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## Expert Doubts Antitrust Claims Over Text Messaging

By **Erin Coe**

Law360, New York (October 24, 2008) -- Evidence does not appear to support a senator's inquiry of the top four U.S. cell phone carriers over rising prices for text messaging or the price-fixing allegations from the 20 different proposed consumer class actions that followed, according to an antitrust expert's analysis.

Christian Dippon of NERA Economic Consulting released a white paper on Thursday criticizing the claims against the carriers as meaningless and incomplete unless the parties define the economic market. Dippon said his own analysis of the U.S. wireless industry showed that the carriers are competing just fine on all aspects of their service offerings, including text messaging.

Dippon's white paper examined a letter sent last month by Sen. Herb Kohl, chairman of the Senate's antitrust subcommittee, to chief executives of Verizon Wireless, AT&T Inc., Sprint Nextel Corp. and T-Mobile USA Inc., asking them to justify the price hikes for text messages over the past three years.

According to that letter, the cost to send or receive a text message has risen from 10 cents to 20 cents since 2005, although the increase "does not appear to be justified by rising costs in delivering text messages."

The letter has sparked about 20 proposed class actions against the carriers alleging price-fixing.

Dippon said the suits do not point to any evidence of collusion or price-fixing, but instead rely on Sen. Kohl's concerns, which claim that "some industry experts" view the alleged price increases as a sign of lower competition or an increase in market power.

Dippon said Sen. Kohl appears to be questioning only the prices of pay-as-you-go text messaging, or short message service, which is just one subset of text messaging. But he noted that the Federal Communication Commission has never identified this subset

of text messaging as an economic market; rather, it is lumped together with all mobile services in a broader market.

Even if short message service, or SMS, made up its own market, Dippon said the FCC has repeatedly found the U.S. mobile market to be “effectively competitive,” and said collusion in this one market would be unlikely.

“Colluding on SMS only and competing on all other products and services in a market makes little economic sense, and collusion on all products and services is not supported by market facts and the FCC’s annual competition reports,” Dippon said.

Dippon also questioned how the proposed consumer class action complaints came up with claims of price-fixing based on Sen. Kohl’s allegations, noting a decrease in competition and an increase in market power.

While the senator correlates the alleged rise in market power with an alleged reduction in competition due to market consolidations, the plaintiffs appear to argue that the increase in market power and the decline in competition are the result of collusion, according to Dippon.

“Although the class action matters seem to be the result of Senator Kohl’s investigation, the two parties appear to base their cases on different economic theories,” Dippon said.

Without the economic market being defined or the economic theory established, the allegations cannot be properly addressed, Dippon said.

The white paper noted that not all U.S. mobile operators charge the same price for pay-as-you-go texting. While the top four carriers all charge 20 cents per text message, Alltel Corp. charges between 10 cents to 15 cents, while Virgin Mobile charges 10 cents. Service bundles that include text messaging were also priced differently by the carriers, the paper said.

The white paper also determined that U.S. prices for all wireless services are among the lowest in the world. Dippon examined the average voice revenue-per-minute, and found that the United States’ revenue-per-minute was lower than in 46 countries and only higher than in Pakistan and Bangladesh.

Dippon said a price increase does not necessarily mean collusion, but rather, could be the result of operators’ pricing strategies to move subscribers from pay-as-you-go to service bundles.

Underscoring that the carriers appear to compete on all bundle attributes and that U.S. rates seem low compared to international standards, Dippon concluded that the case against the mobile industry seemed unsupported.

David W. Zoll, one of the attorneys representing plaintiffs in an Ohio proposed class action against the carriers, said Dippon's white paper lacks merit and that the U.S. public is well served by Sen. Kohl's investigation and the pursuit of civil litigation.

"What is interesting about the paper is the fact that Mr. Dippon found it necessary to expand the market to justify the conduct. Rather than simply compare texting costs, charges and expenses, he ties in rates for voice communications and refuses to look at costs," Zoll said.

He added that Dippon calculated European charges to send text messages, while leaving out mention that there is no charge to receive text messages in Europe.

The proposed class actions against the carriers include a suit in the U.S District Court for the Northern District of Illinois and a suit in the U.S. District Court for the Northern District of Ohio, both filed last month.

Both lawsuits seek certification for a national class of people who have been forced to pay higher prices to send and receive text messages. In addition to the top four providers, the Ohio case names Alltel Corp. as a defendant and the Illinois suit names Vodafone Group PLC.

The plaintiffs in the Illinois case are represented in the matter by Wolf Haldenstein Adler Freeman & Herz LLC.

AT&T Inc. is represented by Sidley Austin LLP. Sprint Nextel Corp. is represented by Goldberg Kohn Bell Black Rosenbloom & Moritz Ltd. Verizon Wireless is represented by Winston & Strawn LLP. T-Mobile USA Inc. is represented by Schiff Hardin LLP and Davis Polk & Wardwell. Vodafone Group PLC is represented by Simpson Thacher & Bartlett LLP.

The plaintiffs in the Ohio suit are represented by Zoll, Kranz & Borgess LLC and Burg Simpson Eldredge Hersh & Jardine PC. Representation for the defendants was not immediately available at the time of publication.

The cases are Orians et al. v. AT&T Inc. et al., case number 08-cv-02191, in the U.S. District Court for the Northern District of Ohio, and Vaughanzella Smith-Howard et al. v. AT&T Inc. et al., case number 08-cv-05198, in the U.S. District Court for the Northern District of Illinois.

--Additional reporting by Julie Zeveloff