Hogan Lovells

Antitrust, Competition and Economic Regulation Quarterly Newsletter

Winter 2019

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This ACER Quarterly includes Hogan Lovells articles, alerts and blogs published between 1 December 2018 and 28 February 2019. The content was produced around the time of the developments in question. Matters covered may therefore have been subject to further developments since initial publication.

A new player: DOJ opines in private "no-poach" litigation

Over the last several weeks, the U.S. Department of Justice (DOJ) submitted notices of intent to file statements of interest in five "no-poach" class actions . While each case dealt with the same substantive issue – alleged "no-poach" agreements – DOJ recommended different antitrust standards of review apparently based on the facts as alleged in each complaint. These notices of intent should be closely monitored for two reasons. First, these notices provide additional guidance regarding DOJ's position on "no-poach" agreements. Second, litigants should carefully consider how best to leverage DOJ's engagement in these cases to their advantage.

Changing no-poach landscape

Agreements between companies that compete for employees have always been subject to antitrust scrutiny. DOJ and the U.S. Federal Trade Commission (FTC) reiterated and expanded on this principle in 2016 by publishing "Antitrust Guidance for Human Resource Professionals." The DOJ/FTC guidance focused in particular on "no-poach" agreements, which the agencies defined as agreements between companies "to refuse to solicit or hire [another] company's employees." The DOJ/FTC guidance explained that the agencies viewed "naked" no-poaching agreements – those that are not tied or ancillary to legitimate business agreements such as a joint venture or acquisition proposal – as per se illegal. These agreements would therefore be deemed illegal without any inquiry into their competitive effects.

The DOJ/FTC guidance also noted that DOJ "intends to proceed criminally against naked wage fixing or no-poaching agreements" entered into, or continued, after publication of the guidance. However, the only enforcement action by DOJ to date has been in the civil context. Nevertheless, the current DOJ administration has indicated that it is actively reviewing "no-poach" agreements and has signaled that there are more "no-poach" cases to come. In addition, state attorneys general, largely led by the Washington state attorney general, have also increased their scrutiny of potential "no-poach" agreements, particularly (but not exclusively) in the fast-food industry.

Class actions – the new battleground

As is often the case, private follow-on litigation alleging illegal "no-poach" agreements has increased in connection with the heightened government scrutiny of these issues. In April of 2018 DOJ announced a settlement with Knorr and Wabtec, two rail equipment supply companies, for allegedly entering into a no-poach agreement. Shortly thereafter, 26 private class actions were filed in the Western District of Pennsylvania specifically relying on the DOJ settlement. Similarly, several private cases have been filed in direct response to the agreements between the Washington state attorney general and various fast food companies. A key issue in all of these private actions is whether the alleged "no-poach" agreements should be analyzed under the per se or rule of reason standard. As a practical matter, if the agreements are analyzed as per se unlawful, the plaintiff's path to proving its case is typically much easier. Plaintiffs have often cited the DOJ/FTC guidance as support for their arguments that the alleged agreements are per se violations of the antitrust laws. In response, defendants argue that the rule of reason is the appropriate standard of review because courts have historically applied the rule of reason standard to similar agreements or because the agreement at issue was vertical in nature.

The few courts that have weighed in to this debate have reached widely disparate results. Judge Robert J. Bryan, of the U.S. District Court for the Western District of Washington, ruled on a motion to dismiss filed by Cinnabon, that the appropriate standard of review in that case was the rule of reason. While Judge Reagan of the Southern District of Illinois, held in the Jimmy Johns case that it was too early in the proceedings to determine whether the rule of reason or the per se rule would apply but plaintiffs had nevertheless "stated a plausible claim for relief under Section 1 of the Sherman Act." Finally, in a Northern District of Illinois case involving McDonald's, Judge Alonso held that the quick look test – an abbreviated form of rule of reason – may apply.

Class actions – a third party enters the field

Perhaps because of the disparity in the courts' analyses of these cases, DOJ has recently filed notices of intent to submit briefing about the relevant antitrust standard of review in three private no-poach cases:

- The Knorr-Wabtec rail case: Here, plaintiffs have alleged an agreement between two direct competitors. Accordingly, DOJ's notice of intent argued that "[C]ourts have held that nopoach agreements among competitors in labor markets are per se unlawful in the same way that customer and market-allocation agreements in product markets are per se unlawful."
- The fast-food cases: In contrast to the rail case, in these cases involving alleged no-poach provisions in fast-food franchise agreements, DOJ argued that the rule of reason should apply because "[v]ertical restraints, as a category, are typically assessed under the rule of reason . . . A no-poaching agreement between a franchisor and a franchisee, within the same franchise system, likely falls within one of these two categories and thus merits rule of reason analysis at the proper procedural stage."
- The Duke University case: Plaintiffs in this case allege that Duke University and the University of North Carolina conspired to suppress the wages of medical school professors. Unlike the other two notices, DOJ did not state whether the per se rule or rule of reason should apply to the case and instead noted that it had not yet reviewed the parties briefing on the appropriate standard of review because the briefing was submitted under seal. Presumably, DOJ will provide its opinion after it has an opportunity to review the underlying materials.

Impact for private litigants

DOJ's engagement in these cases is meaningful for two reasons.

First, DOJ's statements provide additional guidance regarding its view of no-poach agreements between franchisees and franchisors. Notably, DOJ's position is that because the agreeing parties are in a vertical relationship, these no-poach agreements should be analyzed under the rule of reason.

Second, litigants should keep DOJ intervention in mind when developing litigation strategies:

- Filings: Private litigants should be aware that DOJ is monitoring filings in these class actions and consider the impact on their pleadings and arguments. For example, litigants should consider how facts regarding the nature of the relationship between the alleged conspirators (e.g., whether they stand in a vertical relationship) will impact the court's and DOJ's analysis. And DOJ's position with respect to rule of reason treatment for certain agreements may lead more plaintiffs to attempt to allege facts sufficient to plead a rule of reason case in the alternative.
- DOJ enforcement: Defendants should assume that DOJ is monitoring every "no-poach" case filing and consider the possibility of criminal DOJ enforcement of naked "no-poach" agreements that were entered into or continued after October 2016. Defendants should consult experienced, external counsel who can assist them in assessing their options, including whether to seek amnesty.
- Advocacy to DOJ: Parties on both sides should consider advocacy to DOJ through white papers and other mechanisms to encourage DOJ to intervene favorably on its behalf.

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Competition Amendment Act

The much-anticipated Competition Amendment Act 18 of 2018 (Amendment Act), has been signed into law by President Cyril Ramaphosa.

The Amendment Act seeks, among others, to address the issue of economic concentration and to drive transformation of the South African economy, as well as to strengthen the provisions of the Competition Act with respect to prohibited practices.

The Amendment Act changes the competition law landscape in South Africa, and firms will need to become familiar with them in order to adjust their business practices to ensure they continue to be compliant with the law.

Some of the key amendments introduced in the Amendment Act include the following:

- The Amendment Act does away with the so-called "yellow card", in terms of which penalties were not imposed for certain first-time offences. The Amendment Act also significantly increases the maximum penalties for repeat offenders from 10% to 25% of a firm's annual turnover.
- Insofar as mergers are concerned, new factors to be considered have been introduced including cross-ownership and cross-directorships, as well as other mergers undertaken by any party to the merger within a specific period. The public interest provisions have been amended to clarify their importance in the assessment process and to highlight the objectives of transformation and deconcentration mentioned above. As regards foreign acquisitions, it is envisaged that the President will constitute a committee consisting of cabinet members and other public officials to consider whether such transactions may have an adverse effect on national security interests.
- If one has regard to market inquiries, an obligation is placed on the Commission to take reasonable steps to promote the participation of small and medium sized businesses that have a material interest in the market that is the subject of the inquiry.
- The exemption provisions have also been amended to enhance the objectives of transformation and participation of small and medium sized businesses in the economy by including such objectives as criteria to be considered by the Commission when evaluating exemption applications.
- As regards the abuse of dominance provisions, the Amendment Act introduces "buyer power" provisions preventing a dominant firm in sectors yet to be designated from imposing unfair prices or trading conditions on a supplier that is a small or medium sized business or a firm controlled by historically disadvantaged persons. The Amendment Act further prohibits dominant firms from engaging in price discrimination practices that are likely to have the effect of impeding the ability of small and medium businesses or firms controlled or owned by historically disadvantaged persons in participating effectively. It is also prohibited for such dominant firm to avoid purchasing from such suppliers (or selling to such customers) as a way of circumventing the above provisions.

The Amendment Act will only come into operation on a date to be declared by the President. Some provisions may be capable of introduction immediately, but others will require more time to implement. For example, the Amendment Act requires the Minister of Economic Development to make regulations in relation to a number of provisions, including regarding the application of the provisions regarding horizontal and vertical conduct as well as the abuse of dominance provisions. In anticipation of the introduction of the Amendment Act, in December 2018 the Minister of Economic Development published draft regulations pertaining to buyer power, price discrimination and the definitions of small and medium business. Interested parties have provided input, and second drafts are now awaited.

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Valentine's gift by the European Parliament: the EU FDI screening rules approved by the Plenary

On 14 February 2019, the Plenary of the European Parliament (Parliament) approved, with an overwhelming majority, the rules establishing a framework for the screening of foreign direct investment (FDI). The rules were approved by a large majority of 500 to 49 votes and 56 abstentions. This brings the EU one step closer to the adoption of the rules into law, with the Council's vote expected in March 2019.

During the debate in the Parliament's Plenary, EU Trade Commissioner Cecilia Malmström stated that *"[i]t is a very important new tool that would help us to strengthen our collective capacity to respond to challenges that have arisen because of globalization, in particular when foreign investments threaten our strategic interest."*

Background

Currently there is no EU-wide mechanism for screening FDI on security grounds. Such mechanisms are in place in 12 Member States, which vary significantly. Member States are not required to coordinate their policies or approaches, even in situations where FDI might have cross-border security implications within Europe. Some of these national mechanisms have recently undergone significant changes through the introduction of more stringent reviews of transactions that raise national security concerns (see our previous posts on the German reforms here and on the UK reforms here).

The European Commission proposed a regulation establishing a framework for the screening of FDI into the EU in September 2017 which were finalised in November 2018. These rules aim at establishing a more coherent approach among Member States with respect to blocking FDI in EU companies made into sectors that are considered sensitive and strategic and are often linked to national security.

The adoption of the new rules will mean that many European member states will have to start systematically collecting information on FDI for the first time in order fulfil their information duties. The rules are of a general nature. However, they can be seen as a response to the rising importance of state-owned enterprises to strategically acquire companies deemed key to further development – such as China's "Made in China 2025" policy.

Main features of the EU rules

The rules do not aim to establish an EU-wide screening mechanism, nor do they impose the obligation on Member States to establish a FDI screening mechanism in their jurisdiction. Rather, the rules purport to enhance cooperation among Member States and establish more coherent criteria that Member States' screening mechanisms must apply (ie, transparency, non-discrimination and the possibility of foreign investors for judicial redress).

The main elements of the new rules are:

- The rules reaffirm that national security interests are the responsibility of Member States and that the EU framework will not affect a Member State's ability to maintain any national review mechanisms already in place, or require a Member State, where it does not currently have a national FDI regime, to adopt one;
- Member States will have the final say as to whether a specific investment should be permitted or not in their territory;
- The creation of a "cooperation mechanism" whereby Member States are required to exchange information (amongst themselves and with the Commission), concerning FDI taking place in their jurisdiction (both for FDIs undergoing screening and for acquisitions in Member States with no screening mechanism in place). If other Member States or the Commission consider that such FDI is likely to affect security and public order in one or more Member States, they may provide comments and request more information about this FDI. This is a framework through which the Commission and Member States can carry out a more coordinated review of FDI;

- The Commission will be able to issue non-binding opinions:
  - In the context of the cooperation mechanism: where a number of Member States consider that an investment would likely affect security or public order in one or more Member States, they may request the Commission to issue such an opinion (and to which the Member State(s) in question must then "give due consideration"); and
  - Projects and programmes of Union interest: where a proposed investment is likely to affect a project or programme of interest to the whole EU, the Commission may issue an opinion, of which the Member State concerned must "take utmost account" and provide an explanation in case it deviates from such opinion. The new rules list the EU projects and programmes concerned, which include Horizon 2020 or Galileo;
- The rules set out an indicative list of factors and criteria that Member States may consider when assessing whether an FDI would raise concerns for their national security. An enhanced list of sectors now includes critical infrastructure (such as energy, transport, water, telecommunications), critical technologies (such as dual-use technologies), supply of critical inputs (including raw materials and food security), access to sensitive information and the freedom of media. Criteria to be assessed include foreign governmental ownership or control, prior involvement in activities affecting security and engagement in illegal or criminal activities.
- International cooperation on screening policies is encouraged, including through sharing experience and best practices as well as information regarding investment trends;
- The need to "operate under short business-friendly deadlines and strong confidentiality requirements" is recognised.
- The new rules are expected to have a significant impact on FDI transactions into the EU, in particular in sectors that are deemed strategic or sensitive. Increased scrutiny will entail more thorough analysis of potential cross-border transactions, while timeframes for review are expected to be longer (see our previous post here).

Next steps

Following the Parliament's endorsement, the Council is expected to approve them in March 2019.

The rules are expected to enter into force in the coming months and will become fully applicable in 18 months from their entry into force (likely in November 2020).

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A New European Deal?

German Minister of Economics suggests revising EU and German merger control regulations to enable the creation of European champions – and keeps FDI options on the table to prevent acquisitions by non-European players.

The German Federal Minister of Economics, Peter Altmaier, published a paper on 5 February 2019 entitled "National Industry Policy 2030" which sets out the "strategical guidelines for a German and European industry policy" (to be accessed here in German). The paper aims to address the economic changes brought about by globalisation, protectionism and disruptive new technologies. It proposes a two-pronged solution to these developments: loosening EU and German merger control rules to benefit European-only mergers while maintaining a tight German Foreign Investment Control regime (the latter having only recently been amended, see here for more information).

In this paper, the Minister outlines the key technical competencies he believes Germany and Europe should better harness in order to keep up with international developments. The Minister expresses concern that, in the absence of such efforts, Germany and Europe will no longer be technological leaders and could forgo the chance to become such leaders in the future. The paper focuses in particular on the following areas of growth: digitalisation, platform economy, AI, autonomous driving, medical diagnostics and automation of production (i.e. the so-called Industry 4.0).

The Minister expresses his belief that a worldwide "renaissance" of strategies of industrial policies has taken place and states that only a few economically successful countries continue to rely solely on the power of the market without implementing such policies. The paper also identifies a rising global risk posed by the strategies of State players which promote fast expansion in order to conquer and monopolise new markets. The paper suggests two regulatory solutions to combat this:

1. **Looser merger control regulations:** The Minister recommends creating national and European champions, or as he puts it in the paper: "Size matters!" This approach reflects a controversial political debate in competition law over whether EU merger regulation should be loosened to allow the creation of larger, European players on markets which are deemed to be global. This debate has become all the more topical in light of the European Commission's veto against the Siemens/Alstom rail merger. The paper proposes that European and German competition law should be reformed to enable German and European companies to grow and better compete at an international level.

   At the German level such an instrument already exists today: the so-called Ministerial approval which enables the Minister of Economics to approve mergers for macro-economic reasons if he deems the deal to be strongly in the public interest, even if the German Federal Cartel Office has vetoed the transaction because it significantly impedes efficient competition. Following the European elections this summer, the new European Commission may possibly face strong lobbying efforts from Berlin and Paris calling for the review of the EU Merger Regulation in this area.

2. **Tighter FDI screening procedures:** While the German paper condemns the growing tendencies of protectionism internationally, the Minister leaves open the option of using Foreign Direct Investment Control to prevent acquisitions by non-European players of strategically important German companies. The paper specifically refers to companies in the fields of technology and innovation, and more precisely platforms, AI and autonomous driving. In this respect, the Minister proposes to set up a "national investment facility" for the German State to invest in important companies and prevent their acquisition by non-European players.

The paper also states, somewhat vaguely, that the State should exercise its ability to intervene based on a "*new principle of proportionality in political economy*".

The political positioning of the Minister comes as no surprise. As early as last summer, the Federal Government prevented the acquisition by Chinese investors of a 20% share in an electricity transmission operator by instructing the State-owned bank KfW to take over the target. In the aftermath of this transaction, Germany tightened its regulations on Foreign Investment Control (read our previous blog post on this topic here). Another example of the Federal Ministry of Economics intervening in this area was its attempt last year to convince large German companies to work together to set up a local battery cell factory in Germany in order to compete against Asian incumbents in this field. This new paper published by the German Federal Minister of Economics is therefore yet another example of the recent tendency of global and European governments to intervene in national economies. Other examples include the expansion of the CFIUS regime via FIRRMA in the US and the new EU rules for screening foreign direct investment.

Investors and other transaction parties should continue to closely monitor these developments and their effect on the timeline, process and execution of transactions in Germany.

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CMA imposes fine for breaches of 'hold separate' order

On 10 January 2019, the Competition and Markets Authority (CMA) announced that it had fined European Metal Recycling Ltd (EMR) and its parent company, Ausurus Group Ltd, £300,000 for allegedly breaching an initial enforcement order (IEO) issued in relation to the CMA's Phase 2 investigation into EMR's completed acquisition of rival scrap metal player, Metal & Waste Recycling Ltd (MWR). In particular, EMR and Ausurus were sanctioned for actions that amounted to inappropriate and unauthorised integration of the target business whilst the CMA's investigation remained on going.

This fining decision (taken on 20 December 2018) highlights the CMA's determination to make strict compliance with the procedural merger rules an enforcement priority. It also illustrates the risks merging parties face where they proceed to close a transaction without first notifying and receiving CMA clearance.

Background

This fine marks only the second time a penalty has been imposed by the CMA for failure to abide by the terms of an IEO under section 72 of the Enterprise Act 2002 (EA 2002) – often called a 'hold separate' order requiring merging parties to 'standstill' and avoid further integration until the CMA's review is complete. However, this development follows very soon after the first such fine (a £100,000 fine imposed on Electro Rent in June 2018 – see A sign of things to come? CMA imposes first fine for breach of a 'hold separate' interim order) and only a year after the CMA fined Hungryhouse for a procedural breach committed during the CMA's review of the HungryHouse/ Just Eat merger – underscoring a discernible trend of the CMA actively pursuing merging parties for procedural violations.

Procedural breaches of the merger control rules, in particular violations of 'standstill' obligations (whether under EU or national laws) are very much in the news at the moment with the European Commission and other authorities (in Europe and beyond) having recently initiated investigations and/or imposed significant fines in a number of high-profile cases. These recent UK cases are, however, particularly interesting as they arise in the context of a voluntary merger regime (i.e. where there is no legal obligation to notify a transaction) and where parties can (and often do) close their deals without the CMA's prior approval.

IEOs

IEOs are an important feature of the UK's voluntary merger control regime, one in which qualifying mergers (i.e. ones meeting the jurisdictional thresholds) can be completed without notification to the CMA. Such mergers nevertheless remain at risk of being 'called in' by the CMA for review.

Where the CMA exercises such power to examine an already completed transaction, it will routinely impose an IEO to prevent the parties from further integration of their businesses or doing anything which might otherwise prejudice the CMA's investigation or obstruct the imposition of appropriate remedies (which may ultimately be required to address identified concerns). In short, IEOs are a vital tool for ensuring the CMA "has the full range of remedy options open to it if required by the findings of the investigation" (Electro Rent Penalty Notice, para 63).

Where the merging parties wish to do something which is restricted under the terms of the IEO, they must seek a derogation from the CMA in advance. Parties must also submit regular compliance statements to the CMA confirming compliance with the IEO and inform the CMA of any 'material developments' relating to their businesses. This is in addition to the general obligation actively to keep the CMA informed of such material developments.

The CMA has the power (under section 94 EA 2002) to fine parties up to 5% of their combined global turnover in the event an IEO is breached "without reasonable excuse".

Ausurus Group/MWR merger

On 25 August 2017, EMR completed the acquisition of the entire issued share capital of CuFe Investments Ltd (CuFe and the ultimate parent of MWR). Both EMR and MWR were active in scrap metal recycling (the two largest players in the UK prior to the merger) but did not notify the transaction to the CMA.

Having become aware of the transaction through its own market intelligence function, the CMA 'called in' the transaction and (on 11 September 2017) imposed an IEO on the parties. The IEO required the parties to, amongst other things, maintain and operate the businesses separately, to refrain from taking any action that might impinge on the parties' ability to compete as independent entities on the market and to notify the CMA immediately of any breach or suspected breach of the IEO. To this end, the parties provided regular compliance statements confirming that they were operating in compliance with the IEO.

On 24 January 2018, the CMA determined that the transaction gave rise to a realistic prospect of a substantial lessening of competition and that it would refer the matter for a more in-depth Phase 2 investigation unless acceptable undertakings in lieu of reference were provided. When the parties declined to offer such undertakings, the CMA referred the completed acquisition for a Phase 2 review on 7 February 2018. A Monitoring Trustee was appointed on 27 February 2018.

The parties ultimately provided acceptable undertakings in November 2018 – with the CMA publishing a notice on 5 November 2018 confirming its acceptance (and at which point the IEO ceased to be in force). However, a few weeks before the investigation was closed, the CMA informed EMR and Ausurus that it was considering imposing penalties under the IEO owing to potential non-compliance between the date the IEO was imposed (11 September 2017) and March 2018. The issues of concern were flagged to the CMA's attention by the Monitoring Trustee in reports it provided shortly after its appointment (in March 2018).

Following correspondence between the parties and the CMA, the CMA determined that EMR and Ausurus had, in fact, violated the terms of the IEO on the basis that they had (without prior consent from the CMA and going beyond activity covered by an approved derogation):

- directed customers of MWR to make payment into Ausurus' bank account and themselves made payments to MWR metal scrap suppliers – such actions amounting to unauthorised integration (and failure to maintain separation) of the merging businesses and potentially impairing the ability of MWR to compete independently (namely by blurring the separate brand and sales identity); and
- failed to give MWR's managing director a clear delegation of authority to take decisions without consulting or first obtaining permission from Ausurus/EMR – amounting to a failure to take adequate steps to ensure MWR was able to conduct business independently and as a separate going concern.

Under section 94A(1) EA 2002, the CMA may impose penalties where failure to comply with an IEO is "without reasonable excuse" – with the person who has committed the breach bearing the evidential burden of demonstrating that there exists an objectively reasonable justification.

The CMA determined that EMR and Ausurus were not able to establish any such excuse and, therefore, that a penalty was appropriate taking into account general and specific deterrence considerations as well as the seriousness of the breaches in question. The level of the fine, in turn, reflected the seriousness of the breaches and included 'aggravating factors' such as the alleged involvement of senior management in material acts and omissions and that EMR/Ausurus potentially obtained a competitive advantage (and derived potential benefit) from the violations of the IEO.

The CMA, however, considered that the breaches were not so serious as to warrant a fine at the upper end of the statutory 5% maximum. In this respect (and in mitigation), the actual negative effects (though potentially significant) were likely only to be limited. Furthermore, the parties were responsive and cooperative when alerted to the breaches by the CMA (acting swiftly to remedy the situation). The CMA also took into account the level of fine imposed in the Electro Rent case (£100,000) which was imposed (in June 2018) after the breaches in question had taken place in this case. See Penalty Notice (dated 20 December 2018).

Comments

These recent UK cases underscore the importance of parties subject to IEOs working closely with specialist advisors to ensure they appreciate fully the stringent obligations and, as such, to avoid inadvertently falling foul of the requirements under an IEO – especially when integration is already at an advanced or near completed stage.

The fact that these recent cases were 'called in' and the parties subject to fines for IEO non-compliance also highlights the complications and subsequent risk of closing transactions without first notifying and receiving CMA clearance. Indeed, despite the voluntary nature of the UK regime (again, which does not require parties to notify or suspend closing), there will always be material risk in proceeding without notification and/or unconditionally – in particular where the merging parties are competitors on UK markets and/or where the transaction generates significant vertical foreclosure concerns.

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Brazil's CADE and TCU have entered into a cooperation agreement to fight bid-rigging in public procurement

The Administrative Council for Economic Defense (Conselho Administrativo de Defesa Econômica – CADE) and the Federal Court of Accounts of Brazil (Tribunal de Contas da União – TCU), entered into a cooperation agreement on 27 December 2018 as part of a joint effort to fight violations of the country's public procurement process and antitrust regulations. The two regulators will share information, documents, and assets, including technology tools, databases, reports, intelligence, and launch joint initiatives to detect anticompetitive conduct in public tenders. The two agencies will also conduct joint investigations, studies, and training.

The effects of this agreement are wide-reaching given that the Brazilian government is a leading purchaser of goods and services and all major sectors of the economy are regulated in this country. Also, this agreement will be an additional tool to assist Mr. Jair Bolsonaro, Brazil's president-elect who took office on 1 January 2019, to move forward with its promise to clean up Brazil from corruption.

This new cooperation agreement is part of CADE's broader policy to collaborate with other authorities, in particular entities that oversee the federal government. Also in 2018, CADE signed a cooperation agreement with the then Ministry of Transparency, Supervision and Comptroller General (CGU), to increase the prosecution of Brazilian and foreign companies involved in corruption and/or cartel activity. While the CGU is part of the intern/direct public administration and the authority in charge of negotiating leniency agreements at the federal level with respect to corruption cases in Brazil, the TCU is the external control institution of Brazil's federal government that supports the National Congress with the mission of overseeing the budget and the financial performance of the country and contributing to the improvement of public administration. Both authorities are key players in Brazil's fight against corruption and can apply administrative sanctions to entities and individuals.

This cooperation should increase enforcement of Brazil's anti-corruption and antitrust laws given that bid-rigging and corruption are hot topics and a clear priority for CADE, which has entered into more than 10 leniency agreements in cases linked to Operation Car Wash, and of Bolsonaro's government.

Key highlights

The TCU is the Brazilian federal accountability office responsible for assessing the accounting, financial, and budgetary performance of government bodies and entities and maintaining oversight of public property. The TCU is responsible for auditing and evaluating the use of public funds by public administrators and of other individuals responsible for federal public funds and assets. The TCU also evaluates and then approves or rejects the accounts of those whom they deemed to have caused loss, misappropriation, or other irregularity resulting in losses to the public treasury. Potential sanctions that can be applied by the TCU include fines, unavailability of assets, obligation to correct the irregularities identified, and prohibition to work for the federal government or to participate in public procurement processes.

Under the Brazilian Anti-corruption Law, legal entities are strictly liable for corrupt practices. Sanctions may include: (i) fines of up to 20 percent of a company's gross revenue in the year prior to the initiation of the investigation (or R$6,000 to R$60 million if it is not possible to determine the company's revenues); and (ii) an obligation to publish the decision that resulted in the fine in a newspaper. If the conduct also included a violation of the Public Procurement Law in Brazil, an entity can also be barred from participating in future bids or from executing agreements with public bodies, which may significantly impact companies with an interest in this sector due to the importance of public procurement contracts in Brazil. Other potential sanctions include: (i) confiscation of the subject company's assets; (ii) suspension of the subject company's activities or the mandatory dissolution of the entity itself; and (iii) prohibition from receiving incentives, subsidies, grants, donations, or loans from public bodies, public financial institutions, or companies controlled by public authorities for a prescribed period of time.

Under the Brazilian Antitrust Law, CADE can impose fines from 0.1 percent to 20 percent of the gross revenues of a company, group, or conglomerate, earned in the year before the initiation of the proceeding before CADE and resulting from the line of business related to the violation. The fine will never be lower than the advantage obtained from the improper conduct in cases where it is possible to calculate such amount. Additional sanctions can also be applied to the legal entity, including (i) the obligation to publish CADE's decision in a newspaper of wide circulation; (ii) a prohibition on contracting with financial institutions and participating in biddings held by public bodies; (iii) a split-up of the company or a divestiture of certain assets; and (iv) a prohibition on the ability to make arrangements for the payment of taxes in installments, among others. Individuals involved in the conduct may also be personally fined 1 percent to 20 percent of the fine imposed on the legal entity.

Should you require more information, please contact us.

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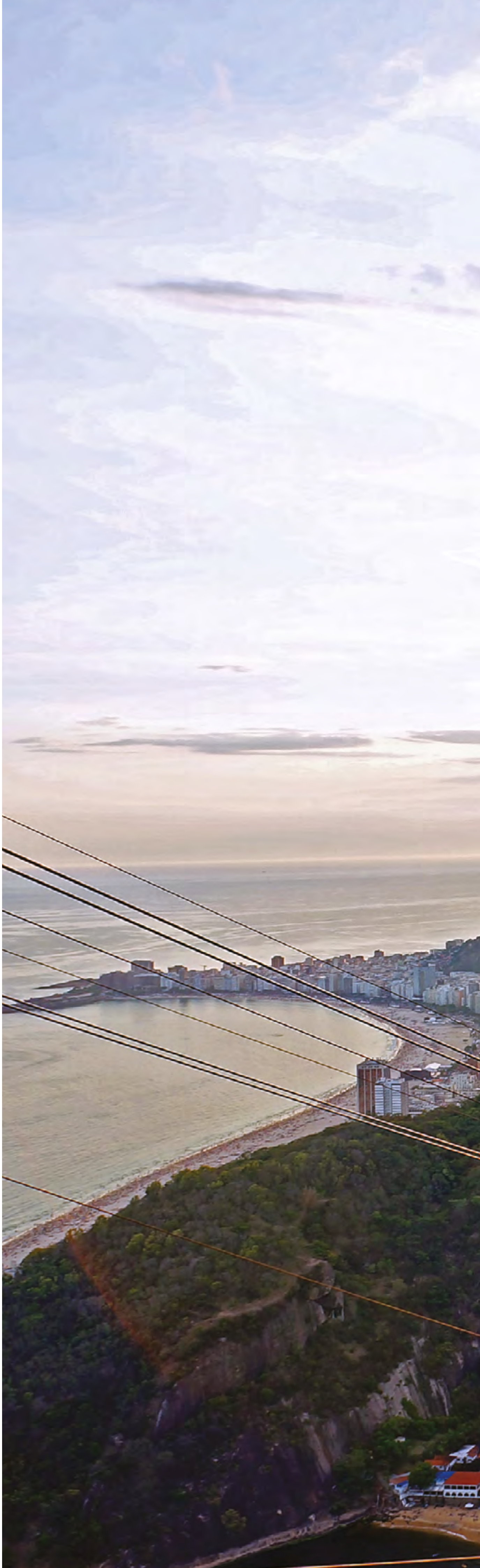

Pharma companies may benefit from proposed patent law changes in China; public comment invited

On January 4, China's National People's Congress (NPC) released draft amendments to the Chinese Patent Law, proposing expanded and enhanced protections that may provide real benefits to companies that develop new drugs. A potentially important condition to one of the key proposed changes specific to new drugs is that it would be available only for products that are submitted for marketing approval concurrently in China and other countries. Although clearly intended to motivate companies to prioritize seeking new drug approvals in China, the proposed patent term extension would appear to be limited to products that are first submitted for marketing approval to China **and another country**, and would not apply to products first filed only in China. As a practical matter, this may limit the usefulness of the provision.

The most significant change that is targeted at drug products would be the possibility of extending the 20-year term of invention patents for new drugs. As proposed, companies would be able to add up to five years to the patent term to make up for the time spent waiting for approval, when the drug product couldn't be commercialized. The extended patent term could not go beyond 14 years after the drug's approval. Pharmaceutical companies would also benefit from proposed enhancements to the available damages for patent infringement: punitive damages of up to five times actual damages would be available for serious willful infringement, and where actual damages can't be proven, the maximum damages a court can impose would be increased from 1 million to 5 million RMB Yuan (around $700,000 USD).

These proposed patent law revisions complement ongoing efforts to establish and strengthen incentives to develop new, innovative drug products, consistent with the Opinions on Deepening the Reform of the Examination and Approval System and Encouraging the Innovation of Pharmaceutical and Medical Devices, issued by the General Office of the State Council in October 2017. As discussed in our previous post, for example, the National Medical Products Administration (NMPA, formerly China Food and Drug Administration) last year issued draft guidance regarding exclusivity for pre-clinical and clinical data submitted to the government. The government is expected to finalize rules on data exclusivity protection for new drugs this year.

The proposed patent law changes could be significant, and the public comment period, which runs through February 3, offers companies an opportunity to voice support and/or suggest revisions to enhance the proposal. If we can help evaluate the likely impact of the proposals, consider possible improvements to suggest, or draft a comment, please let us know by contacting any of the authors of this blog or the Hogan Lovells attorney with whom you regularly work.

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Government shutdown affects antitrust and CFIUS reviews of transactions

After Congress failed to enact appropriations legislation, the United States federal government partially shut down beginning at midnight on 22 December 2018, impacting several departments, agencies, and interagency committees, including the Bureau of Competition at the Federal Trade Commission (FTC), the Antitrust Division of the Department of Justice (DOJ), and the Committee on Foreign Investment in the United States (CFIUS), which is chaired by the Department of the Treasury (Treasury). The FTC and DOJ had previously released contingency plans detailing the impact of a shutdown on the agencies' operations, including their review of mergers and acquisitions. Similarly, Treasury had previously released lapse in appropriations contingency plans, including a Treasury departmental offices plan that outlines the limited CFIUS operations that will continue during a shutdown.

Key takeaways for antitrust review

- **The agencies will continue to accept HSR filings:** Limited staff will be maintained to accept and process new filings submitted under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR).
- **Early termination will not be granted during the shutdown, but waiting periods will continue to run:** Parties submitting filings to the agencies will not receive early termination during the shut down and should plan for the full waiting period (generally 30 calendar days) in determining closing dates. Limited staff at the agencies could also extend waiting periods where they think circumstances warrant further investigation.
- **The FTC will not respond to HSR-related inquiries, but existing guidance will remain available:** FTC staff typically answers questions and provides informal interpretations of HSR rules and regulations in response to email inquiries by parties analyzing whether HSR filings are required or preparing filings, but such guidance will not be available during the shutdown. Existing guidance, along with other agency information, will remain available on the FTC's website.
- **The agencies will continue to investigate and litigate transactions:** Transactions with possible antitrust substantive issues will still likely receive scrutiny by the agencies, and the shutdown is unlikely to decrease the likelihood of a Second Request or challenge if the agencies believe circumstances warrant such action. If anything, some parties who file during the shutdown may be more likely to get a Second Request than they would have been in the absence of the shutdown since they will not have the full 30 days to provide information to address an agency's initial questions. In such cases, a pull and refile of the HSR form by the acquiring person, giving the agencies a second initial waiting period in which to examine the transaction, may make sense.

In the FTC contingency plan, the FTC concedes that, although the agencies can technically challenge a merger outside of the initial generally 30-day statutory review period, "the nature of the available relief changes dramatically once a merger or acquisition is consummated." As a result, the FTC intends to initiate or continue investigations where it believes that "a failure…to challenge the transaction before it is consummated will result in a substantial impairment of the government's ability to secure relief at a later time." For matters currently in litigation, the FTC will "request suspensions of dates for trials, hearings and filings, or similar relief to preserve the government's claim" and will maintain limited staff to litigate matters where it cannot obtain deadline extensions. However, all nonmerger investigations currently underway at the FTC will be suspended during the shutdown.

According to the DOJ contingency plan, the DOJ will similarly limit staffing to those employees necessary to launch or continue merger investigations or litigation where it cannot obtain a continuance or extension of a statutory deadline and where DOJ "leadership determines that allowing a proposed merger to go forward without objection would pose a reasonable likelihood of peril to [the government's interests]." The DOJ will also continue ongoing criminal trials and prepare for criminal proceedings already scheduled, and pursue nonmerger civil litigation.

Key takeaways for CFIUS review

During the government shutdown, CFIUS activities will be suspended except for certain "caretaker functions," according to Treasury's lapse of appropriations plan: The "caretaker functions" are those related to (i) cases the review or investigation of which began prior to enactment of the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) and (ii) CFIUS-related national security exigencies. Thus, CFIUS has suspended its review of all post-FIRRMA declarations and joint voluntary notices and will not review any declarations or notices submitted during the shutdown or acknowledge receipt of such filings.

During the shutdown, all CFIUS-related deadlines will be suspended: The Treasury contingency plan states that "all [post-FIRRMA] cases (including notices and declarations) will be tolled," and CFIUS has notified all parties to pending CFIUS declarations and notices that "all deadlines for declarations and transactions under review or investigation are tolled [as of midnight on 22 December 2018]." In practice, any CFIUS review or investigation period or any time period for responding to CFIUS questions will be extended by the duration of the shutdown (unless the extension would cause the time period to end on a weekend or a holiday, in which case the time period would be further extended to the next business day). So, for example, if the shutdown lasts 14 days, a pending CFIUS investigation generally would be extended by 14 days. FIRRMA explicitly provides for the tolling of CFIUS deadlines during a government shutdown. In contrast, prior to the enactment of FIRRMA, the CFIUS clock kept running during a shutdown, leading some cases in the review stage to be rolled over into the investigation phase and some cases in the investigation phase to be withdrawn and refiled, thereby restarting the CFIUS clock.

Parties should expect delays following the cessation of the shutdown: Although parties can submit joint voluntary notices and mandatory declarations to CFIUS during the shutdown, no action will be taken on them until the shutdown ends. Given CFIUS' heavy caseload, the temporary halt to CFIUS' review of pending cases, and the submission of additional filings during the shutdown, parties that have declarations or notices pending, submit filings during the shutdown, or submit filings shortly after the shutdown ends (i) should expect delays in CFIUS response times and (ii) face an increased risk that cases in the review stage will proceed to the investigation stage and cases in the investigation stage will have to be withdrawn and refiled.

Parties with transactions currently under antitrust or CFIUS review, or that may be required to submit notifications to the government during the shutdown, should confer with HSR or CFIUS counsel to determine the impact of the shutdown.

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No Christmas presents for foreign investors

The German Government tightens regulations on Foreign Investment Control (again) and amends the anti-boycott provision.

Shortly before Christmas, on 19 December 2018, the German Federal Government passed an amendment to the German Foreign Trade and Payments Ordinance (Außenwirtschaftsverordnung (AWV)) that will, among other things, further tighten the regulations for foreign direct investment (FDI) control by lowering their thresholds and widening their scope to include mass media. In addition, the government has amended the scope of the German anti-boycott provision, which recently attracted public attention because of the US's decision to re-introduce sanctions against Iran. These changes will come into effect shortly, pending publication in the Federal Gazette.

Changes to Foreign Investment Control

The first and most important change is the lowering of the threshold for reviews of transactions by the Federal Ministry of Economics (Bundesministerium für Wirtschaft und Energie (BMWi)) from 25% to 10%.This new threshold applies to specific cases of cross-sectoral review (i.e. critical infrastructure and media) requiring a notification to the BMWi and to all cases of sector-specific review (e.g. certain military items). Going forward, acquisitions in these sectors of 10% or more of the shares in a German company can be reviewed and potentially blocked by the BMWi. The blanket clause contained in section 55 AWV for non-sector specific and non-critical infrastructure transactions will retain a 25% threshold.

The second change is the expansion of the catalogue of transactions subject to the new 10% threshold to include acquisitions of mass media enterprises. However, the German regulation requires that the target can influence the public opinion, provides current news and reaches a broad audience. This amendment means that German foreign investment control will, for the first time, explicitly extend to transactions in the media sector. It is likely that this change was made in anticipation of the recently confirmed EU regulation to coordinate and establish foreign investment control at the European level which, as of next year, will also apply to the media sector. The unspecific terms of the new German regulation will likely raise questions in particular in case of transactions regarding digital players.

Changes to the boycott declaration prohibition

In addition to the foreign investment control provisions mentioned above, another change has been made to German sanctions law. The boycott declaration prohibition contained in section 7 AWV prohibits German entities and nationals from complying with sanctions imposed by jurisdictions other than the UN, EU and Germany. In various circumstances, such conduct could be considered an illegal (implicit) call to boycott the target of third party sanctions.

Third party sanctions, notably imposed by the US, have recently caused concern and require the difficult balancing of, on the one hand, not infringing the US Iran sanctions and, on the other hand, complying with German anti-boycott legislation. Section 7 AWV has therefore created significant uncertainty and led to potential compliance issues – not to mention the issues created by the EU Blocking Statute – as the EU and US have parted ways on the Iran sanctions (see here for our blog in German on the practical lessons learned from the EU Blocking Statute).

Section 7 AWV has now been amended to allow German entities and person to comply with sanctions imposed by third party states, as long as the UN, EU or Germany have imposed sanctions against the same target, even in cases where third party sanctions are more far-reaching and don't share the same political goal (as regarding Iran). This amendment has been expressly made because the Federal Government considers the EU Blocking Statute as sufficient to deal with the extraterritorial scope of US sanctions. The amendment therefore aims at lifting the threat to companies following US Iran sanctions to be specifically prosecuted in Germany – without solving the conflict between US Iran sanctions and the EU blockings statute, and without changing the German government's position via-à-vis the US Iran sanctions.

Looking Ahead

The lowering of the FDI threshold does not come as a surprise. Indeed, rumours regarding its introduction have been swirling since at least the summer, when the Federal Government blocked the acquisition by Chinese investors of a 20% share in the electricity transmission operator 50Hertz. As the existing foreign investment control thresholds of 25% had not been reached in that case, the government had to use a creative structure involving the state owned bank KfW, which stepped in as a "White Knight" to prevent the sale to the Chinese investors. However, the speed at which the government has since lowered the threshold to only 10% is remarkable. The reasoning of the reform clarifies that the threshold is derived from an OECD benchmark definition from 2008.

The inclusion of mass media companies in the catalogue for cross-sectoral review is also unsurprising. Many foreign investment control regimes already cover such companies and we are witnessing a greater push towards European harmonisation in this area. The rationale provided by the Federal Government for this amendment is the importance of protecting the German public against disinformation spread by foreign stakeholders.

The practical importance of the change of the German anti-boycott law remains to be seen. In light of the re-introduction of Iran sanctions by the US, it is likely that German companies will still carefully consider the consequences of doing business in Iran.

The changes of the FDI screening process swill enable the Federal Government to review many more transactions involving acquisitions of German companies. This may create capacity issues at the BMWi, although the government has no estimates regarding the number of future reviews. These changes closely follow the last reform to foreign investment control which only dates back to 2017. Together with the recently announced EU regulation on foreign investments and, more globally, with, among other things, the expansion of the CFIUS regime via FIRRMA, these changes paint a clear picture for investors: Regulation of free trade and investments has tightened globally, despite many governments distancing themselves from protectionism. International players should therefore update their compliance rules and pay close attention to relevant regulation when conducting cross-border transactions.

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China antitrust authority consults on agreements rules

On 3 January 2019, the State Administration for Market Regulation (SAMR) released a draft of the Regulation on the Prohibition of Monopoly Agreement Conduct (Draft) on its website, inviting comments from interested stakeholders. The consultation period ends on 3 February.

The Draft is the first significant normative output in the Anti-Monopoly Law (AML) field after the establishment of SAMR and the transfer of antitrust powers from the three prior antitrust units at the National Development and Reform Commission (NDRC), the State Administration for Industry and Commerce (SAIC), and the Ministry of Commerce to SAMR in Spring 2018.

Layout

The Draft is divided into 5 chapters, and has 44 provisions. Unlike the prior regulations adopted by SAMR's predecessor bodies NDRC and SAIC, the Draft contains both substantive and procedural provisions in the same legal text.

The bulk of the agreements-specific provisions can be found in the second chapter of the Draft. In this chapter, SAMR provides guidance on the concept of "concerted practice," largely reflecting the approach laid out in prior NDRC and SAIC regulations. The chapter also puts forward more details on both the horizontal agreements prohibitions in the AML – price-fixing; output restriction; market partitioning; technology-related restrictions; and collective boycott – and the resale price maintenance (RPM) prohibition as the only explicitly outlawed vertical restraint.

Catch-all

At Article 13, the Draft states that agreements not explicitly listed in the AML can be deemed as unlawful monopoly agreements "if there is evidence proving [they] eliminate or restrict competition." Implementing the agreements-related "catch-all clauses" in the AML, this provision lays out a number of factors which SAMR should consider before holding a non-listed agreement to be unlawful.

Article 13 is interesting for several reasons. First, the reference to the evidence on the elimination or restriction of competition could be interpreted as introducing the concepts of "per se" illegality and "rule of reason" through the backdoor. One interpretation of the provision would be that all types of agreements listed in the AML – basically, cartels and RPM – would be illegal without the need to prove an adverse effect on competition, while a showing of such effect would be required for non-listed agreements. In that sense, this provision is likely to reignite the debate among Chinese courts and academia as to what kind of analysis RPM should be subject to.

Second, Article 13 limits the use of the agreements-related catch-all clauses to SAMR at the national level, excluding local SAMR offices (the AML also excluded the possibility of courts using the catch-all clauses).

Article 14 of the Draft contains a further limit on the use of the catch-all clauses in that it provides market share "safe harbours" for horizontal and vertical agreements not explicitly listed in the AML (15% and 25%, respectively). The safe harbours are drafted as presumptions which can be overturned by evidence to the contrary.

Beyond agreements

Even though the title of the Draft focuses on monopoly agreements, many of its provisions go beyond agreements strictly speaking. As such, the first chapter contains rules on the jurisdictional allocation of work between SAMR and its local offices, while most of the provisions in the third chapter regulate the investigation process, which should in principle be largely the same for both agreements and abuse of dominance cases.

Although not specific to agreements, some of these provisions give interesting insights into the set-up and enforcement structure of SAMR and its offices. For example, the Draft confirms the general delegation of AML enforcement powers to the SAMR offices at the provincial level, as laid out in a policy document issued at the end of 2018. Given that the antitrust-related manpower of SAMR at the national level is quite limited, the availability of larger teams in the provincial offices will allow the authority to increase its overall workload.

Yet the broad scope of the Draft also provides uncertainty – for example, it remains to be seen if and when there will be an implementing regulation providing guidance on the AML's abuse of dominance provisions, or what it would look like. Similarly, it is not clear how the Draft will relate to the set of AML implementing guidelines which are reportedly in the process of being adopted and released in the name of the Anti-Monopoly Commission, a not-permanent institution ranked higher than SAMR. These guidelines may deal with similar issues as the Draft, including the substance of the AML's agreements provisions (such as vertical restraints in the automotive industry) as well as procedural arrangements (such as leniency applications).

In any event, the release of the Draft for public comment is likely just the first step of a series of normative efforts we expect the Chinese authorities to undertake in the coming months.

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Pharmaceutical sector remains under scrutiny of EU competition enforcers

On 28 January 2019, the European Commission published its Report to the Council and Parliament regarding "Competition enforcement in the pharmaceutical sector (2009–2017)" (Report). The Report summarizes the notable enforcement activity of EU competition law enforcers in the pharmaceutical sector in the last decade while emphasizing at the same time the scope for continued enforcement action.

The political agenda pursued by the Commission is clearly demonstrated by a quote of EU Commissioner for Competition, Margrethe Vestager:

"Giving European patients and healthcare systems access to affordable and innovative medicines is one of Europe's main challenges and objectives. The report [...] provides key insights into the valuable work that competition authorities across Europe are doing to ensure that pharmaceutical markets help achieve this goal. It is important that we continue giving a high priority to our work in this area."

Anti-competitive agreements and abuse of dominance

The Report provides an impressive overview of antitrust cases led by the EU Commission and the national competition authorities of the 28 Member States which uncovered several infringements of Article 101 and 102 TFEU:

- In total, EU competition authorities concluded 29 antitrust cases against pharmaceutical companies. In some instances, this resulted in hefty fines, totalling over EUR 1 billion.
- They also investigated well over 100 additional antitrust cases in pharmaceuticals without adopting a fining decision.

Whilst anti-competitive practices such as bid rigging in tenders or market sharing can be found in almost any branch and are of course on the radar of the authorities, sector specific conduct such as "pay-for-delay" has also been frequently targeted.

In this highly complex and dynamic environment, EU competition authorities aim at promoting access to affordable and innovative medicines. Active competition law enforcement is regarded as key towards delivering more choice to patients and cheaper products.

Merger review

As regards mergers, EU competition authorities raised concerns in 19 out of the 80 mergers in the pharmaceutical sector which were notified to them. As the pharmaceutical sector is particularly driven by innovation, competition authorities vigilantly analyse the effects on R&D departments when assessing the competitive effects of mergers. Because mergers can thwart innovation competition, authorities often intervene when the combined entity lacks incentives to innovate.

Insofar as M&A transactions can potentially reduce competitive pressure, merger control can play a decisive role in preserving price competition – thereby protecting patients and the health insurance system from paying excessive prices for medicines.

Outlook: Pharmaceutical sector remains under scrutiny

According to the Commission's press release, the antitrust and merger cases cited in the Report show that the pharmaceutical sector continues to require close scrutiny by competition authorities. As competition law enforcement plays an important role to safeguard competition on prices and to stimulate innovation.

In particular the rivalry between originators and generics, also in the area of biological drugs, is one that will continue to be carefully monitored by antitrust authorities. The Commission emphasized that *"authorities must remain vigilant and pro-active in investigating potentially anti-competitive situations, including where new practices used by companies or new trends in the industry are concerned, such as the growing relevance of biosimilars."*

Pharmaceutical companies should continue carefully observing EU competition law enforcers' activities. Having your up-to-date antitrust compliance in place, monitoring current developments and making sure it is followed are key when competition enforcers keep scrutiny high.

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We are the champions – France and Germany unite to revive industrial policy at European level

Following the European Commission's prohibition of the Alstom-Siemens transaction, the French and German governments published a manifesto calling for a reform of current EU merger rules to shape a "European industrial policy fit for the 21st Century." This manifesto appears to be directly addressed to the next European Commission, which will be renewed following the European elections this year.

The Franco-German manifesto (see here) directly stems from the Alstom-Siemens prohibition decision which was criticized by the French and German governments, as they viewed the merger as a unique opportunity to create a "European champion" able to compete with increasingly powerful Chinese competitors. Ignoring such political considerations, the EU Commission assessed that the remedies offered by Alstom and Siemens were insufficient in order to address the competition concerns raised by the transaction, notably in consideration of the very high market shares held by the parties in the high-speed trains and railway signaling systems markets.

The French and German governments did not hide their discontent. The French Minister for Economic and Financial Affairs Bruno Le Maire described European competition rules as obsolete, whilst German Chancellor Angela Merkel expressed doubts on the European Union's ability to create global players. Minister Bruno Le Maire even added that the Commission's decision was a political and economic mistake serving the interests of the Chinese government, and notably the Chinese company China Railway Construction Corp. Ltd. (CRCC).

Reform proposals

The ambition of the manifesto is to strengthen and improve the European Union's industrial strategy by setting clear objectives for 2030. To this end, the manifesto sets three pillars as the cornerstones of the future European industrial strategy:

"Massively investing in innovation"

The rationale behind the first pillar is that the key to success is to create, develop, and produce new technologies. In this respect, the manifesto advocates for: (i) the creation of a European strategy for technology funding primarily focused on private investment; (ii) a strong commitment to disruptive innovation; (iii) the goal to become world leaders on artificialintelligence (AI) through the intensification of the Franco-German cooperation in research and development; (iv) the production of cutting-edge technologies in sectors such as hydrogen, low carbon industrial processes, smart health, or cybersecurity; and (v) financial markets' support of industry innovation thanks to the completion of the capital markets union.

Taking "effective measures to protect ourselves"

This pillar of the manifesto focuses on the adoption of effective measures to defend the European Union's technologies, companies, and markets. The suggested measures notably include ensuring the full implementation of the recently agreed European foreign investment screening framework (see our latest coverage on this here). The manifesto suggests that the French and German legislative frameworks are examples of good practice, due to the countries' "tough national legislation" (see our coverage on the latest developments in Germany here). The manifesto also pushes for the creation of a reciprocity mechanism for public procurement with third countries and the promotion of multilateralism, open markets, and an ambitious EU trade policy.

Adapting the EU regulatory framework

As a direct consequence of the prohibition of the Alstom-Siemens merger, the Franco-German manifesto advocates for an adaptation of the current regulatory framework, notably by:

- "Taking into greater consideration the state-control of and subsidies for undertakings within the framework of merger control." This consideration reflects the French and German ministers' criticism of the prohibition decision in Alstom-Siemens, in relation to the potential competition exerted by Chinese companies such as CRRC, which is directly controlled by the Chinese government.

- "Updating current merger guidelines." The rationale for this consideration would likely be to quickly change the handling of merger procedures under Regulation No. 139/2004 while avoiding the lengthy legislative procedure required to directly modify the regulation.
  - According to the manifesto, new merger guidelines might include assessing competition risks on a global rather than on a European-relevant geographic market, in line with Minister Bruno Le Maire's comments on the fact that the EU Commission allegedly did not sufficiently take into account the potential competition exerted by the Chinese company CRRC.
  - Currently, competition assessments by the Commission already involve an analysis of the relevant geographic market. The Commission thus defines global or regional geographic markets depending on a large number of criteria such as price differences and basic demand characteristics, trade flows, the existence of regulatory barriers, or the costs of transports of the products. These criteria for the geographic market definition are set out in the "Commission Notice on the definition of the relevant market for the purposes of Community competition law" of 1997. Such "soft law" could be revised by the Commission without initiating a formal review of the EU Merger Regulation with unclear prospects of success, in case other member states do not support the French-German initiative.
- The creation of a right of appeal of the EU Commission's decisions, subject to strict conditions. The manifesto proposes a political review of merger decisions without specifying which body would carry out this function. A possibility could be the European Council, which is composed of the 28 heads of state of the member states.
  - This proposal would amount to the creation of a "phase III" in the assessment of concentrations and a right for Commission decisions to be overturned on political grounds. The main objective of the proposal is to enable other arguments to be taken into account, such as the industrial policies of member states, as opposed to an analysis purely based on competition arguments. Such a mechanism is therefore likely to apply mostly to major European economies (such as France or Germany), which are strongly pushing for the creation of European industrial champions.

Context

A so-called phase III already exists both in the French and German national competition frameworks. In France, while the prerogative to authorize or prohibit concentrations was taken away from the minister for economic and financial affairs back in 2008 and granted to the French Competition Authority (FCA), the minister for economic affairs was left with the ability to "evoke a case" within 25 working days after the publication of the FCA decision. Through this process, the French minister may take a decision based on public interest grounds such as industrial development or the creation and safeguarding of employment. Interestingly, this mechanism was used for the first time in France in June 2018 by Minister Bruno Le Maire, who is now trying to push for the implementation of such a mechanism at EU level.

French representatives have been trying to push for the creation of a "phase III" at EU level for a long time. What appears to be new is the recent support of German representatives to this idea, which might (or might not) give a new impetus to this question.

German Minister Altmaier presented his "National Industry Policy 2030" setting out "strategical guidelines for a German and European industry policy" (see our article on it here) on 5 February 2019. The joint manifesto widely reflects the German minister's paper, which already proclaimed "Size matters!" However, the call for a possibility to overturn Commission decisions had notably been absent in the German paper, although a similar instrument exists in Germany. The so-called "ministerial consent" allows a prohibition decision of the Federal Cartel Office (FCO) to be overturned in extraordinary circumstances if: (i) the macroeconomic advantages of the proposed merger outweigh the restriction of competition; and (ii) significant public interest justifies the clearance of the transaction without endangering the free market economy in Germany. In the last 45 years, there have been only 22 applications for such a ministerial consent of which only nine have been successful.

Looking ahead

The directorate-general for competition of the European Commission (DG COMP) promptly responded to the manifesto, as Competition Chief Margrethe Vestager held that the prohibition of the Alstom-Siemens merger should not provide grounds for a major overhaul of EU competition rules, stressing that the prohibition resulted from the parties' own decisions (i.e., the lack of sufficient remedies) and not from competition rules. Representatives of the EU Commission have mostly reacted dismissively of the proposed changes. Johannes Laitenberger, director-general of DG COMP, has viewed the reform proposals as "voluntaristic interventions into a rule-based system" and questioned their effectiveness from a market economy perspective (his speech addressing the reform, of which a transcript is unfortunately only available in German, can be retrieved here).

The criticism from DG COMP also reflects a number of unsolved questions prompted by the joint manifesto with regard to the proposed changes to the merger framework. One important question not addressed yet is how a mechanism to overturn Commission decisions based on policy reasons in the European Union with its 28 member states could be viably introduced.

We expect the political debate to continue in the context of the European Parliament elections later this year.

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