Fordham Competition Law Institute

GLOBAL PRACTITIONERS WORKSHOP
13 September 2017 | 11:30 a.m.–5 p.m.

CLE Course Materials & Speaker Biographies

Fordham Law School
Skadden Conference Center | 150 West 62nd Street
New York City
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https://www.ft.com/content/04fa752c-7dda-11e7-ab01-a13271dlee9c


https://newrepublic.com/article/144694/democrats-face-important-anti-monopoly-test

Fife, Robert, and Chase, Steven. Trudeau says U.S. was consulted before approving Chinese takeover of Norsat. The Globe and Mail, 13 June 2017.


http://www.lexpert.ca/article/a-siren-call-among-shriil-notes/

Slater, Joanna. Goodbye to all that: Is the international order as we know it over? The Globe and Mail, 26 April 2017.


Session B: Patent Licensing in a Multijurisdictional Environment

Presentation Slides (view in document)

ECJ, Case C-170/13 Huawei Technologies Co. Ltd v. ZTE Corp., ZTE Deutschland GmbH

http://curia.europa.eu/juris/document/document.jsf;jsessionid=9ea7d2dc30d6575e299c14a54b6aaff4c6de6738e253.e34KaxilC3qMb40Rch05axyMbn0?text=&docid=165911&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1121777

England and Wales High Court (Patents Court) Decision on Unwired Planet International Ltd v Huawei Technologies Co. Ltd & Anor (2017) EWHC 711 (Pat) (05 April 2017)

http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Patents/2017/711.html&query=(title:(+Unwired+))&AND+(title:(+Planet+))

England and Wales High Court (Patents Court) Decision on Unwired Planet International Ltd v Huawei Technologies Co Ltd & Anor (2017) EWHC 1304 (Pat) (07 June 2017)

http://www.bailii.org/cgi-bin/format.cgi?doc=/ew/cases/EWHC/Patents/2017/1304.html&query=(unwired)


http://iar.agcm.it/issue/view/790/showToc

Additional recommended readings: German Courts decisions

- Judgment of the Düsseldorf Landgerichte, dated November 3, 2015, case 4a O 144/14, Sisvel vs. Haier
- Other German Court decisions rendered post Huawey
- Higher Regional Court Düsseldorf, 13 January 2016, I-15 U 66/15
- Regional Court Mannheim, 29 January 2016, 7 O 66/15
- Regional Court Mannheim, 4 March 2016, 7 O 23/14
Roger Alford
Deputy Assistant Attorney General for International Affairs, Antitrust Division, U.S. Department of Justice

Roger Alford became the Deputy Assistant Attorney General for International Affairs, of the U.S. Department of Justice’s Antitrust Division, on August 1, 2017. A longtime professor, he began his teaching career at Pepperdine Law School in 2000. In 2012, he joined the faculty at the Notre Dame Law School where he served as professor and associate dean for international and graduate programs. Over the course of his career, he has taught on a wide range of subject-matter areas including international trade, international arbitration, and comparative law. In addition to his academic work, he practiced international litigation and trade at Hogan Lovells and clerked for D.C. Circuit Judge James Buckley. He was a legal adviser for Judge Richard Allison of the Iran-United States Claims Tribunal in The Hague and a senior legal adviser for the Claims Resolution Tribunal for Dormant Activities in Zurich, Switzerland. He has written on a wide range of international law issues, focusing on the intersection of private and public international law. In 2009, he coauthored a book with Catherine Rogers, The Future of Investment Arbitration in addition to numerous articles on international law, including several addressing the extraterritorial application of antitrust laws. He received his LL.M from Edinburgh University, his J.D. from New York University, a Masters of Divinity from Southern Seminary, and a B.A. from Baylor University.

Wenlian Ding
Deputy Chief Justice, Intellectual Property Bench, Shanghai People’s Court

Wenlian Ding is the Deputy Chief Justice of the Intellectual Property Bench at the Shanghai High People’s Court. Justice Ding joined the court in 1997, and initially worked on civil and business cases. In 2001, he joined the intellectual property team. He has been the presiding judge in several antitrust cases, including those involving vertical agreements on appeal such as the casein Shanghai High People’s Court, Bangrui Yonghe Technology Trading Co., Ltd. v. Johnson & Johnson (Shanghai) Medical Equipment Co., Ltd. and Johnson & Johnson Medical (China) Ltd., [2012] Hu Gao Min San (Zhi) Zhong Zi No. 63, August 1, 2013. He holds a master’s degree from East China University of Political Science and Law.

Calvin S. Goldman, Q.C.
Chair, Competition, Antitrust and Foreign Investment Group, Goodmans LLP.

Cal Goldman is Chair of the Competition, Antitrust and Foreign Investment Group at Goodmans. His practice covers all aspects of Canadian competition law and foreign investment matters. He is a former Commissioner of the Canadian Competition Bureau. Cal is co-chair of the ICC Task Force on the ICN. He is also co-chair of the National Interest and Competition Law Task Force of the ABA Section of Antitrust Law. He is an Executive Member of the Competition Committee of the Business and Industry Advisory Committee to the OECD. Cal is ranked top tier by Chambers and other leading legal guides for competition/antitrust law and is “Canada’s most highly distinguished competition lawyer” according to Who’s Who Legal Canada 2015. The Legal 500 Canada 2017 quotes a client saying group head Cal Goldman is “without qualification the finest competition lawyer in Canada.”

Andrew Heimert
Counsel for Asian Competition Affairs, Office of International Affairs, U.S. Federal Trade Commission

Andrew J. Heimert is Counsel for Asian Competition Affairs in the U.S. Federal Trade Commission’s Office of International Affairs. He is responsible for the FTC’s relationships with competition agencies in China, Japan, Korea, and several other Asian jurisdictions. He is also responsible for international intellectual property issues, and works frequently on projects for the International Competition Network’s Unilateral Conduct Working Group. He previously was the Executive Director and General Counsel of the Antitrust Modernization Commission, a bipartisan Commission created by Congress to study and report on the antitrust laws and recommend appropriate changes to Congress and the President. He has also worked on a variety of antitrust policy issues and investigations at the FTC as an attorney in the FTC’s Office of Policy and Coordination. Prior to his work in government, he was an attorney at Covington & Burling, from 1997 to 2001, where he practiced antitrust and litigation. Immediately following law school, he clerked for Richard S. Arnold, Chief Judge for the United States Court of Appeals for the Eighth Circuit. He received his J.D. from Yale Law School and A.B. from Stanford University in 1993.

D. Bruce Hoffman
Acting Director, Bureau of Competition, U.S. Federal Trade Commission

Bruce Hoffman is Acting Director of the Bureau of Competition at the U.S. Federal Trade Commission. He came to the FTC from Shearman & Sterling, where he was global co-head of the firm’s antitrust practice. Previously, he served as chair of Hunton & Williams’ antitrust practice, and prior to that, as Deputy Director and Associate Director of the FTC’s Bureau of Competition. He has a law degree from the University of Florida, and a bachelor’s degree from Penn State.

Frédéric Jenny
Chair, OECD Competition Committee, and Global Professor of Law, NYU School of Law

Frédéric Jenny serves as chair of the OECD Competition Committee. He also is a professor of Economics at ESSEC Business School in Paris and co-director of School’s European Center for Law and Economics. He was previously non-executive director of the Office of Fair Trading in the United Kingdom, judge on the French Supreme Court (Cour de cassation, Economic Commercial and Financial Chambers), vice chair of the French Competition Authority, and president of the WTO Working Group on Trade and Competition. He has served as a visiting professor at Northwestern University Department of Economics in the United States, Keio University Department of economics in Japan, University of Capetown Business School in South Africa, and Haifa University School of Law in Israel. He is currently Visiting Professor at University College London Law School and a Global Professor of Law at NYU School of Law.

An editorial board member for several scientific journals, he also is member of the advisory board of the Interdisciplinary Center for Competition Law and Initiative, Middle East Initiative and chairman of the scientific board of Consumer Unity Trust of India (CUTS), the largest consumer organization in India. He received the 2016 Global Competition Review Lifetime Achievement Award. He has has written extensively about trade, competition, and economic development, and he has served as an adviser to many developing countries on competition and trade issues. He holds a Ph.D. in economics from Harvard University, a doctorate in Economics from the University of Paris, and an MBA from ESSEC Business School.
Speakers (continued)

James Keyte
FCLI Director and Adjunct Professor of Law, Fordham Law School
Partner, Skadden Arps

James A. Keyte is director of the Fordham Competition Law Institute and, as an adjunct professor at Fordham Law, teaches the Comparative Antitrust Law and Enforcement course. As a partner at Skadden, he handles a wide variety of antitrust litigation, transactional and advisory matters across numerous industries. In the litigation area, he has handled a number of cases involving alleged price-fixing, monopolization, litigated mergers, other restraints of trade and class actions. In addition, he has handled or played significant roles in a number of sports-related litigations and trials. In the transactional arena, he has represented numerous clients before the Department of Justice and the Federal Trade Commission, as well as parties involved in litigated mergers. Mr. Keyte also counsels on general antitrust matters. He has advised numerous clients on compliance with basic antitrust statutes, including issues relating to competitor collaborations, unilateral conduct and distribution. He also counsels a number of clients on intellectual property matters with antitrust implications. He is the past chair of the Trade, Sports and Professional Associations Committee. He is a former senior editor of the Antitrust Law Journal and a current editor of Antitrust Magazine. He also authors a monthly antitrust column for the New York Law Journal. He holds a J.D. from Loyola Law School and B.A. from Harvard University.

Gabriella Muscolo
Commissioner, Italian Competition Authority

Gabriella Muscolo has served as a Commissioner of the Italian Competition Authority since May 2014. Appointed as a Judge in 1985, she sat at the Specialist Section for Intellectual Property and Competition Law in the District Court of Rome and at the Court for Undertakings in Rome. From 2009 to 2014, she was a member of the Enlarged Board of Appeal-EBA of the European Patent Office-EPO. Since 2008, she has been lecturer of Company Law at the School of Specialization for the Legal Professions at the University of Rome – La Sapienza. She also lectures at Italian and foreign universities. She publishes in Italian as well as in English in the fields of Intellectual Property and Competition Law. She co-edited the volumes Intellectual Property and Competition Law: a European perspective and The Pharmaceutical Sector Between Patent Law And Competition Law. An International Perspective, both for Kluwer International. She was awarded a law degree with honors from the University of Genoa.

Ingrid Vandenborre
Partner, European Union/International Competition, Skadden Arps (Brussels)

Ingrid Vandenborre is the partner in charge of Skadden's Brussels office. Her practice focuses on EU and international merger control and competition law enforcement. She has consistently been named as a leading practitioner in Who’s Who Legal guides in both competition and life sciences. She was recognized by Global Competition Review on various occasions, including being profiled as a leading antitrust attorney in its 2013 and 2016 “Women in Antitrust” issues, selected for its 2012 “40 Under 40” list and shortlisted in the “Lawyer of the Year — 40 and Under” at the GCR Awards 2013. In 2016, she received the ILO Client Choice Award for the category of EU Competition and Antitrust, awarded by The International Law Office in recognition of individual partners who excel across the full spectrum of client service. She has significant experience in Article 101 issues in relation to cartel arrangements (power cables, car battery recycling), as well as vertical and competitive agreements, representing defendants in the recent hotel online booking sector investigations and the European Commission’s first reverse payment patent settlement decision. Ms. Vandenborre also has substantial experience advising on Article 102 enforcement issues both at the EU and Member State levels in pharmaceutical and other sectors, including the representation of Intel in the Article 102 proceedings before the European Commission. In addition to her work on Article 101 and 102 enforcement issues, she has substantial merger control experience notably in the high tech sector. Notable recent examples of her merger control work include advising SanDisk Corporation in its pending $19 billion acquisition by Western Digital Corporation and Broadcom Corporation in its US$37 billion acquisition by Avago Technologies Limited. She is currently advising NXP in its acquisition by Qualcomm. She holds a J.D. from the Catholic University of Leuven and LL.M. from the University of Chicago.
Headlines of Recent Articles

Democrats Face an Important Anti-Monopoly Test
How the party treats Trump's pick for antitrust enforcement will speak volumes about its commitment to fighting corporate consolidation.

BY DAVID DAYEN
September 6, 2017

Deal-Making Is Alive and Well, but the Market Is Changing
Another View

By HERMAN CRIQUIELI - JULY 10, 2017

European Union
Brussels seeks tighter vetting of foreign takeovers
Moves to strengthen EU screening process after Chinese investment
August 10, 2017
By Jim Brundell in Brussels

Exclusive: U.S. toughens stance on foreign deals in blow to China's buying spree

ReuterS - AUGUST 10, 2017

Goodmans
Barristers & Solicitors / goodmans.ca
Headlines of Recent Articles (cont’d)

China’s S$800 Billion Sovereign Wealth Fund Seeks More U.S. Access
NEW YORK TIMES, JULY 11, 2017

Germany Sets EU Tone With Tighter Curbs on Foreign Takeovers
REUTERS, JULY 12, 2017

Germany expands powers to block foreign takeovers - with an eye on the Chinese
FINANCIAL TIMES, JULY 13, 2017
Headlines of Articles (cont'd)

Niall Ferguson is a senior fellow at the Hoover Institution at Stanford University. Fareed Zakaria is the award-winning host of CNN's flagship global-affairs program, Fareed Zakaria GPS.

Evolving Public Interest Considerations

• In recent years there has been a rise in the number of large, high-profile cross-border M&A deals that have been scrutinized, delayed, or blocked on the basis of foreign investment review, or which have invited political commentary

• Examples of these include:
  ▪ Canada – BHP Billiton/Potash and Accelero/MTS Allstream
  ▪ Australia – ADM/Graincorp
  ▪ France – GE/Alstom
  ▪ Germany – Edeka/Kaiser’s Tengelmann
  ▪ UK – Pfizer/AstraZeneca
  ▪ US – Shanghui/Smithfield Foods, Ralls Corp. and Anbang/Waldorf Astoria Hotel

• Since failure of the Doha round, there has been an increasing scope of national interest considerations
Evolving Considerations (cont'd)

- Flow of capital from SOEs generally and from China leading to increased scrutiny
- This trend and increased scrutiny is likely to grow further in light of rising protectionist sentiments around such issues as employment and industrial policy
- Businesses contemplating pro-competitive transactions require substantive and procedural certainty and transparency in the merger review process
- No matter how well-intentioned, the introduction of broadening public interest considerations into this process can create undesirable uncertainty and in particular, lead to inconsistent decisions in multijurisdictional cases, which can have a significant “chilling” effect on investment decisions, with an adverse impact on levels of economic activity

OECD/ABA

- In June 2016, the OECD Competition Committee Working Party No. 3 held a roundtable discussion on the subject of Public Interest Considerations in Merger Control
- In addition to papers presented by many competition authorities from across the globe and from BIAC, Roxann Henry presented a summary of the ABA SAL's Task Force Report on Foreign Investment Review
- That Report is over 200 pages. It was approved by the SAL Council and published in December 2015. It analyzes the significant substantive and procedural interface issues arising between agencies within the same jurisdiction, as well as between agencies with a similar mandate but in different jurisdictions
- The invitation to the ABA SAL Chair to present and discuss the Task Force Report in the context of an OECD Competition Committee meeting reflects the significant interest in this important evolving area
ABA SAL Task Force Report

• The Report addresses the recent rise in the number of large, high-profile cross-border M&A deals (both in the US and internationally) scrutinized, delayed or blocked on basis of foreign investment review and identifies the drivers of this phenomenon, including heightened concerns over cybersecurity and an increasingly complex geopolitical matrix.

• It presents an overview of the substantive and procedural aspects of antitrust and competition reviews as well as of national interest and national security reviews and of sector-specific reviews in the US, Canada, the EU, China, Japan, Brazil, the UK, France, Germany and Australia.

• It details and makes recommendations regarding the significant substantive and procedural interface issues arising between agencies within the same jurisdiction, as well as between agencies with a similar mandate but in different jurisdictions.

OECD Competition Committee/BIAC

• In December 2016, the OECD Competition Committee Global Forum on Competition examined the subject of Independence of Competition Authorities – From Designs to Practices.

• The Business and Industry Advisory Committee (BIAC) contributed a paper in which it underlined the importance of substantive and procedural transparency to businesses contemplating transactions or developing commercial strategies and interacting with the competition authority.

• BIAC articulated the view that the independence of competition authorities is a critically important aspect of this certainty and transparency, and ultimately affects the legitimacy of a country’s competition law.

• “Indeed, the importance of independence of competition authorities from political interference can hardly be overstated.”
International Fora/New ABA SAL Task Force

• In addition to the OECD, the evolving issues arising from the interface of competition law and public interest considerations also have been the subject of panel discussions at the ICN’s Annual Conference in Porto in May 2017, and on panels held by the ICC, the IBA and the World Bank Group in 2017, and in a number of other fora

• The new ABA SAL Task Force will build on the work of the prior Task Force. In so doing, it will be looking at the potential implications of national interest considerations (including protectionism, populism, industrial policy and the impact of trade policies) as well as the evolving breadth of national security reviews as such may relate to normative competition reviews and the independence of competition authorities from political considerations

New ABA SAL Task Force (cont’d)

• The new Task Force will be examining a number of cases across selected jurisdictions where there has been interface of national interest and competition reviews

• In conducting these case studies, the Task Force will be asking questions such as:
  ▪ Should Public Interest considerations be included in the review of mergers, acquisitions, and practices impacting competition?
  ▪ If Public Interest considerations are included, who should review them, competition commissions or another agency or minister?
  ▪ If Public Interest considerations are included, can/should guidelines be created, as in South Africa?
  ▪ If Public Interest considerations are included, should they be balanced against consumer welfare/efficiency considerations or should each consideration carry a veto of the deal or practice? Is balancing possible if more than one agency is participating?
FRAND licensing and antitrust enforcement – A. Heimert (US FTC)

1) Should disputes over FRAND licensing, and in particular whether a SEP holder is refusing to license on terms consistent with its undertaken FRAND licensing obligation, be addressed through antitrust enforcement, or should it be left to other forms of resolution, such as patent law or contract law?

2) If such enforcement should be undertaken by an antitrust authority (or private enforcement of antitrust laws), should the enforcement be limited to only certain types of disputes (such as a pattern or practice of refusals) or certain forms of refusals (e.g., seeking injunctions vs. disagreement on what a reasonable rate is)?

3) If antitrust law is used for enforcement, what should be the scope of agency remedies? For example, should the agency determine what is a reasonable royalty or other terms of the license? If enforcement is private, should a court undertake an analysis that mirrors patent law in terms of royalty determination, or should its remedial scope be broader?
IP litigation and SEP licensing post Huawei – Commissioner Muscolino

1) Patent licensing, competition and the abusive litigation doctrine

2) Antitrust enforcement in Europe before the Huawei/FRAND case

3) The Huawei/FRAND case

4) Antitrust enforcement in Europe after the Huawei/FRAND case

5) Open issues after Huawei

6) The role of the antitrust enforcers and the role of the policy makers

"Reasonable" royalty rates - Deputy Chief Justice Ding Wenlian

- The importance of procedures in SEP royalty litigation
- Assessing/defining "reasonable" royalty rates
  - SEP royalty fee should not exceed the end-products profit by certain percentage
  - SEP royalty fee calculation should avoid royalty stacking.
- Pricing mechanisms.
  - The "Swanson - Baumol" model
  - Feasibility of the application of the "Swanson-Baumol" model