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Contents

FTC takes another look at merger remedies	4
Rail sector comes under EU antitrust and regulatory spotlight	7
MOFCOM rules that foreign to foreign deal jumped the gun in breach of antitrust rules	10
Extradition & antitrust: cautionary tales for global cartel compliance	12
Substantial changes to Hungary's competition law regime	21
Mexican Supreme Court reverses fine against PEMEX	28
First director disqualification: UK focus on pursuing individuals as well as companies for breach of competition law	30
Antitrust in a Trump Administration	32
Highest fine ever for gun-jumping	34
FTC settlement with investment firm founder indicates continued vigorous enforcement of HSR Act	36
Increasing antitrust spotlight on HR professionals – Call to review the compliance program for HR	38
Resale price maintenance – Top 5 tips for retail and consumer products companies	40
Chinese payment encryption device suppliers fined for participation in government-orchestrated cartel	44
NDRC continues resale price maintenance crack-down	46
Beware your associations	48
Rundown on the first year of competition law enforcement in Hong Kong	51

FTC takes another look at merger remedies

On 3 February 2017, the U.S. Federal Trade Commission (“FTC”) released its Merger Remedies Study, which analyzed the success of merger remedies imposed by the FTC from 2006 to 2012. Nearly two decades after it issued a similar report, the FTC has concluded that the remedies in the vast majority of transactions from 2006-2012 successfully maintained or restored competition in their respective markets. The FTC concluded that the report therefore largely confirmed the effectiveness of its existing practices for designing and implementing merger remedies. Although the FTC does not intend to significantly alter its current merger remedies policies, the study provides valuable insight into the FTC’s perspective for companies considering transactions that may require a divestiture. The report also provides new recommended best practices for remedies.

Background

The FTC released its first study of merger remedies in 1999, evaluating 35 consent orders from 1990 to 1994. Following the report, the FTC implemented several changes to its policies and practices, including requiring upfront buyers when parties divested less than an ongoing business, shortening the time period to find a divestiture buyer to less than six months, more frequent appointments of independent divestiture monitors, and establishing a program to track the progress of buyers of divested assets.

In conducting the most recent study, the FTC examined 89 consent orders from 2006 to 2012 – 50 using a case study method across a range of industries, 24 involving the pharmaceutical industry, and 15 in the supermarkets, drug stores, funeral homes, dialysis clinics, and other health care facilities markets.

The study’s findings

The study found that:

- All of the merger remedies in which the entire ongoing business was divested were 100% successful. This will remain the FTC’s clear preference going forward whenever possible.
- Divestitures of less than an ongoing business did not always succeed, although they had a fairly high 70% success rate. Even with an upfront buyer, these transactions will receive close scrutiny from the FTC and will only be approved if the parties can demonstrate to a skeptical regulator that the divestiture of selected assets is likely to maintain or restore competition.
- Divestiture buyers raised concerns about limited time for due diligence and inability to access the parties’ facilities and employees; difficulty in transferring back-office operations; the impact

of transition services agreements and supply agreements that expire too early; and buyers’ failure to communicate proactively with FTC staff as issues arise. The FTC is already addressing these concerns through various measures, including the best practices discussed below.

- The FTC achieved only limited success in merger remedies involving consummated mergers (only 26% were successful). The Commission acknowledged that it is “particularly difficult to restore the pre-merger state of competition if the merging parties have commingled, sold, or closed assets; integrated or dismissed employees; transferred customers to the merged entity; or shared confidential information.” In these cases, “remedial options may be severely limited.”



Best practices

The FTC concluded the study by providing a number of best practices for merging parties and potential divestiture parties as recommendations when navigating the merger remedy process. As the study notes, parties “proposing a remedy must demonstrate that the proposal will solve the likely competitive problem identified by the Commission. The Commission will not accept a remedy unless it determines that the remedy will address the competitive harm caused by the merger and serve the public interest.”

- **Defining the Assets to be Divested** – Because of the lower success rate of divestitures of less than the entire ongoing business, the presumption is that parties will divest the business unit rather than selected assets. Those proposals should explain how the divested business could be operated on its own immediately after the divestiture. If parties propose a divestiture of only limited assets, the proposal would only be accepted if the parties can demonstrate that a more limited set of assets are “likely to maintain or restore competition.” To rebut the presumption that an ongoing business should be divested, the parties would need to explain why a full unit divestiture is “inappropriate or infeasible,” how the selected assets can effectively and viably compete, and would need to provide the buyer with sufficient time to conduct due diligence. Proposals of more limited assets are likely to receive heightened scrutiny from the agency.
- **Vetting the Proposed Buyer** – Nearly as important as defining the assets to be divested, the proposed buyer for those assets will receive careful review by the FTC, including the buyer’s sources of financing for the transaction and documentation supporting its business plans and financial viability under adverse and unforeseen circumstances. The FTC would likely interview not only representatives of the buyer in management, sales, and marketing roles, but also representatives of the entities financing the acquisition of the divested assets. In addition, the parties should propose at least three potential buyers likely to be approved.
- **Supporting Implementation of the Remedy**
 - In response to concerns from buyers who participated in the study, the FTC proposed several ways the parties can ease the burden of implementing the remedy:
 - *Due Diligence* – Because the buyer and seller will compete after the assets are divested, the selling parties’ incentives to provide full disclosure and access are limited. The FTC reiterated that the buyer should have sufficient time to conduct due diligence, including access to necessary information, facilities, and employees.
 - *Customer and Third-Party Relationships* – Unlike the selling parties, the buyer does not always have an ongoing relationship with customers of the divested business and may be buying the business outside of the customers’ typical contracting cycle. As a result, some buyers reported difficulty in attracting or retaining



customers since they were only prepared to support the divested business. The FTC encourages the selling parties to provide early access to customers and other third parties, aid in communications about the buyer and divestiture, assign contracts to the buyer when possible, and assist in obtaining any necessary governmental or regulatory approvals.

- *Transition Services and Supply Agreements* – The selling parties are often required to provide certain back-office or supply support to the buyer for a period while the buyer builds out its own systems and supply infrastructure to support the divested business. The FTC has traditionally preferred short periods for such agreements because of the potential anticompetitive effect of entangling the divestiture buyer and the seller, but some buyers complained that these interim arrangements were not sufficiently lengthy to allow the buyer to effectively compete. As a result, the FTC will closely examine these agreements to ensure that transition services and necessary supply inputs are available to the buyer for a sufficient period. The FTC may also require contract terms allowing the buyer to extend the agreements for a reasonable period or terminate early without penalty.
- *Hold Separate Orders* – These orders preserve the competitiveness of the assets pending divestiture. While independent managers are appointed to oversee the continued operation of the divested business during the holding period, some buyers expressed concern that the assets became less competitive, lost sales, and depleted inventory. Other buyers complained about outdated or missing information about production and sales. The FTC will monitor these orders to ensure that the manager of the divestiture assets has the full cooperation of the parties and is responding to market conditions in operating the divested business.
- **Communicating Early and Often** – The FTC encouraged all parties to a divestiture transaction to bring any issues or concerns to the attention of agency staff and the monitor as soon as they arise (as advised in the 1999 study). The FTC will remain

in contact with the buyer at least until the assets are fully divested and the parties have provided all of the services to the buyer required under transition and supply agreements.

- **Specific Guidance for the Pharmaceutical Industry** – While all of the best practices above apply to the pharmaceutical industry as well, the FTC provided additional guidance for divestitures affecting pharmaceutical products. In particular, in recent transactions involving generic drug overlaps, the FTC has required the divestiture of the easier-to-divest product where possible, especially if a third party manufactured one product under an agreement that could more easily be transferred to the buyer. Parties should think strategically about which overlap product would likely be divested when structuring their transaction.

Although the new FTC Merger Remedies Study only involves the FTC, it has been our experience that the Antitrust Division of the U.S. Department of Justice is increasingly applying similar standards to its remedies. In addition, the 2016 Merger Remedies Guide of the International Competition Network also was informed by past FTC merger remedies studies, so similar considerations are often applied by competition authorities outside the U.S.



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Rail sector comes under EU antitrust and regulatory spotlight

The European Commission has declared its intention to devote more resources in 2017 to investigating and rectifying what it sees as the endemic competition problems in the European rail sector. It believes that it now needs to prioritise the enforcement of the antitrust, State aid and regulatory rules and obligations in the rail sector through the combined efforts of the Commission's Competition and Transport Services working in close cooperation with the national rail regulators and competition authorities.

Antitrust issues in the rail sector

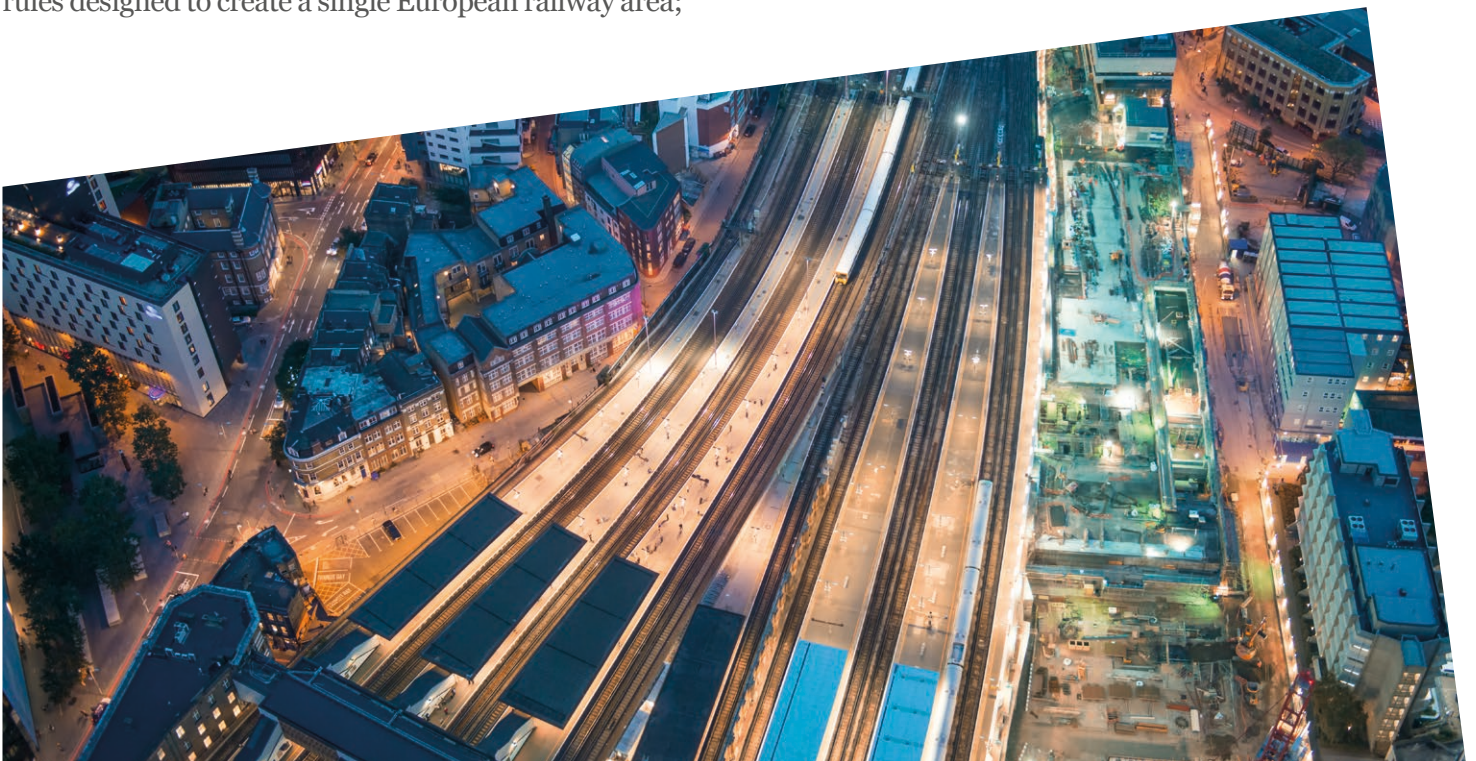
At a recent competition law conference in the transport sector, a senior official at the Commission's Competition Directorate, Henrik Mørch, outlined the problems the Commission sees in the rail industry.

He said that the share of rail is stagnating against other transport modes; the sector is characterised by national vertically integrated monopolies; there is no innovation; and there are risks of unlawful State aid and of abusive behaviour. He also claimed that despite progressive liberalisation there is little to no effective competition in most passenger and some rail freight markets.

Mr Mørch explained that, in the Commission's view, there are several reasons for this state of affairs: (i) there is a lack of effective implementation by Member States of the rules designed to create a single European railway area;

(ii) the EU legal framework itself does not always provide a sufficient basis for an effective change in the market; (iii) most national rail markets in the EU are dominated by incumbents which in some cases are vertically integrated into infrastructure, in particular train paths; (iv) there are high entry barriers (for example, access to rolling stock and maintenance facilities is difficult); and (v) there is an enormous amount of state subsidies to incumbents, estimated to be in the region of €18 to 20 billion per year, excluding infrastructure investment.

The Commission's approach to enforcement of the competition and single market rules in the energy sector is instructive for the rail sector. Following years of ineffectual regulatory initiatives, the Commission opened a sector inquiry in the European energy sector. The Commission believes that the combination of antitrust enforcement of the antitrust and State aid rules in combination with more robust unbundling obligations under the third energy package alleviated many of these perceived problems. Whilst a sector inquiry is unlikely in the rail sector, the Commission has signalled its intention to create a genuine single European rail area through the "two-pronged enforcement" of the fourth railway package using infringement procedures against Member States, and the enforcement of competition law.



Time for focused enforcement

As Mr Mørch put it, now is the “time for focused enforcement” through closer cooperation with national railway regulators and national competition authorities.

Mr Mørch described the competition issues as falling within three main categories:

1. issues relating to market opening and access: these include concerns relating to non-discriminatory access to key installations such as to rail infrastructure (including stations) and rail-related service facilities, and access to rolling stock;
2. issues relating to financial flows between Member States and rail operators and within integrated groups: these issues concern restructuring aid, contributions not in line with the market investor principle, unjustified or ill-defined public service obligations, and cross-subsidisation as a result of over compensation or from financial flows out of infrastructure management; and
3. abuse of dominant positions, notably through predatory pricing, margin squeeze and foreclosure techniques.

In his speech, Mr Mørch went out of his way to signal the Commission’s desire to attract more complaints and open more cases, and noted the difficulty the Commission has faced to date. State aid cases are politically sensitive and private operators often hesitate to come forward for fear of retaliation by integrated incumbents. He also said that the Commission needs well substantiated complaints based on more than anecdotal evidence. Overcoming these problems is likely to require close cooperation between the Commission, national rail regulatory bodies and national competition authorities.

Current cases

Mr Mørch gave three examples of the kinds of competition cases which the Commission is currently looking into. He mentioned an abuse of dominance case concerning the Lithuanian rail incumbent LG which is alleged to have impeded competition by removing a railway track connecting Lithuania and Latvia. Another abuse of dominance case relates to the Czech incumbent ČD, which is alleged to have lowered prices on the route between Prague and Ostrava to below cost in an attempt to oust two new entrants. As for anti-competitive agreements, Mr Mørch referred to sales restrictions on second hand rolling stock and the use by an incumbent of a condition prohibiting resale to certain countries, thereby preventing new entry. Mr Mørch mentioned that they have one more case on predation and another case on resale restrictions of second hand rolling stock. As for restructuring of railway undertakings in financial difficulties, the Commission is currently investigating railway undertakings in five Member States.

Outlook for 2017

2017 is likely to see more aggressive enforcement by the Commission of the antitrust and State aid rules in the rail sector, as well as more vigorous enforcement proceedings against Member States for failure to implement their regulatory obligations.

As the Commission seeks to build up its portfolio of cases in the rail sector, 2017 represents an “open window” for operators who feel that they have been prevented from competing on a level playing field. This presents an opportunity for new entrants, and a threat to incumbents.



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MOFCOM rules that foreign to foreign deal jumped the gun in breach of antitrust rules

In a decision adopted on 16 December 2016 and made public on 4 January 2017, the Chinese Ministry of Commerce (“MOFCOM”) fined Japanese company Canon for failure to file its acquisition of Toshiba Medical Systems (“Toshiba Medical”) for merger control clearance under the Anti-Monopoly Law (“AML”). This decision sends an important message to the business community, demonstrating MOFCOM’s willingness to address and enforce against breaches of the AML’s merger control rules even more actively and assertively than before.

Transaction structure

In March 2016, Canon agreed to buy 100% of the shares in Toshiba Medical from Toshiba (“Transaction”). In anticipation of the Transaction, Toshiba created three types of equity-related rights in relation to Toshiba Medical: 20 shares with voting rights; one share without voting rights; and 100 warrants, allowing the owner to convert them into ordinary shares. In addition, a special purpose vehicle (“SPV”) was established by three unidentified natural persons days before the Transaction.

The Transaction itself was split into two steps. First, the SPV would acquire the voting shares, while Canon would acquire the non-voting share and the warrants. This first step of the Transaction was completed immediately upon signing of the two sale and purchase agreements between Toshiba with the SPV and with Canon, respectively.

Second, Canon would exercise the warrants (involving payment of a nominal fee of JPY 100, amounting to less than US\$ 1) and would convert them into ordinary shares, while Toshiba would buy back and cancel the 20 shares with voting rights from the SPV and the non-voting share from Canon. Only the second step of the Transaction was made subject to antitrust approvals: indeed, Canon filed the Transaction with MOFCOM after completing the first step.

MOFCOM decision

In its decision, MOFCOM held that the two steps were indivisible parts of a single transaction. It pointed out in its ruling that the transfer of all shares and warrants – and the “entire” payment – had already been made before notification to MOFCOM.

Unfortunately, the MOFCOM decision does not provide additional details as to the regulator’s thinking in terms of how it arrived at the decision. For example, it is not clear from the decision that the natural persons setting up the SPV were affiliated with Canon. Similarly, the decision does not provide guidance on whether the mere fact of acquisition of warrants or other share options – rather than their exercise – would be deemed a notifiable transaction under the AML. In that sense, this is a missed opportunity, as MOFCOM has so far only given indications in this regard through informal means.

In contrast, the MOFCOM decision did reveal that the regulator’s assessment was that the Transaction did not raise competition issues.

Following its assessment, MOFCOM decided to impose a fine of RMB 300,000 (around US\$ 43,000) on Canon.



Impact

The *Canon/Toshiba Medical Systems* decision is MOFCOM's ninth public failure-to-file decision since its announcement in March 2014 to make public all breaches of merger control rules as of 1 May 2014. What is particularly notable here, however, is that this is the regulator's first failure-to-file decision in relation to a purely foreign-to-foreign transaction (as all companies involved in this case are headquartered in Japan). This demonstrates the regulator's willingness to address perceived breaches of merger control rules assertively, even when the companies involved are headquartered outside China.

Equally importantly, the *Canon/Toshiba Medical Systems* decision sends a strong signal to market participants that resorting to artificial transaction structures in order to avoid or delay antitrust filing obligations may not achieve the intended purpose. The decision comes hard on the heels of two cases in 2015 – *Fujian Electronics and Information Group/Chino-E Communications*, and *Fosun Pharmaceutical Development/Suzhou Erye Pharmaceuticals* – where MOFCOM had sanctioned the splitting up of two share acquisitions into two tranches (each a 35% share acquisition as the first step, followed by another package of shares as the second step).

In short, the *Canon/Toshiba Medical Systems* decision shows that MOFCOM may be taking a more assertive stance against certain perceived forms of “gun jumping” going forward.



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Extradition & antitrust: cautionary tales for global cartel compliance

Criminal enforcement of cartel laws ultimately relies on the extent to which extradition is a realistic prospect. The United States Department of Justice (“DOJ”) has secured its first litigated extradition on antitrust charges: Romano Pisciotti, an Italian national, was extradited from Germany (where he was catching a connecting flight) on charges related to the marine hose cartel. As more jurisdictions criminalize cartel conduct and increase cooperation with enforcement regimes around the globe, the threat of extradition in cartel cases becomes more and more real. The extradition risk needs to be taken into account in shaping global cartel compliance programs and in advising companies and executives caught in cartel conduct.

The Romano Pisciotti extradition saga

In 2014 the DOJ secured the first ever extradition on cartel charges. But behind the success of the agency, there is the story of an individual, Romano Pisciotti, who was unaware of having been placed on an INTERPOL Red Notice, spent several months as a convict in a grim cell in a U.S. federal prison, and today is unemployed because prospective employers can find on the internet the hundreds of headlines and articles making him the unwilling poster child for international cartel enforcement. Mr Pisciotti today is convinced that his extradition was unfair and discriminatory because the German Government extradited him as a non-German citizen, while refusing to do the same for a German executive at another company caught in the same marine hose cartel, who remains at large as fugitive from the U.S. in Germany.

In 2013 Mr Pisciotti, a former senior executive with Parker ITR, a marine hose manufacturer headquartered in Italy, was arrested by Germany in a stopover at Frankfurt airport. We now know that he had been indicted “under seal” (i.e., filed with a court without becoming a matter of public record) in 2012 for various alleged antitrust violations, and was placed on an INTERPOL Red Notice by the U.S. Government.

The extradition request was based on the DOJ accusing Mr Pisciotti of having participated in a conspiracy to suppress and eliminate competition by rigging bids, fixing prices and allocating market shares for sales of marine hose sold in the U.S. and elsewhere (marine hose is a flexible rubber hose used to transfer oil between tankers and storage facilities).¹ The European Commission and the Japan Fair Trade Commission had also investigated the marine hose case,² and, according

to the Court of Justice of the EU Mr Pisciotti’s employer, Parker ITR, played a coordinating role in that alleged cartel for some time.³

A few years earlier, Mr Pisciotti had been arrested in Switzerland but released within hours when that country determined it would not extradite him, and had travelled to the U.K. where he had two days of interviews with prosecutors at the U.S. embassy (the DOJ had issued a letter of “safe passage”, giving Mr Pisciotti assurance that he would not be arrested).

In 2014, after nine months of legal battles, Mr Pisciotti was extradited from Germany to the U.S. Once on U.S. soil, Mr Pisciotti pled guilty to the DOJ’s charges, resulting in a two-year period of imprisonment and a \$50,000 criminal fine.⁴

Mr Pisciotti fought against his extradition before different courts at the national and the supra-national level, without success. First, the higher regional court of Frankfurt⁵ and the German constitutional court⁶ dismissed Mr Pisciotti’s arguments that the extradition violated EU law, and in particular the principle of non-discrimination; both courts ruled that EU law was not applicable to extradition matters between Germany and the U.S.

Second, an Italian court dismissed an interim action against the German extradition.⁷

1 See the DOJ case file, available at: <https://www.justice.gov/atr/case/us-v-romano-pisciotti>.

2 See the European Commission decision of 28 January 2009, at paragraph 64, available at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/39406/39406_1902_1.pdf.

3 Case T-146/09 RENV, *Parker Hannifin Manufacturing and Other v Commission*, ECLI:EU:T:2016:411, paragraphs 106-7 and 118.

4 See the DOJ press release, available at: https://www.fbi.gov/contact-us/field-offices/houston/news/press-releases/former-marine-hose-executive-who-was-extradited-to-united-states-pleads-guilty-to-participating-in-worldwide-bid-rigging-conspiracydec_docs/39406/39406_1902_1.pdf.

5 Order of the higher regional court of Frankfurt dated 22 January 2014, 2 Ausl A 104/13.

6 Order of the German Constitutional Court dated 17 February 2014, 2 BvQ 4/14.

7 Mr Pisciotti has filed lawsuits with the Italian courts of Varese and Catania. The Varese judge dismissed the action whereas the case was withdrawn from the Catania judge as in the meantime Mr Pisciotti had been extradited to the U.S.

Third, the European Court of Human Rights declared Mr Piscioti's action inadmissible because Mr Piscioti had not exhausted all domestic remedies available to him.⁸

Fourth, the European Commission refused to open infringement proceedings against Germany for violation of EU law.⁹ On the alleged violation of the rules on the freedom of movement and the freedom to provide services under Articles 21 and 56 of the Treaty on the Functioning of the European Union ("TFEU"), the Commission took the position that being held in custody pending an extradition request does not relate to the freedom of movement in the EU, and that Mr Piscioti was transiting through Germany and not offering services there. And on the alleged violation of the non-discrimination principle (Article 18 TFEU), the Commission stated that it was assessing whether EU law could apply to the question whether the extradition treaty between Germany and the U.S. should apply to German and other EU citizens on the same terms. The Commission did not ultimately provide any answer to this question.

The EU Courts in Luxembourg dismissed Mr Piscioti's appeals against the European Commission's decision on procedural grounds: it is settled law that individuals are not entitled to bring proceedings against a refusal by the Commission to institute infringement proceedings against a Member State for failure to fulfil its obligations under EU law.¹⁰

Last, but not least, since he could not succeed in avoiding his extradition to the U.S., Mr Piscioti initiated proceedings before the regional court of Berlin claiming damages from the German state. The Berlin court has decided to stay proceedings and refer the case to the Court of Justice for a preliminary ruling on whether it is compatible with the principle of non-discrimination under EU law that Germany extradites an Italian citizen to the U.S. under cartel charges while at the same time refusing to do the same with its own nationals.¹¹

⁸ Decision of the European Court of Human Rights dated 17 April 2014.

⁹ Decision of the European Commission dated 11 April 2014.

¹⁰ Case T-403/14, *Pisciotti v. Commission*, EU:T:2014:692 and Case C-411/14 P, *Pisciotti v. Commission*, EU:C:2015:48.

¹¹ Case C-191/16, Request for a preliminary ruling from the Landgericht Berlin lodged on 5 April 2016, *Romano Pisciotti v Bundesrepublik Deutschland*, Official Journal 2016/C 270/33.



The German referral order shows that the Berlin court has serious doubts as to the compatibility of German extradition practice with EU law, and in particular the EU law principle of non-discrimination.¹² The order also suggests that more will need to be proven for Mr Pisciotti to establish his damages claim.¹³

The forthcoming Court of Justice preliminary ruling on (non-)discrimination of EU Member States' extradition laws will be the next episode of this saga, though a recent judgment in a related matter offers some insight into what may happen.

Can extradition be discriminatory between non-citizens and own-citizens of the requested state?

Several jurisdictions have laws that prevent the extradition of their own citizens.¹⁴ Mr Pisciotti, for example, was an Italian citizen travelling through Germany when he was detained and ultimately extradited to the U.S. He would have not been extradited by Germany had he been a German citizen, because the Constitution of that country does not allow the extradition of its own nationals. While in Italy, Mr Pisciotti was not extradited because the Italian constitution has the same type of provision.

In an ironic twist, Germany, the country that extradited Mr Pisciotti, refuses to extradite one of his alleged co-conspirators who has been charged with identical crimes, and who today remains at large as a U.S.-indicted fugitive in Germany.¹⁵

The reason for this differentiation lies in a specific provision of the German Constitution stating: “No German citizen may be extradited to a foreign country. The law may provide otherwise for extraditions to a Member State of the EU or to an international court, provided that the rule of law is observed”.¹⁶ Based on this provision, Germany grants privileged treatment to its own citizens in relation to extradition matters.

This gave rise to claims from Mr Pisciotti before the regional court of Berlin that he was being discriminated against based on his citizenship, and that he should accordingly receive compensation from the German government.

The Berlin court referred four questions to the Court of Justice of the EU, giving the Luxembourg judges an opportunity to offer guidance on fundamental questions relating to the applicability of EU law to extradition matters involving non-EU Member States (such as the U.S.) and the compatibility with the non-discrimination principle (under Article 18 TFEU) of domestic laws privileging a Member State's own nationals over nationals of other EU Member States.¹⁷

A recent ruling in a similar case may shed some light on this legal conundrum. On 6 September 2016 the Court of Justice issued a judgment in relation to an Estonian national, Aleksei Petruhhin, who was made the subject of a Red Notice on INTERPOL's website and was later arrested on Latvian soil. Russia made an extradition request to Latvia as Mr Petruhhin was accused of attempted organized drug-trafficking, which is a criminal offense in Russia punishable with 8 to 20 years' imprisonment. According to the Court, EU law did apply, as Mr Petruhhin had exercised his right to move freely within the EU by moving to Latvia.¹⁸ However, according to the Court, the difference in treatment between a Member State's own citizens and citizens of another Member State does not violate EU

¹² The assessment of the Berlin court is contrary to the decisions of the higher regional court of Frankfurt and even the German federal constitutional court in the same case.

¹³ The questions of the German referral order of the regional court of Berlin show that – even if the Court of Justice were to confirm that the extradition of Mr Pisciotti to the U.S. was an unjustified violation of EU law – this would not necessarily lead to the Berlin court granting Mr Pisciotti damages against the German government. Rather, the right to damages will depend on further specific legal issues, namely whether Germany manifestly and gravely disregarded the limits on its discretion, including in the light of the fact that there had been previous decisions of German courts in the same matter.

¹⁴ The Law Library of U.S. Congress has published a chart containing information on the terms that apply to the extradition of citizens in 157 jurisdictions around the globe. The statistics are available at: <http://www.loc.gov/law/help/extradition-of-citizens/chart.php?locr=bloglaw>. Of the countries surveyed, 60 were found to have laws that prevent the extradition of their own citizens. Other requirements may apply in different countries, or they may have a provision that simply allows a government minister to refuse the extradition of a citizen.

¹⁵ See the U.S. DOJ press release, available at: <https://www.justice.gov/opa/pr/former-marine-hose-executive-who-was-extradited-united-states-pleads-guilty-participating>. This German businessman, formerly associated with Dunlop Marine and Oil Ltd., has declared to the press that he received a notification from the Hamburg prosecutor that he would not be extradited, see MLex clipping of 21 May 2014, “US wins one extradition, but dozens of alleged price fixers remain out of reach”. He was also held in Spain but not extradited to the U.S., see MLex clipping of 17 March 2015, “Failed arrest, embassy interview smoothed way for Pisciotti extradition”.

¹⁶ Article 16(2) of the German Constitution, unofficial translation.

¹⁷ The German referral order reveals that the German court has serious doubts regarding the compatibility of Mr Pisciotti's extradition with EU law, considering that extra-EU extraditions should fall within the scope of EU law and calling into questions any possible derogations to the EU principle of non-discrimination (such as the one in the EU-US agreement on extradition stating that the requested State may refuse extradition based on constitutional principles, or the one in Article 4(2) of the Treaty of the European Union referring to “national identities”). The Berlin court concludes that neither of these derogations is sufficiently robust to justify such discrimination between German citizens and those of other EU Member States, and therefore the German court prefers to refer the case to Luxembourg for a preliminary ruling.

¹⁸ C-182/15, *Aleksei Petruhhin*, ECLI:EU:C:2016:630, paragraph 31.

law in so far as it is justified by the legitimate objective in EU law of preventing the risk of impunity for persons who have committed an offence (in the light of the maxim *'aut dedere, aut judicare'* – either extradite or prosecute). The non-extradition of its own nationals is generally counterbalanced by the possibility for the requested Member State to prosecute such nationals for serious offences committed outside its territory. But that Member State as a general rule has no jurisdiction to try cases concerning such acts when neither the perpetrator nor the victim of the alleged offence is a national of that Member State.¹⁹

It is possible that the Court of Justice, when deciding on the case of Mr Piscioti (as well as other extradition cases),²⁰ will follow the principles set forth in this *Petruhhin* ruling, thus confirming that the non-extradition of a Member State's own nationals generally falls within their discretion.²¹ In practical terms, it may be that EU Member States can continue to extradite nationals of other Member States to non-EU jurisdictions such as the U.S. while refusing extradition of their own citizens.

Finally, it is worth noting that the Court of Justice also held in the *Petruhhin* case that, before extraditing the citizen of another Member States, the requested Member State must give priority to the exchange of information with the Member State of origin and allow that Member State to request the citizen's surrender for the purposes of prosecution (with a European arrest warrant).

Extradition is no easy task

Antitrust agencies around the globe ultimately rely on extradition to prosecute foreign nationals. The U.S. is clearly committed to ensuring that culpable foreign nationals serve prison sentences for violating the U.S. antitrust laws. Other jurisdictions that have criminalized cartel conduct might follow the same path in the future.

Many indicted foreign executives have assessed the risk of extradition and made a calculated decision to give themselves up,²² and the U.S. have so far criminally charged over sixty foreign nationals.²³

Others have decided to take the gamble and remain at large.²⁴ The INTERPOL website contains a few examples,²⁵ although most indictments remain under seal so that the fugitive is not aware of their status and can be apprehended while travelling, as happened to Mr Piscioti.

22 For example some U.K. traders decided to waive extradition and face trial in the U.S., see Mlex clippings of 20 October 2015, "British ex-Rabobank trade says that US charges 'terrified' him", and of 27 October 2015, "Former Rabobank trade takes stand, denies improperly moving Libor".

23 DOJ already in 2011 stated that "since May 1999, 49 foreign defendants have served, or are currently serving, sentences in U.S. prisons for violating the Sherman Antitrust Act or obstructing a Federal antitrust investigation. The 'no-jail' sentencing recommendations that were once available to qualifying foreign nationals in the 1990s are no longer an option. Culpable foreign nationals, just like U.S. co-conspirators, are expected to serve jail sentences in order to resolve their criminal culpability". Since then, ten foreign nationals were sentenced to imprisonment in 2013 (with an average prison sentence of 15 months) and two in 2012 (with average sentence of 16 months, including two 36-month sentences imposed upon individuals from Taiwan convicted at trial for conspiring to fix prices in the LCD industry and 24-month sentences for two Japanese executives for their participation in conspiracies to fix prices and rig bids in the auto parts industry). See the DOJ statistics, available at: <https://www.justice.gov/atr/public-documents/division-update-spring-2011/criminal-program-update-2011>, <https://www.justice.gov/atr/public-documents/division-update-spring-2013/criminal-program>, and <https://www.justice.gov/atr/division-update/2014/criminal-program>.

24 For instance, Matsuo Electric has declined to allow three of its employees to travel to the U.S. for depositions in a civil damages suit, citing their risk of arrest in a related criminal cartel probe on capacitors (which are used in electronic devices to store electrical charge). See Mlex press clipping of 12 February 2016, "Capacitor plaintiffs seek order on US depositions as Matsuo, other defendants ask for interviews in Japan".

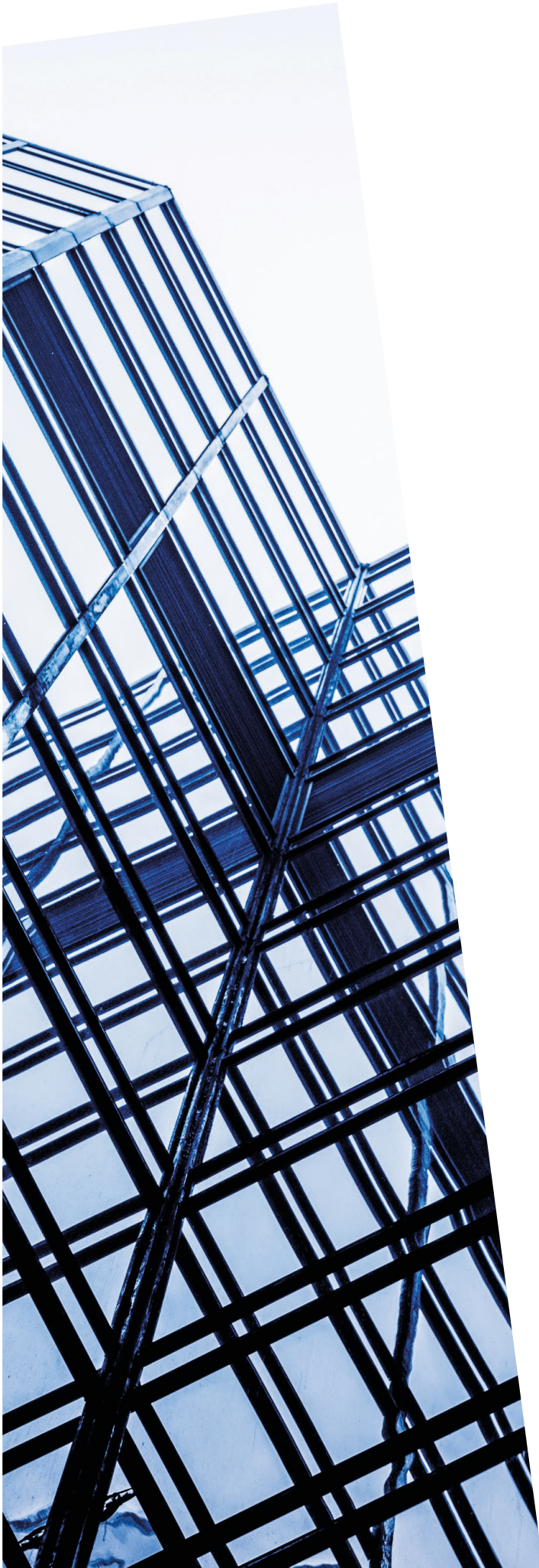
25 It is possible to search the INTERPOL website (available at: <http://www.interpol.int/notice/search/wanted>) by inserting the search term 'Sherman' in the 'free text' field to obtain a few red notices for cartel cases.

19 C-182/15, *Alexksei Petruhhin*, ECLI:EU:C:2016:630, paragraph 37 and 39. See also C-182/15, *Alexksei Petruhhin*, ECLI:EU:C:2016:330, Opinion of Advocate General Bot delivered on 10 May 2016, at paragraphs 43, 58 and 69.

20 Another case, relating to an Austrian doctor sentenced to life imprisonment in Dubai for mercy killing, is still pending before the Court of Justice. C-473/15, *Peter Schottthöfer & Florian Steiner GbR v Eugen Adelsmayr*, request for preliminary ruling from the Bezirksgericht Linz (Austria), 7 September 2015.

21 We note that Mr Piscioti had not moved to Germany, like Mr Petruhhin had done to Latvia, but was only catching a flight therein. However it is likely that the Court of Justice will confirm that EU law also applies to the case of Mr Piscioti.





But to successfully extradite a fugitive for an antitrust violation is no easy task. First, there must be an existing extradition treaty. The presence of an extradition treaty can be largely assumed in most jurisdictions. For example the U.S. has treaties with all but a handful of countries.²⁶

Second, the alleged antitrust violation must be considered punishable under the criminal laws of both the requesting and the surrendering jurisdictions: this is the double criminality requirement. Historically very few jurisdictions had criminal cartels on their books, leaving the DOJ unable to pursue extradition in most if not all fugitives' cases. But antitrust violations today can be considered a criminal offense in several jurisdictions around the globe. Not only in the U.S. (since the enactment of the Sherman Act in 1890)²⁷ or Canada (where criminal antitrust law has existed even longer, since 1889, and where, on paper, cartel sanctions for individuals are the most severe in the world), but also in several EU Member States, such as the United Kingdom and Denmark; several other Member States have criminalized cartel conduct to a lesser extent, for example in Germany and Italy criminal sanctions may apply to bid-rigging. On a global basis, there is indeed a trend toward criminalization of cartel conduct, and more than thirty countries around the world have adopted criminal penalties for cartel activity, including in the Americas (Mexico and Brazil), the Middle-East (Israel), Asia (Japan, Korea and Russia) and the southern hemisphere (Australia, New Zealand and, most recently, South Africa).

Romano Pisciotti was accused amongst other things of bid-rigging, which is a criminal offence in Germany.²⁸ And he was a non-German citizen transiting on German soil. That is why he became the first individual extradited to the U.S. on cartel charges.

²⁶ A list of the U.S. extradition treaties is available at: <http://www.state.gov/s/l/treaty/faqs/70138.htm>.

²⁷ The Government's practice now is to insist on jail sentences for all defendants, domestic and foreign: see Belinda A. Barnett, today Deputy Chief Legal Advisor-Criminal at the DOJ, Criminalization of Cartel Conduct – The Changing Landscape, 3 Apr. 2009, available at: <http://www.justice.gov/sites/default/files/atrl/legacy/2009/07/10/247824.pdf>.

²⁸ Mr Pisciotti was accused of engaging in a bid-rigging conspiracy, and therefore he was extraditable from Germany a country where bid rigging (but not price fixing or other collusive conduct) is a criminal offense. Bid rigging may be a criminal offence also in Italy, but the Italian Government would not extradite Mr. Pisciotti because he was an Italian citizen.

It is worth noting that the U.S.-E.U. extradition agreement²⁹ provides that the requested State, at its discretion, may grant extradition even if its laws do not provide for the punishment of an offence committed outside its territory in similar circumstances.³⁰ This increases the odds of an EU Member State extraditing a citizen of another Member State.

Third, as discussed above, the nationality of the defendant may prevent or reduce the chance of extradition because several jurisdictions have laws that prevent the extradition of their own citizens. Mr Piscioti would have not been extradited by Germany had he been a German citizen. Another notable example: so far, Japan has not extradited its own citizens to the U.S.

Last, but not least, there are other legal and/or procedural hurdles to extradition. For example, the U.S.-Japan extradition treaty requires that the requesting country must prove probable cause.³¹ The procedural steps are also very burdensome, as extradition requests are usually made through diplomatic channels, and national agencies and courts retain much discretion.³²

But it remains a strong deterrent in global cartels enforcement

Even with all these hurdles, extradition remains a strong deterrent.

First, the statistics on extradition in antitrust cases are on the rise. The first ever extradition specifically on an antitrust charge was the one of Romano Piscioti

in 2014. But the U.S. Government had already demonstrated its ability to extradite individuals on counts closely related to cartel violations.

- In 2010, the DOJ secured the extradition of Ian Norris, a retired British CEO, on obstruction of justice charges relating to an antitrust investigation in the carbon and graphite products cartel, after a multi-year battle;³³ he was convicted of the same in the US, and sentenced to 18 months imprisonment.³⁴
- In 2012, David Porath, a dual US and Israeli citizen, was extradited from Israel and eventually pled guilty to three charges, including a bid-rigging count for contracts at a major New York City health care facility; he was sentenced to time served, one year probation, and restitution.³⁵
- In 2014, John Bennett, a Canadian citizen, was extradited from Canada for charges including fraud, kickbacks and bid rigging involving contracts for the treatment and disposal of contaminated soil;³⁶ he was convicted and sentenced to 63 months in U.S. prison and to pay restitution.
- In 2016, Paul Thompson, a former Rabobank trader indicted for manipulating London InterBank Offered Rate (“LIBOR”) for US\$ and Japanese Yen, consented to his extradition from Australia to the U.S.³⁷

29 The agreement on extradition between the European Union and the United States of America (OJ L 181, 19.7.2003, p. 27–33, available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22003A0719\(01\)&qid=1472817060507&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22003A0719(01)&qid=1472817060507&from=EN)) entered into force in 2010, and it supplements the bilateral extradition treaties between EU countries and the U.S. As a matter of EU law, the Member States are obliged to comply, in their bilateral relationships with the United States, with the requirements flowing from the EU-US agreement (see the Handbook on the practical application of the EU-US Mutual Legal assistance and Extradition Agreements by the Council of the European Union dated 25 March 2011, available at <http://www.statewatch.org/news/2011/mar/eu-council-eu-usa-mla-handbook-8024-11.pdf>).

30 See Article 4(4) of the agreement on extradition between the European Union and the United States of America, see footnote 30 above.

31 See the extradition treaty between Japan and the United States, available at: <https://treaties.un.org/doc/Publication/UNTS/volume%201203/volume-1203-I-19228-English.pdf>.

32 See the practical guidelines of the European Commission (available at: http://ec.europa.eu/justice/criminal/judicial-cooperation/legal-assistance/index_en.htm), the Japan Government (available at: <http://www.moj.go.jp/ENGLISH/information/loe-01.html>), and the U.S. Attorneys' Manual to extradition, Title 9: Criminal 9-15.000 – International Extradition And Related Matters (available at: <https://www.justice.gov/usam/usam-9-15000-international-extradition-and-related-matters>).

33 In 2008 the U.K.'s then supreme court, the House of Lords, refused to extradite Mr Norris on price-fixing charges because price-fixing was not a criminal offense in the U.K. at the time of his alleged conduct, and the principle of double criminality barred extradition. But it allowed extradition on obstruction of justice charges. In 2009, a U.K. court ordered Mr Norris extradited to the U.S. to stand trial for obstruction of justice. He was unsuccessful in appeal efforts that went all the way to new U.K. Supreme Court in relation to the question of whether the extradition would be incompatible with his rights under Article 8 of the European Convention on Human Rights: the right to respect for his private and family life (as both Mr and Mrs Norris had health problems at the time). The U.K. Supreme Court found that in an extradition case the consequences of any interference with Article 8 rights would have to be exceptionally serious before this could outweigh the public importance of extradition. This was not such a case. The alleged offences of obstructing justice, although subsidiary to the price-fixing charge, were very serious. See *Norris v Government of United States of America* ([2010] UKSC 9), judgment of 24 February 2010.

34 See the DOJ press release available at <https://www.justice.gov/opa/pr/former-ceo-morgan-crucible-co-sentenced-serve-18-months-prison-role-conspiracy-obstruct>.

35 See the DOJ press release, available at: <https://www.justice.gov/opa/pr/owner-insulation-service-company-pleads-guilty-million-dollar-bid-rigging-and-fraud>.

36 See the DOJ press release, available at: <https://www.justice.gov/opa/pr/former-ceo-canadian-hazardous-waste-treatment-company-convicted-conspiracy-pay-kickbacks-and>.

37 See the DOJ press release, available at: <https://www.justice.gov/opa/pr/former-rabobank-derivatives-trader-pleads-guilty-scheme-manipulate-libor-benchmark> (“The department also thanked the Australian Attorney-General’s Department, the Australian Federal Police and the Western Australia Police for their assistance”).

- More cases are in the pipeline: for example, it is understood that the U.S. government may seek extradition of a U.K. citizen involved in the investigation into manipulation of foreign exchange rates,³⁸ and several Japanese executives involved in the automotive steel tubes case for which the DOJ has already indicted their employing corporation.³⁹

Second, indictments and extradition requests do not go away. Mr Piscioti's 2014 extradition was based on bid-rigging that began at least as early as 1999, and Mr Porath's 2012 extradition arose from a scheme that began in 2000. Similarly, Mr Bennett's extradition in 2014 arose from criminal conduct in 2002, and was protracted. The Norris extradition in 2010 involved conduct in the 1999-2000 time-period, and the extradition itself was a multi-year battle.

Third, indictments and extradition requests can be strategic. The agencies can charge other crimes that can provide a basis for extradition, even in countries where price-fixing is not strictly a criminal offense. Mr Piscioti could be extradited from Germany, which does not currently criminalize price-fixing generally, but where bid-rigging is criminal. Mr Norris's case is also illustrative: the obstruction arising from the DOJ's investigation was admitted in guilty pleas by Mr Norris' subordinates in the U.S. that implicated him, their CEO, located in the U.K.

Fourth, unseen circumstances can occur, and antitrust agencies will be ready to seize the moment. The DOJ and other regulators may rely on INTERPOL Red Notices: the persons concerned are wanted by national jurisdictions for prosecution or to serve a sentence based on an arrest warrant or court decision, which is often "under seal". INTERPOL's role is to assist the national police forces in identifying and locating these persons with a view to their arrest and extradition.⁴⁰ Even if executives live in a country that

will not extradite, if they travel to another country, they are going to be increasingly at high risk of being extradited.⁴¹ And as noted above, EU Member States may extradite nationals of other Member States to non-EU jurisdictions such as the U.S. while refusing extradition of their own citizens. In the case of Mr Piscioti, the Red Notice list worked.

Last, but not least, at the end of the extradition journey, extradited white-collar fugitives do not get any special treatment. Mr Piscioti, who after his extradition cooperated with investigators and pleaded guilty, still spent over two years in custody, including several months in a U.S. federal prison in a room with around 40 inmates and a single corner toilet. While the DOJ credited him for the nine months that he had been held in custody in Germany pending his extradition request, his actual release date was one month later than the scheduled date because the U.S. prison management lost his passport. Mr Piscioti could not be returned to his home country, Italy, for completion of his sentence even though his plea agreement allowed for this option (as do several extradition treaties and the Council of Europe Convention on the Transfer of Sentenced Persons).⁴² Why not? Because of delays while the Italian Ministry of Justice waited for certain documentation from the U.S. regarding the case.⁴³ Finally, Mr Piscioti is today unemployed.⁴⁴

In conclusion, extradition remains a strong deterrent for executives caught up in cartels. But is also a factor to be taken into account by corporations in shaping their cartel compliance programs as well as their strategic choices when facing cartel investigations.

³⁸ Mlex clipping of 20 July 2016, "US forex probe so far yields antitrust charges for banks, fraud charges for bankers". Note, however, that the U.K. closure of the probe into the manipulation of the foreign exchange trades, and the acquittals of businessmen accused of manipulating the interest benchmark Libor, may make less likely that the DOJ pursues extradition in these cases, see Mlex clippings of 27 January 2016 "Brokers acquitted in Libor case still face US charges, though perhaps only in theory", and of 23 March 2016 "After SFO [U.K. Serious Fraud Office] closure, DOJ left with tough choices in forex probe".

³⁹ Mlex clipping of 15 June 2016, "Car parts case sees first indictments since AUO in 2010".

⁴⁰ See the INTERPOL's website, available at: <http://www.interpol.int/INTERPOL-expertise/Notices>. See also the DOJ Attorneys' Manual, section on Red Notices, available at: <https://www.justice.gov/usam/criminal-resource-manual-611-interpol-red-notices>.

⁴¹ Bill Baer, Assistant Attorney General for the Antitrust Division (today Acting Associate Attorney General) stated that: "Even if you're not extradited immediately from your home country, you may not be able to travel for fear you'll get stopped ... and detained somewhere else until we can sort out whether extradition is appropriate", see interview of 15 May 2015, available at: <http://www.law360.com/articles/656850/exclusive-doj-s-baer-promises-more-extradition-fights>.

⁴² The Law Library of U.S. Congress offers statistics, available at: <http://blogs.loc.gov/law/2016/03/new-resource-covers-the-laws-of-157-countries-on-the-extradition-of-citizens/>.

⁴³ The transfer provision has been used before in a few antitrust cases and foreign executives have returned to Luxembourg and France to serve out sentences. The French businessman Christian Caleca involved in the marine hose cartel was released from custody on arriving home. And no one from Japan has ever been known to petition for a transfer. See Mlex clipping of 31 October 2014, "Cartel offenders can try, but US prison transfers to home countries are rare".

⁴⁴ The American Antitrust Institute has sent a letter to the head of the DOJ antitrust division asking to improve criminal plea agreements by prohibiting companies from rehiring individuals convicted of price fixing; see the letter of 28 December 2014, available at: <http://www.antitrustinstitute.org/sites/default/files/AAI%20to%20DOJ%20re%20criminal%20reemployment12.29.14.pdf>. The plea agreement of Mr Piscioti did not contain such a clause.

The solution remains global cartel compliance and strategy

We have seen how the threat of extradition in cartel cases has become more and more real. This increased risk of extradition has to be factored in by individuals and corporations.

In light of the legal hurdles to extradition, many indicted nationals are taking their chances and remain fugitives. On the other hand, many foreign executives have voluntarily chosen to turn up, cooperate, and serve jail time. There is no certainty that an indicted foreign citizen will not be extradited as the requested country retains considerable discretion on whether to surrender. Although the odds are currently in the indicted individual's favour, there is still a possibility that the extradition will succeed. Thus, for those not feeling lucky, it may be better to cooperate fully in order to avoid harsher punishment in the event they are extradited.

If indicted foreign nationals prefer to remain at large, they will essentially be prisoners within their own country. With the advent of international agencies such as INTERPOL, an indicted individual would forever wonder if their next international trip will lead them to a federal prison in the U.S. or elsewhere. Weather conditions could trigger an unexpected unfolding of events.

The uncertainty of extradition success cuts in both directions. And this uncertainty works in the favour of the antitrust agencies, which can use extradition as an imminent and ever-present peril, a modern sword of Damocles. Executives should seek advice from a counsel that is cartel-savvy and has a global perspective so as to weigh carefully the options.

This "increased extradition factor" also affects global cartel compliance. In the past, senior executives would surely have an idea that what they were doing could be considered a violation of antitrust laws, but perhaps they had less appreciation of the consequences: extradition, red notices, and jail will now increase compliance culture and reduce the options open to individuals.

Corporations should take that into account in shaping their compliance programs, for example by offering their executives in all subsidiaries around the world a way to report bad conduct anonymously.

The extradition factor should also be taken into account by corporations in their strategic choices when caught in cartel conduct. An executive facing the threat of extradition may help the company in shaping their cooperation with regulators, or indeed in helping to rebut the allegations.

In conclusion, corporations should make sure they have a carefully tailored global compliance program, and that they have access to counsel with a track record in advising companies involved in global cartels – the options are different now, and the stakes are high.

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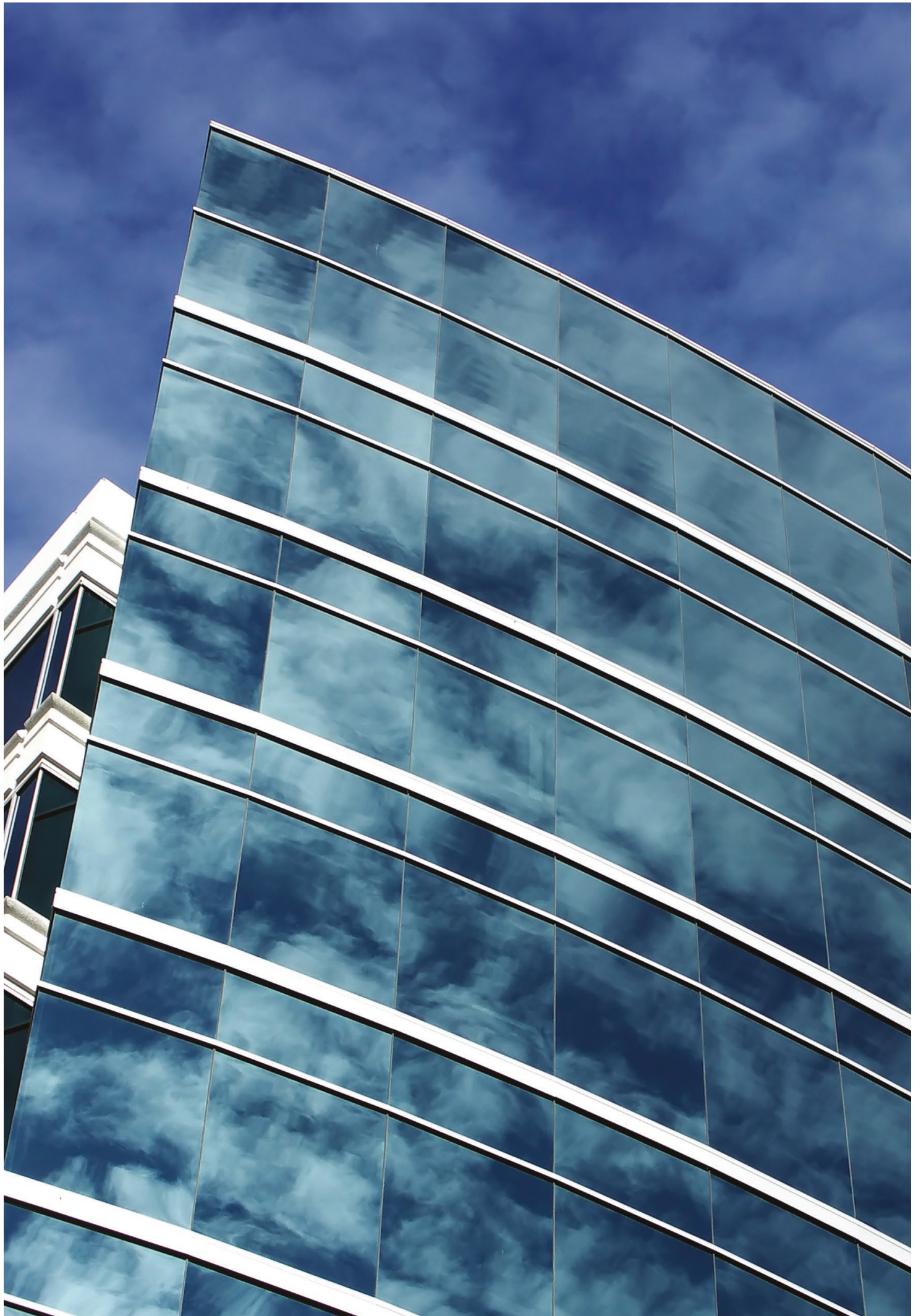


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Substantial changes to Hungary's competition law regime

The Hungarian Parliament has recently adopted a major amendment to the Hungarian Competition Act, which entered into force on 15 January 2017 (the “Amendment”).

Significant changes introduced by the Amendment include new provisions in relation to the merger control regime and the implementation of Directive 2014/104/EU on antitrust damages actions that is anticipated to have a major impact on private enforcement of damages suffered by third parties as a result of a competition law infringement under Hungarian law.

Merger control

Introduction of a simplified notification procedure

In the last couple of years, the number of simple merger control cases assessed in fast track procedures has increased. In order to make the merger control review even more efficient, the Amendment introduces a simplified notification procedure that applies to all concentrations.

Instead of submitting an application for clearance, the parties are now required to submit a less detailed notification which will be reviewed within 8 days by the Hungarian Competition Authority (“HCA”).

If, based on the review made by the HCA, the information set out in the notification is sufficient to establish that the concentration does not obviously decrease competition on the relevant market, an official certificate is issued by the HCA to the notifying party. Such certificate attests that no further review of the notified concentration is required. Otherwise, if any negative impact of the transaction on competition cannot be clearly excluded, the HCA will commence formal merger control proceedings in order to carry out a comprehensive review of the transaction and its effects. The main rules of formal merger control proceeding (Phase I and Phase II) have remained unchanged.

The procedural fee of the notification procedure is HUF 1 million (approx. EUR 3,200), which means a significant decrease for non-problematic cases.

Dawn raid in merger control cases

The HCA’s investigative powers have also been extended: the HCA is now also entitled to conduct dawn raids in merger control cases, i.e. unannounced inspections to investigate possible breaches of competition law such as violation of standstill obligation or providing incomplete or incorrect information during merger control proceedings.

Increased general thresholds

The aggregate turnover threshold of all undertakings concerned has remained unchanged, whereas the threshold to be reached by at least two groups of undertakings has been increased from HUF 500 million (approx. EUR 1.6 million) to HUF 1 billion (approx. EUR 3.2 million). Accordingly, the HCA must be notified of a merger if the aggregate net turnover of the participating undertakings exceeded HUF 15 billion (approx. EUR 48 million) and the net turnover of at least two groups of participating undertakings exceeded HUF 1 billion (approx. EUR 3.2 million) in the previous business year.

The method of calculation of the turnover has also changed, since, as opposed to the previously applicable rules, according to which the worldwide turnover of Hungarian undertakings was taken into account, now only the net turnover realised in Hungary is the basis of calculation both for foreign and Hungarian undertakings.

The above increase of the thresholds is expected to reduce the number of notifiable transactions. However, the introduction of a new threshold for smaller transactions as described below may also have an impact on the volume of the transactions filed with the HCA.

Introduction of a “soft” threshold for specific cases

Some of the concentrations which are not caught by the general turnover thresholds may still be subject to merger control under certain conditions. The aim of the introduction of such specific system was to enable the HCA to intervene in the case of concentrations which may have negative effects on the relevant market without reaching the general thresholds.

According to the new rules, the HCA must be notified of a concentration if the aggregate net turnover of the participating undertakings exceeded HUF 5 billion (approx. EUR 16 million) in the previous business year, and it is not obvious that the concentration will not significantly decrease competition on the relevant market, especially as a result of creating or strengthening a dominant position.

In such cases, the decision of whether or not to notify the HCA of a merger is at the discretion of the undertakings concerned. In order to ensure the correct assessment as to whether the concentration must be notified, the HCA intends to issue explanatory notes on the notification sheet and a notice to give guidance how to interpret the second condition which will primarily be assessed based on a market share test. If the undertakings concerned consider that the notification is not necessary, the HCA may still initiate an investigation, however, only within 6 months following the implementation of the concentration.

In such specific cases, there is no standstill obligation, i.e. the undertakings may implement the transaction during the ongoing HCA proceedings, without any fines to be imposed by the HCA, but in case of serious competition concerns the HCA may order the parties to unwind the transaction.

Private enforcement

The Amendment has also implemented the EU Private Damages Directive (Directive 2014/104/EU) into Hungarian law. Therefore, the Amendment sets out special substantive and procedural rules to facilitate the private enforcement of damages suffered by third parties as a result of competition law infringements. The key elements of the above new regime are as follows:

The principle of full compensation

The Amendment sets out as a general principle that all injured parties, irrespective of their position in the marketing/distribution chain (i.e. direct and indirect purchasers, suppliers, customers etc.) are entitled to seek full compensation. This principle is further strengthened by the general rule that the court, may not reduce the amount of compensation lower than the total loss suffered, not even in the case of exceptional circumstances. As an exception to the general rule, in the case of direct purchasers, who are, in most cases, resellers, the amount of compensation will be reduced with the amount of damages passed on to indirect purchasers and customers.

Presumptions

One of the most significant novelties in relation to private enforcement under Hungarian competition law is the lowering of the burden of proof. In this context, the Amendment has implemented the following presumptions:

- in the case of cartels, the plaintiff may rely on the presumption that the infringement had a 10% effect on the price applied by the market operators entered into the cartel agreement; and
- in the case of price fixing, should the indirect purchaser prove the fact of infringement and that it purchased from the affected goods, it may rely on a presumption that it suffered damages from the infringement.

We note that the above 10% presumption is a Hungarian specific provision, making Hungary potentially a preferred forum to pursue competition damages cases.

Special rules of limitation

The limitation period of any damages claim arising from competition infringements only starts when the injured party becomes aware of all of the circumstances below:

- the competition infringement;
- the amount of damages suffered in consequence of the infringement; and
- the identity of the infringer.

Disclosure of information

Before the Amendment was adopted, the main issue regarding private enforcement was the lack of information on the injured party's side, which made almost impossible to successfully seek compensation based on damages occurred as a result of competition law infringements.

The Amendment has implemented a number of procedural rules, with the aim to ease the obligation of proof and to help the plaintiff collect the evidence necessary for a successful private enforcement. While, according to the general Hungarian civil procedural rules, the plaintiff is obliged to present evidence to support its claim, new rules have been introduced on the disclosure of information making it possible for the court to oblige the defendant or any third party to disclose certain, precisely defined, necessary information, including documents or any other evidence, upon the plaintiff's request. In order to protect the defendant's and third persons' rights, the Amendment only allows the above, if the plaintiff strongly suggests that it does not have the specific information that would be potentially suitable to demonstrate a relevant fact regarding its claim.

In a much smaller scale, the court is even entitled to oblige the defendant and any third person to disclose confidential information to the extent absolutely necessary. In this case, confidential information is only permitted to be disclosed among the parties and their legal representatives and may only be used for the purposes of the specific procedure.



Notwithstanding the above, the court may not order the disclosure of the following information:

- any document which contains or may contain any reference to the identity of the complainant if it is considered confidential information by the order of the HCA or the complainant requested so;
- seizure copies, interim working dossiers and examination working dossiers provided for defending during the administrative proceedings of the HCA;
- leniency statements or any other data which may contain reference to the merits of the leniency statements;
- any information which fall within the scope of legal privilege;
- the statement of the perpetrator of a specific cartel related criminal offense if they confess the act to investigation authorities before the authorities become aware thereof and unveil the circumstances of the criminal act.

An equally important procedural measure is that the decision of HCA and the European Commission legally binds the court regarding the competition infringements. Therefore, there are no grounds for counter-proofing by defendants in the litigation procedure regarding the above matter.

The new rules also enable the court to ask the HCA regarding the existence or the extent of damages in the specific case. However, in this case the assessment of HCA does not bind the court.

Other changes: leniency policy and settlement

The Amendment also introduces changes applicable to leniency policy and settlement.

Leniency policy

Leniency policy may offer undertakings involved in a cartel either total immunity from fines or a reduction of fines provided that the undertaking self-reports and provides information and evidence enabling the HCA to find and detect an infringement. According to the recent changes, the undertakings are now also entitled to submit an application for leniency in the case of vertical agreements aimed directly or indirectly at fixing the purchase or resale prices which was previously only available for horizontal hardcore cartels.

Settlement

Settlement is a relatively new, simplified procedure available to undertakings in Hungary since 1 July 2014, which enables the HCA and the undertakings to bring a case to a swift close. Such invitation to settlement is at the discretion of the HCA and can lead to significant cost savings and a reduction of the amount of the fine if the undertaking provides a declaration of having participated in the infringement, accepts the legal qualification made by the HCA, and waives in advance a part of its rights such as the right of access to documents, the right to make statements or to initiate a hearing, and the right to appeal. In order to motivate the undertakings to participate in a settlement, the maximum of the potential reduction of the fine has been increased from 10% to 30 %.



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Trends in competition law enforcement across Africa

Competition law is growing in Africa. According to a recent World Bank report¹, in 15 years the number of jurisdictions in Africa with competition law has almost trebled. A number of African countries have introduced or proposed new or updated legislation, and some jurisdictions have introduced guidelines and other policies to facilitate the operation of the legislation.

Growth in competition regulation is happening not only at a national level, but also at a regional level. The Common Market for Eastern and Southern Africa (“COMESA”)² brought its competition legislation into operation in January 2013, but this is not the only regional body on the continent. There are other regional authorities including the Central African Economic and Monetary Community (“CEMAC”)³ and the West African Economic and Monetary Union (“WAEMU”)⁴. The East African Community (“EAC”) is also in existence and has expressed the intention to begin enforcing its competition legislation soon. The EAC Member States are Burundi, Kenya, Rwanda, South Sudan, Tanzania and Uganda. Almost all of these countries are also members of COMESA, and it is unclear how the EAC and COMESA intend to dovetail their operations.

Awareness of competition legislation is growing across the continent as regulators turn their attention from a narrow focus on merger control to a wider focus on enforcement. We shall look at a few of the recent developments in this regard in various African jurisdictions.

South Africa

Enforcement activities have long been a focus of the South African competition authorities, and South Africa is still most active in this regard. According to the World Bank Group Report, 50% of the horizontal agreement cases that were completed by nine authorities in 2013 – 2014 were investigated by the South African Competition Commission (“SACC”). The SACC continues to focus on cartel conduct, having recently referred a number of complaints to the Competition Tribunal for adjudication. It has also pursued a number of abuse of dominance cases over the years.

Catch-up by other African countries

Other African authorities seem to be keen to follow suit in prosecuting enforcement cases rather than focusing only on merger control. According to the World Bank Group Report, to this end the annual budgets of African competition authorities have increased. Although in some countries the increase is off a low base, the average annual budget increase was about 39% between 2009 and 2014.

Kenya is one example of this trend, where the Competition Authority of Kenya (“CAK”) is increasing its manpower and in doing so has become active in enforcement and compliance. The CAK stated in late 2015 that it had increased its focus on restrictive trade practices enforcement, especially in the financial sector, advertising and cement; and that it expected increased cartel enforcement in the coming year. In addition to efforts to detect and prosecute competition contraventions, the CAK has also launched a Special Compliance Process (“SCP”) as a “soft” enforcement tool for trade associations in the financial and agricultural sectors. The aim of the SCP is to ensure that trade associations are in compliance with the competition laws, and to assist them in identifying and rectifying past conduct in their sectors.

Other African countries are also devoting greater effort to their enforcement activities. To that end, a number of countries have issued enforcement guidelines. Zambia and Namibia have both taken this step, for example, and in 2016 Namibia issued its first fine for a cartel offence.

1 World Bank Group Report titled “Breaking down Barriers: Unlocking Africa’s Potential Through Vigorous Competition Policy: June 2016 at page 10. <http://documents.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-WBG-ACF-Report-Printers-Version-21092016.pdf> accessed 10 December 2016 (hereafter “World Bank Group Report”).

2 The Member States of COMESA are Burundi, Comoros, Djibouti, Democratic Republic of Congo, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe.

3 The Member States of CEMAC are Gabon, Cameroon, the Central African Republic (CAR), Chad, the Republic of the Congo and Equatorial Guinea.

4 WAEMU’s Member States are Benin, Burkina Faso, Cote d’Ivoire, Guinea-Bissau, Mali, Niger, Senegal, and Togo.

Cooperation between authorities

There is also a noticeable degree of cooperation between regulators. The African Competition Forum (“ACF”) plays an important role in this respect – many competition regulators are active members of the ACF, through which they share information and assist in capacity building, while increasing awareness around the benefits of implementing competition laws. The ACF was launched in March 2011 as an informal network. Since then it has grown substantially and, as at November 2016, its members included 30 national competition agencies and four regional agencies.

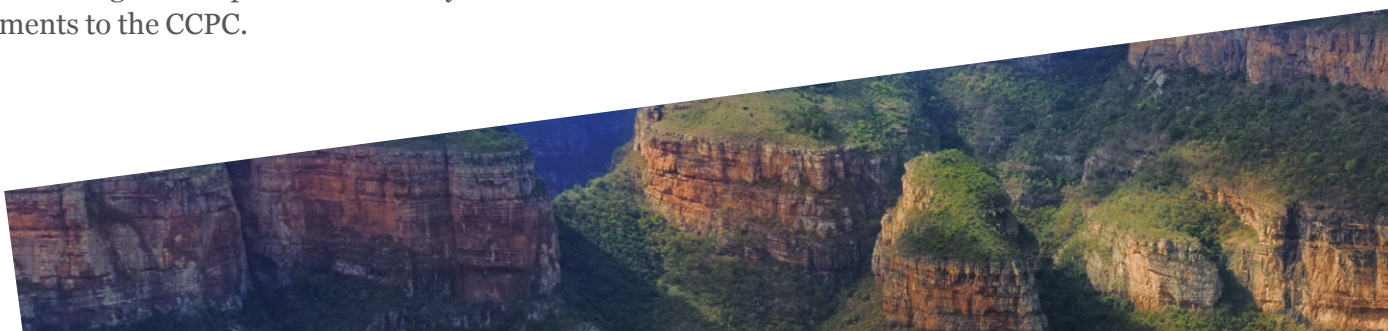
Another indicator of cooperation amongst regulators is the conclusion of Memoranda of Understanding (“MoUs”) between them. A number of these MoUs were signed in 2016. In mid-2016 representatives from the competition authorities of Botswana, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, and Zambia, all being member states of the Southern African Development Community, signed a MoU to cooperate on competition matters. The SACC was very active in signing a number of MoUs with various authorities. The COMESA Competition Commission (“CCC”) has also been very active this past year on the advocacy front, having signed MoUs with numerous countries, enabling the agencies to conduct joint investigations and enforcement activities. The CCC has also issued a notice calling on parties to notify them of any agreements (both historic and forward-looking) that may be anti-competitive, in order to have these agreements exempted under Article 20 of the COMESA Competition Regulations. This follows the Zambian legislation, which has a similar provision in their legislation. Notably, the Zambian Competition and Consumer Protection Commission (“CCPC”) is enforcing this provision more and more actively, and companies are being called upon to voluntarily disclose their agreements to the CCPC.

Leniency programmes

A number of African countries have leniency policies in place, although not all of them are actively used. According to the World Bank Report, at least seven countries have a leniency program for cartel participants, but leniency applications at the time of that report had only been received in South Africa and Mauritius.

In Kenya, the CAK published the terms of two voluntary disclosure programmes applicable to trade associations in the financial, agriculture and agro-processing sectors, allowing parties to report contraventions in exchange for immunity from prosecution. The deadline for submissions to be made to the Authority was mid April 2016. The amnesty did not, however, extend to conduct which was already the subject of an ongoing investigation. Thus, since an inquiry into the cement industry was already underway, the amnesty did not apply to the cement sector.

South Africa’s leniency policy has been particularly successful, having assisted in the uncovering of numerous cartels since 2008, when the policy was updated inter alia to allow ringleaders to seek leniency. In fact, it is frequently a follow-on process from a dawn raid as parties comb through their records and apply for leniency shortly thereafter. Going forward its popularity is likely to decrease, since the South African legislation was amended in May 2016 to allow for criminal prosecution of individuals involved in cartel conduct. The legislation provides for the SACC to recommend that whistleblowers be granted leniency from prosecution, but the final decision rests not with the SACC but with the National Prosecuting Authority, and this may cause parties who would otherwise have come forward to be more cautious.



Market enquiries

South Africa has made active use of this tool, having held its first market enquiry over ten years ago, when it investigated the banking sector. The SACC did not use this tool frequently, however, as the legislation did not clearly make provision for market enquiries. Since the legislation was amended to provide explicitly for market enquiries in 2013, the SACC has launched three market enquiries (healthcare, LPG, grocery retail).

This investigative tool has not been adopted in other African jurisdictions as yet, although the COMESA Competition Commission (“CCC”) has indicated that they propose to hold market enquiries.

Dawn raids

The SACC has conducted a number of dawn raids across numerous industries since the commencement of the South African Competition Act, 1998. Its first search and seizure exercise, which was carried out against participants in the cement industry in the early 2000s, was not a success, since it was procedurally flawed, and the SACC’s conduct was heavily criticised by the courts. The procedural irregularities in the execution of the warrant resulted in it being set aside, and the SACC had to return the documents seized during the raid. After this inauspicious start, the SACC desisted from conducting dawn raids for a number of years, but the SACC has since carried out numerous successful raids.

At least 16 countries have search and seizure powers, but few have carried out raids, although the trend seems to be catching on outside South Africa. For example, dawn raids have been carried out recently in Zambia, Kenya, and Namibia.

Follow-on damages

Another phenomenon that has started to arise is that of follow-on damages. While these are becoming quite common globally, it is probably too early to see such cases in most African jurisdictions, where prosecutions are relatively new. However, South Africa is starting to see parties launching civil damages claims and no doubt other jurisdictions will follow.

The need to address African competition law Enforcement of competition legislation is growing in Africa. As can be seen from our discussion of recent developments across the continent, enforcement tools and fines are on the increase, and the stakes for parties who contravene the legislation, both national and regional, are rising.

Against this backdrop, companies operating, or considering making acquisitions, in Africa, should ensure that they are familiar, and comply with, the competition legislation of the countries or regions they operate or intend to operate in, to ensure that they do not run the risk of falling foul of that legislation and consequently bearing the brunt of enforcement action against them by the relevant competition authorities.



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Mexican Supreme Court reverses fine against PEMEX

The 2013 energy reform introduced under Peña Nieto's federal administration revamped the oil and energy sectors in Mexico. Although the reform did not allow the privatization of Mexican assets, the nation's wide oil resources and activities were opened to international and local private players.

The energy reform also obliged the state-owned oil Company, Petróleos Mexicanos ("PEMEX") to give up its monopoly status, which it had maintained since the 1938 national oil expropriation ordered by former President Lázaro Cárdenas. Protected at a constitutional level, almost all of PEMEX's activities were considered to be a "*strategic reserved area*" of the nation.

Over the years, discussions and cases have concerned the scope of such constitutional protection. An example occurred back in 2013 where the now dissolved Mexican competition agency, the Federal Competition Commission ("FCC"), heavily fined PEMEX and one of its divisions for abuse of dominance.

According to the investigation performed by the former FCC, PEMEX was involved in tied sales activities. Findings concluded that PEMEX tied the acquisition of transportation services including the hiring of PEMEX personnel and equipment, to the acquisition of gasoline (where PEMEX was the only supplier nation-wide).

The former FCC concluded that although certain activities of PEMEX were under constitutional protection, which consequently allowed an exemption from local competition legislation, activities involving the transportation of gasoline were not one of them. As consequence, the FCC imposed in August 2013 a fine of MEX\$653.2 million pesos. PEMEX and its division challenged the FCC decision all the way up to the Supreme Court of Justice, which at the end of January 2017 protected PEMEX's monopoly status. This decision was very important since the Supreme Court –and especially its Second Chamber– had up till then affirmed all decisions taken by the competition authorities.



PEMEX's defense seemed quite evident as former article 27 of the Mexican Constitution protected the state-owned company at almost any level from competition enforcement. The Second Chamber of the Supreme Court confirmed such circumstance in its decision, and although the initial draft decision proposed affirming the decision rendered by the former FCC, the case was decided otherwise. The Justices of the Second Chamber of the Supreme Court decided that PEMEX's tied sales activities were excluded from the application of the competition legislation.

Moreover, the Second Chamber of the Supreme Court rendered its decision recognizing that transportation activities of gasoline from storage and distribution terminals to service stations, was considered to be a "strategic area" reserved for the nation.

The Second Chamber of the Supreme Court concluded that such activities were performed before the enactment of the 2013 energy reform and that the former statutory framework allowed PEMEX and its divisions to perform such sales despite the competition framework.

As consequence, the *current* competition authority, the Federal Economic Competition Commission ("Comisión Federal de Competencia Económica" or "Cofece") has publicly stated that it will comply with the Supreme Court's decision.

Yet, Cofece has also remarked that the Supreme Court's decision applies exclusively to behaviour performed by PEMEX before the 2013 energy reform and under the newly revamped framework, PEMEX and other players, are forced to comply with competition rules.



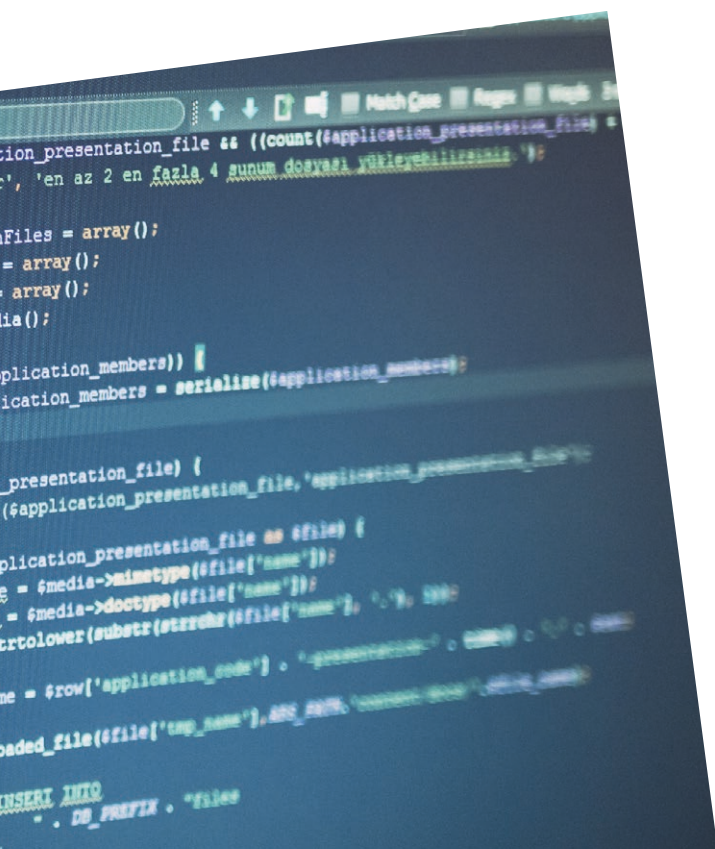
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First director disqualification: UK focus on pursuing individuals as well as companies for breach of competition law

The UK's Competition and Markets Authority ("CMA") has secured its first disqualification of a director of a company found to have infringed competition law. On 1 December 2016, the CMA announced that Daniel Aston, managing director of Trod Ltd ("Trod"), had provided a disqualification undertaking not to act as a director of any UK company for 5 years.

This development shows the CMA's renewed determination to pursue both companies and individuals for competition law infringement.

What are the CMA's powers to disqualify directors?

The Enterprise Act 2002 amended the Company Directors Disqualification Act 1986 ("CDDA") to give the CMA the power to apply to the court for a competition director disqualification order ("CDDO"). This order can be made against a director for up to 15 years if the company, of which that person is a director, is involved in a breach of competition law and their conduct as a director makes them unfit to be concerned in the management of a company.

The CMA can accept a disqualification undertaking from a director instead of bringing proceedings before the court to obtain a CDDO. Where a disqualification undertaking is accepted, this will normally result in a shorter period of disqualification that the CMA may otherwise be prepared to accept.

It is a criminal offence for any person to act in contravention of a CDDO or undertaking punishable by imprisonment and/or a fine.

The CMA has stated that (subject to limited exceptions) it will not apply for a CDDO against a current director in cases whether the relevant company has benefited from leniency. However, that will only be the case where the individual has co-operated with the CMA as part of the leniency process.

Despite the fact that the powers have existed since 2003, the CMA has not used them until now. Although in 2008 the three individuals who were imprisoned for cartel activity in the market for marine hoses were made the subject of disqualification orders, those disqualifications were based on powers that were available to the court because the individuals had committed a criminal offence.

What happened in this case?

On 12 August 2016, the CMA issued a decision finding that Trod had infringed competition law by agreeing with GB eye Ltd ("GBE") that they would not undercut each other's prices for posters and frames sold on Amazon's UK website. The agreement was implemented by both parties through the use of automated repricing software which was configured to give effect to the agreement. The CMA fined Trod Ltd £163,371. GBE was not fined, having received immunity for reporting the cartel to the CMA and cooperating with the investigation.

Following its infringement decision, in October 2016 the CMA served Mr Aston with a notice setting out the grounds and evidence on which it proposed to rely in applying for a disqualification order. In November 2016, the CMA determined that it would bring proceedings for an order unless Mr Aston agreed to give a disqualification undertaking.

Mr Aston has now given that undertaking. He has undertaken that, for a period of 5 years, he will not, without the leave of the court, *"be a director of a company, act as a receiver of a company's property or in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company; or act as an insolvency practitioner."*

Mr Aston had been the managing director of Trod since its incorporation in 2005, and was the managing director throughout the period of infringement. In the schedule to the disqualification undertaking, Mr Aston states that he does not dispute (solely for the purposes of the CDDA) that he caused Trod to make and implement the illegal agreement, in particular through the use of automated repricing software, and that he took steps to ensure implementation.

If Mr Aston had not given the undertaking, he could have faced a longer period of disqualification. The CMA has stated that it agreed in this case to accept a shorter disqualification period of 5 years *“in the light of Mr Aston’s conduct and the fact that Mr Aston was willing to give an undertaking before court proceedings were commenced”*.

Tougher stance toward directors

This development is part of the CMA’s strategy to take a tougher stance toward directors of companies involved in competition law breaches. The CMA appears determined to show that this first use of a tool, which has been available since 2003, will not be a one-off. In the CMA’s accompanying press release, Michael Grenfell, Executive Director for Enforcement at the CMA, comments: *“The business community should be clear that the CMA will continue to look at the conduct of directors that have broken competition law, and, where appropriate, we are absolutely prepared to use this power again.”*

In this first case, the CMA has targeted a managing director who appears to have been heavily involved in the initiation and implementation of the infringement during its lifetime. It remains to be seen whether the CMA will seek to use its disqualification powers on less obvious targets. But the talk is tough. In its 2010 guidance note *Director disqualification orders in competition cases*, the CMA (OFT as it then was) makes clear that it will not just seek CDDOs against directors who are directly involved in a competition law infringement. The CMA will also consider seeking CDDOs against directors who had reasonable grounds to suspect that competition law had been breached and took no steps to prevent it, or where a director ought to have known that the conduct of the company constituted a breach.

Expectations on directors are high. In its revised guidance *Company Directors and Competition Law*, the CMA makes clear that it expects all directors to understand that compliance with competition law is important, and that infringing competition law could lead to serious legal consequences for the company and for them as individuals. It also expects directors to demonstrate a commitment to competition law compliance, and to have sufficient understanding of the principles of competition law to be able to recognise

risks, and to realise when to make further enquiries or seek legal advice.

The UK is not unique in seeking to deter individuals through director disqualification in relation to competition law breach. A number of jurisdictions worldwide have introduced or are in the process of introducing director disqualification for competition law breach.

This development provides a strong additional incentive for competition law compliance to be elevated as a central boardroom issue. There is now more pressure than ever for directors to take greater responsibility for checking that their companies have the most effective competition law compliance programmes, and that appropriate training and detection systems, such as competition law audits and whistle-blower hotlines, are in place.



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Antitrust in a Trump Administration

The recently concluded US Presidential election will likely significantly affect the scope and focus of antitrust enforcement over and beyond the next four years. In addition to appointing new leadership at the Antitrust Division of the Department of Justice (“DOJ”), President Donald Trump will have the unique opportunity to appoint at least two and likely three Commissioners to the five-member Federal Trade Commission (“FTC”), including the next chair, moves that will have a huge impact on the FTC’s enforcement priorities and policy decisions for years to come.

The question now is: What will antitrust enforcement look like in a Trump administration? The Trump campaign did not issue any official policy proposals regarding antitrust, and the Republican Party platform does not specifically mention antitrust policy.

Antitrust enforcement in a Trump Administration

For the last 40 years, there has been general bipartisan agreement that (1) enforcement decisions should be economics-based, focusing on the consumer welfare standard, and (2) overzealous enforcement can deter potentially efficient business relationships, while too little enforcement could lead to business combinations or arrangements that reduce competition in ways not outweighed by efficiencies.

Trump’s economic policies, to the extent he fleshed them out during the campaign, have been neither uniformly pro-business nor anti-regulation. He consistently struck populist notes on the campaign trail by railing against the “special interests” representing “big business.” Candidate Trump made several references to antitrust enforcement that indicate he may take a much more aggressive stance in some cases than one would expect from a Republican administration.

Among those who may be in the crosshairs:

- High-tech companies, including Amazon, which Trump deems to have “a huge antitrust problem,” and company CEO, Jeff Bezos, who Trump alleges will use Bezos-owned *The Washington Post*, “for political purposes to save Amazon in terms of taxes and in terms of antitrust.”
- AT&T’s proposed acquisition of Time Warner, which Trump stated that he will block, because he believes “it’s too much concentration of power in the hands of too few”—a much different standard than the “substantial lessening of competition” test that the courts enforce under Clayton Act Section 7.

- The 2011 Comcast/NBCU transaction, which Trump claimed he would undo, without explanation.

There also may be clues in Trump’s previous personal interactions with the antitrust laws.

- Trump zealously used the antitrust laws as a plaintiff when he owned a franchise in the now-defunct US Football League (“USFL”). The USFL filed a federal complaint alleging that the National Football League (“NFL”) had unlawfully monopolized professional football. The jury found a violation, but awarded only \$1 in damages (which was trebled to \$3) because it found that the USFL’s demise was caused largely by its own mismanagement rather than by the NFL’s alleged conduct.
- In 1988, Trump paid \$750,000 to settle alleged violations of the Hart-Scott-Rodino Antitrust Improvements Act (“HSR”) for failure to make HSR filings on reportable transactions.

While a Trump Administration’s positions on antitrust enforcement are unpredictable, based on his history and his campaign rhetoric, we expect to see a mix of traditional Republican caution in non-cartel cases with some potentially unpredictable aggressive enforcement decisions—perhaps involving industries that Trump mistrusts, such as the media, or entities with which he has had a negative experience as a businessman.

A check on any potential Trump inclination toward aggressive enforcement is the fact that the Antitrust Division and FTC, unlike antitrust enforcers in some other countries, cannot make a dispositive finding of an antitrust violation without convincing a court that the relevant judicial antitrust precedents compel a finding of an antitrust violation. That said, the mere threat of government litigation may compel parties to abandon a transaction or discontinue a business practice.

International cooperation

Another area of potential concern in a Trump Administration is international cooperation with other antitrust enforcement agencies. Antitrust has been one of our most successful exports, and well over 100 countries now have their own antitrust laws. Businesses operating in multiple jurisdictions may be subject to conflicting or differing outcomes in multi-jurisdictional investigations of mergers or unilateral conduct. Increased cooperation among antitrust enforcers, through international organizations as well as multilateral and bilateral agreements, must play an important role in future antitrust enforcement.

In response to observations that American businesses may be subject to disproportionate antitrust enforcement abroad, The Antitrust Division and FTC have been highly active in international organizations such as the International Competition Network and the OECD, as well as in bilateral agreements like those recently signed with China and India. Recently proposed updates to the Antitrust Enforcement Guidelines for International Operations explain how the agencies cooperate with other enforcers and describe when and how they will launch investigations that have an international dimension. A new chapter on international cooperation addresses the agencies' investigative tools, confidentiality safeguards, the legal basis for cooperation, types of information exchanged and waivers of confidentiality, remedies, and special considerations in criminal investigations.

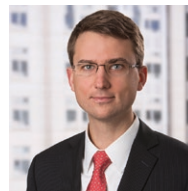
It is not clear how the Trump Administration will choose to reconcile its "America First" stance with these guidelines, or how much emphasis it will place in general on international antitrust coordination and competition advocacy abroad. Trump's campaign rhetoric often eschewed traditional foreign policy positions and implied a retreat from traditional international cooperation such as NATO and international trade agreements such as NAFTA.

What's to come

The enforcement of the antitrust laws has a significant impact on our economy--and the world economy. It is difficult to tease out a coherent antitrust policy from Trump's rhetoric as a candidate and his personal antitrust experience, but there is a strong likelihood that a Trump Administration's enforcement efforts will be unpredictable in some cases and may not reflect traditional Republican antitrust norms. The people he appoints to the antitrust agencies will provide important indications of what we can expect. FTC Commissioner Maureen Ohlhausen has been appointed Acting Chairman of the FTC. Ohlhausen is a thoughtful and experienced antitrust enforcer, so further appointments like that one will help ensure a smooth transition in antitrust enforcement for the new administration. Stay tuned



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Highest fine ever for gun-jumping

On 8 November 2016, the French Competition Authority (“FCA”) fined French-based Altice group and its telecommunications subsidiary SFR 80 million euros for the coordination of their commercial behaviour in the period between the acceptance of Altice’s purchase offer of SFR and the FCA’s merger clearance decision.

This is the highest fine ever imposed by a competition authority on companies for gun-jumping, namely the early implementation of a merger prior to its clearance in accordance with merger control rules.

What happened?

In March 2014, Altice and its cable operator subsidiary Numericable made an offer for the purchase of SFR. The offer was accepted in April 2014 and the share purchase agreement was executed in June 2014. The FCA cleared the transaction subject to commitments four months later in October 2014.

The FCA considered that Altice interfered in SFR’s management and commercial policy, and that an excessive amount of strategic information was shared during the preparation of SFR and Numericable’s integration between April and October 2014, at a time when the transaction had yet to be cleared.

In particular, the FCA focussed on the following interferences by Altice in SFR’s management and commercial policy:

- Altice’s involvement in the definition of SFR’s pricing and promotional policy;
- Altice’s prior approval of SFR’s participation in a tender offer;
- The joint preparation of an SFR offer using Numericable’s box, TV channel package and network;
- The approval by Altice’s top management of the renegotiation of certain aspects of the mobile network sharing agreement with Bouygues Telecom.

The FCA also considered that Altice and SFR coordinated their behaviour in connection with the purchase of OTL, which supplies mobile phone services under the brand “Virgin Mobile”. The acquisition of OTL was originally contemplated by SFR but was eventually carried out by Altice in the weeks following the acceptance of Altice’s purchase offer of SFR -- upon disclosure to Altice’s top management of the amount of SFR’s initial bid for OTL. The FCA considered that there had been illegal coordination of behaviour despite the fact that the possible acquisition of OTL by SFR could have had a direct impact on SFR’s valuation and thus on the final amount and definitive structure of Altice’s acquisition of SFR.

More generally, the FCA considered that Numericable and SFR had shared an excessive amount of strategic information (in particular recent and forecasted commercial data) while preparing for the integration of both businesses.

The FCA also ruled that Altice had implemented OTL’s acquisition prior to clearance, in particular through the premature participation of OTL’s CEO in the SFR-Numericable group’s decision-making and the monthly reporting to Altice of OTL’s commercial performance.

The 80 million euro fine is the result of a settlement between the FCA, Altice and its subsidiary SFR.

This decision comes on the heels of the appointment of Isabelle de Silva as the new President of the FCA three weeks ago.

Impact

This fine forms part of the increasing trend for competition authorities worldwide to punish companies for gun-jumping. The US antitrust agencies have in the past been the most active enforcers of antitrust law with respect to gun-jumping, but authorities in Europe and elsewhere, as yesterday's fine evidences, are now taking a more aggressive approach.

In addition to fines, this can also include "dawn raids" of companies between signing and completion to check for gun-jumping. The FCA in this case, for example, conducted dawn raids on the premises of Numericable, SFR and OTL to gather evidence of gun jumping. The European Commission in 2007 during its in-depth inquiry of Ineos/Kerling conducted a dawn raid to check whether the merging parties were implementing the transaction early in breach of EU merger control rules (although it did not in the end find any evidence of violation).

It is widely accepted that early transitional planning and rapid implementation are the key to success for most mergers. However, this fine shows the importance for parties to rein in the understandable desire to start the process of integration at too early a stage.

Merging parties need to implement an effective strategy which balances the limitations imposed by antitrust law and the business imperatives of detailed due diligence and early integration planning. This strategy involves obtaining specialised local merger control input to interpret the relevant rules and risks, and the provision of pragmatic guidance for those involved in integration planning.



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FTC settlement with investment firm founder indicates continued vigorous enforcement of HSR Act

On 28 October 2016, the Department of Justice's Antitrust Division ("DOJ"), following a recommendation by the Federal Trade Commission ("FTC"), announced a proposed settlement with investment firm founder Faye Sarofim for alleged violations of the Hart-Scott-Rodino ("HSR") Act after he failed to notify the antitrust agencies of stock purchases in multiple issuers between 2001 and 2012. The FTC alleged that because Mr. Sarofim served as a board member at each company whose shares he acquired, he could not rely on the "investment-only" exemption to HSR's premerger filing requirements. Under the proposed settlement, Mr. Sarofim agreed to pay a US\$720,000 fine.

This consent decree, the third one the government has obtained this year alone for acquisitions of voting shares in alleged violation of the HSR Act, highlights the continued need for vigilance in determining when HSR filings are required in connection with acquisitions.¹

HSR Act Filing Requirements

Unless an exemption applies, the HSR Act imposes pre-closing notification requirements for certain acquisitions of assets, voting securities, and controlling interests in non-corporate entities meeting certain annually adjusted thresholds. After the parties notify the DOJ and FTC of a transaction, a waiting period commences in which the antitrust agencies conduct a pre-closing antitrust review. During this period, the parties may not close the transaction. If a company or person fails to submit a required filing or closes on a reportable acquisition before the applicable HSR waiting period has expired or been terminated, such company or person can face substantial civil penalties for each day in which assets, voting securities, or non-corporate interests are held in non-compliance. On 1 August 2016, fines for an HSR violation were increased from US\$16,000 per day to US\$40,000 per day.

Background and FTC Allegations

Mr. Sarofim, an early stockholder of Kinder Morgan Inc. ("Kinder Morgan"), became a board member of Kinder Morgan in 1999. Beginning in 2001, Mr. Sarofim acquired additional Kinder Morgan shares on several occasions, through open-market purchases and once as compensation for sitting on the Kinder Morgan board, crossing various applicable HSR filing thresholds. Mr. Sarofim was also a stockholder in and director of Unitrin Inc. On 10 May 2007, Mr. Sarofim acquired through an open-market purchase additional

shares of Unitrin and as a result held Unitrin voting shares valued in excess of US\$50 million (as adjusted). On 21 November 2014, Mr. Sarofim submitted corrective HSR filings for the acquisitions in each issuer that crossed the applicable HSR thresholds.

In its complaint, the government contended that Mr. Sarofim's past acquisitions of Kinder Morgan and Unitrin voting shares were not exempt from HSR filing requirements under the solely for the purpose of investment exemption 16 C.F.R. Section 802.9. The Complaint alleged that because Mr. Sarofim was a board member for both Kinder Morgan and Unitrin at the time he purchased voting shares in each company, his position "necessarily caused him to participate" in the "basic business decisions" of the company, disqualifying him from utilizing the solely for the purpose of investment exemption. Complaint at 16.

Key Takeaways

There are a number of significant takeaways from the latest HSR consent agreement.

1. Mr. Sarofim filed corrective HSR filings on one day (21 November 2014) for multiple missed HSR filing obligations involving two different issuers. Presumably he examined all of his investments when he discovered his HSR error and made the necessary corrective HSR filings on the same day. The FTC has a "one bite at the apple" policy, and typically does not impose fines on parties who inadvertently miss an HSR filing obligation if, among other things, such parties self-report the violation upon discovery and make a corrective HSR filing soon thereafter. In this case, however, the FTC chose to seek a penalty when an acquiring person self-reported and filed corrective HSR filings for multiple violations all on one day.

¹ See Record Fine for Improper Reliance on HSR Act Investment-Only Exemption (15 Jul 2016); UK Company Agrees to Pay HSR Fine in Connection with Vesting of Restricted Stock Units (23 Aug 2016).

2. Although Mr. Sarofim agreed to pay a fine, it was significantly less than it could have been had the agencies sought the maximum penalty of US\$16,000 a day for each day of the violation (the settlement was agreed to before the maximum penalty increased to US\$40,000 per day). The maximum penalty could have been in the millions of dollars. It is prudent when a party realizes it inadvertently missed an HSR filing obligation to examine all of its past acquisitions and self-report and correct all of its missed filings to minimize possible very costly penalties.
3. The “solely for the purpose of investment” exemption did not apply to Mr. Sarofim’s prior acquisitions of voting shares in two companies because he was a director of both issuers at the time he acquired the additional shares. Officers and directors who acquire voting shares of their companies should be mindful of HSR filing requirements since by definition none may qualify for the passive investor exemption.
4. Acquiring persons should also be mindful that the HSR Act can apply to the acquisition of voting shares of a corporation regardless of the means. Mr. Sarofim’s past violations involved open-market purchases and even one case in which he received voting shares as compensation for his board service.

Given that the U.S. antitrust agencies have demonstrated an aggressive approach to enforcing the limits of the investment-only exemption, it is advisable for acquiring persons to exercise caution and consult with experienced HSR Act counsel before relying on any HSR exemption, including the investment-only exemption. This remains true even if acquiring persons would acquire and hold a very small percentage of a company’s voting shares.



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Increasing antitrust spotlight on HR professionals

– Call to review the compliance program for HR

On October 20, 2016, the U.S. Antitrust Division of the Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) issued guidance for human resource (“HR”) professionals on steps to avoid antitrust violations. This covers “no-poaching” agreements, agreements to fix wages or other terms of employment, and the exchange of HR information. The guidance includes a Q&A section, which provides examples of the application of the antitrust laws in various practical situations, as well as a one-page reference card that sets out some antitrust red flags for employment practices.

The Guidance follows well-publicized interest in these issues by both U.S. antitrust agencies. Most notably, following long investigations, in 2010 DOJ entered into consent decrees with several high-tech companies, including Adobe, Apple, eBay, Google, Intel, Intuit, LucasFilm, and Pixar, to resolve claims that senior executives of these companies entered into agreements not to “poach” employees of other tech companies. Although those cases were resolved through civil consent decrees, DOJ has now stated its intention to bring criminal prosecutions in appropriate circumstances, in addition to civil enforcement.

The guidance and accompanying press release reveal the U.S. agencies’ determination to scrutinize the employment arena very closely, and their intention to use, if necessary, their most powerful enforcement tools, including criminal prosecution. According to the Antitrust Division’s Acting Assistant Attorney General, Renata Hesse: “Antitrust violations in the employment area can greatly harm employees and impact earnings over the course of their entire careers. HR professionals need to understand that these violations can lead to severe consequences, including criminal prosecution.”

Global corporations should consider this U.S. development carefully and ensure that HR has been adequately covered in their antitrust compliance programs.

Wage fixing and no poaching agreements

The guidance states that an individual is likely violating the antitrust laws if he or she:

- “agrees with individual(s) at another company about employee salary or other terms of compensation, either at a specific level or within a range (so-called wage-fixing agreements); or
- agrees with individual(s) at another company to refuse to solicit or hire that other company’s employees (so-called “no poaching” agreements).”

Importantly, no formal agreement is necessary to breach the antitrust laws. It is enough that there is evidence of discussions and parallel behavior which may lead to an inference that the individual agreed to limit employee compensation or recruiting.

The guidance highlights the U.S. agencies’ view that naked wage-fixing and no-poaching agreements are per se illegal infringements of antitrust law, meaning that the agreement is deemed illegal without any inquiry into its competitive effects. It notes that: “Going forward the DOJ intends to proceed criminally against naked wage-fixing or no poaching agreements. These types of agreements eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers, which have been traditionally investigated and prosecuted as hardcore cartel conduct.” It states that a criminal investigation could involve bringing “criminal, felony charges against the culpable participants in the agreement, including both individuals and companies.”

To date, the DOJ has not pursued HR-related agreements as criminal violations but both agencies have taken several civil enforcement actions in recent years. For example, the DOJ filed a civil enforcement action leading to a consent judgment against the Arizona Hospital & Healthcare Association for acting on behalf of most hospitals in Arizona to set a uniform bill rate schedule that each hospital would pay for temporary and per diem nurses, in addition to the cases against tech companies referenced above.

Information exchange

The guidance explains that sharing information with competitors about terms and conditions of employment can also breach antitrust laws. It notes that “while agreements to share information are not per se illegal and therefore not prosecuted criminally, they may be subject to civil antitrust liability when they have, or are likely to have, an anticompetitive effect.” The guidance also reiterates the U.S. agencies’ view that “exchanging

competitively sensitive information could serve as evidence of an implicit illegal agreement.”

According to the U.S. agencies, however, an information exchange may be lawful if:

- “A neutral third party manages the exchange,
- The exchange information is relatively old,
- The information is aggregated to protect the identity of the underlying sources, and
- Enough sources are aggregated to prevent competitors from linking particular data to an individual source.”

Scrutiny in other jurisdictions around the world

While there are fewer examples of antitrust enforcement in the employment area outside the U.S., no-poaching agreements, wage-fixing agreements, and certain types of competitively sensitive HR information exchange are likely to breach antitrust laws in other jurisdictions as well. These practices may also infringe local labor codes. EU competition law, for example, takes a strict approach to information exchange. The Court of Justice of the European Union in the T-Mobile case has confirmed that the sharing of competitively sensitive information with competitors at a single meeting can constitute an infringement of EU competition law. Under EU competition law, the exchange of information regarding companies’ individualized intentions concerning future pricing or sales intentions will constitute a restriction “by object,” meaning that the impact on competition will not need to be assessed.

Impact

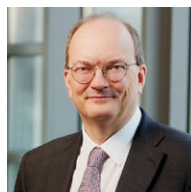
The publication of these U.S. guidelines serves as a reminder for companies to ensure that human resources personnel have been adequately included within antitrust compliance programs. While sales and marketing personnel commonly attend antitrust compliance trainings, this may not be the case for members of the HR department. Certain risk areas may not be obvious for HR professionals. For example, HR may not understand that certain types of HR information are competitively sensitive, or that the one-off provision of information given orally to a competitor over the telephone or at a meeting could serve as evidence of an implicit illegal agreement.



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Resale price maintenance – Top 5 tips for retail and consumer products companies

Nearly 10 years after the Supreme Court removed the per se unlawful label from resale price maintenance (“RPM”) agreements,¹ the practice continues to land in the crosshairs of plaintiffs’ attorneys and state attorneys general.

This may come as a surprise to some, because the Supreme Court stated that RPM can at times be pro-competitive, which was one of its bases for deeming RPM should be reviewed under federal law using the rule of reason. Under the rule of reason, a court must perform a detailed analysis of the relevant market and competition within that market to assess anticompetitive effects. Even if such effects are found, they are considered in the context of any pro-competitive benefits associated with the conduct. The Supreme Court listed a number of ways in which RPM could be pro-competitive and promote inter-brand competition, including by encouraging retailers to invest in services or promotional efforts that aid the manufacturer in competing against rivals or preventing free riding by retailers who invest very little in selling a product (and sell at a discounted price) on other retailers who invest more into marketing the brand (but sell at a higher price). RPM can still be unlawful under the rule of reason but plaintiffs have a much higher bar in proving so.

Many state laws and state antitrust enforcers, however, do not share the Supreme Court’s view, and RPM remains explicitly unlawful or the frequent target of state attorney general interest in those states. For instance, Maryland and California have laws that make RPM unlawful.² And attorneys general in Illinois, Michigan, and New York have targeted RPM in lawsuits with mixed success.³ Most recently, the Maryland Attorney General sued Johnson & Johnson Vision Care, Inc. for violating its antitrust laws by “establishing a minimum retail price for the sale of contact lenses to consumers.”⁴ By contrast, the Kansas state legislature made an abrupt pivot after its supreme court found RPM per se unlawful and enacted a statute reversing the decision and following federal law. Most states, however, have never directly spoken to the issue either by statute or by bringing a

case. Thus, under state antitrust laws, the rules that apply to RPM are unsettled.

Additionally, even under federal law, plaintiffs remain active in challenging RPM provisions in litigation, including class actions. For instance, in *In re: Disposable Contact Lens Antitrust Litigation*, plaintiffs, on the same facts as the Maryland Attorney General’s suit against Johnson & Johnson, allege that major contact lens manufacturers conspired to fix prices for disposable contact lenses through RPM policies. This case is currently in discovery.⁵ As another example, in *In re: On-Line Travel Company (“OTC”)/Hotel Booking Antitrust Litigation*, plaintiffs claimed that OTCs conspired with major hotel defendants to create and enforce RPM agreements to minimize competition on hotel room prices.⁶ Plaintiffs argued that RPM agreements fixing the rate that OTCs could charge for a hotel room and requiring that the rate would be as favorable as the rate offered to any OTC competitor and on the hotel defendants’ own website were unlawful. Similarly, in *House of Brides, Inc. et al. v. Alfred Angelo, Inc.*, the plaintiff, a retailer of bridal gowns, alleged that the manufacturer, which also had its own retail sales, violated federal and state antitrust laws by instituting a manufacturer’s suggested retail price (“MSRP”) and a minimum pricing policy (“MPP”).⁷ The MSRP policy established the expected retail price for online sales, and the MPP represented the minimum price for products sold at brick and mortar stores. The manufacturer sought the retailer’s agreement to the policies and stopped selling to the retailer when it refused to agree. Both the OTC and House of Brides cases were dismissed.

Given this climate of uncertainty that remains surrounding RPM, what are retail and consumer products companies to do? Below we have listed the top 5 things retail and consumer product companies should remember when considering RPM or similar policies.

1 See *Leegin Creative Leather Products v. PSKS*, 551 U.S. 877 (2007).

2 See Cal. Bus. & Prof. Code § 16720(b) (2009); Md. Code Ann., Com. Law § 11-204(b) (West 2009).

3 Compare *People v. Tempur-Pedic Int’l. Inc.*, 944 N.Y.S. 2d 518 (2012) (stating that NY law makes RPM agreements unenforceable but not unlawful) with *New York v. Herman Miller*, 08 CV 2977 (S.D.N.Y., filed March 21, 2008) (resulting in a stipulated final judgment and consent decree; the Michigan and Illinois state attorneys general joined).

4 *State of Maryland v. Johnson & Johnson Vision Care, Inc.*, No. 03-C-16-2271, 2016 WL 1086167 (Md. Cir. Ct. Feb. 29, 2016).

5 See *In re Disposable Contact Lens Antitrust Litig.*, 109 F. Supp. 3d 1369 (MDL June 2015).

6 See *In re Online Travel Company (OTC) Hotel Booking Antitrust Litig.*, 997 F. Supp. 2d 526 (N.D. Tex. Feb. 2014).

7 See *House of Brides World’s Largest Online Wedding Store, Inc., et al. v. Alfred Angelo, Inc.*, No. 11C 07834, 2014 WL 64657 (N.D. Ill. Jan. 8, 2014).



1. Stick to the Colgate Doctrine

The Colgate doctrine, dating back to the early 20th century, remains alive and well. Under the Colgate doctrine, companies are free to deal with whomever and on whatever terms they decide as long as all decisions are unilateral.⁸ If a company wants to implement an RPM policy, it can announce such a policy; it can even announce that it will terminate distributors who do not comply with that policy, but it cannot obtain an agreement from a distributor to agree to follow that policy nor can it coerce a company to comply.

2. Consider a Minimum Advertised Price (“MAP”) Policy Instead

Although Colgate is a viable defense, instituting a MAP policy can be a less risky approach. A MAP policy is where a manufacturer requires that retailers not advertise their products below a certain price. These are frequently used, and courts have generally upheld MAP policies that only restrict advertised, not actual, prices.⁹ For instance, retailers may only advertise products for sale at a certain price, but they can sell to customers at whatever price they choose. Doing so, however, can sometimes be a challenge where there is no practical way for a retailer to communicate a lower price to a consumer (i.e., some online sales). To reduce the risk even further, companies may unilaterally announce MAP policies (in alignment with Colgate), but this has not always been a requirement.

⁸ See, *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) (“[T]he Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’”); see also *Monsanto Co. v. Spray- Rite Service Corp.*, 465 U.S. 752, 761 (1984) (holding that a manufacturer’s independent acts to set minimum resale prices, without seeking agreement from its retailers do not amount to a contract).

⁹ See, e.g., *WorldHomeCenter.com, Inc. v. Franke Consumer Products, Inc.*, No. 10 civ. 3205(BSJ), 2011 WL 2565284, *5 (S.D.N.Y. June 22, 2011) (granting motion to dismiss where internet retailer was terminated by manufacturer for violating MAP policy because policy affected advertised not resale prices; MAP prohibited retailers from publishing discount prices, but permitted then to communicate discount prices over the phone or email or by offering a coupon to be applied at checkout); *Blind Doctor, Inc. v. Hunter Douglas, Inc.*, No. C-04-2678 MHP, 2004 WL 1976562, at *7 (N.D. Cal. Sept. 7, 2004) (denying motion for preliminary injunction where retailer was terminated for advertising a price lower than the MAP policy allowed and finding MAP policy did not constitute vertical price fixing).

3. Evaluate Using a Consignment Arrangement

Companies may be able to set resale price when they use a consignment arrangements; that is, where the reseller is operating as an agent of the manufacturer or is selling on a consignment basis.¹⁰ The law views consignment sales as occurring directly between the manufacturer and the consumer at prices properly set by the manufacturer. Thus, there is no “resale,” so no RPM.



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4. Consider the Most Restrictive Jurisdiction (Federal, State, International)

If a product will be sold widely, manufacturers should consider conforming their pricing policies to the most restrictive jurisdiction in which they will operate. In the US, those jurisdictions are California and Maryland.¹¹ Practically, what that means is that if a consumer goods manufacturer decides to sell to an online retailer and wants to minimize its antitrust risk, the company should adhere to the laws in California in Maryland, which means avoiding using RPM policies. Instead, a less risky option is to use a MAP policy or true consignment arrangement. The danger is even greater when a product is sold outside of the US, where the antitrust laws of a number of significant commercial trading jurisdictions prohibit RPM, including the EU and China.



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5. Consult with Antitrust Counsel

For all of these reasons, companies should consult antitrust counsel before instituting anything resembling an RPM policy or a MAP policy. Because of the uncertainty surrounding state law treatment of RPM and the circumstances that could make a MAP policy have the same effect as an RPM policy (i.e., no practical way for a retailer to communicate a discount), antitrust counsel should be involved to assess the risk of imposing any RPM or MAP policy. Hogan Lovells’ Antitrust, Competition, and Economic Regulation practice group routinely advises companies on questions involving the trickiest RPM and MAP policies in the US and globally. We can help meet your business goals while staying aligned with the antitrust laws.

¹⁰ See *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13 (1964) (“an owner of an article may send it to a dealer who may in turn undertake to sell it only at a price determined by the owner. There is nothing illegal about that arrangement”; determining the consignment relationship at issue in the case was a sham).

¹¹ Additionally, as noted above, state attorneys general in New York, Michigan, and Illinois, have also indicated their willingness to challenge RPM policies.

Chinese payment encryption device suppliers fined for participation in government-orchestrated cartel

On 4 November 2016, the State Administration for Industry and Commerce (“SAIC”) – one of China’s antitrust authorities – published on its website three decisions, whereby three payment encryption device suppliers were fined by SAIC’s branch in Anhui Province (“Anhui AIC”). Payment encryption devices are used by bank customers to protect the security of payments from their bank accounts. These devices are typically distributed by the banks to their customers.

The Anhui AIC considered the companies’ conduct to amount to market partitioning, prohibited under Article 13 of the Anti-Monopoly Law (“AML”). Interestingly, the market partitioning was orchestrated by the local branch in Anhui of the People’s Bank of China (“Anhui PBOC”), one of the financial regulators in China.

Facts

On 20 October 2010, the Anhui PBOC selected three out of six companies as suppliers of payment encryption devices in Anhui: Sunyard System Engineering Co., Ltd., Sinosun Technology Co., Ltd., and Shanghai Haijiye Technology Co., Ltd. On 7 December 2010, the Anhui PBOC convened a meeting which was attended by the three companies and 20 local banks. In the meeting, the participants agreed, among other, that

- the 20 banks were divided into three groups, and each group would distribute the payment encryption devices for one of the three suppliers, and
- the payment encryption devices would be distributed at a fixed price agreed in the meeting.

Following the meeting, the Anhui PBOC issued two circulars to embody the agreement above. In line with the two circulars, each of the three suppliers entered into agreements with the corresponding group of banks for the distribution of the payment encryption devices.

Ruling

Based on the findings above, the Anhui AIC held that the carving-up of customers among the three companies constituted a cartel practice prohibited under Article 13 of the AML, particularly because the three companies:

- attended the meetings organized by the Anhui PBOC, where they communicated their intentions with each other, and
- conducted themselves in accordance with the circulars issued by the Anhui PBOC, for example by not supplying devices to the banks allocated to the other suppliers; jointly fixing and adjusting the sales price; jointly paying commissions to the banks; and engaging in joint marketing and promotional activities.

For each of the three companies, the Anhui AIC imposed a fine and confiscated the illegal gains resulting from the practice in question. The penalties imposed on the three companies amounted to around RMB 30 million (approximately US\$ 4.3 million) in total.

Impact

Unlike most cartel cases, the present case involved a government body playing a significant role in the cartel practices – the Anhui PBOC took the initiative to select three suppliers for local banks, organize meetings to “assign” each of the three suppliers to a fixed group of banks and set the price for the payment encryption devices. From the decision it seems that the three companies would not have been able to supply their products if they had chosen not to obey the Anhui PBOC’s directions. Indeed, the three suppliers cited this point as a defence in the investigation process. However, the Anhui AIC did not agree.

This is not the first case involving cartel conduct “supported” by government actors. On several occasions in the past, the Chinese antitrust authorities have attributed liability for cartel conduct to the companies involved, even where the cartel was “organized” by a government body. For example, in the Fireworks case, six fireworks suppliers divided up the sales territories in Chifeng, a city in Inner Mongolia, following regulatory requirements by the local government body responsible for work safety. In that case, the decision by SAIC’s Inner Mongolia branch in May 2014 similarly found the market partitioning practice to be a violation of Article 13 of the AML.

The National Development and Reform Commission (“NDRC”) – another antitrust authority in China – took a similar position. In June 2015, NDRC’s local branch in Yunnan Province found that four

telecommunications carriers had entered into an anti-competitive agreement on their promotional activities. The four carriers were fined despite the fact that the local telecommunications regulator had taken the initiative in organizing the various discussions leading to the allegedly anti-competitive agreement.

These cases stand somewhat in contrast with the Vitamin C litigation in the United States, where an appeal court decided to exculpate Chinese vitamin exporters found to have engaged in cartel conduct due to the regulatory intervention by government bodies in China.

In China, the government still plays an important role in both macro- and some micro-economic activities, even over 30 years after it introduced the market-oriented “reform and opening up” policy. In such an environment, the difficulty for businesses operating in China is that, on the one hand, they need to comply with the various regulatory requirements by government bodies and, on the other hand, they must ensure full compliance with the law including antitrust law. The antitrust authorities’ position, as illustrated in this case, may potentially put companies in a dilemma: facing antitrust risks or losing business opportunities (if they choose not to work with a government body on a potentially anti-competitive project).

The difficulty is particularly significant for companies operating in regulated industries. For example, in the heavily-regulated telecommunications and financial sectors, the government plays a major, if not predominant, role in economic activities. Companies from such sectors need to comply with various regulatory requirements on a daily basis. This case and prior cases show the importance of legal awareness and effective compliance systems – a mandate from a government body does not necessarily protect companies from potential antitrust liabilities.



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NDRC continues resale price maintenance crack-down

On 5 December 2016, the National Development and Reform Commission (“NDRC”) – one of the three Chinese antitrust authorities – issued its decision fining the local unit of Medtronic, a U.S.-listed medical device maker, for resale price maintenance (“RPM”).

Case summary

Medtronic was found to maintain a distribution system for cardiovascular, rehabilitation therapy and diabetes medical devices in China, consisting of various tiers of distributors. NDRC held that Medtronic had engaged in RPM practices since 2014, including:

- **Setting resale prices.** For an unspecified type of product, Medtronic was found to set the resale prices for distributors at various tiers of the distribution system. For another unspecified type of product, Medtronic was only found to set the price at which tier 1 distributors could resell the products to tier 2 distributors.
- **Fixing profit margins.** Medtronic was found to fix the profit margins of “platform” distributors reselling its products to tier 2 distributors. Different from tier 1 distributors, the platform distributors were not allowed to resell the products to end customers.
- **Imposing minimum bidding prices.** Medtronic was found to have imposed “guiding” bidding prices in the distribution agreements, and distributors were required to seek Medtronic’s approval for any deviation from those prices.
- **Setting minimum resale prices to hospitals.** Medtronic was found to impose minimum prices for the resale of products to hospitals.

In addition, Medtronic was found to impose restrictions as to which territories distributors could resell and to which customers. It was also found to impose an exclusive purchasing requirement (requesting distributors not to sell competing brands). NDRC considered these additional restrictions to increase the anti-competitive effect of the RPM practices.

As a result, NDRC imposed a fine of RMB 118.52 million (approximately US\$ 17 million), which amounts to 4% of Medtronic’s 2015 sales revenues in China for the products involved. According to the NDRC decision, Medtronic committed to terminating the RPM practices; the territorial and customer restrictions; and the exclusive purchasing requirement for those products where Medtronic has market power.

Which benchmark for RPM?

There have been a number of RPM cases decided by NDRC, its local offices and the Chinese courts in recent years. However, there seems to be a divergence between the authority and the courts in applying Article 14 of the Anti-Monopoly Law (“AML”), which regulates RPM conduct.

On one side, the courts seem to have developed an effects-based approach to RPM through a string of cases – ranging from *Rainbow v. Johnson & Johnson* in 2013 through to the Gree case decided by the Guangzhou Intellectual Property Court in August 2016. In other words, beyond the finding of the resale price obligation as



such, plaintiffs needed to prove that the obligation actually restricted competition in the marketplace. In several instances, the courts found that there was not sufficient proof of such restriction and dismissed the actions.

In contrast, NDRC's position on RPM has been much more restrictive, resembling a "per se" approach. In some of the past cases, NDRC seemed to consider the finding of RPM conduct to be sufficient to establish a violation of Article 14 of the AML, without the need to look at actual effects in the market. The *Haier* case, from August 2016, is a recent example of this NDRC position. In some other past cases, NDRC did mention some sort of effects of the RPM conduct found, but its analysis remained very high-level.

Now the *Medtronic* decision is somewhat more elaborate on the anti-competitive effects of the RPM conduct, when compared to NDRC's past cases. The decision has a sub-heading referring to negative effects on competition and consumer harm, and mentions Medtronic's leading market position and high barriers to entry into the relevant markets.

One interpretation of this somewhat more detailed discussion of NDRC's underlying reasoning would be that the authority's position is converging with that of the courts – in particular, RPM would only be problematic where the company in question has a significant degree of market power and there is not sufficient competition in the marketplace. However, at this point in time, it is far from certain whether this interpretation represents the true intention of NDRC.

Expanding the scope of the law?

As noted, NDRC's decision in the *Medtronic* case found the territorial and customer restrictions and the exclusive purchasing requirement to have increased the anti-competitive effects of the RPM conduct. As a result, Medtronic committed to terminating the territorial and customer restrictions (presumably for all products), and the exclusive purchasing requirement for those products where it has market power. This is a very notable development.

As the law currently stands, it would seem that territorial and customer restrictions and exclusive purchasing requirements are problematic only if the company in question has a dominant position. For non-dominant companies, Article 14 of the AML only

explicitly prohibits RPM. That said, the provision also contains a catch-all clause allowing NDRC and the State Administration for Industry and Commerce ("SAIC") – another antitrust authority – to find other, not specified vertical agreements to be unlawful.

To the best of our knowledge, there are no public cases where NDRC and SAIC have used the catch-all clause to tackle territorial/customer restrictions and exclusive purchasing requirements imposed by non-dominant companies.

Now, the *Medtronic* decision may signal a shift in the law. Even though NDRC did not find these additional restrictions to be illegal themselves, it found them to aggravate the competition problem and accepted Medtronic's commitments in that regard. Taking into account that NDRC published draft guidelines for the automotive industry which also target certain types of territorial restrictions and exclusive purchasing requirements, a new trend to expand the scope of the AML's application may arguably become visible.

Conclusions

Most of all, the *Medtronic* decision is a strong reminder for companies that they should not engage in RPM conduct – at least until the benchmarks on what distinguishes anti-competitive from pro-competitive resale practices have been clarified.

Beyond this simple lesson, the decision may become more important if it were to indicate a shift in the law – leading to an alignment between NDRC and the courts as to the necessity of an effects analysis for RPM, and/or expanding the obligations on non-dominant companies not to impose territorial/customer restrictions and exclusive purchasing requirements.



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Beware your associations

On 28 November 2016, the Hong Kong Competition Commission (“HKCC”) published an advisory bulletin calling upon the Hong Kong Institute of Architects and the Hong Kong Institute of Planners to take appropriate action to remove or amend certain provisions in their respective codes of conduct which raised competition concerns.

While such associations, as statutory bodies, may be exempt under the Competition Ordinance, their members are not.

This latest advisory bulletin highlights HKCC’s ongoing concern with possible price-fixing by trade associations as a serious form of anti-competitive conduct under the “First Conduct Rule” of the Competition Ordinance.

Price recommendations and fee scales

During its first year of full operation, HKCC has reviewed the published practices of more than 350 associations and identified and engaged with over 20 associations whose practices placed them at risk of contravening the Ordinance. It has also published a guidance pamphlet specifically for trade associations.

The HKCC Guideline on the First Conduct Rule makes it clear that that “recommended fee scales and “reference” prices of trade and professional associations are decisions of associations of undertakings which the [Competition] Commission would likely consider as having the object of harming competition.”

HKCC considers that price recommendations issued by trade associations are issued with a view to members charging similar prices for their goods or services and that price recommendations are made with the expectation that members will follow them. If price recommendations are allowed, it would enable competitors to indirectly fix prices through trade associations to overcome the prohibition on directly fixing prices.

Whilst it may be argued that a true recommended fee scale or mere guide not generally adhered to by members may not be in breach or may otherwise be justified (where for example the fees represent an upper level or are considerably lower than would be the case if normal rates were to be charged), such arguments need to be looked at in context, including any regulatory background to the association in question.

Other trade association activities

Under the Competition Ordinance, trade associations should exercise caution when carrying out activities which, although intended to assist the members of an industry group, may amount to or encourage anti-competitive activity. Such activities and practices should be reviewed and appropriately modified – sometimes by taking simple steps – to minimize any risk of contravening the law.

- **Association meetings** – anti-competitive conduct may take place under the veil of trade association meetings, but risks may be minimized by circulating a clear agenda in advance and accurate minutes afterwards. Potentially, the presence of competition counsel at meetings can also minimize risk.
- **Certification standards and standard terms** – while clearly serving an important purpose, these could be deemed problematic if they significantly restrict price or product competition. For example in respect of fees charged or products and services supplied.
- **Membership and event participation criteria** – where membership or participation in an event are essential for competing in a market, if the terms upon which a business can join a trade association or participate in an event exclude the entry of a new member, this may be anti-competitive. For example, a minimum turnover threshold requirement for membership may be viewed as anti-competitive.



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Rundown on the first year of competition law enforcement in Hong Kong

In late October, the Hong Kong Competition Commission (“HKCC”) published its 2015/2016 annual report, the first since the Competition Ordinance (“Ordinance”) came into full force on 14 December 2015.

No case has yet been brought in the Competition Tribunal but Hong Kong’s enforcement authority, the HKCC, has already taken a number of enforcement actions and concrete changes in business practices have been reported.

Barely a year into the cross-sector competition regime, Hong Kong has already seen:

- public consultation and market studies on the electricity market, building renovation and auto fuel industries
- first publicised enforcement action against recommended pricing by a trade association
- first dawn raids targeting bid-rigging in the technology sector
- first proposed block exemption for certain liner shipping agreements, and
- first case involving competition elements in the High Court.

Key trends and developments are summarised below.

Complaints and enquiries

By mid-2016, the HKCC had received some 1250 cases for potential enforcement and begun 10 in-depth probes.

The majority of cases related to resale price maintenance, cartel conduct and abuses of substantial market power.

The HKCC escalated 119 cases to the initial assessment phase to identify whether it was reasonable to conduct investigations and whether there was sufficient evidence. Most of these escalated cases related to cartel conduct.

The major sectors involved were:

- professional & technical services;
- transport, logistics & storage;
- food & groceries;
- real estate & property management;
- construction & infrastructure; and
- banking, financial & insurance products & services.

Public consultations and market studies

The government conducted a public consultation on the electricity market and in response the HKCC recommended setting up an independent advisory board to consider, amongst other things, granting network access for new entrants and setting up a wholesale electricity market.

The HKCC has conducted market studies into:

- residential building renovation and maintenance. The study into 500 past project tender records confirmed public views that bid manipulation had occurred in this sector.
- auto fuel in response to public concerns over price uniformity. It expects to publish the results by year end.

Trade associations

The HKCC initiated a compliance project and reviewed published practices of over 350 associations. It identified over 20 associations whose practices placed them at risk of contravening the Ordinance. The key risk areas identified included:

- price recommendations or fee scales, and
- codes of conduct or rules restricting price competition.

Many of these trade associations have voluntarily stopped publishing price restrictions and fee scales for members.

The HKCC publicised its first sector-specific enforcement action on 31 May 2016. This was against the price recommendation by the Hong Kong Newspaper Hawker Association for branded cigarettes. The association withdrew its price recommendation following meetings with the HKCC.

Bid-rigging and dawn raids

There has been significant media coverage in relation to bid-rigging in the building renovation and maintenance sector, and more cases are coming to light.

In relation to a recent bribery case involving subcontractors conspiring to manipulate tender outcomes, the HKCC noted that bid-rigging is a complex issue and may sometimes involve elements that contravene different areas of law. Had the conduct taken place after 14 December 2015, it would have been bid-rigging under the Ordinance.

Building renovation and maintenance is not the only sector facing bid-rigging. The HKCC is reported to have conducted dawn raids targeting the technology sector for suspected bid-rigging. In particular, the HKCC is reported to have conducted a dawn raid of a software company, and summoned its executives for questioning in a cartel probe. The HKCC has not yet announced details of the probe, but has reportedly conducted six dawn raids since the commencement of the Ordinance.

Block exemptions

On 17 December 2015, three days after the Ordinance came into full force, the Hong Kong Liner Shipping Association (“HKLSA”) made the first application for a block exemption order in respect of vessel sharing agreements (“VSAs”) and voluntary discussion agreements (“VDAs”).

According to the HKLSA, VSAs and VDAs are complementary and necessary for the proper functioning of the liner shipping industry which is characterised by unusually high fixed and operating costs. In its non-confidential summary of the application, the HKLSA stated that:

- VSAs brought about increased service quality, cost and port capacity efficiencies, decreased costs of entry and expansion, and environmental benefits.
- VDAs brought about rate stability, service stability, and rate and surcharge transparency, enabling better planning and budgeting of long-term shipping costs.

On 14 September 2016, the HKCC published a proposed block exemption order exempting VSAs subject to certain conditions (including a 40% market share cap) for a period of five years. VDAs on the other hand were not considered to fall within the scope of exclusion for agreements enhancing overall economic efficiency.



First lawsuit involving competition law

In February 2016, Loyal Profit International Development, a travel agency, applied to the High Court for injunctions against directives issued by the Travel Industry Council (“TIC”), which were described as “outright anti-competitive.”

In a move circumventing the Ordinance’s bar on standalone actions, Loyal Profit is not claiming contravention of a conduct rule but instead claims contravention of the Companies Ordinance, pursuant to which the TIC has acted in excess of its powers as limited by its articles.

The hearing was scheduled for February 2017.

Conclusions

Although it has taken nearly two decades to adopt a cross-sector competition law, Hong Kong has had a relatively active first year of competition enforcement.

The HKCC acknowledges in its 2015/2016 annual report that its resources are limited. This inevitably means that the HKCC will have to prioritize which cases it chooses to investigate, and which cases it will bring to the Competition Tribunal. For now at least, it appears that the HKCC’s focus will continue to be on cartels, particularly where bid-rigging is suspected to be involved.



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