
Antitrust and Competition 2010 New Year's Letter: A Look Back at 2009 and a Peek at 2010

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As we begin a new year, we want to take a moment to reflect on 2009, share our thoughts for 2010, and highlight a few of the successes we achieved for clients. Although 2009 was a hugely challenging year in many respects, it was also an exciting year for our [Antitrust and Competition practice](#)—with considerable work being done in Antitrust Litigation, Cartel/Monopolization/Abuse of Dominance Defense, Intellectual Property Antitrust Disputes and, surprisingly, Merger Clearance across all offices—and especially in our newly opened Frankfurt office with its team of seasoned competition lawyers.

We would like to congratulate our now former partner **Doug Melamed** on his recent appointment as the General Counsel of Intel. We are also particularly proud to congratulate and recognize this year's promotion of [Hartmut Schneider](#) to Partner, resident in our Washington, DC office, as well as the promotion of [Peter Spaeth](#) and **Wendy Terry** to the position of Special Counsel in recognition of their expertise and dedication to the practice and our clients. We also recognized the growth and achievements of our other lawyers through the promotion of five attorneys to Counsel, four to Senior Associate and the addition of a number of Associates across our US and EU offices to meet the demand for expertise in antitrust and

competition.

Litigation at the Intersection of Antitrust and Intellectual Property. The lure of big settlements from *per se* liability and treble damages has always attracted private class-action litigants to bring antitrust claims, but this year we saw a substantial increase in the number of private antitrust claims within IP-related business disputes, and even in trade and import litigation as business rivals grapple for additional leverage. In addition, government regulators on both sides of the Atlantic have geared up to investigate and bring actions in innovation, technology and research-driven markets. This combination creates a "perfect storm" focused on the intersection of antitrust and intellectual property law—with no sign of easing in 2010.

With many members of the Antitrust and Competition group involved in contested antitrust IP matters this year, WilmerHale has been at the forefront of antitrust and intellectual property disputes, and we have achieved several notable victories for our clients. Partners in the group are currently leading teams in defending Intel in an FTC action alleging monopolization in a market for x86 microprocessors, among other allegations. In the EU, we represent a number of significant software vendors seeking to ensure that Microsoft complies with its disclosure and unbundling obligations under EU competition law. We also represent Cephalon in prominent FTC and class-action challenges to a Hatch-Waxman "reverse payment" settlement over the branded wakefulness drug Provigil. In addition, we moved to dismiss monopolization claims brought by a putative class of direct purchasers against Braintree Laboratories following our successful defense of Braintree from a generic competitor's antitrust claims after a week-long trial in the District Court of Delaware. On behalf of Broadcom, we pursued antitrust and patent exhaustion claims against a competitor to obtain a very favorable settlement. We are also currently

preparing for argument before the Federal Circuit *en banc* in appeal from a decision of the International Trade Commission granting our client an exclusion order against recordable and rewritable compact discs imported from Taiwan.

Antitrust Litigation. This year we saw a sharp upswing in the amount of antitrust litigation from both private litigants and increasingly interventionist and activist antitrust agencies—a trend likely to continue through 2010 and beyond. In German courts, we defended the cooperation between our client WINGAS and E.ON Ruhrgas for building and operating the onshore connection of a gas pipeline through the Baltic Sea. In the EU, partners litigated before the EU's Court of First Instance on behalf of leading Taiwanese LCD panel manufacturer Chi Mei Optoelectronics to challenge the European Commission's authority to compel the production of documents located outside the EU, in the absence of a clear jurisdictional nexus. We also appeared before the European Court of Justice to raise an appeal for Deutsche Telekom against a fine imposed by the Commission for an alleged "price squeeze" in the telecom sector.

In the United States, the group's attorneys successfully defeated US antitrust class-action claims against Lufthansa brought by passengers traveling between Europe and Japan, and we lead Lufthansa's civil antitrust defense on US-Asia/Oceania and US-Europe routes. We successfully defeated class certification in a case alleging attempted monopolization of the US market for wood shipping pallets, and we obtained dismissal of an antitrust action challenging the cable industry's practice of bundling of cable television channels, instead of offering each à la carte. In addition, the group's attorneys obtained an outright dismissal with prejudice on behalf of a number of venture capital firms of a significant case seeking to impose liability on venture capital companies under the Digital Millennium Copyright Act. We

prevailed on a motion to dismiss an indirect purchaser class action against our client Odfjell SE, a major Norwegian parcel-tanker shipping company. We are also defending HSBC in litigation arising from interchange payments in the MasterCard network.

In addition, the Antitrust and Competition group litigated several cases to the Circuit Courts of Appeals and US Supreme Court during 2009. We worked closely with our Appellate Group to argue before the Third Circuit on behalf of The Hartford and others in *In re Insurance Brokerage Antitrust Litigation*. We also represent Odfjell in vigorous opposition to a charterer's effort to pursue a class-action antitrust arbitration on behalf of all direct purchasers (other charters) and argued the issue of whether an otherwise silent arbitration clause permits antitrust class-action arbitration through four levels of judicial review, from the tribunal up to the US Supreme Court which heard oral arguments in December. We also completed briefing on, and will shortly argue, an appeal in the Ninth Circuit raising issues regarding the application of antitrust group boycott principles in the rubber chemical industry.

Cartel Defense. Economic downturns often place intense pressure on managers and can lead to allegations of concerted efforts to maintain prices or reduce losses. This year, the countercyclical nature of our Cartel Defense practice required the involvement of many members of the Antitrust and Competition group as we responded to government investigations and defended civil claims across the US, EU and Asia for clients in all three regions.

In the United States, we have been representing JP Morgan Chase in parallel DOJ and SEC investigations of the municipal derivatives markets. In Europe, the group led teams to vigorously defend our clients Lufthansa

Cargo and Swiss International Airlines in a broad-ranging and ongoing global investigation into allegations of price-fixing in the international air cargo sector. In the United Kingdom, the group is actively defending clients Morrisons and Sainsbury's against an OFT Statement of Objections relating to the sale of tobacco products. Members of the practice are also vigorously defending Outokumpu, a major European copper producer, in follow-on civil suits in the United States related to copper tubing. In Germany, we convinced the Düsseldorf Court of Appeals to reduce the fine imposed on one company for participating in a paper wholesale cartel by about 50 percent and actively defended clients in the German chocolate and coffee cartel investigations. We also successfully defended Deutsche Telekom before the German Federal Cartel Office against "price squeeze" allegations concerning value-added services.

In Asia, we represent Nissin, a Japanese freight forwarder, in litigation relating to coordination and agreement on surcharges for fuel and security. We are also defending Chi Mei Optoelectronics in a US criminal cartel investigation and private class actions, as well as EU proceedings and follow-on civil litigation, including putative class actions and individual actions. Although US and EU authorities have long pursued international price-fixing cartels, we have noticed a recent increase in the scrutiny of Asian businesses, and in particular Chinese companies. With extensive cartel defense experience and offices in China, the US and Europe, we are well poised to assist clients in global cartel defense.

Merger Clearance. Although the global economic crisis froze most worldwide merger activity during the first half of 2009, we were fortunate to represent a number of clients on achieving merger clearance for strategic transactions.

We are representing Cisco Systems in obtaining global merger clearance for

its acquisition of video communications company Tandberg—Cisco's first acquisition outside the United States. We were able to successfully clear Lufthansa's three acquisitions this year: Brussels Airlines, Austrian Airlines and BMI (two of these cases were subjected to detailed Phase II review by the European Commission). We are also assisting leading Austrian-based industrial plant and equipment supplier, ANDRITZ, in various acquisitions. We represented TUI in several merger control matters, including the transformation of leading container liner shipping company Hapag-Lloyd into a joint-venture, and the sale of TUI Travel's German low cost airline operations. Just before Christmas, we obtained clearance from the German Federal Cartel Office for the acquisition of Germany's second largest web hoster by Deutsche Telekom.

We obtained merger clearance for BAE Systems' acquisition of leading defense contractor MTC Technologies, and shepherded pharmaceutical client Sepracor through the merger clearance process in its acquisition by Dainippon Sumitomo Pharma. The group also represented Starent, a provider of mobile packet telecommunications equipment, in connection with its acquisition by Cisco.

Counseling. As always, we have also had an active year advising companies on strategic issues and compliance. Particular issues this year have included pricing and discounts, loyalty programs, and other unilateral conduct by dominant firms; restructuring in light of the recession; and maintaining compliance during difficult market conditions.

Well Positioned for 2010 and Beyond. As we begin the new year, we want to thank our clients for having entrusted to us some of their most pressing matters and concerns. We are glad to have achieved successful outcomes for them and to continue to vigorously represent their interests. Our

experience over the past year continues to add to our ability to meet and exceed our clients' expectations in Antitrust Litigation, Cartel and Dominance Investigations, Merger Clearance and Antitrust and Intellectual Property Disputes.

We wish you and your families a prosperous new year.

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