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Promoting Competition
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Message from the Chair

Welcome to the Spring 2015 edition of our committee newsletter *Transportation, Energy & Antitrust.*

Join us for two exciting programs at the ABA Section of Antitrust Law Spring Meeting in Washington, D.C.:

A TWO-SIDED STORY: ANTITRUST IN TWO-SIDED MARKETS
Wednesday, April 15, 9:00 – 10:30 am

Presented by the Insurance & Financial Services and Transportation & Energy Industries Committees

Recent antitrust litigation highlights the issue of how to assess market power in two-sided markets. Participants on one side of the market may claim a platform is essential to their business, but the owner of the platform may point to competitive constraints on the other side as evidence of lack of market power. This panel will explore the workings of two-sided markets in multiple industries.

CHAIR AND MODERATOR:

- Eric J. STOCK, Chief, Antitrust Bureau, Office of the Attorney General, New York, NY

PANELISTS:

- Joseph FARRELL, University of California Berkeley, Berkeley, CA
- Thomas GRAF, Cleary Gottlieb Steen & Hamilton LLP, Brussels, Belgium
- David C. KULLY, Chief, Litigation III Section, U.S. Department of Justice, Antitrust Division, Washington, D.C.
- Fiona SCOTT MORTON, Yale School of Management, New Haven, CT

MAVERICKS WRESTLING WITH REGULATION: TESLA, UBER, AND AIRBNB

Wednesday, April 15, 1:45 – 3:15 pm

Presented by the Legislation, Pricing Conduct, and Transportation & Energy Industries Committees

On the one hand, consumers benefit when mavericks disrupt stale and stodgy markets. On the other, government regulations protect consumers. What role, if any, should antitrust law play in establishing the proper balance? Tesla, Uber, and Airbnb have all been met with regulatory resistance as they innovatively approach established markets, and their examples may help us answer this question.

CHAIR AND MODERATOR:

- David L. MEYER, Morrison & Foerster LLP, Washington, D.C.

PANELISTS:

- Daniel CRANE, University of Michigan, Ann Arbor, MI
- Matthew W. DAUS, Windels Marx Lane & Mittendorf, LLP, New York, NY
- Marina LAO, Director, Office of Policy Planning, Federal Trade Commission, Washington, D.C.
- Paul NORMAN, Boardman & Clerk, Madison, WI

These two programs continue our exciting year on the Transportation & Energy Industries Committee. Since our last newsletter, we have sponsored two committee programs: Joint Ventures: The Fundamentals (November 20, 2014) and Net Neutrality: Lessons from Other Fields (March 3, 2015). The materials for both programs (including the audio recording) are available on the Section website and through Connect.

Speaking of Connect … **The TEI Committee has made the move to Connect!** We have made the switch to communicate with our members exclusively through the Section's Connect platform. Most importantly, what this means for you is that **we have a new email address: abaantitrust_tei@ConnectedCommunity.org**. Our old address for AT-TEI has been discontinued. Starting March 1, 2015, send all messages to **abaantitrust_tei@ConnectedCommunity.org**. If you have any questions or need help with Connect, check the **FAQ section**, or **email the ABA's Connect helpline**.

And, don't miss this edition of *Transportation, Energy & Antitrust*! The first piece by José Azar, Martin Schmalz, and Isabel Tecu, summarizes a lengthier article by the same authors titled *Anti-Competitive Effects of Common Ownership*. The paper considers the long-standing economic theory that common ownership of firms by the same investors reduces incentives for the jointly-owned companies to compete. Using data from the airline industry, the authors find that taking common ownership into account implies increases in market concentration that are ten times larger than what is "presumed likely to enhance market power" by the United States antitrust authorities. The paper discusses the potential policy implications of the findings.

Second, Francois Tougas and Ryan Gallagher write about mergers of transportation businesses in Canada and the dual-track review processes required by different regulatory bodies including the Canadian Competition Bureau under the Canadian Competition Act, and the Canada Transport Agency which reviews mergers in the transportation sector. In addition, mergers involving non-Canadian companies are subject to review under the Foreign Investment Policy Act. The authors discuss the different processes and substantive concerns involved in reviews by the agencies as well as certain reasons that mergers in the railroad industry may not be considered anticompetitive.

Third, Robert M. Nichols summarizes our March 3, 2015, committee program, Net Neutrality: Lessons from Other Fields. This excellent summary is a must read if you were not able to listen to the program live.

I look forward to seeing you at the Spring Meeting in a few weeks. Stay tuned and happy reading!

Amanda Wait
Chair, Transportation and Energy Industries Committee
2014-15

Summary of "Anti-Competitive Effects of Common Ownership"

By José Azar, Martin Schmalz, Isabel Tecu[1]

Many natural competitors are jointly held by a small set of large diversified institutional investors. Using the transportation industry as an example, five of the largest seven shareholders of United Airlines, the third largest US airline, are also among the largest ten shareholders of Southwest and Delta Air Lines, the largest and second-largest airlines respectively. Common ownership is not only an issue in the airlines industry. Large institutional investors, possibly as a mechanical effect of their size and portfolio diversification, generally tend to hold firms that are natural competitors. For example, BlackRock is the largest shareholder of each of the nation's largest three banks. Vanguard, State Street, and Fidelity are among the top

six shareholders in each of these banks as well. The top five shareholders of CVS and Walgreens are identical.

Economists have long theorized that such common ownership of firms by the same investors reduces incentives to compete. They point out that the benefit to one firm of competing aggressively -- gains in market share -- comes at the expense of firms that are part of the same investors' portfolio, reducing the investors' overall profit. Therefore, it is not in the interest of common owners that their portfolio firms compete aggressively. This paper is the first, to our knowledge, to study this question empirically. Using the airlines industry as a laboratory, we first ask: how large are current levels of common ownership, and what are the implications for market concentration? We then ask whether present-day common ownership levels adversely affect product market competition.

We find that taking common ownership into account implies increases in market concentration that are ten times larger than what is "presumed likely to enhance market power" by the United States antitrust authorities. In the first quarter of 2013, common ownership increases market concentration on the average airline route by about 2,200 points on the Herfindahl-Hirschman Index (HHI). This increase comes on top of already high levels of traditional measures of market concentration, and it adds as much concentration as going from roughly four to two equal-sized carriers.

Given this large degree of common ownership, it would not be surprising if firms' competitive behavior would reflect the associated anti-competitive incentives. Indeed, we find that changes over time in common ownership of airlines serving a particular route are associated with respective changes in ticket prices on that route. The magnitude of this effect is meaningful; according to our estimates, US airfares are 3-11% higher because of common ownership when compared to the counterfactual world in which airlines are separately owned. Consolidation in the asset management industry can be an important way in which common ownership develops. We estimate, for example, that the single acquisition of Barclays Global Investors (BGI) by BlackRock caused airfares to increase by 0.6% on average across routes.

The measure of common ownership we employ in this paper was developed by Salop and O'Brien[2] and is an ownership-modified version of the Herfindahl-Hirschman Index (HHI). For example, a market with two equally sized firms has a traditional HHI of 5,000. If these two firms are owned by the same set of investors, however, the ownership-modified HHI (MHHI) is 10,000 – reflecting that the two firms will maximize their investors' profits by acting as a monopoly.[3]

The MHHI is already used by antitrust agencies in reviews of partial acquisitions, for example when a company acquires a minority ownership interest in a competitor. The acquisition of shares by investors labeled as "passive" – as studied in the present paper –, however, has received little attention thus far. An important reason is that the acquisition of shares of less than 15% can be exempt from filing pre-merger notifications under the Hart-Scott-Rodino Act. The presumption appears to be that ownership by "passive" investors does not influence competitive

behavior. Investors with passive investment strategies, however, are not necessarily passive in corporate governance – in fact, they frequently emphasize the active role they play in their portfolio firms.[4] Our results confirm this view by indicating that the competitive behavior of investors' portfolio firms does reflect their owners' anti-competitive incentives.

Figure 1 plots the average HHI and the average Ownership-Modified HHI (MHHI) on US airline routes over the last decade. The gap between the MHHI and the HHI, which measures the degree to which market concentration is generated by common ownership among the airlines, was around 2,000 at the beginning of the period, declined to around 1,000 in 2006-2007, and then increased to about 2,200 in 2013. The stark increase in the gap in 2009 coincides with BlackRock's acquisition of Barclays Global Investors (BGI).

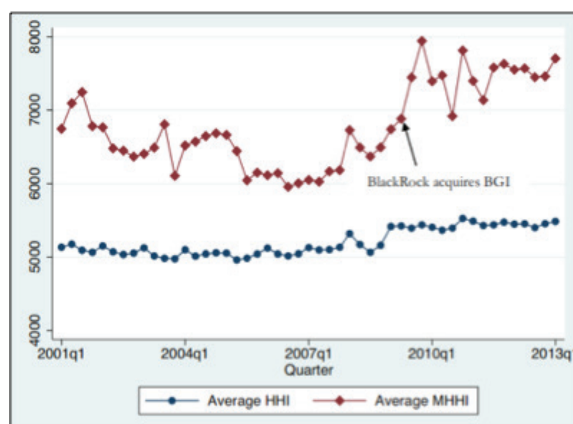

Figure 1: Average HHI and ownership-modified HHI (MHHI) across airline routes, 2001 Q1 -2013 Q1.

To study whether common ownership affects competition, we performed a regression analysis that correlates variation over time in common ownership, as measured by the MHHI delta, with variation in airfares on the same route. This methodology measures whether an increase in common ownership between the airlines serving a particular route coincides with an increase in fares on the same route.[5] We find that current levels of common ownership imply airfares that are 3-5% higher, compared to the "but-for" world in which airlines are separately owned (or in which airlines ignore their owners' anti-competitive incentives).[6] This effect is of a similar economic magnitude as the effect of the traditional HHI measure of market concentration.

We turn to the acquisition of BGI by Black Rock in 2009 to address concerns that the above results are driven by alternative explanations. Prior to the acquisition, BGI and Black Rock both held shares in a number of airlines. The combination of these two investors thus mechanically led to increased common ownership in routes that were served by these airlines. At the same time, however, airline stocks constituted a small part of both BlackRock's and BGI's total portfolio. Thus, the acquisition was not driven by dynamics in the airline industry. A positive association between increases in common ownership implied by the acquisition and increases in airfares on the affected routes would thus constitute strong evidence that common ownership impacts airfares, and not the other way around.

We indeed found such a positive association. Routes on which the BlackRock-BGI acquisition implied larger increases of common ownership exhibited larger increases in ticket prices in the years following the acquisition, compared to routes that were less affected (or entirely unaffected) by the acquisition. Figure 2

illustrates this result by plotting airfares for "treatment" routes that were heavily affected by the acquisition and "control" routes that were less or not at all affected by the acquisition because neither BlackRock nor BGI owned significant stakes in the airlines serving the routes. Before and immediately following the acquisition, airfares in the two groups track each other. About one year after the completion of the acquisition, however, fares in the treatment group markedly increase relative to the control group of routes. On average, airfares rose by about 0.6% due to the acquisition. This estimate implies that airfares are at least 10% higher because of the total level of common ownership, compared to a counterfactual world in which airlines are separately owned, or in which airlines ignore the anti-competitive incentives of their shareholders.[7]

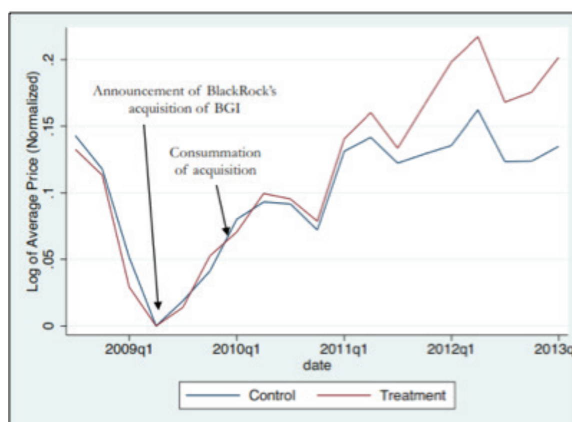

Figure 2: Average airfares in "treatment" and "control" markets of the BlackRock-BGI acquisition.

In summary, this paper highlights the extent to which many firms within the same industry are now owned by the same institutional investors, and the detrimental effect of such common ownership on product market competition. In particular, consumers and economic efficiency are harmed by airfares that are sizably higher than if airlines did not have the same owners.

Institutional investors view themselves as an active voice in the governance of their portfolio firms.[8] Not only do they elect directors and set executives' pay in shareholder elections, they also leverage their voting power to engage with firms' management behind the scenes.[9] It is neither necessary nor likely, however, that owners micro-manage competition of their portfolio firms. Investors only need to remind their firms of their interests, i.e., to help identify the competitors which whom aggressive competition is least desirable. With firms naturally attempting to limit competition, common ownership is a natural coordination device that may help make cooperative arrangements more stable and price wars less frequent.

These results present a policy challenge. Institutional investors help shareholders to diversify their portfolios and hold companies accountable to act in their interest, both of which are desirable goals. At the same time, however, these goals come at the cost of reduced competition between portfolio companies, which hurts consumers by increasing prices and decreasing output. Balancing these effects requires a careful analysis of social costs and benefits that goes beyond the scope of our paper. One direct policy implication, however, is that empirical measures of market concentration should take ownership into account. This further suggests that mergers of large asset management companies should be reviewed with regard to anti-competitive effects on the product market of the portfolio companies, and not only with regard to anti-competitive effects on the market for asset management.

1 Azar and Tecu are senior associates at Charles River Associates. Schmalz is an assistant professor at the University of Michigan Ross School of Business. This paper has been published as Ross School of Business Paper No. 1235, and it is currently under peer review at an academic journal. The full paper is available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345.

2 *See* O'Brien and Salop, "Competitive effects of partial ownership: Financial interest and corporate control," ANTITRUST LAW JOURNAL (2000), pp. 559-614.

3 The MHHI calculation is more complex than a traditional HHI and depends on owners' financial interests and voting rights as well as the firms' market shares.

4 For example, Vanguard explains their corporate governance engagements under the title "passive investors, not passive owners" (https://personal.vanguard.com/us/insights/article/proxy-commentary-042013); the *Financial Times*, in an article titled "passive investment, active ownership," quotes the former head of corporate governance at TIAA-CREF as saying: "Having a passive investment strategy has nothing to do with your behaviour as an owner" (http://www.ft.com/intl/cms/s/0/7c5f8d60-ba91-11e3-b39100144feabdc0.html); and BlackRock's chairman and CEO, Laurence D. Fink, does not tire to emphasize that "We are an active voice, ..." (http://blogs.wsj.com/moneybeat/2014/01/16/blackrocks-larry-fink-typical-activists-are-too-short-term/tab/print/). These are not isolated examples: A team of Wharton finance scholars find that exogenous changes in ownership by "passive" index funds has large real effects on board composition and other measures of corporate governance and conclude "our findings suggest that passive investors play a key role in influencing firms' governance choices" (Appel, Gormley and Keim, "Passive Investors, Not Passive Owners," working paper (2014), available at http://ssrn.com/abstract=2475150).

5 By looking at changes within a given route, we can rule out that our results are driven by differences between different routes, such as distance. We also control for a number of other time-varying factors that may impact fares, such as the traditional HHI, the number of carriers serving the route nonstop, and the presence of low cost carriers, among others.

6 We also found that increased common ownership implies a decrease in the number of passengers on a given route. This is reassuring, because it suggests that the higher fares we observe on routes with increased common ownership cannot be explained by increased demand on these routes.

7 Our estimates for the price effect of common ownership are comparable to estimates from studies of full airline mergers during less tightly regulated periods. For example, airline mergers during the less tightly regulated period 1985-1988 increased airfares in affected routes by about 9% compared to routes that were unaffected by the merger (Kim and Singal, "Mergers and Market Power: Evidence from the Airline Industry," THE AMERICAN ECONOMIC REVIEW (1993), 83(3), pp. 549-569). Studies of airline mergers in other periods, when they were regulated by the DOJ/FTC, find only small price increases (see, e.g., Borenstein, "Airline mergers, airport dominance, and market power," THE AMERICAN ECONOMIC REVIEW (1990), 80(2); Luo, "The Price Effects of the Delta/Northwest Airline Merger", REVIEW OF INDUSTRIAL ORGANIZATION (2014), 44(1), pp. 27-48). Whereas our estimates are similar to the estimates obtained from less tightly regulated periods, is not surprising that unregulated increases in common ownership, as implemented by an acquisition in the asset management industry and measured in the present paper, have stronger effects on airfares than full mergers that have been scrutinized by antitrust authorities.

8 See supra note 3.

9 For example, BlackRock explains: "When we engage successfully and companies adjust their approach, most observers are never aware of that engagement. [...] We typically only vote against management when direct engagement has failed. [...] Engagement encompasses a range of activities from brief conversations to a series of one-on-one meetings with companies." (BlackRock "Proxy Voting and Shareholder Engagement FAQ", https://www.blackrock.com/corporate/en-us/literature/fact-sheet/blk-responsible-investment-faq-global.pdf) Similarly, Vanguard states: "Through engagement, we're able to put issues on the table for discussion that aren't on the proxy ballot."("Vanguard's approach to corporate governance", https://about.vanguard.com/vanguard-proxy-voting/) A recent survey finds that "the majority of institutional investors ... are willing to engage in shareholder activism" or "behind-the-scenes" corporate governance (McCahery, Starks, and Sautner, "Behind the Scenes: The Corporate Governance Preferences of Institutional Investors," working paper (2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1571046).

Canadian Regulation of Cross-Border Mergers and Acquisitions in the Transportation Sector

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With the announcement last fall that Canadian Pacific Railway (CP), one of Canada's two major railroads, was interested in acquiring CSX Transportation, Inc., one of the seven largest (so-called "Class 1") freight railroads operating in the United States, interest was sparked in how Canada's regime of transportation and competition regulation would handle such a trans-national transaction in the transport sector. This article summarizes the somewhat complex hurdles that any such transaction would confront, and provides some explanation of the historical evolution of this regime.

As we explain below, mergers of transportation industry businesses (or undertakings) in Canada may be subject to review by an array of different bodies, including the Competition Bureau applying the *Competition Act*; the Investment

Review Division of the Ministry of Industry ("Investment Canada") applying the *Investment Canada Act*; the Ministry of Transport ("Transport Canada") and the Canadian Transportation Agency ("Agency") applying the special scheme for mergers of federal transportation undertakings found in the *Canada Transportation Act*; and, the federal cabinet.[2]

Part A focuses on the merger review process, which involves the dual jurisdiction of (i) the Canadian Competition Bureau ("CCB")[3] in respect of competition matters governing all transactions (whether the parties operate federal or provincial transportation businesses) and (ii) Transport Canada/Agency in respect of public interest matters in the context of transactions involving federal transportation undertakings and the Agency in respect of public interest matters regarding air transportation undertakings. Part B addresses foreign investment review and policy in the same context.

A. Merger Review

Since 2007, transactions involving a federal transportation undertaking are subject to a dual-track process of federal regulatory review involving the merger review scheme administered by the CCB under the Competition Act and the transportation-specific regulatory scheme found in the Canada Transportation Act. If a transaction involves the acquisition of a transportation business governed within provincial constitutional authority, only the CCB has constitutional authority.

1. Dual-Track Jurisdiction

The dual review scheme requires the CCB to identify to the Minister of Transport any competitive concerns that may result from a transaction involving a transportation undertaking and requires the Minister of Transport to identify any concerns with respect to the public interest in relation to national transportation. On recommendation of the Minister, the federal Cabinet may approve the transaction if satisfied that it is in the public interest to do so. The Competition Tribunal, to which the CCB ordinarily brings applications to challenge a merger, may not make an order addressing competitive concerns of such a transaction if Cabinet approves the transaction. Absent Cabinet approval, however, the transaction would be subject to CCB challenge in the Competition Tribunal in the same manner as mergers in other sectors.

All mergers are subject to the substantive merger review provisions of the *Competition Act*, which permit the Commissioner of Competition to apply to the Competition Tribunal for a determination as to whether a merger prevents or lessens, or is likely to prevent or lessen, competition substantially (SLC). Mergers above certain monetary thresholds (Part IX mergers) are subject to mandatory notification, with few exceptions.

Practically, parties engaged in such mergers are subject to prolonged lead times to closing. The rationale for a dual merger review scheme may have arisen in the context of two significant mergers, one involving Canada's two main airlines and the other involving two cross-border railways. The first saw the suspension of the

Competition Act and a somewhat politicized process and outcome, while the second, had it not been subject to a moratorium in the United States, would have occurred without oversight by either Transport Canada or the Agency.

2. The Dual-Track Process Step-By-Step

Parties to a proposed merger involving a transportation undertaking that are required to notify the Bureau under the *Competition Act* also must notify the Minister of Transport (and the Agency in the case of air transportation undertakings). They must also provide a submission discussing the public interest.

(i) The CCB process: With limited exceptions, the CCB's process requires that parties to a merger notify the CCB where both the size of parties and the size of transaction thresholds are exceeded and, in the case of share transactions, the percentage of issued voting shares acquired exceeds prescribed limits. The size of parties to the transaction test is C$400 million. The size of transaction test in 2015 is C$86 million. The voting shares acquired in the case of public companies is 20%+1 (or if more than 20% is already held, 50%+1) and in the case of private companies is 35%+1 and 50%+1, respectively. A merger involving all of Canadian National or Canadian Pacific Railway would easily exceed the relevant thresholds and those involving the Canadian operations of the other Class I railways might also exceed those thresholds.

Assuming a merger is notifiable, all of the parties to the merger are required to submit prescribed information before closing or completing the transaction. The CCB has 30 days within which to determine whether it will make a supplemental information request, failing which the parties may complete the transaction, usually at risk of subsequent review within the year following closing. Any merger involving Class I railways almost certainly would involve such a request as well as a request for further delay.

The CCB must, within 150 days after the original filing date, or any longer period the Minister of Transport allows, report to the Minister and the parties to the transaction of "any concerns regarding potential prevention or lessening of competition that may occur". Immediately after the Minister receives this report, the report must be made public. The report to the Minister is a deviation from the normal merger review process, which might normally lead to an application before the Competition Tribunal challenging the merger.

(ii) The Transport Canada Process: If the Minister is of the opinion that the proposed transaction does not raise public interest issues, she must give notice of that opinion within 42 days after a person gives notice of the transaction. If the public interest arises, the Minister is given some discretion to further examine the matter, including seeking further reports from the Agency or third parties.

After receipt of the CCB's report and any report the Minister directs from the Agency or a third party, in a part of the process that has no time limits, the Minister must:

- consult with the CCB regarding any overlap between: (a) any public interest concerns of the Minister; and (b) any concerns raised in the Commissioner's report, and

- request the parties to the transaction to address public interest concerns with the Minister and SLC concerns with the CCB.

The parties to the transaction must then:

- after conferring with the Minister regarding public interest concerns, inform the Minister of any measures they are prepared to undertake to address those concerns, and

- after conferring with the Commissioner regarding any concerns that the Commissioner has regarding SLC concerns, inform the Commissioner of any measures they are prepared to undertake to address those concerns, including, in each case, proposing revisions to the transaction.

Before making a recommendation to the federal Cabinet, the Minister must obtain the CCB's assessment of the adequacy of any undertaking proposed by the parties to address the SLC concerns and the effects of any proposed revisions to the transaction on those concerns.

(iii) Cabinet's Role: If Cabinet is satisfied that it is in the public interest to approve the proposed transaction, taking into account any revisions to it proposed by the parties and any measures they are prepared to undertake, Cabinet may, on the recommendation of the Minister, approve the transaction and specify any terms and conditions that Cabinet considers appropriate.

(iv) Role of Agency in Airline Transactions: As noted above, for transactions involving air transportation undertakings such as airline mergers that are notifiable to the Bureau, parties must also give notice to the Agency. Further, the Agency must determine whether the transaction would result in an undertaking that is "Canadian", meaning that the entity "is controlled in fact by Canadians and of which at least seventy-five per cent, or such lesser percentage as the Governor in Council may by regulation specify, of the voting interests are owned and controlled by Canadians." Below, we discuss other foreign investment restrictions, separate from and in addition to the foregoing.

3. <u>Substantive Principles Governing Transportation Mergers</u>

The CCB assesses substantive competitive concerns for all transactions using the SLC test, which is applied to all relevant markets affected by the transaction. If it determines there are grounds for challenging, the CCB has exclusive authority to bring an application to the Competition Tribunal challenging the merger. The CCB employs an analytical framework similar to US concepts. Considerations for the CCB and the Tribunal include the extent and effectiveness of foreign competition, likelihood of business failure in the absence of the merger, availability of acceptable substitutes for products supplied or purchased by the parties, current

barriers to entry into relevant markets, whether the transaction would remove a vigorous and effective competitor, the extent of effective remaining competition after the transaction, change and innovation in the relevant markets, and other factors. Even an anti-competitive merger may be permitted if the efficiencies gained by the merger outweigh and offset the anti-competitive harm and if the gains likely would not be achieved if the Tribunal were to order the CCB's proposed remedy, such as blocking, divestiture or dissolution, for example. The CCB's Merger Enforcement Guidelines are similar to those employed in the United States.

(i) CCB Review of Railway Transportation Undertakings: Antitrust approaches used to analyze network industries, such as telecommunications, broadcast, energy transmission, *etc.*, are a good place to start. In addition, past transactions provide some guidance. The regulatory environment in which transportation undertakings operate also has a significant impact on antitrust enforcement.

The acquisition of the railway of the provincial government-owned British Columbia Railway Company by the federal Canadian National Railway in 2004 is one of the few actual rail mergers that engaged the Bureau in a significant way. Despite clearly overlapping portions of the two railways, the 2-to-1 merger was ultimately approved. To do so, CN entered into a 10 year consent agreement with the CCB, whereby the shipper customers who had enjoyed the benefits of two railways for some Origin/Destination (O/D) pairs obtained an extraordinary remedy that preserved rates allowing access to the Vancouver gateway where those customers would then have access to a railway other than CN. This merger demonstrated that even an overlapping merger-to-monopoly could be justified under Canadian competition law.

Since then, the Canadian Pacific Railway (the smallest of the six main Class I railways) has been the subject of merger rumors on at least two occasions. Whether either of them could pass a merger analysis today remains to be seen, but the 2007 amendments to the *Canada Transportation Act* allowing for Cabinet review upon the Minister's consent almost certainly would be invoked in any merger involving either CN or CP, particularly if the merging party were a current market participant (strategic buyer). Despite that power, there is no basis on which to conclude that such a merger would not be approved. Even a financial buyer of, say, infrastructure assets, might face greater scrutiny today than in the past, due to recently enacted investment review powers permitting Cabinet to make essentially political decisions about the desirability of certain buyers on the basis of national security interests. But, the fact of the legislative Cabinet power does not obviously lead to the conclusion that such a merger would be disapproved.

Not surprisingly, acquisitions by new entrants, especially financial rather than strategic buyers, would scarcely raise any competitive issues. However, strategic buyers tend to have more to gain from such mergers and, perhaps, they are more logical buyers from a pricing perspective. Even in those cases, there may be few antitrust reasons to prevent a merger of two railways, even large railways. There are several reasons for this.

First, current merger analysis largely ignores the degree of competition pre-merger and instead focuses on whether the transaction gives rise to an SLC in relevant product and geographic markets. Both the fact of the future looking inquiry into competition and the substantiality of any prevention or lessening, allows for markets already subject to very high degrees of market power to become even less competitive, as long as the degree is not substantial. Logically, in markets already characterized by monopoly, there can be no prevention or lessening upon a merger, much less a substantial prevention or lessening.

Second, few railways actually overlap as a whole. For the six largest North American Class I railways, the geographic areas of operation are roughly divided into three zones of North America: two east of the Mississippi (CSX and Norfolk Southern), two west of the Mississippi (BNSF and Union Pacific) and two in Canada (Canadian National and Canadian Pacific). They all converge on Chicago, and find themselves sharing parts of the Mississippi Valley. In 1998, when BNSF Railway tried to merge with Canadian National Railway, the parties not surprisingly described it as an end-to-end merger (i.e., one joining two systems that connected with one another but did not operate many lines serving the same areas). Indeed, there was little geographic overlap. The two railways touched at a few places (Vancouver and Winnipeg in Canada, and a few more in the United States, including Chicago). At that time, there was no effective way to assess the merits of a rail merger in Canada, because there was not a public interest test.[4] However, the US Surface Transportation Board ("STB") placed a moratorium on Class I mergers, effectively killing that deal and placing a chill on future deals. What conclusions one may draw from the STB's actions are unclear, but it appears that "end-to-end" is not a sufficient justification. And, of course, the end-to-end analysis leaves little to recommend it. In fact, a much better way to assess overlap is to look at the degree of competition at origin and destination ("O/D"), with each as a market. Indeed, O/D pairs tell us a lot about the degree of captivity of rail shippers and receivers, as they do in the airline industry and network industries generally. Certainly, not all O/D pairs are created equal and analyzing a network market requires concerted effort to assess the harm a merger could cause in each of those markets, if any.

Third, Canadian competition law permits otherwise anticompetitive mergers where the efficiencies from the merger are greater than, and offset, its anticompetitive effects. Thus, it may be that a railway merger would achieve such efficiencies, perhaps particularly because railways exhibit characteristics of a natural monopoly. Despite market power on some segments of merging railway companies, that market structure might just be the most resourceful and efficient, especially if underused railway lines that do not benefit from economies of scale were to achieve greater economies of density.

Fourth, regulatory remedies designed to address the market power of railway companies may countervail antitrust concerns upon a merger. The Canadian regulatory scheme found in the *Canada Transportation Act* allows federal railway companies to set rates and conditions of service unilaterally, by issuing tariffs that once issued are presumed lawful. Indeed, the only way for a private party

to challenge a rail freight rate in Canada is by invoking final offer arbitration. There are at least three ways to challenge conditions of service (by complaint to the Agency after the fact or by invoking one of two types of arbitration). It is tempting to conclude that the fact of the existence of these mechanisms might justify otherwise problematic mergers. But the remedies are not what they seem. Despite the obvious market power a railway company may enjoy over vast segments of its railway system, there is no *ex ante* oversight of its rates or terms of service. The price of invoking arbitration is high, both in terms of transaction costs and in terms of the possibility of retribution, particularly for the most captive rail shippers. Consequently, there are few challenges of rates and service. Further, some of the remedies have been found inoperative, others are easily frustrated by railway companies, some are available only to certain shippers, and still others have never been granted in favour of shippers.

(ii) CCB Review of Air Transportation Undertakings: The CCB has made submissions to the OECD stating that it has applied certain theories and analyses expressed in its challenge in Air Canada/United Continental. In those submissions, the CCB states that

> [t]he merger provisions of the [Competition] Act are sufficiently broad to allow the Bureau to review and challenge not only "traditional" airline mergers but also certain "non-traditional" airline mergers such as joint ventures that involve close cooperation between competitors. The Bureau's experience in the Air Canada/United Continental Holdings Matter . . . is an example not only of enforcement actions taken in respect of a "non-traditional" airline merger and certain pre-existing alliance agreements, but also of the types of remedies that the Bureau may rely on in respect of such mergers and alliance agreements." The OECD submissions contain a fair bit of guidance in relation to mergers (and other conduct) involving air transportation undertakings.[5]

(iii) Public Interest Review by the Minister of Transport: Transport Canada would apply a public interest standard. It released draft guidelines in 2008 setting out a list of public interest factors, including economic (impact on prices and employment), social (impact on low-income workers and Canadian sovereignty), environmental, security, and safety factors. In particular, the draft guidelines contemplate that Transport Canada's consideration of economic factors might include (i) impacts on users of the transportation system, with particularly emphasis on prices and the levels of and access to services and facilities, (ii) impacts on communities, including, perhaps, impacts on labour and employment, (iii) impacts on other transportation undertakings, which might include intermodal connections and freight consolidators, (iv) impacts on Canada itself, including impacts on trade, gateways and corridors, and, possibly, impacts on taxation and government expenditures, and (v) impacts on the undertaking involved, such as the financial viability of the resulting entity. These guidelines were not finalized, but Transport Canada personnel treat them as if they are final and binding.

(iv) Cabinet Review: The federal Cabinet would likely employ the draft factors of Transport Canada, or others, in its determination. There is no guidance in the *Canada Transportation Act*, or elsewhere, for situations where the Minister and the Bureau reach different conclusions about public interest issues that relate to competition. It is entirely possible that the Minister of Transport would recommend approval for a transaction that raises serious horizontal competition issues. For example, when Canadian Airlines attempted to acquire Air Canada in 1999, the federal Cabinet suspended the application of the entire *Competition Act* for ninety days under the statutory authority found in the *Canada Transportation Act* to address extraordinary disruptions to the national transportation system. That same statutory power was recently invoked by the current government to compel two federal railways to transport mandated quantities of grain on pain of financial penalties.

B. Foreign Investment Policy

The *Investment Canada Act* (ICA) applies when a non-Canadian acquires control of an existing Canadian business or commences a new business activity in Canada.

1. Thresholds and Control Tests

Non-Canadian investors in such transactions must either notify Investment Canada or, if significant financial thresholds are exceeded, apply for review to determine whether the investment is of "net benefit to Canada". While review thresholds vary depending on the country of origin of the investor, the form of investment and the type of business conducted by the target company, the monetary threshold that has applied is C$366 million in book value of assets (2015 threshold) for direct non- cultural investments by investors from WTO countries. There are several "acquisition of control" tests, but as a general rule, the *ICA* primarily focuses on the acquisition of interests representing one third or more of the whole.

On March 25, 2015, long-awaited amendments to the *Investment Canada Regulations* and the *National Security Review of Investments Regulations* were published.[6] These amendments raise the key foreign investment review threshold and change the valuation methodology from asset value to "enterprise value" for most transactions.[7] They also expand the information required to facilitate assessment of national security and state-owned enterprise issues and extend the theoretical maximum length of national security reviews under the *Investment Canada Act* (*ICA*).

The enterprise value review threshold will be C$600 million for a two-year period, C$800 million for a further two-year period, and then C$1 billion, subject to inflationary indexing in subsequent years. The situations where enterprise value will apply, and the manner in which it is to be calculated, are summarized in the table below:[3]

Transaction	Non-SOE WTO Investor	SOE WTO Investor
Acquisition of publicly-traded shares	Enterprise value = market capitalization (on a published exchange) + liabilities – cash and cash equivalents*	Asset value of the Canadian entities
Acquisition of privately-held shares	Enterprise value = acquisition value + liabilities – cash and cash equivalents	
Acquisition of assets	Enterprise value = acquisition value + liabilities assumed – cash and cash equivalents	

2. Process

The obligation to apply for review falls on the investor that acquires control. The application consists of prescribed information required of the investor: the investor's ultimate origin, attributes of the Canadian business and declarations regarding how the investment by the investor will be of net benefit to Canada. The waiting period for approval or deemed approval is 45 days after receipt of a properly documented application, subject to several grounds for extension. In the case of a merger of Class I railways, one would expect delay. It is unlawful to complete a transaction in the absence of approval or deemed approval. In the end, and within the time frames, the Minister is required to notify the investor that, having taken into account any information, undertakings and representations referred to the Minister by the Director of Investments and the relevant factors set out in the ICA, the Minister is satisfied that the investment is likely to be of net benefit to Canada, failing which the Minister is deemed to have done so.

3. Net Benefits test

The *ICA* states that "the factors to be taken into account, where relevant," are

a. the effect of the investment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada and on exports from Canada;

b. the degree and significance of participation by Canadians in the Canadian business or new Canadian business and in any industry or industries in Canada of which the Canadian business or new Canadian business forms or would form a part;

c. the effect of the investment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;

d. the effect of the investment on competition within any industry or industries in Canada;

e. the compatibility of the investment with national industrial, economic and cultural policies, taking into consideration industrial, economic and cultural policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the investment; and

f. the contribution of the investment to Canada's ability to compete in world markets.

Each case is examined on its merits and is too fact dependent to draw conclusions about the manner in which a particular merger in the transportation sector might unfold. The experience is that very few investments are prevented.

4. National Security

Under the *ICA*, the Minister of Industry may initiate a review of a transaction upon determining that it may be injurious to national security (although such reviews have been extremely rare to date). The Minister may initiate such a review regardless of the size of the transaction, the nationality of the investor and even if the transaction involves an acquisition merely of a minority interest. To date, no guidance has been provided as to the types of transactions that may be injurious to national security, although the the *National Security Review of Investments Regulations* now require filing information to identify national security and SOE issues in connection with (i) the investor's board, (ii) the identity of the five highest paid officers and each person or entity owning 10% or more of investor's equity or voting interest, (iii) ownership or influence by foreign state, including direct or indirect ownership interests in the investor, the name of the state, the nature and extent of interest in the investor, whether the foreign state owns a third or more of investor's voting interests and no other party has a controlling interest, all special rights or powers of foreign state (power to appoint members to investor's board, number of members state has appointed and total number it may appoint), the power to appoint the CEO or senior management, special veto or other decision-making rights attached to the foreign state's interest, etc.

The Canadian federal government states that it maintains a policy of welcoming foreign investment. Indeed, the vast majority of investments into Canada occur without any significant government oversight. Since the ICA was enacted in 1985, the Canadian government has approved nearly 20,000 transactions. In 2011, for example, there were 649 direct and indirect acquisitions and investments, with 96.8% of these occurring via notifications and only 3.2% requiring review and approval. Very few transactions have been rejected. October 7, 2013 marked the first time that the Canadian federal government expressly rejected a proposed foreign investment on the basis of the national security provisions that were added to the ICA in 2009. Although the basis for the rejection was not detailed by the Minister due to confidentiality concerns, another Cabinet Minister commented that "[w]e have to listen to the advice that we get from intelligence and police security agencies (and) that's what we're doing." Reports indicated that the review considered other previous investments by one of the investor's Egyptian principals in North Korea. At least one previous transaction involving an offshore uranium

project is thought to have been abandoned in part due to the commencement of a national security review.

The approach parallels that of the U.S. *Foreign Investment and National Security Act*, which expressly covers, among other sectors, critical technology and infrastructure. The Canadian federal government may employ the national security provisions of the *ICA* to address more than just narrow military or terrorism issues.

5. Other Restrictions on Investment

In addition, other Canadian federal and provincial statutes may set restrictions on investments, including those involving mergers of transportation sector businesses. As noted above, acquisitions of certain air transportation undertakings are limited to a maximum of 75%. Acquisitions of provincial transportation sector businesses may be subject to statutes governing entities within provincial legislative spheres of competence.

6. Analyzing Transportation Investments

Any merger of the substantial parts of the respective businesses of Class I railways would exceed the new thresholds. That is less likely the case for air transportation undertakings. There is no specific maximum non-Canadian ownership threshold for railways or trucking, unlike aviation (see above) and, to a certain degree, marine. In fact, Canadian federal railways in particular are characterized by significant foreign ownership, primarily American.

Two significant questions arise with respect to mergers involving transportation industry businesses: (1) would any such transaction pass the regular "net benefits" test; and, (2) would any such transaction be more or less likely subject to a national security review under the ICA than other transactions?

Transactions that involve State-Owned Enterprise investors likely would receive very careful scrutiny and even transactions that fall below the thresholds, whether or not involving State-Owned Enterprise investors likely would be subject to national security reviews. At the very least, they would be more likely subject to such a review than non-transportation investment transactions.

1 François Tougas, Partner, Co-Chair Transportation Group, Co-Chair, Competition & Antitrust Group, McMillan LLP, Vancouver, British Columbia, and Adjunct Professor of Competition Law & Policy, Faculty of Law, University of British Columbia; Ryan Gallagher, Principal at McMillan LLP, Transportation Group, Vancouver, British Columbia.

2 The several provinces also regulate, to some degree, mergers of provincial transportation businesses within their sphere of constitutional authority. Other federal and provincial statutes govern business combinations involving marine vessel acquisitions and trucking businesses.

3 For ease of reading, we use the expression "CCB" throughout whether speaking of the Competition Bureau or the Commissioner of Competition.

4 The public interest test that had existed up until 1996 was repealed, only to be re-enacted in 2007, as described above.

5 In its "Submission to the OECD Competition Committee Roundtable on Airline Competition", the Bureau stated, in relation to mergers:

> When reviewing mergers in the airline industry … the Bureau has generally focused on unilateral theories of harm; namely, the elimination of actual or future rivalry between the parties on both direct and indirect routes where they overlap (or would likely have overlapped but for the transaction). The Bureau has also evaluated the extent to which transactions between airlines are likely to lessen or prevent competition on routes where one of the merging parties competes with an alliance partner of the other merging party (even though this party may not itself be present on those routes). Market definition and the analysis of barriers to entry for the purposes of merger review … [focus on differences between leisure and business travel, for example].
>
> … In recent reviews, the Bureau has placed an increased emphasis on the econometric analysis of ticketing and route performance data, including cross sectional analysis and route entry/exit analysis, in order to more precisely understand the degree of rivalry between parties and the likely effects of a transaction … the Bureau will also carry out demand estimations to facilitate the use of merger simulation techniques.

6 Effective April 24, 2015

7 The increased monetary thresholds do not apply to acquisitions by state-owned enterprises, investors from non-WTO countries or investments related to Canada's cultural heritage or national identity.

Panel Compares New Net Neutrality Requirements to Regulation in Other Network Industries

By Robert M. Nichols

On Tuesday, March 3, the Transportation & Energy Industries (TEI) Committee hosted a panel discussion of the net neutrality rules announced by the Federal Communications Commission in late February. The panel was moderated by David Meyer (Morrison & Foerster LLP) and featured former FCC General Counsel Sam Feder *Jenner & Block LLP), noted energy attorney Sandra Rizzo (Arnold & Porter LLP), and former STB General Counsel Raymond Atkins (Sidley Austin LLP). The panel's objective was to explore regulatory systems in other network industries, compare and contrast these systems with the FCC's net neutrality policy, and discuss how such systems would apply to carriers of internet traffic.

First, David Meyer introduced the panel and outlined the FCC's expected new rules, noting expected bright-line prohibitions on blocking legal content, throttling network speeds, and paid prioritization of content. Earlier FCC rules prohibiting blocking and paid prioritization under Title I of the Communications Act were struck down by the D.C. Circuit in 2014. The new FCC rules utilize Title II rather than Title I, giving the FCC greater authority but also subjecting carriers to new rules, including a general prohibition on unjust or unreasonable practices. However, the FCC does exempt internet carriers from the rate regulation or unbundling requirements of Title II.

Next, each of the panelists spoke to how similar issues were regulated in their sphere of expertise. Sam Feder began by discussing telecommunications, the industry to which Title II was already applied. Sam discussed the history of telecom regulation, including rate regulation by the FCC and forced unbundling, where incumbent local exchange carriers were forced to provide competitors with

cost-based access to "last-mile" transmission. Although internet carriers will face many of the same requirements as telecommunications carriers, such as no blocking and "just and reasonable" practices, they will not face these requirements. Notably, however, internet carriers will be prohibited from paid prioritization of content, which was traditionally allowed in telecommunications so long as everybody receives a base level of service.

Sandra Rizzo next discussed regulatory requirements in the energy industry, starting with the history of state and federal regulation and creation of the Federal Power Commission to regulate interstate transmission. Owners of transmission lines are required to allow non-discriminatory interconnection both from affiliated and un-affiliated generators. Sandra noted that transmission rates are determined by an agency proceeding. However, as with telecommunications (and contrary to the net neutrality principles), transmission owners are allowed to provide different levels of service, such as "firm" service that provides priority in periods of high demand.

The third speaker, Raymond Atkins, spoke to railroad regulation. Ray noted that railroads were subject to strict regulation after perceived abuses in the late 1800s led to the creation of the Interstate Commerce Commission (ICC). For many years, federal regulations prohibited the railroads from discriminating in rates and services, similar to a prohibition on paid prioritization. Ray described how the rail industry changed over time, such that the regulations against discrimination were slowly transformed into regulatory barriers to competition. These changes in the industry and the failing health of the railroads prompted Congress in 1980 to take steps to promote competition and reduce the degree of federal regulatory control. Though there are still mandatory obligations regarding interchange and crossing of other lines, the Surface Transportation Board (successor to the ICC) now only regulates rates where there is no effective competition. And carriers are permitted to offer different service levels (i.e., paid prioritization) so long as they can meet the "reasonable" service requirements of their common carrier obligation.

After each panelist spoke, there was a brief discussion among the panelists and the audience. One audience member asked which of these regulatory systems was most appropriate for the internet. The panelists agreed that there was no simple solution but argued that it was odd to see a move to strict internet regulation when other network industries have been rolling back regulation and allowing greater commercial flexibility. The FCC's ban on paid prioritization was especially controversial, as different levels of service could be economically efficient in many circumstances and were allowed in telephone, power, and rail industries.

Developments
Energy

EU Approves BP's Acquisition of Statoil Fuel and Retail Aviation AS

In December 2014, BP's acquisition of Statoil Fuel and Retail Aviation AS (SFR Aviation) received approval from the European Commission after BP agreed to the divestment of SFR Aviation's operations at four Scandinavian airports. The Commission determined that there were high barriers to both de novo entry and expansion by existing players because of the difficulty in accessing key infrastructure. With the divestitures, the Commission concluded that the deal would not raise competition concerns as the combined entities' activities would possess little geographic overlap. For more information, see the European Commission's press release: http://europa.eu/rapid/press-release_IP-14-2681_en.htm.

Israeli Antitrust Regulators Might Declare Noble Energy and Delek Group a Cartel

In December 2014, Israel's antitrust authority stated that it might declare Noble and Delek a cartel, which would have implications for both companies' holdings in the Tamar and Leviathan fields. No decision has been made as of March 24, 2015, but the companies' prior investments in developing the fields could be at stake with a cartel designation. The fields are estimated to possess 32 trillion cubic feet of gas, enough to supply Israel's domestic demand for decades while also allowing for ample exports to neighboring countries.

U.S. Supreme Court Hears Arguments Regarding Federal Preemption of State Antitrust Claims

In January 2015, the U.S. Supreme Court heard arguments in *ONEOK Inc v. Learjet Inc.*, regarding whether the Natural Gas Act preempts state antitrust claims made in light of the western U.S. energy crisis of 2000-2002. Specifically, the case focuses on whether the Federal Energy Regulatory Commission's jurisdiction over wholesale prices under the Act extends to retail transactions. A ruling is expected by June. The case is *ONEOK Inc v. Learjet Inc.*, case number 13-271, in the Supreme Court of the United States.

DOJ Investigates the Baker Hughes-Halliburton Merger

In February 2015, DOJ requested additional information from Baker Hughes and Halliburton in its investigation of the merger between two of the top three oil services companies. The transaction would make the combined company the largest in the industry, ahead of the current largest such company, Schlumberger Limited. As of March 24, 2015, Halliburton is looking to sell almost $10 billion in assets as a prerequisite for DOJ approval. Both companies must eliminate at least four groups of overlapping business lines for the merger to proceed.

Prominent Energy Companies Face Antitrust Lawsuit in Pennsylvania

In February 2015, several landowners filed a lawsuit against prominent energy companies drilling for oil on their respective lands in the Middle District of Pennsylvania. The landowners allege that Chesapeake Energy, Williams Partners, and other energy companies colluded in the market for gas gathering services, violating antitrust laws (among other theories). The case is *A&B Campbell Family LLC et al. v. Chesapeake Energy Corp. et al.*, case number 3:15-cv-00340, in the U.S. District Court for the Middle District of Pennsylvania.

Siemens Bid for Dresser-Rand Encounters EU Investigation

In March 2015, Siemens faced an inquiry by the EU over its acquisition of oil and gas equipment firm Dresser-Rand. If consummated, the proposed acquisition would reduce the number of suppliers of turbo compressors and drivers and turbo compressor trains from three to two. General Electric is the other market participant. The EU is expected to rule on the deal by June 19.

FTC Approves Par-Mid Pac Acquisition

In March 2015, with a 4-1 vote (with Commissioner Wright dissenting), the Federal Trade Commission approved Par Petroleum Corp.'s acquisition of Koko'oha Investments Inc.'s Mid Pac Petroleum LLC, and required Par to give up storage and throughput rights at Mid Pac's Oahu terminal. The Commission was concerned that Par could have used these rights to make it more difficult for its competitors to import gasoline, leading to higher gasoline bulk supply prices (and in turn, higher gasoline prices for consumers in Hawaii). The Commission's proposed consent order requires Par to terminate its storage and throughput rights within five days of the merger. For more information, see the FTC's press release: https://www.ftc.gov/news-events/press-releases/2015/03/ftc-puts-conditions-par-petroleum-corporations-acquisition-mid.

Transportation

NYK Becomes the Third Company to Plead Guilty in DOJ's Ocean Shipping Investigation

In December 2014, the DOJ announced that the Japanese corporation Nippon Yusen Kabushiki Kaisha (NYK) agreed to plead guilty and pay a $59.4 million criminal fine for its involvement in a conspiracy to fix prices, allocate customers, and rig bids of international ocean shipping services for roll-on, roll-off cargo. The charge against NYK is the result of an ongoing federal antitrust investigation into the industry, in which NYK is the third company to agree to plead guilty. For more information, see the DOJ's press release: http://www.justice.gov/opa/pr/third-company-agrees-plead-guilty-price-fixing-ocean-shipping-services-cars-and-trucks.

United Airlines and Orbitz Serve "Unfair Competition" Suit Against a 22 year old Entrepreneur

In December 2014, United Airlines and Orbitz served a lawsuit against a 22 year old entrepreneur. Both companies allege "unfair competition" and demand $75,000 in lost revenue as a result of the entrepreneur's ticketing company, "Skiplagged." The company operates according to a booking ploy known as "hidden city" ticketing. The case is *United Airlines Inc. v. Zaman*, case number 14-cv-9214, in the U.S. District Court for the Northern District of Illinois.

European Commission Sends a Statement of Objections to Railway Company AB Lietuvos Geležinkeliai

In January 2015, the European Commission sent a statement of objections to Lithuanian railway incumbent AB Lietuvos geležinkeliai (LG) based on suspicions of it limiting competition in Lithuanian and Latvian rail markets. The alleged violation occurred in 2008 when LG suspended traffic on a railway track running between Lithuania and Latvia and later dismantled the track. A statement of objections is a formal step in Commission investigations where the Commission informs the concerned parties in writing of the objections raised against them, allows the companies to examine the documents in the Commission's investigation file, and allows the companies to respond. As of March 24, 2015, no update has been reported. For more information, see the European Commission's press release: http://europa.eu/rapid/press-release_IP-15-2940_en.htm.

Federal Court Curtails US Airways Antitrust Lawsuit Against Sabre Corporation

In January 2015, the U.S. District Court for the Southern District of New York curtailed an antitrust lawsuit brought by US Airways, Inc., now part of American Airlines Group, Inc., against Sabre Corp. The lawsuit alleges that Sabre Corp. charged inflated booking fees and suppressed competition. US Airways initially sought treble damages on the $317 million to $482 million it claims in lost profits and overcharges from Sabre from April 21, 2007 to March 31, 2014. The court's ruling narrowed the time period US Airways could claim damages to February 23, 2011 to October 30, 2012, when American reached its own agreement with Sabre. The case is *US Airways, Inc. v. Sabre Holdings Corp, et al.*, case number 11-02725, in the U.S. District Court for the Southern District of New York.

EU General Court Rejects easyJet Antitrust Complaint, Clarifying the European Network of Competition Authorities' Function

In January 2015, the General Court of the European Union determined that the European Commission was justified in rejecting easyJet Arline Co. Ltd.'s complaint on the basis that it was already evaluated by a national competition authority. In 2008, easyJet filed a complaint with the Netherlands competition authority against the pricing policy of Schiphol Airport. It filed a subsequent complaint in 2011 with the European Commission. The General Court's decision clarified that the Commission may, in rejecting a complaint, rely on the fact that a Member State's

competition authority previously rejected the complaint when its review was conducted in light of EU competition law. For more information, see the General Court's press release: http://curia.europa.eu/jcms/jcms/P_152969/.

Aer Lingus Recommends a Takeover Offer from International Airlines Group

In January 2015, the Irish flag carrier Aer Lingus said its board had recommended that shareholders accept a takeover offer from the International Airlines Group, which is the parent of British Airways and Iberia of Spain. The deal is subject to EU antitrust approval. As of March 24, 2015, the two parties appear close to finalizing a deal, though the Irish government has requested that International Airlines Group extend its initial guarantee to keep Aer Lingus's 23 pairs of Heathrow airport slots that focus on Irish routs open from five years up to ten years.

More Guilty Pleas and Indictments in the DOJ Auto-Parts Investigation

In February 2015, the DOJ announced that Japanese automotive parts manufacturer Sanden Corp. has agreed to plead guilty and to pay a $3.2 million criminal fine for its role in a conspiracy to suppress and eliminate competition for the purchase of certain compressors. Sanden has also agreed to cooperate in the DOJ's ongoing investigation into price fixing and bid rigging in the automotive parts industry. Over 30 companies as well as 50 individuals have been charged in that investigation, with all of the charged companies having pled or agreed to plead guilty and to pay a fine. For example, February 2015 also saw two former executives of Mitsuba Corporation indicted for their participation in an automotive-parts price-fixing conspiracy. For more on the guilty pleas and indictments, see the following DOJ press releases: http://www.justice.gov/atr/public/press_releases/2015/311396.htm; http://www.justice.gov/atr/public/press_releases/2015/311686.htm.

K-Line Executive Pleads Guilty and Receives Jail Time and a Fine in DOJ's Ocean Shipping Investigation

In February 2015, the DOJ announced that two executives of Japan-based Kawasaki Kisen Kaisha Ltd. (K-Line) pleaded guilty and were sentenced to prison in the Antitrust Division's ocean shipping investigation. The first executive received a sentence of 18-months jail time and must pay a $20,000 criminal fine for his involvement in a conspiracy to fix prices, allocate customers, and rig bids of international ocean shipping services for roll-on, roll-off cargo. The second executive received a 14-month prison sentence and must pay a $20,000 fine. Their sentences mark the first two to be imposed against individuals in the ocean shipping investigation. For more information, see the DOJ's press release: http://www.justice.gov/atr/public/press_releases/2015/311443.htm.

Motion to Dismiss Denied in Oxbow Carbon Minerals LLC Antitrust Lawsuit

In February 2015, the U.S. District Court for the District of Columbia denied Union Pacific Railway Company and BNSF Railway Company's motion to dismiss a suit by Oxbow Carbon Minerals LLC and other related companies. While the plaintiffs' initial complaint was dismissed, their amended complaint's allegations—that Union Pacific and BNSF engaged in a price-fixing conspiracy through a uniform fuel surcharge—was found to sufficiently state a claim. The case is *Oxbow Carbon & Minerals LLC et al. v. Union Pacific Railroad Co. et al.*, case number 1:11-cv-01049, in the U.S. District Court for the District of Columbia.

CSR Corp and CNR Corp's Merger Receives Antitrust Approval

In March 2015, China's two largest train makers, CSR Corp and CNR Corp, announced that their proposed merger received approval from antitrust regulators in Australia, Germany, Pakistan, and Singapore. These approvals were granted without any additional obligations or remedies.

The merger still needs to be approved by several Chinese regulators, including the Ministry of Commerce. CSR and CNR agreed terms last December for the merger, which is intended to make China's rolling stock industry more competitive in international markets.

DOJ Garners Third Sentence in Antitrust Division's Ocean Shipping Investigation

In March 2015, DOJ announced that an executive of Japan-based Nippon Yusen Kabushiki Kaisha (NYK) pleaded guilty and was sentenced to serve a 15-month prison term and pay a $20,000 criminal fine for his involvement in a conspiracy to fix prices, allocate customers, and rig bids of international ocean shipping services for roll-on, roll-off cargo. His sentence marks the third to be imposed against an individual in the Antitrust Division's ocean shipping investigation. For more information, see the DOJ's press release: http://www.justice.gov/atr/public/press_releases/2015/312415.htm.

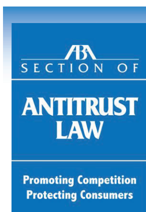
Coach USA, City Sights, and Twin America Reach a Settlement with DOJ and the New York Attorney General

In March 2015, Coach USA Inc., City Sights LLC, and their joint venture, Twin America LLC, have reached a settlement with the Department of Justice and New York State Attorney General to remedy competitive concerns in the New York City hop-on, hop-off bus tour market. The transaction forming Twin America was not required to be reported under the HSR Act, and neither the DOJ nor the State of New York learned about the joint venture until after its consummation. The proposed settlement, which if approved resolves a 2012 lawsuit, requires Twin America to divest certain bus stop authorizations and requires the defendants to disgorge $7.5 million in profits they obtained from the operation of their illegal joint venture. For more information, see the DOJ's press release: http://www.justice.gov/atr/public/press_releases/2015/312541.htm.

Third K-Line Executive Pleads Guilty in DOJ Ocean Shipping Investigation

In March 2015, the DOJ announced that a third executive of Japan-based Kawasaki Kisen Kaisha Ltd. (K-Line) has pleaded guilty and been sentenced to serve an 18-month prison term and pay a $20,000 criminal fine for his involvement in a conspiracy to fix prices, allocate customers, and rig bids of international ocean shipping services for roll-on, roll-off cargo. His sentence marks the fourth to be imposed against an individual in the Antitrust Division's ocean shipping investigation. For more, see the DOJ's press release: http://www.justice.gov/atr/public/press_releases/2015/312744.htm.

APPENDIX

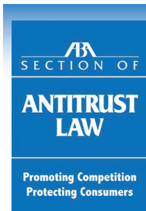


The New Net Neutrality Rules: How Have Other Regulated Fields Tackled Similar Issues?

March 3, 2015

Moderator: **David L. Meyer**
Panelists: **Raymond A. Atkins**
Sam Feder
Sandra E. Rizzo

1



Broadband Net Neutrality Issues

- Reclassify "broadband Internet access service"—that's the retail broadband service Americans buy from cable, phone, and wireless providers—as a telecommunications service under Title II, incorporating ***general rule prohibiting "unjust and unreasonable practices."***
- Bright Line Rules: **No Blocking, No Throttling, No Paid Prioritization**
- New authority to ensure that ***interconnection activities of ISPs*** (involving exchange of traffic between mass-market broadband providers and edge providers) are just and reasonable.
- "Fair access" to poles and conduits under Section 224.
- Exempts broadband service providers from "tariffs or other form of rate approval, unbundling, or other forms of utility regulation"

2

ABA SECTION OF ANTITRUST LAW
Promoting Competition Protecting Consumers

Other Regulatory Arenas

- Arguably analogous situations arise in other regulatory arenas:
  - ⇨ Access by content providers or competing communication networks to the “last-mile” wireline (or wireless voice) connection to user
  - ⇨ Access by competing generators to interstate transmission lines needed to deliver electricity to end users in distant markets.
  - ⇨ Access by rail shippers or competing rail networks to the rail network segments needed to reach shippers or receivers served only by a single railroad.

3

ABA SECTION OF ANTITRUST LAW
Promoting Competition Protecting Consumers

How Do Those Fields …

- Limit (if at all) the carrier’s ability to “block” certain network traffic, limit the quality of service provided to such traffic; or differentiate in service terms based on compensation?
  [The Common Carrier/Reasonable Practices Issue]
- Regulate rates (tariffs, unbundling, discrimination)?
  [The Rate Issue]
- Regulate interconnection between the carrier and competing carriers or sources of network traffic.
  [The Interconnection Issue]
- Require the carrier to provide access to its network infrastructure for use by competitors?
  [The Physical Access Issue]

4

ABA SECTION OF ANTITRUST LAW
Promoting Competition
Protecting Consumers

Wireline and Wireless Voice Telecomm

- Federal regulation of interstate wireline and wireless voice; state regulation of intrastate wireline voice.

<u>The "Common Carrier/Reasonable Practices" Issue</u>

- Treatment as a telecommunications service with attendant regulation of "just and reasonable" practices and pricing.
- But pay for better service traditionally allowed.

<u>The "Rate Regulation" Issue</u>

- Wireless rates unregulated.
- Retail wireline rates for incumbent carrier regulated by many states.
- Carrier-to-carrier wireline rates regulated by FCC and states.

<u>The "Interconnection" Issue</u>

- Incumbent wireline carriers have duty to directly interconnect at cost-based rates.
- Wireless and incumbent wireline carriers have duty to interconnect "direct or indirectly."

<u>The "Physical Access" Issue</u>

- Incumbent wireline carriers must offer network elements at cost-based rates.
- All wireline carriers must allow resale.

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ABA SECTION OF ANTITRUST LAW
Promoting Competition
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Fed'l Electric Utility Regulation

- Federal regulation of all wholesale sales and interstate transmission

<u>The "Common Carrier/Reasonable Practices" Issue</u>

- Duty to provide open access service to all on a comparable basis. Different service options with different rates exist such as firm or non-firm network service and firm or non-firm point-to-point service.

<u>The "Rate Regulation" Issue</u>

- Agency proceedings determine transmission owners' revenue requirements. Charges for different service levels are posted in tariffs.

<u>The "Interconnection" Issue</u>

- Non-affiliated and affiliated generators permitted to interconnect to the transmission system on non-discriminatory bases.

<u>The "Physical Access" Issue</u>

- Open access to transmission lines under Order No. 888.

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ABA SECTION OF ANTITRUST LAW
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Railroad Regulation

The "Common Carrier/Reasonable Practices" Issue

- Common carrier obligation – reasonable service on reasonable request.
- Historic prohibitions against discrimination in rates or service.
- Post 1980, a railroad may freely differentiate service levels by contract or tariff, so long they do not jeopardize the carrier's ability to meet its common carrier obligation.
- In other words, there is a minimum common carrier level of "reasonable" service, but shippers can and routinely do pay railroads for a higher level of service.

The "Rate Regulation" Issue

- Review of reasonableness of tariff (non-contract) rates, but only where there is no effective competition.
- Very limited "bottleneck" rate-setting obligation.

The "Interconnection" Issue

- Mandatory interchange obligation.

The "Physical Access" Issue

- Availability of "competitive access" if railroad engaged in anticompetitive conduct.
- Mandatory crossing over other railroad lines.

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Transportation and Energy Industries
COMMITTEE OFFICERS

Chair:
Amanda L. Wait
Hunton & Williams LLP
2200 Pennsylvania Avenue, NW
Washington, DC 20037-1701
Phone: (202) 955-1502
Fax: (202) 778-2201
await@hunton.com

Vice-Chairs:
Michelle M. Burtis
Cornerstone Research
Suite 600
1919 Pennsylvania Avenue, NW
Washington, DC 20006-3420
Phone: (202) 912-8940
Fax: (202) 466-4487
mburtis@cornerstone.com

David L. Meyer
Morrison & Foerster LLP
Suite 5500
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1831
Phone: (202) 887-1519
Fax: (202) 785-7599
dmeyer@mofo.com

Nicholas G. Grimmer
McDermott Will & Emery
Suite 3900
1000 Louisiana Street
Houston, TX 77002-5035
(713) 653-1778
ngrimmer@mwe.com

William H. Stallings
U.S. Department of Justice
Antitrust Division
325 7th Street, NW
Room 300
Washington, DC 20004
(202) 514-9323
william.stallings@usdoj.gov

Daniel J. Fletcher
Union Pacific Railroad
Stop 1580
1400 Douglas Street
Omaha, NE 68179-0002
(402) 544-0436
djfletcher@up.com

Karen Kazmerzak
Sidley Austin LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-806
kkazmerzak@sidley.com

Paul Brown
GreenbergTraurig
1000 Louisiana Street Suite 1700
Houston, TX
(713) 374-3500 brownpa@gtlaw.com

Council Representative:
Kevin O'Connor
Godfrey & Kahn S.C.
Suite 500
One East Main Street
Madison, WI 53701-2719
Phone: (608) 284-2600
Fax: (608) 257-0609
koconnor@gklaw.com

Young Lawyer Representative:
Andrew Mann
White and Case
701 13th Street, NW Washington,
DC 20005 Phone: (202) 637-6174
Fax: (202) 639-9355
andrew.mann@whitecase.com

Please send all submissions for future issues to:

Editor
David L. Meyer
Morrison & Foerster LLP
Suite 5500
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1831
Phone: (202) 887-1519
Fax: (202) 785-7599
dmeyer@mofo.com

Michelle M. Burtis
Cornerstone Research
Suite 600
1919 Pennsylvania Avenue, NW
Washington, DC 20006-3420
Phone: (202) 912-8940
Fax: (202) 466-4487
mburtis@cornerstone.com

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