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The Quick Look

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- **THE DOJ FILES A STATEMENT OF INTEREST IN RESPONSE TO A JUDGE'S DISMISSAL OF THE DC AG'S LAWSUIT AGAINST AMAZON**
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The DOJ files a statement of interest in response to the Judge's dismissal of the DC AG's lawsuit against Amazon

On April 27, 2022, the Department of Justice (DOJ) submitted a statement of interest in support of the District of Columbia's recent motion for reconsideration, arguing that the Superior Court of the District of Columbia had misinterpreted the law and incorrectly analyzed whether Amazon's agreements with third-party sellers violated D.C. Code § 28-4502. The DOJ's interest in the matter appears to be at least partly motivated by the fact that D.C. Code § 28-4502 corresponds to Section 1 of the Sherman Act.

The District of Columbia had filed its lawsuit against Amazon in May 2021. The focus of the District's complaint was Amazon's Business Solutions Agreement (BSA) that "explicitly prohibited [third party sellers] from offering their products on a competing online retail sales platform, including the [seller's] own website, at a lower price or on better terms than the [seller] offered the products on Amazon." The particular type of clause is known as a "price parity provision" ("PPP") and the District argued that the provision is equivalent to a most favored nation agreement between Amazon and its third-party sellers. The District alleged that Amazon has significant market power and its MFN agreements have the effect of raising prices on items sold both on and off Amazon, leading to an outsized impact on the entire online marketplace. The complaint also argued that Amazon's replacement of PPP with its Fair Pricing Policy ("FPP") did not eliminate the anticompetitive harm because FPP is an "effectively-identical substitute" of the PPP.

On March 18, 2022, the Superior Court dismissed the District's lawsuit stating that the complaint offered only "conclusory allegations" to support the claim that the parity provision led to higher

prices. The District asked the court to reconsider its decision. In its statement, the DOJ also urged the court to do the same. The statement explains that to establish a Section 1 claim, the District needed to show (1) that there is concerted action and (2) that the action unreasonably restrains trade. In DOJ's view, the court incorrectly blended the two elements instead of treating them as independent inquiries. The DOJ argues that the court looked at inapplicable case law from *Bell Atlantic Corp. v. Twombly* when considering the concerted-action element and misapplied the reasoning from *Ashcroft v. Iqbal* to "determine whether the conduct unreasonably restrains trade".

This is not the only lawsuit that Amazon is facing due to its MFN-style agreements in other jurisdictions. As we previously reported in Issue 11, a federal judge in Seattle permitted a consumer class action lawsuit against these agreements to proceed after finding that Amazon's pricing policy had suppressed competition when it "require[d] sellers to add Amazon's fees to the cost of their products when they sell them on external platforms." In Canada, over the last couple of years, multiple class-action lawsuits containing similar allegations have been filed against Amazon. Interestingly, Amazon dropped PPP clause from its seller agreements in Europe in 2013, following investigations by competition agencies in Germany and the UK.

Third Circuit Affirms Dismissal Of Conspiracy Claims, Finding Airport Exclusive "Pouring" Contract Did Not Cause Antitrust Injury

Last week, a Third Circuit panel affirmed dismissal of Section 1 challenges to an agreement between PepsiCo and the landlord of retail spaces at Philadelphia International Airport ("PHL") that prevents retailers from serving non-Pepsi drinks. *See Host Int'l, Inc. v. MarketPlace, PHL, LLC*, 2022 WL 1233630 (3d Cir. Apr. 27, 2022). Plaintiff Host International ("Host") hoped to lease two retail spaces at the airport and sublease them to Starbucks and a restaurant. But when the landlord Marketplace refused to remove the "pouring rights" restriction from the lease, Host abandoned negotiations and filed tying and conspiracy claims against Marketplace in the Eastern District of Pennsylvania.

The District Court dismissed and denied leave to amend after finding that, with respect to airport retail space, the relevant geographic market cannot be limited to "a single airport in Philadelphia." 2020 WL 4704939, at *4 (E.D. Pa. Aug. 13, 2020). The Third Circuit affirmed, but based on antitrust standing and failure to plead illegal tying.Antirust reform debaters may take interest in the panel characterizing the antitrust standing limitation as a "murky" and "a-textual requirement" that "stray[s] from the ordinary best meaning" of the Sherman Act. *Id*. at *1, *5. But we will highlight three other noteworthy points.

First, the panel's ruling on antitrust standing creates a touchpoint for when contract disputes may mature into antitrust injury. Host's complaint alleged that the pouring rights restriction suppressed competition, and "as a result, Host suffered the injury of exclusion from PHL's concession market." *Id*. at *3. But in rejecting this, the panel instead found that "Host was not excluded," "Host chose to walk away from the table because it did not like the lease terms," and "a breakdown in contract negotiations is outside the Sherman Act's scope." 2022 WL 12336030, *3.

Second, the panel concluded that the contract clause precluding Host's sublessees from serving anything other than Pepsi beverages could not constitute an illegal tie as a matter of law because the clause did not "force" Host to purchase anything. Instead, it "only limits Host's sublessees' choice of vendors." *Id*. at *5. Creative contract drafters may take note of this court's emphasis on the distinction between compulsion and restriction in exclusivity clauses.

And third, the panel did not disturb the District Court's ruling that the relevant market in this case could not be limited to a single airport, and instead the "relevant geographic market is the world." 2020 WL 4704939, at *4; 2022 WL 12336030, at *6 n.13. Host argued on appeal that this decision creates a disagreement with at least three circuit courts. Although Marketplace contests that characterization, the District Court's finding, and on the pleadings no less, could have implications in other cases involving airports, arenas, and other allegations of real property markets.

OTHER DEVELOPMENTS

SENATE JUDICIARY COMMITTEE APPROVES THE NOPEC BILL. As oil and gas prices continue to skyrocket, an almost 22 year-old initiative to amend the Sherman Act to make oil-producing and exporting cartels illegal is facing new developments. The so-called No Oil Producing and Exporting Cartels Act (NOPEC) was designed to remove the state immunity from national oil companies that would allow the U.S. Department of Justice to bring antitrust lawsuits against OPEC. The bill was passed by the Senate Judiciary Committee on May 5, 2022, but is now encountering opposition by the oil trade group American Petroleum Institute (API) and the U.S. Chamber of Commerce. The bill must now pass the full Senate and House of Representatitves and then be signed by the President to become law.

ICC NEW PUBLICATION GATHERS THE LENIENCY PRACTICES AND GUIDELINES FOR OVER FORTY COUNTRIES. The International Chamber of Commerce ("ICC") released the third edition of its Leniency Manual comprising a user-guide for leniency applications worldwide at the Pre-ICN Forum 2022. The Manual aims to give a step-by-step guidance on the leniency application process, whether for local or multi-jurisdictional applications. This new edition (i) outlines the generic leniency application proceeding and (ii) provides the antitrust leniency programmes from over 40 jurisdictions, with specific filing requirements and flowcharts for each country. The ICC's publication follows the DOJ Antitrust Division's recent updates to its leneniency policy as we previously reported in Issue 14.

U.S. SENATE URGE NEED FOR CONGRESS TO ACT TO RESTORE THE FTC'S SECTION 13(b) AUTHORITY. Sen. Maria Cantwell is planning to introduce legislation that would fully restore the Federal Trade Commission's ("FTC") power under Section 13(b) to seek monetary awards for consumers harmed by consumer protection violations. The legislation also aims to create a 10-year statute of limitations for FTC suits. On May 2, 2022, the Senate Commerce Committee released a report supporting the urgency for Congress to restore the Federal Trade Commission's authority to directly seek monetary relief in federal court actions", highlighting also the "implications of the Supreme Court's April 2021 decision in *AMG Capital Management LLC v. FTC* that gutted the FTC's enforcement authority under Section 13(b) of the FTC Act".

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*The views expressed in The Quick Look reflect those of the authors, and are not necessarily those of the American Bar Association, the Section of Antitrust Law, or the Joint conduct Committee.
