyers in America publication also recommends Orrick partner **Ted Henneberry** for the antitrust law and antitrust litigation categories; partner **Bob Rosenfeld** for the antitrust law, commercial litigation and bet-the-company litigation categories; and partner **Stephen Bomse** for the antitrust law, bet-the-company litigation, commercial litigation and antitrust litigation categories.

The Legal 500 Europe, Middle East and Africa edition recently recognized Orrick partner **Philippe Rincazaux** as "very good," noting that he stands out for his "excellent écritures."

Paris-based Orrick partner **Philippe Rincazaux** has been re-appointed Non-Governmental Advisor to the International Competition Network (ICN) by the French Competition Authority (FCA). He was asked by the FCA to assist in issues relating to cartels and merger control and was a guest at ICN's annual event on cartels, held Oct. 10–13, 2011, in Bruges, Belgium.

Chambers Europe recently recognized Orrick partner **Philippe Rincazaux**, noting that he is "very bright" and "has the trust of important clients."

Get to Know
Veronica Lockyer

As a commercial law specialist, **Veronica Lockyer** is quite familiar with handling major overhauls on the corporate landscape. But this year, she handled a major overhaul of her professional and personal landscapes, in relocating from Orrick's London office to its Shanghai office.

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Lockyer, whose practice also focuses on antitrust, market regulation, consumer law and data privacy, was happy to be a part of Orrick's continued strengthening of its Asia presence. She's also enjoyed helping existing clients explore business opportunities in Asia.

"My relocation to Asia this year has allowed me to help a lot of the same clients I was already working for in Europe feel comfortable branching into new directions in Asia," she said.

Many of the same legal issues arise in Asia as in Europe, but clients appreciate Lockyer's guidance on the important governmental, legislative and even cultural differences.

"It is fascinating to look at similar issues from an entirely different legal and regional perspective and to see the similarities and differences in the approach to and resolution of these issues," she said.

The law in China is developing at a fast pace to accommodate the country's rapid economic development, Lockyer noted, adding that the many new laws, regulations and guidance can sometimes appear opaque or contradictory initially. It's therefore vitally important for attorneys to stay on top of the government's priorities in order to provide clients with sound legal advice against this background, she said.

Veronica's work has included advising clients on commercial agreements, merger control, abuse of dominance, anticompetitive behavior and pricing practices. She has also helped clients develop global privacy policies as well as terms and conditions for Internet sales, and provided advice on international cross-border data transfers. Veronica received her law degree from the College of Law of England and Wales in 1998. Before joining the firm, Veronica was an associate in Coudert Brothers' London office. She speaks French and Mandarin and said that in her off time, she enjoys spending time with her family and exploring "my new city, country and region."