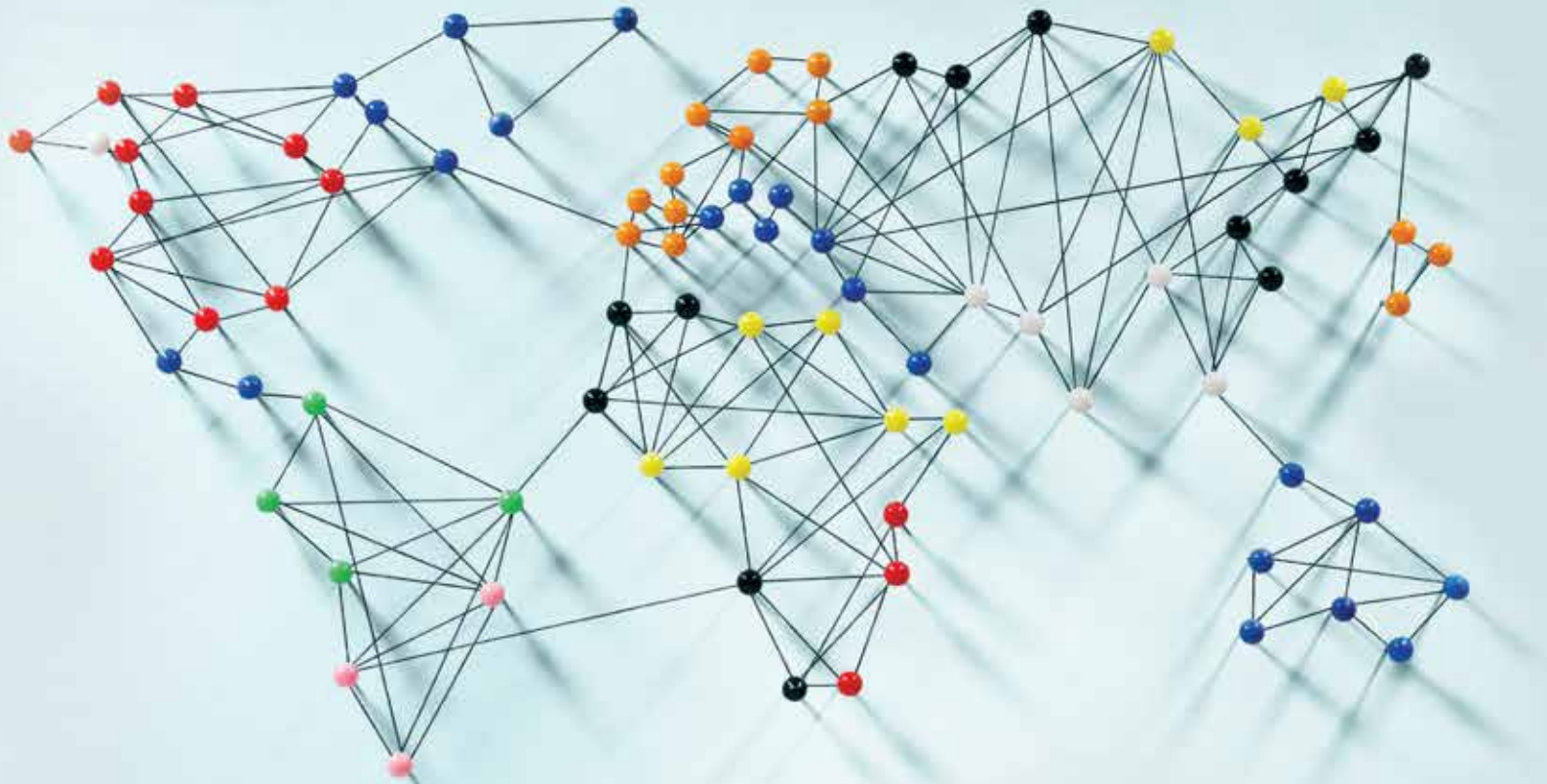

ANTITRUST MATTERS

MARCH 2015

DLA PIPER

EDITORIAL

By Bertold Bar-Bouyssiere

LUXLEAKS – CHALLENGING THE CHALLENGES TO TAX RULINGS IN THE EU

The European Commission's recent state aid crusade against so-called sweet deals in the form of tax rulings may have unwelcome consequences never contemplated by the Commission.

When the six founding members of the European Union drafted the 1957 Treaty of Rome, they established "state aid" rules as a means to subject member state subsidies to the Commission's control. What they had in mind was, in simple terms, that national governments would be tempted to favor their "national champions", which could lead to a "subsidy race" and ultimately distort competition within the common market. Hence the need to have an independent arbitrator.

Initially, the notion of state aid was quite easy to grasp conceptually, but over the years more and more forms of state measures were found to involve state aid. From the one-off cash grant to the mere announcement of a government guarantee, everything short of a smile can today amount to a "selective financial advantage".

"Selectivity" is indeed the key issue here. A "general measure" is never state aid, but any advantage that is not truly "general" will be "selective", even where this is not *prima facie* obvious. If one particular company receives a financial advantage paid out of state resources, it is deemed selective. The same is true where a particular sector is favored. The "selectivity" can be hidden; a measure can *de facto* favor a particular company or sector.

What was designed to ensure a competitive level playing field for companies throughout the single market has turned into a much wider political scheme. It is not the first time that the Commission uses its powers under the competition chapter of the EU Treaty to "discipline" member states unwilling to progress with harmonization of laws. It was in 1998 that the Commission adopted its first notice on "fiscal state aid",[1] in which it announced its intention to use the state aid stick in the field of non-harmonized direct business taxation. Its most problematic feature was the stated view that the simple existence of administrative discretion can indicate selectivity whenever the administrative exercise of the discretion power "goes beyond the simple management of tax revenue by reference to objective criteria". According to the 1998 Notice, if "in daily practice tax rules need to be interpreted, they cannot leave room for a discretionary treatment of undertakings. Every decision of the administration that departs from the general tax rules to the benefit of individual undertakings in principle leads to a presumption of State aid and must be analysed in detail. As far as administrative rulings merely contain an interpretation of general rules, they do not give rise to a presumption of aid. However, the opacity of the decisions taken by the authorities and the room for manoeuvre which they sometimes enjoy support the presumption that such is at any rate their effect in some instances. This does not make Member States any less able to provide their taxpayers with legal certainty and predictability on the application of general tax rules."[2] In short, in the Commission's view any tax ruling that does more than simply interpreting the general tax system bears the potential of being state aid.

One may wonder why the Commission did not start its crusade against tax rulings in 1998. Could it possibly ignore their existence? Is it just politically more compelling at a time when EU member states struggle with their budget and thirst for money? One of the dangers is that the state aid procedure is primarily a "bilateral" procedure between the Commission and the member state government. The state aid beneficiary only has a third-party status. Moreover, once the Commission concludes that the state aid granted under the umbrella of a tax ruling is "incompatible with the common market" (which it likely will), the member state that has granted it then has to recover it for up to 10 years back. Legitimate expectations are irrelevant.

[1] Commission Notice on the application of the state aid rules to measures relating to direct business taxation, *Official Journal 1998 C 384, p. 3.*

[2] *Ibid*, para. 22

The number of rulings published by *Luxleaks* is quite significant, and more information may become available over time in relation to other member states. Of course the Commission can only process a limited number of cases per year, but does that help? Competitors of state aid beneficiaries may apply to national courts and ask for conservatory measures (including the temporary recovery of state aid) pending the Commission's decision on its compatibility. It is difficult to imagine the endemic consequences of a massive tide of court proceedings that not even the Commission may have pondered.

Maybe the political actors would be advised to find a legal and/or political solution to the problem before this gets out of hand. The policy makers in the Commission's ivory tower may have rushed ahead on initiatives that may be difficult to get under control. Fingers crossed.

IN THE US

Please take a few minutes to reflect on this important issue – there is an opportunity here that we do not want to miss. You have heard of "Luxleaks" – the leak of confidential information about companies that have obtained preferential tax rulings in Luxemburg, and we have already circulated a few alerts on this. However, since this is a very EU-specific topic, we thought we give you a bit of guidance

10 YEARS OF TAX SAVINGS AT RISK

In the EU, the European Commission has far-reaching powers to implement a level-playing field for competition throughout the EU. It ensures that EU Member States do not enter into a "subsidy race" with each other, thereby distorting unfettered competition across national boundaries. The "classic" subsidy is a cash grant in favor of the domestic car maker (e.g. Volkswagen) to help it compete with foreign rivals (e.g. Fiat, Peugeot). Such subsidy is called "State aid". All State aid has to be approved by the Commission prior to its implementation.

When the Commission became frustrated that Member States refuse to harmonize tax laws some 15 years ago, it used its State aid powers in the field of taxation. Hence the label "Fiscal State aid". More recently, it has taken the view that tax rulings that deviate from the normal tax rules and grant advantages to domestic or foreign investors, amount to Fiscal State aid.

What used to be limited to Luxemburg and a few other EU countries (Ireland, the Netherlands), has now become a fully blown issue affecting all of the EU. Until recently, the Luxemburg Government had resisted the European Commission's attempts to disclose the beneficiaries of tax rulings. It had even taken the information injunction to the EU Court of Justice. This has now changed. On 18 December 2014, the Luxembourg Government announced its willingness to fully comply with the Commission's information request, and to drop its request for judicial review.

On 17 December 2014, Commissioner Vestager announced that the Commission broadened the tax ruling enquiry to all EU Member States. The other Member States will soon receive information requests for tax rulings granted between 2010 and 2013. It is understood that the Commission intends to adopt a decision regarding the four on-going investigations into tax rulings granted to multinational companies before the summer 2015 and to use them as test cases to establish a new line of policy in the field.

5. The risk is enormous: companies may be required to pay up for any tax savings made over up to 10 years, including interest.

WHAT YOU CAN DO NOW

- Speak to you clients that operate in the EU. Are they concerned?
- Offer them a review of their tax rulings. Not every tax ruling amounts to Fiscal State aid.
- [Roderik …]

APPENDIX: Q&A

WHAT IS THE ISSUE WITH TAX RULINGS UNDER EUROPEAN STATE AID LAW?

Upon discovery by the European Commission of the existence of a tax ruling, the Commission would apply a number of criteria to assess whether the ruling amounts to non-approved State aid. Without any doubt, the ruling would amount to a financial advantage for the company and it would involve a (negative) transfer of public funds. The key issue is whether it is "selective" rather than a general measure that applies to all companies.

A selective measure is one that openly or implicitly, directly or indirectly, favors "certain" undertakings (an individual company or a sector). In the field of State aid, a measure is deemed selective where it amounts to a deviation from the general tax system.

In practice, the Commission first determines the commonly applicable system ("reference system"). In a second step, it examines whether the measure constitutes an exception to the reference system. Thirdly, the Commission assesses whether the deviation (if any) is justified by the nature or general scheme of the reference system, i.e. whether the exception derives directly from the basic principles of the reference system. If the deviation is not justified, the measure amounts to State aid.

In the case of tax rulings, the Commission takes into account (i) whether the ruling departs from general tax rules to the benefit of one individual undertaking, or (b) whether it constitutes a mere interpretation of general rules and thus merely serves the purpose of legal certainty and predictability on the application of general tax rules.

In some of the recent cases, for example, the Commission inferred selectivity from the fact that the ruling used transfer pricing mechanisms which were not in line with any of the recommended OECD methods.

WHAT HAPPENS IF A TAX RULING IS CONSIDERED TO CONSTITUTE STATE AID?

Should the measure include State aid, it would likely be incompatible with the common market, as it would fall in the category of "operating aid", i.e. aid that does not incentivize any particular project (e.g. energy-saving investment, regional aid etc.). Wherever the Commission holds State aid to be incompatible with the common market, the Member State is under an absolute obligation to recover it. In that context, legitimate expectations of the company are irrelevant.

IS IT POSSIBLE TO QUANTIFY THE FINANCIAL RISK ASSOCIATED WITH RECOVERY OF INCOMPATIBLE STATE AID?

Recovery aims at restoring the situation prior to the grant of the aid. In its decision, the Commission is not required to identify the exact amount of aid which is to be recovered. It is sufficient for the Commission to include information which will enable the amount of aid to be calculated by the Member State concerned without too much difficulty. In the case of State aid in the form of tax measures, the amount to be recovered is calculated on the basis of a comparison between the tax actually paid and the amount which should have been paid if the generally applicable tax rules had been applied.

In addition, in its recovery decision the Commission must order the payment of interest at the rate that it will determine, calculated from the date on which the unlawful aid was at the disposal of the beneficiary until the date of its recovery. This interest aim at taking into account fluctuation of value of money over time.

National authorities in charge of recovery may deduct certain sums where appropriate from the gross sum to be recorded (such as tax paid) pursuant to internal rules, provided that the application of such rules does not render recovery impossible in practice or discriminate in relation to similar cases governed by national law.

HOW FAR CAN THE COMMISSION GO BACK IN TIME TO SCRUTINIZE PAST TAX RULINGS?

According to the applicable rules on State aid procedures, the Commission is not entitled to order the recovery of an aid after a limitation period of 10 years starting from the day on which the incompatible aid was "granted" to the beneficiary either as an individual aid or as aid under an aid scheme.

In case *France Telecom*, the Court of Justice indicated that "*the determination of the date on which aid was granted may vary depending on the nature of the aid in question*". Depending on the mechanism authorized by the tax ruling, one might take the view, if necessary, that the aid was granted at the time of the ruling. However, the more realistic view is that the "grant" is deemed to occur anew with every annual tax exercise. In Solvay's case the difference would not matter, at least not now.

In addition, any action taken by the Commission or by the Member States, acting at the request of the Commission, with regard to the unlawful aid interrupts the limitation period, which then starts to run afresh, e.g. the Commission writes to the Member State seeking information on the suspected aid scheme, even if the aid recipient is not informed of the Commission's concerns at that stage.

WHAT SHOULD US COMPANIES DO?

US companies benefitting from tax ruling concluded with tax authorities in the European Union are at risk. Sooner or later, the question whether their tax ruling deviates from standard tax rules will be asked. Ideally, finance and legal departments of US companies should conduct together a self-assessment as soon as possible. Once a potentially problematic ruling has been identified, we recommend to conduct a deep assessment with a team combining expertise in tax and state aid law.

While accounting firms have set up those mechanism following an established practice, rules have now obviously changed and this is the end of an era of tax leniency. As a result, companies should be aware that there might be a conflict of interest between the accounting firm or the financial advisor which designed the tax ruling and the company benefitting from it. This could only be solved by using external counsel to advise companies on those delicate issues.

Time is of the essence because it is understood that the Commission intends to adopt a decision regarding the four on-going investigations into tax rulings granted to multinational companies before the summer 2015. Afterwards, those cases will be used as test cases to establish a new line of policy in the field.

DLA Piper combines the tax and state aid expertise to provide guidance to its clients and a special task force has been set up to address the needs of companies in those troubling waters. DLA Piper regularly advises multinational clients on the potential consequences of a state aid qualification of a tax ruling. DLA Piper also has a long experience in representing clients in complex state aid cases before the European Commission, the Court of Justice and national courts.a

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EUROPE

Damages for infringements of the competition law in Europe: the way forward

By Yoichi Shibasaki, Dodo Chochitaichvili and Bertold Bar-Bouyssiere

On 26 November 2014, the European Parliament and EU Council of Ministers jointly adopted Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law of the Member States and of the European Union[1].

This new Directive aims at achieving more effective enforcement of competition rules in Europe by streamlining the interaction between private damages claims and public enforcement. The Directive reaffirms the right to compensation for harm caused by infringements of competition law and regulates the coordination of the applicable rules in actions for damages in Member States on various matters, such as disclosure of evidence, the effect of national decision, the limitations periods, the joint and several liability, the passing-on of overcharges as well as consensual dispute resolution.

DISCLOSURE OF EVIDENCE

The Directive facilitates access to evidence by allowing disclosure of categories of evidence identified via common features such as the nature, object or content of the documents, upon request of the claimant. Evidence may include information submitted by the parties in response to the request by the competition authorities for information in the administrative proceeding other than the protected documents and internal documents of the competition authorities. Safeguards against fishing expeditions and against the disclosure of business and confidential information are however provided by the Directive by granting national judges with the final say on the relevance and proportionality of a request for disclosure. In order to also preserve the incentives of companies to cooperate with the Commission or national competition authorities, the Directive provides that leniency statements and settlement submissions are fully protected from disclosure and use in damages actions.

PASSING-ON OF OVERCHARGES

To implement the principle under which claimants shall receive full compensation for the harm suffered, no more and not less, the Directive is introducing rebuttable presumptions. Those concern the fact that (i) cartel infringements cause harm and that (ii) cartel overcharges are at least partially passed on to indirect purchasers. The defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or not entirely, passed on to the indirect purchaser. On the other hand, the defendant can raise the passing-on defense against a claimant, provided he proves the existence and extent of pass-on of the whole or part of the overcharge. However, theoretically, the defendant may face double charges from the direct and indirect purchasers. How to allocate and settle the damages that are claimed by the direct and indirect purchasers has also been a major issue in the private damage actions in the United States because the direct and indirect purchasers compete among them. National courts will be entrusted with the – sometimes difficult – task to quantify the amount of damages based on the basis of reasonably available evidence and economic analysis.

THE EFFECT OF NATIONAL DECISION

The Directive introduces the possibility for claimants before courts of a given Member State to rely on the "final" infringement decisions of this Member State's national competition authority or a review court as constituting "irrefutable proof" of the material, personal, geographical and temporal scope of the infringement. The Directive also provides that before courts of a Member State, a final decision rendered by a national competition authority or the review court of another

[1] OJ L 349, 5.12.2014, p. 1-19.

Member State constitutes "at least *prima facie* evidence" of the infringement. This is designed to prevent infringers to re-litigate the finding of infringement itself in damages actions before civil courts, after the decision has become final. This is expected to reduce delays and costs for the injured parties.

The Directive introduces longer period of the statute of limitation during which claimants may bring a damages action in order not to "*render practically impossible or excessively difficult the exercise of the right to full compensation*".

The statute of limitation is at least at least for five years and will not start running before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know (a) of the behavior and the fact that it constitute an infringement of competition law; (b) of the fact that the infringement caused harm to it; and (c) the identity of the infringer.

The statute of limitation is suspended or interrupted if a competition authorities initiates its administrative proceedings (investigation) and until one year after the final decision in the administrative proceedings.

In addition, where several undertakings infringed the competition rules jointly, they will, in principle, be held jointly and severally liable for the entire harm caused to victims. A co-infringer will nevertheless have in this case the right to obtain a contribution from other co-infringers if it has paid more compensation than its share.

CONSENSUAL DISPUTE RESOLUTION

Compensation through actions for damages can be sought before national courts and through other dispute resolution mechanisms, such as arbitration, mediation or conciliation.

The new Directive encourages consensual dispute resolution methods. Such methods aim at facilitating a settlement between the parties on compensation for the harm caused by a competition law infringement, in particular to overcome difficulty to quantify the damages. To allow the possibility of reaching such settlement, the Directive provides for the suspension of the limitation periods for the duration of the consensual dispute resolution process up to two years and that the court may also suspend the legal proceedings while the parties are engaged in consensual dispute resolution methods. Moreover, pursuant to the Directive, the payment of compensation as a result of a consensual settlement can be considered by competition authorities as a mitigating factor to determine fines prior to their decision. Unless the defendant disputes the existence or the scope of the infringement, they can elaborate strategy to settle damages claims as soon as possible to reduce its total liability of the infringement and the victims do not have to wait for the final decision of the competition authorities.

Finally, Member States will have to ensure that national courts are empowered to quantify the harm suffered by the claimants, in accordance with national procedures. Where appropriate for the determination of the quantum of damages, national courts can ask for the assistance by a national competition authority.

CONCLUSION

The Directive makes available for the victims (natural or legal persons) of competition law infringement(s) various specific mechanisms that facilitate them to recover damages from the infringers for their harm. With the purpose of improving the conditions for bringing damages actions and reducing the differences between the Member States as to the national rules governing those actions, claimants can expect that their right to full compensation is protected through minimum European standards defined in the Directive. Member States shall transpose the provisions of the Directive by 27 December 2016.

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EU court warns businesses: Do not tamper with electronic data during a dawn raid

By Fabienne Dony

In *Energeticky a prumyslovy holding a.s. and EP Investment Advisors s.r.o. v European Commission* (T-272/12), the EU General Court has dismissed the appeal brought by two Czech energy companies against the €2.5 million European Commission fine imposed for their obstruction in a dawn raid and in particular for allowing access to email accounts the Commission had required to be blocked and diverting emails to a server.

BACKGROUND

In 2009, European Commission officials commenced the inspection of the premises of two energy companies in Prague: Energeticky a prumyslovy holding a.s. (EPH) and EP Investment Advisors s.r.o. (EP).

During the dawn raid, the Commission inspectors ordered a senior executive of EP to block the email accounts of four colleagues (including that of Mr M) holding key positions in the company and to re-set the passwords for those accounts. The emails addressed to those four colleagues passed through the group server before being distributed to their accounts. To ensure that the inspectors had exclusive access to those accounts during the entire duration of the inspection, the passwords would only be known to them.

After those email accounts had been blocked and the passwords changed, Mr M called the IT desk reporting that he was unable to log into his account from home; upon his request, the IT department reset the password, allowing Mr M to access his account again. The inspectors only became aware of this on the second day of inspection, when they could no longer access Mr M's email account.

On the third day of inspection, the Commission discovered that the IT department had been ordered to prevent incoming emails addressed to the four individuals from being delivered, which meant that the incoming emails would stay on the group server but were not directed to the inboxes of the four individuals. This had in fact only been applied to the email account of one individual, whose inbox did not contain any new emails.

Both companies were fined €2.5 million in March 2012 for refusal to submit to an inspection. They lodged an appeal seeking the annulment of the Commission's decision or a fine reduction.

JUDGMENT

The EU General Court considered the issues below and dismissed all the applicants' pleas.

Negligently allowing access to a blocked email account

The General Court held that the Commission was fully entitled to find that access to a blocked email account had been negligently allowed. The Commission had the burden of proving that access was not granted to the data in Mr M's s blocked email account, but was not required to prove that the data was manipulated or deleted.
It follows that the refusal to submit to the inspection was established when the inspectors did not obtain exclusive access to Mr M's account.

Intentional diversion of emails

The General Court held that the diversion of the emails was intentional, in that those employees who carried out the diversion had received the instruction about blocking the email accounts directly from the Commission and clearly thwarted both the instructions given to them and the purpose of the inspection. The European Commission was not required to examine whether the missing data could be found elsewhere in the applicants' IT system. The fact that the emails were still stored on a group server was therefore irrelevant. The Commission should have been able to access all emails normally, i.e. in the email inbox.

Breach of principle of proportionality when determining the fine

In considering the absence of guidelines for calculating a fine for a procedural breach, the Commission has a greater discretion to set the amount of the fine for a breach of procedure than it does for an infringement of the substantive law. The General Court held that a fine of €2.5 million could not (in this case) be considered to be disproportionate since it only corresponded to 0.25 percent of the company's annual turnover; falling far below the maximum ceiling of 1 percent turnover.

This is the first case where the European Commission's powers to fine a company for failing to provide complete electronic information have been considered. Electronic files are much easier and quicker to manipulate than paper files and therefore pose particular difficulties for the effectiveness of an inspection.

The Commission's power to carry out inspections is its primary investigative tool to detect infringements of competition law. The judgement safeguards this detection tool and sends a crystal-clear message to companies that any steps undermining the effectiveness of inspections will be sanctioned by fines, which includes tampering with evidence – be it stored in paper or electronic form.

This judgement follows the Commission's trend to pursue procedural infringements during inspections set by the *E.ON Energie AG v European Commission* (T-141/08 and C-89/11P) and Suez Environment (COMP/39.796) cases where the companies were fined €38 million and €8 million respectively for damaging seals during inspections.

For assistance during a dawn raid, please contact the DLA Piper 24/7 global rapid response hotline and download the Rapid Response App as set out on page [XY].

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The Second-Generation Competition Law Cooperation Agreement between the EU and the Swiss Confederation: Breaking New Ground

By Nina Mampaey

The agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws is in force.

This agreement, which entered into force on December 1, 2014, is the very first "second-generation" agreement the European Union has concluded with a third country. The EU has already concluded several bilateral agreements with regard to its competition policy, but these were all "first-generation" agreements. The major difference between this second-generation agreement and a first-generation agreement is that the former will enable the contracting competition authorities to actually exchange information, evidence and other documents that are obtained during their respective investigations.

This groundbreaking agreement originates from the consideration that a closer cooperation on addressing anticompetitive activities will improve and strengthen the relationship between the EU and Switzerland, especially given the fact that they are two very important economic partners. The economic ties between the two parties have as a consequence Coordinating their competition policies will lead to a sound and effective enforcement of competition law.

According to Article 1, the purpose of the Agreement is "to contribute to the effective enforcement of the competition laws of each Party through cooperation and coordination, including the exchange of information, between the competition authorities of the Parties and to avoid or lessen the possibility of conflicts between the Parties in all matters concerning the application of the competition laws of each Party".

The first part of the Agreement holds the same (or at least similar) principles and conditions with regard to the cooperation of competition authorities that can be found in the first-generation agreements the EU concluded with the United States in 1991, with Canada in 1999, with Japan in 2003 and with South Korea in 2009. The principles which both types of agreement have in common evolve around the notification in case of enforcement activities that may affect important interests of the other party (Article 3); the coordination of enforcement activities with regard to related matters (Article 4); and the obligation to carefully consider the important interests of the other party in order to avoid conflicts (Articles 5 and 6).

The second part of the Agreement, however, presents us with a set of new principles, which show some similarities to the principles laid down in the Commission Notice on Cooperation with the Network of Competition Authorities within the European Competition Network (Pb. C. 101/43).

The principles on the exchange of information and consultation may be found in Articles 7 to 11 of the Agreement. It is to be noted that this information can, in principle, only be transmitted among competition authorities when the undertaking that provided the information has given its express consent (Article 7, (3) of the Agreement). Moreover, the transmission of personal data is only allowed when the competition authorities are investigating the same or related conduct or transaction (Article 7, (3) of the Agreement). At first sight, it seems this is not very different from the first-generation agreements, since they also provide for the exchange of information after an express waiver of the source of information.

However, under certain conditions and as opposed to the general rule, *information can be transmitted, upon request, for use as evidence without the express consent of the undertaking concerned*. This transmission of information will be allowed when the competition authorities are investigating the same or related conduct or transaction; when the request for information is made in writing, including a general description of the subject matter, the nature of the investigation or proceedings and identifying the undertakings subject to the investigation or proceedings; and when it is determined which information is relevant to be transmitted (Article 7, (4) of the Agreement). The important difference from the four first-generation agreements the European Union has concluded is that under the second-generation agreement, the European Commission and the Swiss Competition Commission can exchange confidential information which they have obtained during the investigative process, under certain conditions, in order to guarantee the protection of personal data.

Another novelty in the Agreement is Article 10. This provision sets out the principles and conditions under which the information transmitted to the European Commission can be sent to the national competition authorities of the member states. Given the importance of the European Competition Network for the EU's competition policy, adding this aspect to the Agreement will, from a process-economic and legal certainty view, be very beneficial for the functioning of this cooperation.

It is expected the Agreement will provide for an even stronger cooperation between the European Union and the Swiss Confederation, and, given the extent of the Agreement, results and an evolution in the relevant practice should be expected soon. This instrument should significantly reduce the workload and timeliness of cross-border competition enforcement activities between the two competition authorities for the future.

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German Federal Court of Justice on the internal liabilities for EU fines: ruling especially relevant in the M&A and multinational contexts

By Verena Pianka

The German Federal Court of Justice (FCJ) recently issued a decision on the liability of a parent company for the antitrust offences of its subsidiary [FCJ, decision of 18 November 2014, KZR 15/12 – Calcium carbide Cartel II] that will be of particular importance for cases in which the parent and the subsidiary are part of the same company group during the time an antitrust offence has taken place and the subsidiary is sold during or after the infringement.

The decision addresses this question: is there is a general rule that the parent is always internally fully liable for an EU antitrust fine, or are the facts of an individual case decisive?

Parent company is not in any case fully internally liable for fines

In antitrust proceedings in 2009, the European Commission imposed fines on several companies active in the calcium carbide sector that had concluded cartel agreements since 2004. Fines of more than €13 million were jointly and severally imposed on a subsidiary that was a member of the cartel and its direct and group parent companies. Before the cartel was uncovered, the group parent company had listed the subsidiary at the stock exchange and had sold its shares. Subsequent to paying its part of the fine, the group parent company brought an action against the direct parent company and the subsidiary seeking reimbursement of the sum already paid. The group parent company argued that it had not been involved in the cartel and was thus internally not liable for the fine.

The Higher Regional Court (HRC) dismissed the claim. It was of the opinion that the group parent company internally had to bear the total fine.

The HRC's decision was set aside by the FCJ. The FCJ tied its decision to a recent decision of the European Court of Justice [ECJ, 10 April 2014, C-231/11 p and C 233/11 P – Siemens AG Austria]. In its judgment, the ECJ pointed out that, within the framework of national law, it was up to the national courts to decide on internal liabilities. According to the FCJ, the parent company is not in any case fully internally liable for fines jointly and severally imposed by the European Commission on the parent and its subsidiary in an antitrust procedure.

Facts of the individual case are decisive, no general rule available

Rather, it emphasized that in cases where the parties have not concluded an agreement (such as a profit transfer agreement on the basis of which the liability ultimately remains with the parent) regarding internal liabilities, no general rule that the parent has to bear the total fine applies. Rather, all circumstances of the concrete case are decisive.

In particular, the individual contribution to the antitrust infringement and the degree of fault in that regard as well as the facts relevant for the calculation of the fine have to be taken into account. As regards the individual contribution, the FCO stressed that the subsidiary that is solely responsible for the misconduct acts against good faith if it invokes the insufficient exercise of the parent's duty to supervise. In addition, the economic profit that each joint debtor has gained from the misconduct, as well as the respective economic capacity and the volume of the sales involved in the antitrust infringement have to be considered.

High practical relevance of the decision in M&A and for foreign companies

As a consequence of the FCJ's decision, companies selling their subsidiaries or former parent companies of undertakings listed on the stock exchange will in future even more try to shift a European Union antitrust fine to their subsidiaries and their current owner. It is likely that the subsidiaries will need to prove that the parent company was also participating in any antitrust infringement or turned a blind eye on the issue.
In addition, it will likely have to be demonstrated by the subsidiary that the parent (potentially) profited from the cartel infringement.

In M&A transactions, it is therefore more important than ever to agree on sufficient wraps and warranties in order to secure an adequate contractual protection against the potential risk that acquirers may, years later, be exposed to claims for compensation relating to EU antitrust fines. In addition, this decision will be of importance for foreign companies which may encounter, or already face, allegations of antitrust-relevant misconduct in Europe.

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NETHERLANDS

Dutch antitrust watchdog fines investment firms as part of flour cartel

By Stijn de Zwart

Dutch Competition Authority Fines Investment Firms: How Much Influence Is "Decisive"?

Private equity firms can be held liable for cartel infringements of their portfolio-companies. This has been confirmed by the judgment of the EU Court in *Kendrion* (2013) and by the European Commission in 2014 when it fined Goldman Sachs €37.3 million in relation to the High Voltage Cable case. Following these examples, the Dutch competition authority (ACM) has now for the first time imposed fines on private equity investment firms.

In 2010, the ACM imposed fines on Dutch, Belgian and German millers and several parent companies in relation to the flour cartel. One of the millers fined is Meneba. Subsequently, two other millers that were fined complained to the ACM about unequal treatment, arguing that their shareholders had been held accountable, whereas the Meneba shareholders had not. Following these objections, the ACM has re-evaluated its position towards the investment companies that were, at the time of the infringement, indirect shareholders in Meneba.

On 30 December 2014, the ACM published the decision by which it imposed fines on subsidiaries of investment firms Capital Investors Group Limited (CIGL) and CVC Capital Partners Europe Limited (CCPEL) and on subsidiaries of investment firm Bencis Capital Partners B.V. (BCP) with regard to the successive periods during which these investment firms were shareholders in Meneba.

In its assessment, the ACM relied on the principles established in EU case law on parental liability, according to which a parent company can be fined even though it had no personal involvement in the infringement. According to this case law, if a parent company exercises decisive influence over its subsidiary, there is a single economic unit and therefore a single undertaking for the purposes of the cartel prohibition. If a parent company holds (nearly) 100 percent of the shares, there is a rebuttable presumption that the parent company does in fact exercise decisive influence over the conduct of its subsidiary.

In the case of the investment firms that owned shares of Meneba, however, the ACM could not rely on the presumption that these firms did exercise decisive influence. CIGL and CCPEL only owned 41 percent of the shares (during 2001-2004) and BCP owned 92 percent of the shares (during 2004-2007). Therefore the ACM had to go into more detail and investigate the influence actually exercised by the investment firms over Meneba. Aspects that the ACM deemed particularly relevant included, for example: members of the statutory board were nominated by the investment firms; the investment firms had appointed one or more representatives to the supervisory board; and, according to the shareholders agreement, strategic decisions had to be approved by the shareholders.

These decisions confirm that not only group holding companies but also private equity investment firms can under circumstances be considered to form a single economic unit with their subsidiaries. This exposes private equity firms to liability for cartel fines, even in

circumstances when they had no personal involvement in, nor knowledge of, illicit cartel arrangements. As demonstrated by this decision, there may be such risk even if the private equity firm holds no more than 41 percent of the shares.

The present legal landscape requires a thorough due diligence prior to any acquisition, but in case of investment firms also the fund structure and arrangements that might give rise to "decisive influence" must be carefully assessed. When confronted with an antitrust investigation into a portfolio company, investment firms should seek to convince the authorities at the earliest possible stage that no decisive influence was exercised.

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NORWAY

National developments

By Kjetil Johansen and Katrine Lillerud

Short news report I: Published new guidelines on best practices for competition cases 20 December

The EFTA Surveillance Authority has adopted new guidelines aimed at increasing interaction with parties in proceedings under Articles 53 and 54 of the EEA Agreement and strengthening the mechanisms for safeguarding the procedural rights of parties.

http://www.eftasurv.int/press--publications/press-releases/competition/nr/1826

With these new guidelines, procedures will be aligned with those applicable for cases under Articles 101 and 102 under the TFEU.

Short news report II: €78,000 (NOK 700,000) fine to Jotunfell Partners for gun jumping (photo stores)

The Norwegian Competition Authority (NCA) has imposed a fee for early implementation of a concentration. The NCA concluded that Jotunfjell was in breach of the implementation prohibition of the Norwegian Competition Act when they entered into the lease agreements, and took control over equipment and inventory from 18 stores. The seller was the administrator of a bankruptcy estate.

In parallel with Jotunfjell's requesting an exemption from the standstill obligation, they opened the relevant stores. In the NCA's view, Jotunfjell consciously chose to implement the transaction without awaiting a formal clearance and exemption decision from NCA. This reinforces the seriousness of the violation, and, accordingly, the fee is set relatively high.

http://www.konkurransetilsynet.no/no/Aktuelt/Nyheter/Gebyr-for-brudd-pa-gjennomforingsforbudet/

Short news report III: NCA considers to block the TeliaSonera/Tele2 Norge merger (telecom operators)

NCA considers to intervene against TeliaSonera acquisition of Tele2. The acquisition involves a merger of two of the three largest mobile operators in Norway. NCA fear that prices for consumers will be higher and the quality of services lower with this acquisition, given the already highly concentrated market.

The remedy measure package proposed by TeliaSonera are – in the view of the NCA – not sufficient to rectify the competition problems emerging from the deal.

http://www.konkurransetilsynet.no/no/Aktuelt/Nyheter/Teleoppkjop-Vurderer-a-stanse-TeliaSonera-Tele2-Norge/

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POLAND

Manufacturer of replacement parts for army helicopters fined by the NCA for refusal to supply

By Andrzej Balicki and Michał Orzechowski

The decision is of a precedential nature because the NCA has not historically regarded the defence sector as a competition law enforcement priority. The investigation was launched based on a complaint of a company servicing army helicopters in connection with public tenders organized by a Polish military unit. The NCA found that after the servicing company's offer was chosen in the tender, the manufacturer of replacement parts allegedly refused to supply them to the winner of the tender. The NCA did not accept any objective justifications put forward by the manufacturer and held that such a practice constituted an abuse of a dominant position. The total fine imposed by the NCA amounted to about €80,000.

The official text in Polish can be found here.

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ROMANIA

Amendments brought to the Romanian antitrust legislation

By Sandra Moga, Livia Zamfiropol and Alina Lacatus

During the final quarter of 2014, Romanian antitrust legislation was amended regarding both aspects of procedure applied by the Romanian Competition Council (RCC) and merger control regulations modified as a result of amendments implemented at the EU level in 2014.

Amendments brought to the access to file procedure

The provisions regarding the access to file procedure included in the Romanian Competition Law were subject to subsequent modifications at the end of 2014.

According to the Competition Law, in the context of an investigation, the confidential documents included in the RCC file are made available to the investigated parties in the context of the access to file procedure, based on an order issued by the RCC President. Before the adoption of the amendments, the order of the RCC President whereby the parties to an investigation were denied access to such confidential documents might have been challenged directly in court; when a claim was initiated, the investigation process would be suspended until a court decision on the claim was issued.

Following the adoption of the relevant amendments, such an order may only be challenged along with the final decision issued in the respective case, and the challenge must be lodged by way of the same court action.

In this context, the parties to the investigation are no longer able to challenge potential breaches of access to information which is necessary in the preparation of their defense prior to the finalization of the investigation.

At the end of 2014, the Guidelines regarding the rules of access to the RCC file was also modified by clarifying the definitions of "business secret" and "other confidential information".

Amendments to the Regulation on economic concentration (RCC Merger Regulation)

In October 2014, the RCC Merger Regulation was modified to reflect the package of measures adopted by the European Commission at the end of 2013 for the simplification of procedures for notifying mergers under the EU Merger Regulation.

The scope of the simplified merger procedure has been extended in order to mirror amendments brought by the European Commission. In this context, the RCC has increased the market share limits in the sense that the simplified procedure covers transactions where parties' combined market shares are below 20 percent for horizontal overlaps and below 30 percent for vertical overlaps.

Similarly, the RCC amended the definition of the "affected markets" of Annex 1 to the RCC Merger Regulation (which mirrors Form CO of the European Commission's Implementing Regulation). Parties only need to submit information for affected markets where there are horizontal overlaps of more than 20 percent (previously 15 percent) and vertical overlaps of more than 30 percent (previously 25 percent).

The RCC Merger Regulation also emphasises the importance of pre-notification contacts in cases of simplified notification, but notes that such contacts are not mandatory and that the parties are recommended to request a meeting with the RCC representative, with a two-week deadline prior to the submission of the notification, provided that they submit relevant information in relation to the envisaged notification prior to such meeting.

Amendments to the Guidelines regarding the acceptance of commitments in antitrust cases (Commitments Guidelines)

According to the amendments to the Commitments Guidelines, should a commitments proposal be prima facie deemed acceptable by the RCC and if the

investigation was initiated based on a complaint, then the complainant will also be notified in relation to the market test and will be invited to submit observations (similar to the provisions of the Commission's Best Practices on the conduct of proceedings concerning art. 101 and 102 TFEU). Moreover, the deadline for the submission of observations within the commitments procedure by third parties cannot be shorter than 30 days (previously it was 15).

Amendments to the Regulation for ascertaining of breaches and application of fines

The RCC Regulation for ascertaining of breaches and application of fines has been modified in order to include that the RCC decision for application of fines constitutes a writ of execution, without any other formality being necessary.

Other amendments concerning the adoption of decisions by the RCC Plenum

The modality of adopting decisions by the RCC Plenum has been modified. In previous version of the Competition Law, meetings of the RCC Plenum were valid when held in the presence of five out of seven members and the decisions were valid with the vote of the majority of its members. These requirements have been amended to the following:

The RCC Plenum meetings are validly held in the presence of the majority of the Plenum members in function, but with no less than three of such members and Decisions may be validly adopted with the vote of the majority of the present members of the Plenum.

Implications of the amendments

The amendments brought to the RCC Merger Regulation should result in a better alignment of the local merger control rules with those applicable at EU level.

Moreover, as regards the additional modifications, it seems that the RCC intended to correct certain disadvantages and failures of the previous legal provisions observed in practice. However, the issue of the application and interpretation of such amendments in practice remains open, while the amendment which removed the right to challenge in court immediately the denial of access to information in the file raises concerns from the perspective of the Romanian Constitution. Several companies have already raised an unconstitutionality claim and the Constitutional Court will have to decide the issue.

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SLOVAKIA

Antimonopoly Office taking actions against bid-rigging in the energy sector

By Michaela Stessl, Andrea Cupelova and Beata Kusnirova

In November 2014, the Antimonopoly Office of the Slovak Republic on its own initiative commenced an administrative proceeding against three entrepreneurs operating in the energy sector in the matter of a possible agreement on restricting competition.

The Office had a reasonable suspicion that the entrepreneurs coordinated their actions within the bidding procedure for public procurement, the subject matter of which was the supply of the line for the production of equipment that generates electricity from renewable energy sources in a total value up to €15 million. This project was implemented with the support of EU funds. Such conduct of entrepreneurs may be contrary to the provisions of Act No. 136/2001 Coll. on the Protection of Competition and Article 101 of the Treaty on the Functioning of the European Union, both of which prohibit agreements between competitors that restrict competition.

Entrepreneurs that are parties to horizontal agreements between direct competitors, which are considered hard-core cartels, may face a fine of up to 10 percent of their turnover for the previous closed accounting period.

The Office has not specified which entrepreneurs purportedly committed the above-mentioned conducts.

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FCA's new competition powers in the financial services market

By Fabienne Dony

The Financial Conduct Authority ("**FCA**") is the sectoral regulator of financial services firms in the UK. From 1 April 2015, the FCA will obtain competition powers to promote effective competition in the interest of consumers in the markets for regulated financial services. These competition functions will be exercised concurrently with the Competition and Markets Authority ("**CMA**"), the lead competition authority in the UK having jurisdiction in all sectors of the economy.

The FCA will be given the following competition powers:

- Market study powers under the Enterprise Act 2002

The FCA will have the power to carry out market studies to consider the extent to which any aspect of the provision of financial services in the UK has or may have an adverse effect on competition and, therefore, on the interests of consumers.

After conducting a market study, the FCA can refer the relevant market to the CMA for a detailed review. The CMA has the power to conduct an in-depth market investigation and, if necessary, use its powers in Part 4 of the Enterprise Act to remedy adverse effect on competition that it finds in the market. The FCA will not have the concurrent function of conducting market investigations, which will remain solely that of the CMA. The CMA and the FCA must consult each other before exercising any of their concurrent functions to ensure they do not both exercise the same functions in relation to the same matter.

- Enforcement powers under Part 1 of the Competition Act 1998

The FCA will be able to enforce breaches of the prohibitions on anti-competitive behaviour (prohibitions on anti-competitive agreements and abuse of dominance) set out in the Competition Act 1998 and the Treaty on the Functioning of the European Union in the context of financial sector activities. The FCA is required to consider the use of these Competition Act powers before exercising certain regulatory powers including cancellations and variations of permission. This is known as the primacy obligation by which the FCA has a duty to consider whether it would be more appropriate to use their competition powers rather than their regulatory powers. For example, if the FCA believed a firm was engaging in anti-competitive information exchange, the FCA would consider first, before using its regulatory powers to require that firm to stop, whether it would be more appropriate to investigate under the Competition Act.

The FCA has already taken steps to acquire the necessary expertise to implement its new powers effectively by recruiting competition lawyers, training its current staff and building up a new specialist division known as the Competition Department. These new powers will put the FCA in a better position to engage at a European level to address cross-border competition issues and in the UK, allow it to become a full member of the UK Competition Network which was created to help deliver the UK government's desire to deliver stronger competition across the whole economy.

In addition to the FCA's new powers, regulated firms are obliged to inform the FCA if they have infringed any applicable laws under Principle 11 (principles for business) and that obligation will extend to the infringement of any of the prohibitions contained in the Competition Act. This obligation and its new powers will enable the FCA to detect competition law breaches more easily and be able to step in and take action more quickly. Regulated firms should be aware of the potential risk that while they are engaging with the FCA on regulatory issues, they may expose themselves to competition law investigations.

Following the recent scandals related to the financial services industry ranging from LIBOR/EURIBOR to Payment Protection Insurance (PPI) and more recently interest rate hedging products, the spotlight will continue to be put on the financial services sector and an influx in the number of competition law cases in the financial services industry is to be expected.

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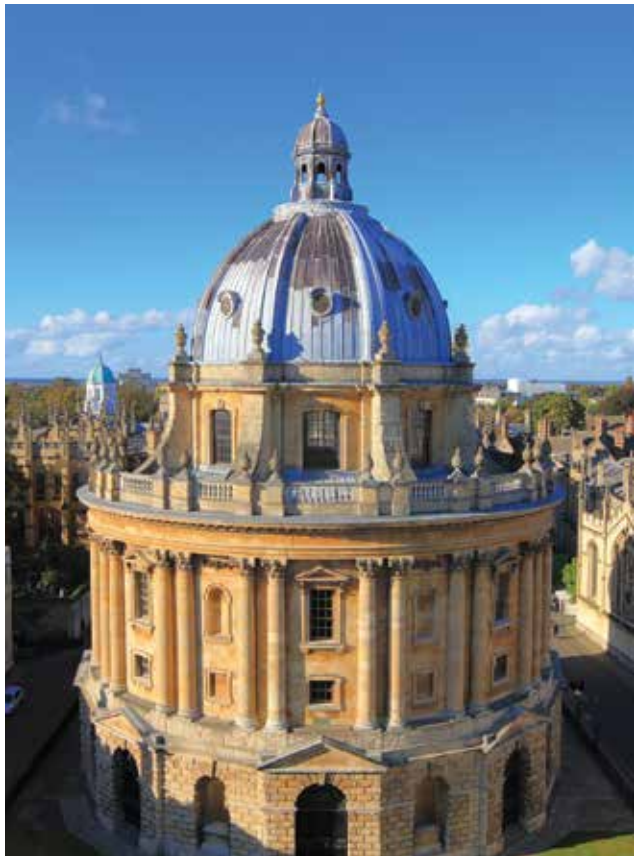

The CMA Refers To Phase II Reckitt Benckiser's Purchase Of K-Y

By Louisa Mottaz

On 7 January 2015, the Competition and Markets Authority ("**CMA**") announced that it had referred the acquisition of K-Y by Reckitt Benckiser ("**RB**") for Phase 2 investigation. The CMA found that the acquisition gave rise to a the realistic possibility of a substantial lessening of competition in the supply of personal lubricants to grocery retailers and national pharmacy chains and was not satisfied with the undertakings offered to address the competition concerns.

This case is the first Phase 2 referral made by the CMA after rejecting undertakings in lieu offered by the parties since it took over from the OFT on 1 April 2014. This case highlights the particular importance of offering undertakings in lieu that will be acceptable to the CMA in order to clear the transaction at Phase 1.

BACKGROUND

RB and Johnson & Johnson ("**J&J**") through its subsidiary McNeil-PPC Inc. supply personal lubricants to grocery retailers and national pharmacy chains in the UK under the well-known Durex and K-Y brands respectively. Over the past two years RB has been growing its English consumer-health sales through various acquisitions and this segment now represent about 28% of the company's revenue. On 10 March 2014, RB decided to purchase the global rights of the K-Y brand which in 2013 had net global sales of over US$100 million. The transaction does not involve any transfer of fixed assets or employees and the consideration offered remains unknown.

PHASE 1

Given the fact that the transaction involved a highly concentrated horizontal overlap in the supply of personal lubricants in the UK, the CMA was responsible for reviewing the acquisition.

Following its Phase 1 investigation, the CMA found that as a result of the transaction, the merged entity would have the highest combined share of supply on the market and would in effect combine the two best known brands. The principle issue for the CMA is that Durex and K-Y products are widely sold in grocery stores and other national pharmacy chains where other brands are barely if at all available. The CMA also found that competition concerns were not sufficiently constrained by own label products from the supermarkets and pharmacies where Durex and K-Y are sold in the UK.

Sheldon Mills the Senior Director of Mergers Division at the CMA commented that: "While these personal lubricants are differentiated to an extent, we found that retailers and consumers perceive them as competitors". K-Y was created in 1917 and initially only available with a prescription until 1980. Nevertheless, both K-Y and Durex are considered to be in the intimate lubricant category and are now both sold over the counter.

PHASE 2

Although, RB offered undertakings in lieu to address the competition issues arising of the acquisition, these were ultimately rejected by the CMA. Under the in-depth Phase 2 investigation, a decision on the merger will be made by a group of independent panel members supported by a case team of the CMA staff.

Under section 73(3) of the Enterprise 2002 Act, the CMA must consider the need to achieve a comprehensive solution which is reasonable and practicable to avoid the lessening of competition. Therefore, undertakings in lieu must be effective and capable of being implemented in practice. The commitments offered by RB are not publicly available but in practice, the process of agreeing undertakings in lieu is usually consensual; suggesting that in the present case, RB was unable to offer realistic propositions that would comfort the CMA to a sufficient degree. It should also be noted that the products involved in this transaction are very similar in nature and often are the only options available for customers who regard them as competitors. Consequently, offering plausible commitments was likely to have been further complicated by the nature of the product in this case.

Although this is the first referral for an in-depth Phase 2 investigation made by the CMA after rejecting undertakings in lieu offered by the merging parties, six other transactions are currently under Phase 2 referral after not offering any undertakings at the conclusion of the Phase 1 investigation. These transactions include: Sonoco Products Company/Weidenhammer inquiry (13 January 2015); Pork Farms Caspian Limited/ Kerry Foods Limited merger inquiry (5 January 2015); Xchanging/Agencyport Software Europe merger inquiry (8 December 2014); Pure Gym/The Gym (26 June 2014); Ryanair/Aer Lingus merger inquiry (14 July 2014); and Anglo American PLC/Lafarge S.A. merger inquiry (11 July 2014).

The number of mergers under Phase II review demonstrates the CMA's statutory obligation to refer to Phase II any mergers where there is a realistic prospect of a substantial lessening of competition. By not offering any undertakings at all or by offering inadequate ones, parties should beware that they are setting themselves up to an almost certain Phase 2 investigation by the CMA.

The CAT Rules That CMA Should Pay Skyscanner's Costs Of Successful Appeal

By Louisa Mottaz

On 26 November 2014, the Court of Appeal ("**CAT**") handed down a ruling in connection with an application for costs by Skyscanner for its successful appeal against the decision of the Office of Fair Trade ("**OFT**") to accept binding commitments in the hotel online booking case. The CAT ordered the Competition and Markets Authority ("**CMA**") to pay a total of £186,096.81 in respect of Skyscanner's costs; a 5% reduction for partial success from the recoverable costs claimed by Skyscanner. Interestingly, Skyscanner and its solicitors had a capped fee agreement whereby the company would only be responsible for 50% of the total fees, yet this did not deter the CAT from awarding costs in this case. The present award demonstrates that the CAT is highly sensitive to failures by the competition authority (first the OFT and now the CMA) to properly investigate and consider cases and that the financial burden of appealing such improper decisions should be on the authority itself and not on the successful parties.

The CAT decided by a judgment handed down on 26 September 2014 that the appeal by Skyscanner against the decision by the OFT of 31 January 2014 to accept commitments, pursuant to section 31A(2) of the Competition Act 1998 ("**the Act**") was successful.

Skyscanner sought an order from the CAT that the CMA pay its costs of the appeal amounting to a total of £258,642.01.

The CAT found in favour of Skyscanner on two of its three grounds of appeal:

1. The CAT found that the OFT had failed to properly consider Skyscanner's objections to the proposed commitments and failed to properly investigate. Instead, the OFT continuously insisted on more evidence or supporting material from Skyscanner. The CAT found that relying on Skyscanner so heavily for information was unfair on the company as it was up to the authority to examine the issues further and carry out an analysis of the economic effects on a given market. Therefore, the process by which it reached its decision was procedurally improper.
2. Further, by failing to thoroughly examine the possible impact of the points raised by Skyscanner, the OFT acted unreasonably as it should have given a proper level of attention to these arguments. Skyscanner had claimed that the commitments would lead to a market with a lack of transparency and would harm inter-brand competition by damaging price comparison websites. Indeed, the commitments would have made discounted prices visible only to consumers who logged on to a specific travel agent's website directly rather than being readily visible on price comparison websites such as Skyscanner.

Under Rule 55 of the CAT Rules, the CAT has a broad discretion to award costs by making "any order it thinks fit in relation to the payment of costs". This allows the CAT to be flexible for example by taking into account the conduct of the parties in relation to the proceedings.

Overall, the CAT regarded Skyscanner as having been substantially successful in its appeal and awarded costs to be paid by the CMA for: solicitor's costs, counsel's costs, part of the economist's costs, other disbursements and the costs related to the efforts for obtaining the disclosure of the statement of objections from the OFT. However, the CAT concluded that a reduction of 5% from the recoverable costs was appropriate given that Skyscanner was only partially successful on its appeal as the CAT rejected the argument that the OFT acted ultra vires in accepting commitments that had an effect on third parties such as price comparison websites like Skyscanner.

The most striking element of the CAT's ruling is the fact that it awarded Skyscanner almost 72% of the costs sought under the order and that Skyscanner was in any case subject to a capped fee arrangement with its solicitors meaning that the financial burden was already greatly alleviated for the company. This however, should not be seen as a guarantee by the CAT that it will compensate to such a high extent all successful applicants. For example, in a previous decision handed down on 16 January 2014, in the successful appeal by BMI against the Competition Commission (1218/6/8/13 BMI Healthcare Limited v Competition and Markets Authority (No. 1), [2014] CAT 1), the CAT found that the amounts claimed by BMI were disproportionate given the nature and complexity of the case. The CAT therefore ordered the Competition Commission to pay less than half the amount claimed by BMI only. This highlights the fact that in the Skyscanner appeal, the CAT considered the failings of the OFT to be so important that it should bear responsibility to Skyscanner for having to appeal the decision.

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AMERICAS

UNITED STATES

Collaborators or Conspirators? After Seven Years of Litigation, a US$590 Million Settlement – and Four Takeaways

By Steven Levitsky

Cooperation is often good in business. There are many industries where even competitors form joint ventures to reduce their individual risks, to cut costs or to pool their expertise. Those goals are certainly legal, and, in many cases, unquestionably *pro*-competitive and *pro*-consumer.

Private equity is one of the industries where that type of joint activity regularly takes place. That's what makes a recent case, the *Dahl* LBO case, so interesting.

In *Dahl,* leading private equity companies got sued for conspiring to limit the number of bidders on an LPO deal. They supposedly used artificial bidding protocols that reduced the level of competition for any buyout, which ultimately reduced the shareholder return on the LBO.

This case dealt specifically with the financial markets. But, as we discuss at the end of this article, the case is important to any industry where competitors typically collaborate, because it shows the risk that legitimate joint venture activity could be mischaracterized as conspiracy.*

The *Dahl* case started in 2007. Shareholders of companies that had gone through leveraged buyouts filed an antitrust case against 11 leading private equity companies. They asked for billions in damages. The case dragged on for seven years, was heavily litigated, and went through five amended complaints.

Just last fall, the last party settled, bringing the total settlement amounts to about US$590 million, plus US$200 million in attorneys' fees.

One of the legal theories in the case was that there was an "overarching conspiracy" to restrain trade in the LBO market. The complaint describes it this way:

- Defendants and their co-conspirators engaged in a continuing agreement, understanding, and conspiracy in restraint of trade to allocate the market for and artificially fix, maintain, or stabilize prices of securities in club LBOs in violation of § 1 of the Sherman Act.

The complaint concluded that these acts "suppressed competition in 19 of the largest LBOs—and 8 related transactions—that closed between 2003 and 2007."

Among other things, the complaint described a collaborative (read "friendly") environment where the PE companies were staffed by people who worked closely with each other, who were often personal friends, who often switched jobs to work for competing firms during their careers and who allegedly followed "club etiquette" regarding buyout transactions.

In particularly, the plaintiffs claimed that PE companies (1) formed "bidding clubs" to reduce competition for the LBOs; (2) gave each other "*quid pro quo*" courtesies that reduced competition; (3) manipulated auctions to reduce competition for the deal (and then compensated the conspiring losers by giving them a share of the deal later), and (4) refused to "jump" each other's deals – or, if they did, would back down in the face of a direct request to desist.

As the case dragged along over seven years, the judge did narrow the issues. But he kept alive for trial the part of the "overarching conspiracy" claim that the defendants had agreed not to "jump" each other's deals. If true, that could have constituted an horizontal agreement not to deal, a *per se* violation of the antitrust laws. All the defendants settled before the threatened trial date in November 2014.

Obviously, the defendants claimed that their actions were all unilateral decisions, made according to legitimate industry practices, and in their own self interests. Under US antitrust law, the tricky question was how to separate genuinely independent but parallel conduct (which is legal) from conspiratorial conduct (which is not).

The Supreme Court's rule, expressed in *Matsushita v. Zenith Radio*, 475 U.S. 574, 588 (1986), is that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." In a later case, *Bell Atlantic v. Twombly*, 550 U.S. 544, 556 (2007), the Court added that evidence that tends to *exclude* the possibility of independent action may include "parallel behavior that

would probably not result from chance, coincidence, independent responses to common stimuli, or mere interdependence unaided by an advance understanding among the parties."

Evidence that the court considered on these issues included an email in which one bank executive wrote that another bank "has agreed not to jump our deal *since no one in private equity ever jumps an announced deal*." Another piece of evidence was a statement by one bank executive – made when another bank withdrew from bidding one a deal – that "club etiquette prevails." Other similar statements included lines such as "he had told me before they would not jump a signed deal of ours."

The district court rejected the claims of a "market-wide overarching conspiracy," and was frankly impatient with the "[p]laintiffs persistent hesitance to narrow their claim to something cognizable and supported by the evidence." But, relying on the statements we just quoted, the court did allow the case to proceed on the theory that there might be an "overarching agreement between the Defendants to refrain from 'jumping' each other's announced proprietary deals."

FOUR TAKEAWAYS

This case settled before trial, so technically there is no "holding." However, the US$590 million in settlements teaches a very powerful lesson that goes far beyond LBOs.

It makes four very telling points:

(1) In any market where there is joint competitor activity, there is always a risk that buyers will try to create an antitrust claim.

(2) This risk is especially heightened in subscription markets – including PE activity or insurance subscription markets – where selected participants may bid on or sign up for a deal, and then admit some of the losing bidders later on.

(3) As you can expect, there are always indiscriminate emails or other communications that have the potential to save the plaintiff's case. Here, the single line "*no one in private equity ever jumps an announced deal*" helped rescue what the court otherwise saw as a floundering case. It should be obvious that many companies are totally unaware of what email evidence their servers contain. If there is any doubt about this, consider the Libor emails.

(4) We have suggested before that competitors always make business decisions in their unilateral self interests. But in cases like *Dahl,* where the losers could become winners later on anyway – the antitrust risk could be dramatically increased if companies seem to forego business in favor of a competitor. In those cases (which are really predictable), it makes sense to keep memos *made at the time* that record the business basis for the decision.

Our conclusion is that even where a company has an antitrust policy in place, and believes that it is operating in compliance with antitrust standards, it still needs to back that up with regular compliance audits. The defendants in the *Dahl* case all initially claimed that the case had absolutely no merit. Despite that, they settled for US$590 million to avoid a trial. Prudence and compliance audits can help avoid detect dangers and avoids results like that.

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Guilt by Association: Four Questions to Ask about your Trade Association Activity

By Steven Levitsky

In 1918, the newly-formed FTC sued the Association of Flag Manufacturers of America. The case is reported at 1 FTC 55 (1918). The FTC charged that the trade association conspired to raise the prices of American flags. Once the FTC attacked their price fixing activities, the trade association dissolved. It apparently had no other purpose in life than price fixing.

Over the years, the FTC and DoJ have agreed that trade associations can serve pro-competitive purposes. But they also warned that trade associations are one of the leading incubators for anti-competitive activity. It's true that some of that anti-competitive activity takes place in the restaurants and bars that surround formal trade association activities. But there is also an unbroken track of enforcement actions against trade associations based on their *official, on-the-record* anti-competitive activities.

The FTC recently announced their most recent enforcement actions against four trade associations. The charges are all very similar: they all encouraged their members to engage in overtly anti-competitive activity, often in their by-laws or "code of ethics." Here are quick highlights from the four proceedings:

(1) The National Association of Residential Property Managers adopted a "Code of Ethics" with these overtly anti-competitive conditions:

- Professional Members shall refrain from criticizing other property managers or their business practices.
- The Property Manager shall not knowingly solicit competitor's clients.

Apparently, in their so-called "ethics training," property managers were told that this behavior was required for good standing.

(2) The National Association of Teachers of Singing had rules that prevented teachers from (a) soliciting each other's students; (b) taking any student who hadn't paid an earlier teacher; (b) advertising prices or scholarships; or (d) competing on price-related terms.

(3) The Professional Lighting and Sign Management Companies of America had bylaws that (a) barred members from providing lighting or sign services in another member's territory, without that member's consent; (b) created a price schedule for work performed in another member's territory; and (c) barred former members from competing for clients of current members for up to one year after they left the trade association.

(4) The Professional Skaters Association had a code of ethics that banned teachers from soliciting each other's students.

It's actually rather touching, in a nostalgic sort of way, that these trade associations still seem to be unaware, in the 21st century, that horizontal customer allocations and agreements not to compete are illegal. In any event, the associations will probably remember the lessons they were just taught, because *the FTC imposed consent decrees whose provisions run for 20 years!*

Is *your* company at risk through guilt by association?

Here are four questions you need to answer:

1. Has your company reviewed your trade association's bylaws, ethics code and its own antitrust compliance program?

2. Does your legal department review trade association agendas *before* your employees attend those meetings?

3. Has your company provided antitrust training to your employees who go to trade association meetings?

4. Does that antitrust training give them practical, easy-to-apply advice about (a) what to do if competitive issues come up during formal sessions; and (b) what to do if competitive issues come up during informal "social" sessions?

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ASIA PACIFIC

AUSTRALIA

Australia's first authorisation of resale price maintenance conduct – addressing free riding in high-quality product markets

By Natasha Koravos

Under the Competition and Consumer Act 2010 (Cth) (the **Act**) resale price maintenance (RPM) is per se prohibited regardless of the effect on competition. However, RPM conduct may be authorised by the Australian Competition and Consumer Commission (ACCC) if the conduct is likely to result in public benefits which outweigh the public detriments likely to result from the conduct.

Until 2014, no application for authorisation of RPM conduct had ever been made under the Act. In December 2014, the ACCC granted conditional authorisation to Tooltechnic Systems (Aust) Pty Ltd to amend its existing agreements with its dealers to include a requirement that they not sell Festool products, being trade quality tools, below specific minimum prices (the Proposed Conduct).

Free riding off the service provided by other dealers

Tooltechnic is the sole importer and supplier of Festool products in Australia. It submitted that its distribution model is dependent on high levels of retail services being offered with the supply of its goods. It sought authorisation to engage in the Proposed Conduct to address the risk of "free riding" by dealers who do not invest in the supply of services but focus on discounting their prices below other dealers. It submitted that customers often purchase products from discounting dealers after going to full service retailers for pre-sales service.

Future with and without the conduct

Tooltechnic submitted that the service standard obligations in its dealership contracts are no longer effective in preventing free riding due to aggressive discounting and Internet sales. It noted that another way of addressing the free riding risk was to implement exclusive territories or online re-supply restrictions. The ACCC accepted that in the absence of the Proposed Conduct, Tooltechnic may implement exclusive dealer territories and ban online retailing by dealers.

Eliminating price competition

The ACCC found that the detriment arising from the elimination of price competition would be limited by the existence of many alternative trade quality power tools being available to customers, and the little incentive Tooltechnic would have to set minimum retail prices above competitive prices because doing so would likely reduce Festool sales.

It also found that the conduct is unlikely to facilitate coordinated conduct between suppliers of trade quality power tools, because Festool products have a small market share, power tools are highly differentiated products, innovation is key in the industry and there was a history of entry and expansion by international manufacturers.

Addressing the market failure

The ACCC found that Festool products are complex and highly differentiated in terms of their attributes and quality and that the provision of pre – and post-sales services is important in their sale. However, there is a market failure caused by free riding, and the ACCC acknowledged that over time persistent free riding could risk crowding out full service retailers.

It said that to the extent there are any public benefits that arise from the Proposed Conduct, they will arise from improved pre – and post-sales services, namely:

1. assisting customers in making more informed decisions in purchasing trade quality power tools and

2. continuing to enable customers to be offered the choice of a premium trade quality power tool product which is accompanied by a high level of post-sales service.

Decision to grant conditional authorisation

On balance, the ACCC found that the public benefit resulting from the increase in retail services will likely outweigh the detriment resulting from the increased retail price some consumers will now need to pay. Tooltechnic sought authorisation for five years, but the ACCC granted authorisation for three years on conditions which require Tooltechnic to provide the ACCC with annual information, such as the minimum retail prices it sets and the average wholesale prices it charges for some Festool products.

Implications

The timing of the decision to grant authorisation is interesting. It comes at a time when RPM is a focus for many regulators around the world, for example:

1. Just over one year ago the ACCC obtained its second largest penalty, AU$2.2 million, for RPM conduct.
2. In March 2014, the Office of Fair Trading issued an infringement decision prohibiting arrangements made by a manufacturer of mobility scooters which restricted retailers from advertising below a recommended price online.
3. In 2014, the Italian Competition Authority commenced public consultation on commitments offered by a sports-nutrition manufacturer regarding alleged agreements with retailers to keep levels of discounts between a particular range.

The ACCC's decision may encourage suppliers wanting to improve their product's retail service standards to seek authorisation for RPM conduct. However, businesses will still need to consider the fact that the process requires a fee of AU$7,500 to be paid with lodgement and often takes five to six months. The Harper Review's Draft Report suggests enabling businesses to make notifications of RPM conduct, which would provide immunity 14 days after a valid application is lodged. If that suggestion is accepted, a substantial number of businesses will likely file notifications seeking legal immunity for RPM conduct.

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SOME OTHER NEWS

Recent merger in the railway sector (Thalys Joint venture)

By Carole Maczckovics

Liberalisation of international passenger transport services by rail: the case of Thalys JV

In September 2014, the Commission decided not to oppose the creation by SNCF and SNCB of a full function joint venture, Thalys JV. The Commission deemed the concentration to be compatible with the internal market. The decision is made available in French since last December.

As of 1 January 2010, international passenger transport services by rail have been opened up to competition. Railway undertakings providing "genuine" international services may also provide cabotage, that is the right to pick up passengers at any station located along the international route and set them down at another, including stations located in the same Member State. Five years of liberalisation have not witnessed the creation of many new entrants on international routes. Rather, existing cooperation between incumbent railway undertakings have often further consolidated, as was lately the case of Thalys.

Thalys refers to a long standing marketing cooperation between the railway incumbents in France (SNCF), Belgium (SNCB), the Netherland (NS) and Germany (DB). While DB is progressively withdrawing from the cooperation with a view to further developing its own offer of ICE trains, SNCF and SNCB have notified the Commission their intention to take joint control of a newly created railway undertaking, being a joint venture, Thalys JV. SNCF would own 60% of the shares whereas SNCB, 40%.

The Commission went on to analyse whether the new undertaking was a effectively controlled by both parties. Given the unbalance of shareholding, it looked at the effectiveness of veto rights that SNCB will be able to exercise and was satisfied that SNCF's casting vote would be limited. Regarding the full functional character of the undertaking, the Commission was reassured that Thalys JV would effectively dispose of its own resources, own safety certificate, own financing sources, assets, etc. Finally, the deal contained a non-compete clause according to which the parties commit not to develop new international rail services on the routes exploited by Thalys.

To assess the effects on competition of the deal, the Commission did not conclude to a definitive market definition, although it confirmed previous practice by taking into account each pair of origin and destination as the relevant market, and making a distinction of the services in function of the motive of the travel (professional or leisure). It also recognised that the international passenger rail services were subject to competitive pressure from personal cars and the longer routes, from airlines as well as other high speed trains, such as ICE.

On the routes at stake, Thalys JV is going to substitute itself to SNCB and SNCF within current Thalys cooperation with NS and DB. As such, the market structure is not affected by the deal. The only remarkable modification is the non-compete clause contained in the deal leading to a loss of potential competition. The Commission however observed that the parties have not launched new competing services on these routes in the past, because of the considerable requirement for human and financial resources. Applying the SSNIPP test (test of a small but significant and non-transitory increase in price) to the services that Thalys JV would offer on the said routes, the Commission considered that competition from other means of transport or from other railway undertakings would constitute a real competitive constraint on Thalys JV, so that the Commission cleared the deal.

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News report re. Germany

By Verena Pianka

A German court has confirmed the decision of the Federal Cartel Office that prohibited the online hotel booking platform HRS from continuing to apply "best price" clauses. Under the "best price" clauses, HRS's hotel partners are obliged to always offer the hotel portal the lowest room prices, maximum room capacity and most favourable booking and cancellations available on the Internet. The Higher Regional Court of Düsseldorf in January 2015 confirmed that the best price clauses restrict German and European competition law to such an extent that they cannot be exempted under the TFEU Block Exemption Regulation or as an individual exemption. Many other European competition authorities are – according to the FCO – currently conducting proceedings against hotel booking portals in relation to best price clauses, and the FCO is in close contact with these authorities and the European Commission. As to the president of the FCO, the decision of the Higher Regional Court of Düsseldorf can serve as an orientation for the proceedings currently conducted by other European competition authorities. The FCO's press release is available here.

The president of the FCO, Mr. Andreas Mundt, briefly outlined the future of the German competition policy during a recent conference in Germany. Online trade remains an enforcement priority in Germany. According to Mr. Mundt, retailers should be allowed to sell their products via third-party platforms such as eBay. The prosecution of cartels also remains a top priority. As regards best price clauses in the contracts of hotel booking platforms with its hotel partners, Mr. Mundt's focus is on safeguarding that the same approach is taken in view of all undertakings applying such clauses, whether the market share exceeds the VBER threshold of 30 percent or not. In addition, he intends to focus on a balanced and effective sanction regime. Mr. Mundt commented negatively about current ideas of introducing more severe fines on company representatives, noting that approach could have an impact on the effectiveness of the German leniency program as it may prevent those representatives from applying for leniency. Finally, Mr. Mundt is of the opinion that a subsidiary of a parent company should be fined based on its individual financial strength, not taking into account the resources of the parent (no economic unit). As regards the current discussion whether Google constitutes a threat to competition, he prefers that policy makers aim to create an adequate level playing field rather than launching possible trust-busting procedures against Google. Finally, Mr. Mundt called on the German legislative authority to complement the German Competition Act and to more clearly regulate legal succession in antitrust fines.

The FCO has published its inquiry into buyer power in the food retail sector. The results of the inquiry show that the German food retail market is highly concentrated. The large retail groups already have a lead over their competitors and can make use of their structural advantages in negotiations with manufacturers. The reseller's private labels have become an increasingly important factor for their bargaining power. In some cases, even large manufacturers with well-known brands are confronted with the large retailer's bargaining power, since they have no other distribution options for their products. The issue has become the subject of intensive political debate and has on a European level led to calls for the provision of rules or for commitments by the companies themselves to observe fair practices in negotiations. The FCO's press release is available here.

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DLA PIPER RAPID RESPONSE APP

DLA Piper has launched the first of its kind Rapid Response App. The App provides our clients with legal crisis assistance at the touch of a button and compliments the 24/7 global hotline to assist them in a legal crisis.

Crisis management lawyers and communication specialists are on call to answer any questions and help clients deal with any legal crisis they might be facing. Whether it is a dawn raid, unannounced regulatory visits or interviews under caution the App provides a useful first port of call. Through the App, clients can also receive regulatory compliance audits to identify where risks lie, tailored training on compliance issues, legal updates for their business, and other crisis management tips.

This App is particularly relevant in the competition law context as it provides a direct line to our antitrust team who can immediately advise clients in a dawn raid when the investigators show up at the door. By way of example, during a recent dawn raid at a client's headquarters in Germany, investigators arrived carrying search warrants. Our antitrust team was contacted using the App's hotline and were able to assist from the outset by advising on the scope of the search warrant, which documents could be legally seized or not and solutions to mitigate the impact of the search on the client's business interests. Timing is crucial in these cases as it is essential to understand exactly what the investigators are allowed to look at before they start searching the premises.

The App is available for free to download from the Apple Store, Black Berry World and Google Play.

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DLA Piper is a global law firm with 4,200 lawyers located in more than 30 countries throughout the Americas, Asia Pacific, Europe and the Middle East, positioning us to help companies with their legal needs anywhere in the world.

We have a leading global Competition and Antitrust practice across all areas including competition investigations by regulators, compliance, cartel enforcement defence, civil litigation, criminal antitrust defence and merger regulation. Our network of specialists allows us to provide clients with a fully integrated team who work closely together providing consistent quality across multiple jurisdictions. We also work closely with DLA Piper's full service international network to provide clients with a truly integrated service in particular with our trade and global government relations practice which represents clients in the political arena and in the media, giving us a unique perspective on the workings of governments and policy makers, and allows us to provide a broader range of solutions to the problems faced by businesses.

Our lawyers have the experience and insight to find creative and innovative solutions to competition law issues. Members of the team have gained experience not only in law firms but also as in-house counsel within global companies in a number of sectors, with trade associations, and as officials of competition authorities.

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