SHEARMAN & STERLING

# KEY ANTITRUST ENFORCEMENT TRENDS

## 2019 ANTITRUST ANNUAL REPORT

Shearman

**SHEARMAN & STERLING LLP'S "*HIGHLY EXPERT AND EXPERIENCED*" TEAM PROVIDES "*PRAGMATIC AND RELEVANT ADVICE*."**

*Legal 500 UK, 2018*

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# FOREWORD

## Welcome to the 2019 Shearman & Sterling Antitrust Annual Report.

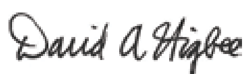
## Our seventh edition focuses on the contrasting use by regulators of antitrust laws with respect to the FANGs, and how antitrust is being enforced in the U.S. under the Trump Administration.

We also highlight other noteworthy international antitrust enforcement trends and developments, including: tougher implementation of procedural rules in merger control; CFIUS reform; a resurgence of conglomerate theories of harm in merger control in the European Union (EU); the apparent decline in leniency applications; the extension of parental liability for EU infringements; an increased focus on employee no-poach agreements; extraterritorial application of U.S. and EU antitrust laws; Germany's modernization of its abuse of market power law for use in the digital age; antitrust enforcement against online platforms' use of data; the importance of two-sided market analysis in the United States Supreme Court's decision in *Ohio v. American Express*; international comity with the Supreme Court's decision in the *Vitamin C Antitrust Litigation*; and the European Courts' first step towards recognizing creditors' interests in State aid decisions.

In 2018 we recruited Ben Gris to our D.C. office, building on the expansion of our U.S. team with the addition in 2017 of a five-partner team led by David Higbee and Bruce Hoffman. Ben is the former Assistant Director of the Mergers II Division of the Bureau of Competition at the Federal Trade Commission and brings a wealth of experience to the team, in particular with regard to merger control and litigation.

Our group's continued success is attributable to the talent, hard work and commitment of all our lawyers and staff. On behalf of the firm, we express appreciation and gratitude to our team.

You, our clients, are self-evidently at the heart of what we do. Thank you for entrusting us with your antitrust needs and we wish you every success in 2019.



**DAVID HIGBEE**
Global Antitrust Practice Group Leader

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Global Antitrust Practice Group Leader

# 01

FOREWORD

In both the United States and in Europe, antitrust enforcement in the digital economy has been a popular topic that has received significant media coverage, though approaches to actual regulation have differed significantly.

*Continued overleaf*

# ANTITRUST AS A TOOL TO REGULATE THE FANG COMPANIES

## DIFFERING APPROACHES IN THE UNITED STATES AND IN EUROPE

BY BEN GRIS, MATTHEW READINGS, ELVIRA ALIENDE RODRIGUEZ, GEERT GOETEYN AND GABRIELLA GRIGGS

01

# Antitrust as a Tool to Regulate the FANG Companies: Differing Approaches in the United States and in Europe

**COMMISSIONER MARGRETHE VESTAGER HAS GAINED A REPUTATION FOR BEING TOUGH ON TECH GIANTS**

While in Europe antitrust has increasingly been used as a tool to regulate the so-called 'FANG' companies (Facebook, Amazon, Netflix and Google), to date the U.S. antitrust authorities have taken a far less aggressive approach towards enforcement of the FANGs. Whether antitrust authorities have sufficient tools to take action against the FANGs, and indeed whether such enforcement is the most appropriate approach to regulation, is up for debate in both the United States and in Europe.

## EUROPE

In Europe, European Union Competition Commissioner Margrethe Vestager has gained a reputation for being tough on tech giants. This year's record-breaking €4.34 billion fine for abuse of dominance by Google has further cemented this image. We are also seeing national competition authorities in Europe test the boundaries of their antitrust powers to deal with an ever dynamic digital sector.

### ABUSE OF DOMINANCE CASES

Google has been subject to a series of headline-grabbing fines by the European Commission (EC) for alleged abuse of dominance in various digital markets.

In July 2018, Google was fined a record-breaking €4.34 billion by the EC for allegedly using its open-source Android operating system as a vehicle to retain its dominance in internet search. The EC identified various restrictive terms that Google imposed on manufacturers of Android smartphones, including requiring the pre-installation of the Google Search app and the Chrome browser as conditions to use of the Google Play app store (*i.e.*, tying), and providing financial incentives to device manufacturers to pre-install Google Search on Android devices. Google appealed the fine in early October, challenging the EC's narrow market definition — which held that the Apple iPhone was not even an indirect competitor of Android devices — and arguing that Google's 'tying' contracts were not anti-competitive, but rather were a means to recoup billions spent in research and development. In the meantime, Google has begun charging device manufacturers a license fee for use of its Android app store in an effort to comply with the EC's decision, a move that has drawn criticism from search engine rivals, and which puts the EC in the awkward position of inadvertently creating a new price tag for a previously free product.

Google is no stranger to record-breaking fines, having been fined €2.42 billion by the EC in 2017 for allegedly giving unfair prominence to its own comparison shopping service on the Google search engine. Google similarly appealed that decision, arguing that the EC erred in treating Google as an 'essential facility' that rivals must use to compete. Google also argued that every company should be allowed to promote its related services regardless of dominance.
As with Google's attempts to comply with the Android decision, competitors criticized Google's proposed remedy, which introduced an 'auction system' allowing other shopping sites to bid for the chance to appear in a carousel of ads at the top of the site; some lawmakers have even argued that only splitting Google's search engine from its specialized services will suffice.
The appeal is still pending in the European Courts.

Most recently, in March 2019, Google was fined €1.49 billion by the EC for its alleged abuse of its dominant position in the online search intermediation market through its AdSense for Search service. The EC found that, by imposing restrictive clauses in its contracts with third-party websites, Google had prevented its rivals from placing their own advertisements on those websites. From 2006, Google had imposed an exclusive supply obligation, preventing third-party websites from placing search advertisements from competitors on their search results pages entirely. From March 2009, Google had moved to a "*relaxed exclusivity*" position and began replacing exclusivity clauses with premium placement clauses, requiring publishers to reserve the most profitable space on their search results pages for Google's adverts and request a minimum number of Google adverts. It also included clauses requiring publishers to seek written approval from Google before marking changes to the way rival adverts were displayed. Unlike the Google Android and Google Shopping cases, the AdSense case is not expected to lead to compliance issues; the EC found that the infringement had ended in 2016. In April 2019, Google confirmed its intention to appeal the decision.

Commentators have queried whether these large fines imposed by the EC and the accompanying remedies are an effective way to regulate Google's behavior. Share prices of Google's parent company Alphabet dropped a mere 0.3% on news of the €4.34 billion fine in the Google Android case, and Alphabet had more than US$100 billion in cash, cash equivalents, and marketable securities to absorb it. In addition, analysts anticipated minimal impact on the business resulting from the remedies offered in the Android case, upon determining that consumers are likely to simply download the apps for Google's services when they get new Android phones, much as they do with Apple iPhones. Commentators have also noted that, in such a rapidly moving market, the latest EC fine comes late in the day as it sanctions conduct that attracted complaints as early as 2011, and critics say Google is now entrenched.

More broadly, the EC has recently published a report entitled "*Competition policy for the digital era*" prepared by three external special advisers, appointed by Commissioner Vestager. The advisers were asked to explore "*how competition policy should evolve to continue to promote pro-consumer innovation in the digital age.*" The report makes a number of recommendations, including proposing new or updated theories of harm relating to the conduct of dominant platforms and discussing the role of data interoperability. It remains to be seen what impact this report will have on the EC's decisional practice in this area.

**'BIG DATA'**

In addition to enforcement pursuant to the more traditional European competition law theories as in the Google cases, competition authorities in Europe are also grappling with the concept of 'big data' — in particular, the antitrust implications of companies collecting and using data on a massive scale.

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**IN SUCH A RAPIDLY MOVING MARKET, THE LATEST EC FINE COMES LATE IN THE DAY AS IT SANCTIONS CONDUCT THAT ATTRACTED COMPLAINTS AS EARLY AS 2011**

01

# Antitrust as a Tool to Regulate the FANG Companies: Differing Approaches in the United States and in Europe

**THE GERMAN COMPETITION AUTHORITY, HAS BEEN A FRONTRUNNER IN TACKLING THE QUESTION OF COLLECTION AND USE OF DATA AS A POTENTIAL COMPETITION ISSUE**

The German competition authority, the Bundeskartellamt (BKartA), has been a frontrunner in tackling the question of collection and use of data as a potential competition issue. In February 2019, the BKartA issued a decision finding that Facebook abused its dominant position in the German social media market. This finding was based on a novel theory of harm at the intersection of competition and data protection law: specifically, that Facebook abused its dominant position by making access to its social networking service conditional on users' consent to the unlimited collection of their personal data from third-party sources. Facebook has issued a statement announcing that it will appeal the BKartA's decision as it considers that the BKartA underestimated the competition that Facebook encounters in Germany and the decision undermines the existing mechanisms for ensuring consistent data protection standards across the EU. Facebook claims that the BKartA is "*trying to implement an unconventional standard for a single company.*"

The BKartA investigation signals an important focus by the competition authorities on the FANGs' market behavior and digital markets more broadly. Commissioner Vestager stated at a recent press conference that the EC is conducting a preliminary investigation into whether Amazon's collection and use of data from smaller merchants on its site could constitute an abuse of dominance is a further illustration of the same trend. These investigations demonstrate that as data has acquired economic value in evolving digital markets, access to it now has significant implications for the competitive landscape of the digital economy.

**MERGER CONTROL — UNDER-ENFORCEMENT OF FANGS?**

In the context of M&A activity, the EC has been criticized for 'under-enforcement' in the tech sector. In particular, the question has been raised whether the ability to properly investigate combinations of internet platforms and digital companies has been hampered because the European Union's (EU) revenue-based jurisdictional thresholds may fail to capture acquisitions of mavericks or start-up companies that have yet to generate significant revenues but that may hold important data, IP, technology or network value. Germany and Austria have addressed this by introducing to their merger control regimes a 'transaction value' threshold, with the hope that measurement of the value that a purchaser places on the target business will capture transactions such as acquisitions of tech or pharmaceutical start-ups. The EC is probably closely monitoring the implementation of the new thresholds in Germany and Austria as it is also examining whether to revise its thresholds in a similar vein.

**LEGISLATION**

In addition to competition law enforcement, the EU has proposed a number of legislative measures aimed at controlling the behavior of the tech giants and online platforms. For example, in September 2018, the EU passed new rules that will force the FANG companies to stop users uploading copyrighted content and to share revenue with writers and musicians. In February 2019, the European Parliament, the Council of the EU and the EC reached a deal on the provisions of the proposed platform-to-business (P2B) law that will govern the FANGs' commercial relations with

**THE EU HAS PROPOSED A NUMBER OF LEGISLATIVE MEASURES AIMED AT CONTROLLING THE BEHAVIOR OF THE TECH GIANTS AND ONLINE PLATFORMS**

smaller businesses who rely on using these online platforms. The EC considers that these are the first rules of their kind, requiring online platforms (approximately 7,000 of them operating in the EU) to be more transparent and fair, for example regarding how they rank search results and why they do not list some services. Where companies list their own products on their platform, they will need to clearly disclose any advantages they grant to their own products. In addition, online platforms cannot suspend or terminate a business user without first providing a statement of reasons. Mariya Gabriel, the EU's Commissioner for the digital economy and society, has stated that the rules "*strike the right balance between stimulating innovation while protecting our European values.*" Indeed, initial reactions from the industry appear to be positive, viewing the proposed law as relatively light-touch. The rules will now need to be formally approved by the Member States and the assembly before becoming law.

## UNITED STATES

In the United States, although enforcement of digital markets has been the subject of significant attention and robust discussion, including among top officials at the U.S. antitrust agencies, actual enforcement action has been limited and the agencies have not publicly announced any active investigations in the past few years. The most recent indication was an investigation by the Federal Trade Commission (FTC) in 2015 into whether Google favors its own search and other services on the Android operating system, though no more recent information has been revealed (including with regards to whether the investigation is ongoing). And while the recent fines imposed on Google by the EC have led to calls for the reopening of the FTC's investigation into Google's search advertising practices that it closed in 2013, the FTC has not publicly commented on any such renewed investigation.

### FEDERAL TRADE COMMISSION

As between the two U.S. antitrust agencies, the FTC appears to be more active in this area. Beginning in September 2018, the FTC launched a series of public hearings on various topics, including competition issues in communication, information and media technology networks; market power, entry barriers and anti-competitive conduct in platform markets; and the intersection of privacy, 'big data' and competition. The FTC is also seeking public comment on these issues, and together these initiatives evidence the FTC's critical assessment of its enforcement policies and priorities as they relate to regulation of digital markets. In February 2019, the FTC also announced the formation of a 17-member 'Technology Task Force,' whose focus is to monitor and investigate U.S. technology markets and to take enforcement actions when appropriate. The new task force will also coordinate with other agency staff in reviewing both proposed and consummated mergers in the industry.

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# Antitrust as a Tool to Regulate the FANG Companies: Differing Approaches in the United States and in Europe

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FTC CHAIRMAN JOSEPH SIMONS HAS ARTICULATED INTEREST IN ENFORCEMENT OF UNILATERAL CONDUCT BY DOMINANT FIRMS IN INDUSTRIES CHARACTERIZED BY NETWORK EFFECTS

With regards to particular priorities, FTC Chairman Joseph Simons has articulated interest in enforcement of unilateral conduct by dominant firms in industries characterized by network effects. Simons has expressly stated that "*some of the significant high-tech platforms*" might be appropriate subjects for the antitrust authorities, and he has also indicated that the FTC is interested in "*mergers of high-tech platforms and nascent competitors.*" Simons' recent statements and the evident focus of the agency on the digital economy — as demonstrated by both the public hearings and the formation of the Technology Task Force — suggest that scrutiny of the major digital platforms may already be under way at the FTC, and that enforcement action may be forthcoming.

Not unlike in the EU, the FTC is also considering the intersection between the privacy, consumer protection and competition implications of data collection. As FTC Commissioner Rebecca Kelly Slaughter recently stated, "[t]*echnological innovation is not only affecting our traditional work in both competition and consumer protection, it is blurring the line between our two traditionally distinct missions.*" Relatedly, FTC Commissioner Rohit Chopra has cautioned that the ability of digital marketplace operators to engage in the mass collection ('data surveillance') and analysis of data presents issues related to collection practices, property rights, the use of predictive analytics and monetization of harvested data. Potential abuse of data by the major digital platforms is therefore an area that the FTC appears to be scrutinizing, as evidenced by the agency's March 2018 announcement of a consumer protection investigation into Facebook's privacy practices. Given the FTC's dual missions, it is uniquely positioned to regulate at the intersection of consumer protection and competition.

**U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION**

The other U.S. antitrust agency, the U.S. Department of Justice Antitrust Division (DOJ or Antitrust Division), appears to be less actively examining innovative enforcement action in this area. Based on recent statements from senior officials, the DOJ appears to be adhering to traditional antitrust enforcement principles and existing analytical frameworks and antitrust tools in considering digital markets and platforms. Makan Delrahim, Assistant Attorney General of the Antitrust Division, has suggested that regulators should carefully apply the antitrust laws to enforcement of big platforms and regulation of data, indicating that new tools and a new approach are not necessary. Comments from other senior Antitrust Division officials have similarly expressed skepticism with regards to expanding the antitrust laws to regulate the digital economy.

A significant divergence in approach between U.S. and EU regulators is apparent in the treatment of dominant firms. As noted above, the topic of 'big data' has received significant attention in the last few years, with calls for scrutiny of the competition and privacy-related implications of the ability of the FANGs to collect and analyze mass amounts of information. At the DOJ, Delrahim has cautioned against categorical treatment of companies that accumulate large amounts of data: "[r]*ecognizing the benefits of data, some commentators have argued in favor of requiring dominant firms to share data with*

*smaller competitors. They argue that a refusal to share data by a dominant firm is anticompetitive. In the United States, however, we do not generally require firms, even dominant ones, to deal with competitors. I am not yet convinced that we should have different rules for data.*" In September 2018, in connection with comments regarding Amazon, Delrahim noted that, "*Just because somebody is big does not mean they have violated the laws nor should we in any way just* [target them] *just because they've succeeded.*" Barry Nigro, Deputy Assistant Attorney General of the Antitrust Division, has similarly made comments suggesting that he does not view data as an asset meriting special regulatory treatment, but rather as one for which he favors letting a competitor that has invested in innovation reap the benefits of that investment.

In addition to enforcement interest at the federal level, regulation of online platforms has also caught the attention of state enforcers in the United States as attorneys general from 14 states met with former U.S. Attorney General Jeff Sessions in September 2018 to discuss cooperation with regards to privacy and antitrust investigations of online platforms. As in the EU, various legislative proposals addressing both privacy- and antitrust-related concerns with the online platforms have been released, though at the time of writing such proposals are in the early stages of the legislative process.

## CONCLUSION

Calls for regulation of the FANGs are not expected to abate on either side of the Atlantic, and continued enforcement by the EC and national competition authorities seems almost guaranteed. While enforcement by antitrust authorities in the United States has been less active to date, the FTC's significant interest and investment in examining consumer protection and competition issues in digital markets suggest that enforcement may be forthcoming. Whether, and the extent to which, antitrust enforcement by antitrust authorities will regulate the conduct of the FANGs so as to impact the competitive landscape in the quickly evolving digital markets remains to be seen.

**THE DOJ APPEARS TO BE ADHERING TO TRADITIONAL ANTITRUST ENFORCEMENT PRINCIPLES AND EXISTING ANALYTICAL FRAMEWORKS AND ANTITRUST TOOLS IN CONSIDERING DIGITAL MARKETS AND PLATFORMS**

# 02

While the Trump administration officially took office on January 20, 2017, the appointment and confirmation of the officials leading the two antitrust agencies has been gradual and staggered: Assistant Attorney General (AAG) for the Antitrust Division of the Department of Justice (DOJ) Makan Delrahim was confirmed in September 2017, while the full slate of new commissioners at the Federal Trade Commission (FTC), including Chairman Joseph Simons, was confirmed in April 2018.

*Continued overleaf*

# U.S. ANTITRUST ENFORCEMENT IN THE TRUMP ADMINISTRATION

**BY DAVID HIGBEE AND REBEKAH CONLON**

# 02

## U.S. Antitrust Enforcement in the Trump Administration

**THE DOJ AND THE FTC HAVE BOTH CHALLENGED HIGH-PROFILE MERGERS AND PRIORITIZED STREAMLINING THEIR MERGER REVIEW PROCEDURES**

Therefore, while the administration is in its third year, articulation and demonstrated enforcement of antitrust policies and priorities are continuing to emerge from the two U.S. antitrust agencies.

Over the past year, the DOJ and the FTC have both challenged high-profile mergers and prioritized streamlining their merger review procedures, in addition to various other developments, which we highlight below.

### DOJ CHALLENGES VERTICAL *AT&T/TIME WARNER* MERGER

Since his confirmation in September 2017, AAG Delrahim has expressed a clear preference for structural remedies in antitrust cases, stating that the DOJ would "*return to the preferred focus on structural relief to remedy mergers that violate the law and harm the American consumer,*" and noting that "*a behavioral remedy supplants competition with regulation; it replaces disaggregated decision making with central planning.*"[1]

In the past year, nowhere was the DOJ's preference for structural remedies more evident than in its challenge to AT&T/DirecTV's proposed US$85 billion acquisition of Time Warner Inc.[2] The *AT&T* case was the DOJ's first attempt to litigate a 'vertical' merger case — that is, a combination involving firms operating at different levels in the value chain — in four decades. Vertical merger enforcement is typically prompted by agency concerns that the combined company will have the ability and incentive to harm competition by foreclosing competitors' access to critical inputs, raising rivals' and customers' prices, curtailing innovation or facilitating coordination among competitors. At trial in *AT&T*, the DOJ's primary argument was that the merger would harm competition by raising rival video distributors' costs on 'must have' Time Warner content. The DOJ also claimed that the combined company could steer customers away from rivals and toward DirecTV, an AT&T subsidiary, by means of a content blackout.

In defense, AT&T and Time Warner advanced arguments that the merger would enable the combined company to compete with companies like Netflix, Amazon, Hulu, and Google that are able to leverage consumer data to target advertisements and bolster revenues. In June 2018, Judge Richard J. Leon of the U.S. District Court for the District of Columbia ultimately sided with AT&T and Time Warner, approving the deal without requiring any remedies. In a lengthy and colorful opinion, Judge Leon held that the DOJ failed to meet its burden of proving an anti-competitive effect of the proposed merger. The DOJ subsequently appealed the district court's decision, but the United States Court of Appeals for the District of Columbia Circuit affirmed it.[3] However, the appellate court notably declined to "*hold that quantitative evidence of price increase is required in order to prevail on a Section 7 challenge*" to a merger, clarifying that "[v]*ertical mergers can create harms beyond higher prices for consumers, including decreased product quality and reduced innovation.*"[4]

*AT&T* highlights both the DOJ's enforcement emphasis on obtaining structural remedies and the difficulty of challenging a merger that does not result in the elimination of a horizontal competitor. Competitive concerns raised by vertical mergers are typically resolved by the government and the merging parties through negotiated remedies,

1. Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, Keynote Address at American Bar Association's Antitrust Fall Forum (Nov. 16, 2017).

2. See *U.S. v. AT&T, Inc.*, 310 F. Supp. 3d 161 (D.D.C. 2018).

3. *U.S. v. AT&T, Inc.*, 916 F.3d 1029 (D.C. Cir. 2019).

4. *Id.* at 1045.

5. Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, Remarks to New York State Bar Association (Jan. 25, 2018).

6. Press Release, U.S. Dep't of Justice, Department of Justice Announces Initiative to Terminate "*Legacy*" Antitrust Judgments (April 25, 2018).

7. Andrew Finch, Principal Assistant Attorney General, U.S. Dep't of Justice, Remarks at Heritage Foundation (Jan. 23, 2018).

rather than by court order following prolonged litigation. For many vertical mergers, government enforcers are willing to accept behavioral remedies, such as agreements to modify business practices. In certain cases, structural remedies such as divestitures are required, but attempts to block vertical mergers entirely are exceedingly rare. Here, however, Time Warner offered — and the DOJ rejected — a behavioral remedy in the form of an agreement to arbitrate pricing disputes between the company and distributors, similar to an arbitration commitment the DOJ accepted in the 2011 *Comcast/NBCUniversal* merger. Despite AT&T's victory, the case indicates both the DOJ's willingness to challenge vertical mergers, and that an enforcer or private plaintiff might still succeed in challenging a merger without putting forth a quantitative model predicting that the merger will lead to price increases.

## REVISITING CONSENT DECREES

As another example of the DOJ's preference for and focus on structural remedies, in early 2018 AAG Delrahim announced several provisions that the DOJ will include in consent decrees going forward that are intended to make the decrees more easily enforceable and less regulatory in nature.[5] The DOJ will now include provisions in consent decrees that establish that consent decree violations may be proven by a preponderance of the evidence, rather than by the more stringent clear and convincing evidence standard. The DOJ will also include provisions that will allow the government to seek an extension of the consent decree term if a court finds a violation of the decree, and that will require defendants to reimburse the government for costs related to successful enforcement. Additionally, the DOJ can now terminate consent decrees after providing notice to the court and to the defendants.

Separately, the DOJ has announced an initiative to terminate outdated legacy antitrust judgments that no longer serve their intended purpose to safeguard competition in light of industry, economic and legal changes.[6] To aid in fostering compliance with and enforcement of existing consent decrees, the DOJ announced the creation of an Office of Decree Enforcement. These changes reflect AAG Delrahim's view that the Antitrust Division is an enforcer of the antitrust laws rather than an industry regulator.

## TARGETING NO-POACH AGREEMENTS

In early 2018, the DOJ highlighted so-called 'no-poach' agreements as an enforcement priority.[7] The DOJ clarified that naked no-poach agreements — that is, agreements between firms not to hire each other's employees, when the firms are not parties to a legitimate collaboration — are *per se* unlawful, as they eliminate competition among employers for labor.

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**NAKED NO-POACH AGREEMENTS ARE *PER SE* UNLAWFUL**

02

# U.S. Antitrust Enforcement in the Trump Administration

**THE MFP AIMS TO ESTABLISH WORLDWIDE PROCEDURAL NORMS IN COMPETITION ENFORCEMENT AND TO ENSURE COMPLIANCE AMONG INTERNATIONAL COMPETITION ENFORCERS**

The Division's January 2018 announcement that it expected to initiate several enforcement actions against no-poach agreements followed on its October 2016 announcement that no-poach agreements may be criminally prosecuted. Specifically, the DOJ has indicated that it intends to criminally prosecute no-poach agreements that began or continued after the October 2016 announcement, and will pursue civil enforcement actions against no-poach agreements that entirely predate the 2016 announcement.

## CREATING AN INTERNATIONAL ENFORCEMENT FRAMEWORK

In June 2018, the DOJ announced the creation of an international enforcement framework called the Multilateral Framework on Procedures in Competition Law Investigation and Enforcement (MFP).[8] The MFP was developed in cooperation with several of the DOJ's international counterparts, along with the FTC and the State Department, and aims to establish worldwide procedural norms in competition enforcement and to ensure compliance among international competition enforcers.

The MFP further seeks to bridge the gaps that exist between enforcers around the world. It is based on existing cooperation agreements between antitrust authorities, competition chapters from free trade agreements, and procedural principles common among international organizations.

8. Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, Remarks on Global Antitrust Enforcement at the Council on Foreign Relations (June 1, 2018).

9. *Id.*

10. Press Release, U.S. Dep't of Justice, New Multilateral Framework on Procedures Approved by the International Competition Network (April 5, 2019).

11. Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice, Remarks at the 2018 Global Antitrust Enforcement Symposium (September 25, 2018).

It "*includes important due process commitments regarding: non-discrimination, transparency, timely resolution, confidentiality, conflicts of interest, proper notice, opportunity to defend, access to counsel, and judicial review.*"[9] After receiving feedback from other jurisdictions around the world, the DOJ sought to implement the framework through the International Competition Network (ICN). The ICN unanimously approved a framework premised on the MFP in April 2019.[10]

## STREAMLINING DOJ MERGER REVIEWS

In September 2018, the DOJ announced reforms intended to streamline the merger review process, such that the majority of merger reviews will take no longer than six months.[11] The reforms were announced after AAG Delrahim noted that the average length of significant merger reviews had risen to nearly eleven months in 2017, up from approximately seven months in 2013.

Acknowledging that the length of merger investigations will continue to vary on a case-by-case basis, Delrahim outlined the following steps the DOJ is taking to modernize the merger review process:

- offering an initial introductory meeting with the parties and Antitrust Division staff to allow the staff investigating the deal to gain a better understanding of the parties' business rationale and to identify the key facts early in their analysis;
- publishing a model voluntary request letter that addresses the production of key documents in the initial waiting period to resolve information imbalances that exist between the parties and the DOJ;
- implementing a system that tracks what occurs when the parties pull and refile their Hart-Scott-Rodino Act filings in order to help the DOJ staff make the best use of the additional time provided by the pull and refile; and
- publishing a model timing agreement for merger reviews and modernizing timing agreements so that the review process involves fewer custodians and fewer depositions, and shortening the length of time between the parties' certification of compliance and the DOJ's decision on the merger.

Delrahim made clear that increased expectations of the merging parties accompany these changes: the DOJ expects parties to produce documents and data faster and earlier in the compliance period and to be more discerning with respect to their handling of privilege logs. Accordingly, parties should be prepared to comply swiftly with the DOJ's requests.

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**THE DOJ EXPECTS PARTIES TO PRODUCE DOCUMENTS AND DATA FASTER AND EARLIER IN THE COMPLIANCE PERIOD AND TO BE MORE DISCERNING WITH RESPECT TO THEIR HANDLING OF PRIVILEGE LOGS**

02

# U.S. Antitrust Enforcement in the Trump Administration

**THE PURPOSE OF THESE HEARINGS IS TO IMPROVE THE FTC'S ABILITY TO MAKE POLICY AND ENFORCEMENT DECISIONS BASED ON EVIDENCE AND ANALYSIS, WITH ASSISTANCE FROM PUBLIC PARTICIPATION**

## FIVE NEW FTC COMMISSIONERS APPROVED

In April 2018, the Senate confirmed five nominees to serve on the FTC, restoring a full slate of commissioners for the first time since 2015. FTC Chairman Joseph Simons, formerly an antitrust attorney in private practice who is expected to serve as a steady hand at the agency, has suggested that the FTC should devote significant resources to examining whether its merger enforcement practices are too lenient and has demonstrated a particular interest in exploring enforcement in the digital economy, including online platforms. Commissioners Noah Phillips, Rebecca Slaughter, Rohit Chopra and Christine Wilson are expected to pursue their own specific areas of enforcement interest under the FTC's dual consumer protection and competition mandate.

## PUBLIC HEARINGS COVER COMPETITION IN THE 21ST CENTURY

The FTC held a series of public hearings to examine the potential impact of economic, political and technological shifts on competition and consumer protection law and policy. The hearings, which began in September 2018 and continued into April 2019, covered topics such as the current state of competition and consumer protection law and enforcement; competition and consumer protection issues in information and media technology networks; privacy, 'big data' and competition; analysis of vertical mergers; and the FTC's investigative, enforcement, and remedial processes. Resisting the notion that antitrust policy and enforcement decisions should be driven by ideology, Chairman Simons has emphasized that the purpose of these hearings is to improve the agency's ability to make policy and enforcement decisions based on evidence and analysis, with assistance from public participation.

## FTC ANNOUNCES NEW MODEL TIMING AGREEMENT FOR MERGER REVIEWS

In August 2018, the FTC announced a new Model Timing Agreement for its merger reviews.[12] Timing agreements outline assurances regarding the timing of various phases in a merger investigation. The Model contains several provisions that warrant attention from parties, including:

- an agreement not to close the deal until the FTC has had 60 to 90 days to review the transaction after the parties have substantially complied with a Second Request, although this timeframe will vary on a case-by-case basis;
- a requirement of 30 calendar days' notice before the parties certify substantial compliance with a Second Request or close the transaction;

12. U.S. Fed. Trade Comm'n, Timing is everything: The Model Timing Agreement (Aug. 7, 2018).

13. See *Fed. Trade Comm'n v. Tronox Ltd.*, 332 F. Supp. 3d 187 (D.D.C. 2018).

**IF THE PARTIES' OWN DOCUMENTS CONTRADICT THEIR PROPOSED MARKET DEFINITIONS OR DEFENSES, THEY ARE IN FOR AN UPHILL BATTLE**

- a requirement to identify priority custodians within five days of execution of the timing agreement and to make substantially complete document productions from priority custodians at least 30 business days before the parties certify substantial compliance with a Second Request; and
- a stipulated temporary restraining order and agreement not to seek a declaratory judgment against the FTC concerning the transaction.

The FTC has made clear that it anticipates that future timing agreements will align with the Model. However, parties should be aware that timing agreements do not strictly limit the FTC, and enforcers frequently request (and expect) additional time to review transactions.

## DISTRICT COURT BLOCKS *CRISTAL/TRONOX* MERGER

In September 2018, after the FTC sought to block the merger of Tronox Limited's proposed US$2.4 billion acquisition of Cristal's titanium dioxide ($TiO_2$) business, Judge Trevor McFadden of the U.S. District Court for the District of Columbia granted the agency's motion for preliminary injunction, finding that the FTC showed that the proposed transaction was likely to impede competition in North America for chloride-process $TiO_2$.[13]

Noting that the market for $TiO_2$ has been characterized as an oligopoly dominated by five companies and that there are no substitutes for the product, the Court concluded that the proposed five-to-four transaction would increase concentration in an already concentrated market. The court was further convinced by evidence that the transaction would likely lead competitors to strategically withhold output to avoid price competition.

Judge McFadden rejected the parties' argument that competition from Chinese producers would mitigate any potential anti-competitive effects from increased market concentration, finding no indication that entry from Chinese firms would occur rapidly enough to bolster competition. He also found that the parties' internal documents supported the FTC's proposed market definition.

The *Tronox* decision highlights the evidentiary value of contemporaneous, internal documents in merger litigations. If the parties' own documents contradict their proposed market definitions or defenses, they are in for an uphill battle. Moreover, the decision shows that courts will carefully consider the relative likelihood and timing of new entry in merger cases.

## KEY TAKEAWAYS

Antitrust enforcers in the second year of the Trump administration appeared focused on reforming merger review processes and obtaining structural remedies where they allege harm to competition. While some observers expected to see the new administration's appointees pursuing overtly populist or ideological agendas, enforcement has been generally mainstream and predictable, with the notable exception of the more aggressive challenge of the *AT&T/Time Warner* transaction. However, with the President and leading members of Congress repeatedly calling for more aggressive antitrust enforcement in various industries, we should not be surprised if enforcement during the remainder of the Trump administration reflects the generally heightened profile of the antitrust laws in the public dialogue.

03

Very significant fines have been levied for procedural breaches of the merger rules in the last year or so. Facebook was fined €110 million in 2017 for providing misleading information and Altice was fined €125 million in 2018 for gun-jumping. The European Commission (EC) has gotten much tougher on procedural violations of the merger control rules. But it's not just the EC. The U.S. agencies have also continued to penalize gun-jumping heavily, and several other antitrust authorities across the world are following suit.

*Continued overleaf*

# TOUGHER IMPLEMENTATION OF PROCEDURAL RULES IN MERGER CONTROL

**BY JAMES WEBBER AND CAROLINE PRÉEL**

03

# Tougher Implementation of Procedural Rules in Merger Control

**AGENCIES, INCLUDING THE EC, HAVE BECOME MORE RECEPTIVE TO WAIVER REQUESTS FROM THE STANDSTILL OBLIGATION OR WORKING WITH PARTIES TO SPEED UP CLEARANCE IN UNPROBLEMATIC CASES**

Such aggressive enforcement of procedural rules makes merger control more difficult and more risky to manage at a time when foreign investment control and substantive merger review are also tightening.

## GUN-JUMPING

Most merger control regimes require parties to await clearance before they execute a notifiable transaction (the standstill obligation). Failure to comply with this obligation is called gun-jumping and can lead to significant fines.

While the EU and U.S. competition authorities have remained active in enforcing gun-jumping cases,[1] other competition authorities across the world have started focusing on gun-jumping enforcement. For example, at the time of writing, the Chinese competition authority has published six penalty decisions related to gun-jumping in 2018, and publicly announced 17 gun-jumping cases in 2017. China clearly ramped up its enforcement against non-notifiers, not just imposing fines but also 'naming and shaming' infringing companies. In Japan in 2016, the Japan Fair Trade Commission (JFTC) formally criticized the two-step structure used in *Canon/Toshiba Medical Systems* (TMS), whereby Canon used a so-called 'warehousing' structure involving an interim buyer, which allowed it to acquire TMS prior to obtaining the relevant merger approvals.[2] Even though the JFTC did not impose a penalty on Canon, the public announcement served as a warning to others contemplating similar structures. Other national competition authorities such as Denmark, Austria, Greece, Lithuania, Romania, Hungary, Portugal, Moldova, Philippine, Indonesia, India, Mexico and Brazil have also been active in enforcing gun-jumping in the last year.

Even in jurisdictions without a standstill obligation in their merger control regimes, procedural rules are being more strictly implemented. For example, in July 2018, the Australian competition authority brought proceedings for the first time for gun-jumping, against Cryosite Limited in relation to its entry into an asset sale agreement with Cell Care Australia Pty Ltd.

The majority of gun-jumping cases involve straightforward failure to notify. There have, however, also been more subtle cases where authorities have paid closer attention to whether merging parties, between the signing and closing of the deal, have started to integrate part of the deal too early. This is what happened in the European Commission's *Altice* case, attracting one of the biggest fines ever for gun-jumping (almost €125 million). The EC concluded that Altice gave instructions on the marketing campaign of the target, benefitted from a sales and purchase agreement with 'ordinary course' business covenants that went beyond what was necessary and were not sufficiently caveated by materiality. Further, Altice had sought detailed commercially sensitive information outside a clean team arrangement. Together these things amounted to an exercising control prior to clearance and hence gun-jumping.

Similarly, the U.K. Competition and Market Authority (CMA) imposed a £100,000 fine in June 2018 against Electro Rent for the termination of the lease for its U.K. premises in violation

1. The EC recently imposed a record-breaking fine on Altice for gun-jumping and is still investigating into potential gun-jumping in Canon's acquisition of Toshiba Medical Systems (TMS). Similarly, the U.S. agencies recently obtained a US$600,000 penalty for gun-jumping violations relating to Duke's acquisition of Osprey.

2. This case involved a two-step acquisition procedure known as 'warehousing.' On signing, Canon acquired a single non-voting share in TMS, for which it paid effectively the full value of TMS. At the same time, an interim buyer acquired voting shares in TMS for a nominal amount. Canon also took options over these shares. Canon intended to have control of TMS only when it exercised the options following notification and merger approval.

3. The severity of risk posed by breaching gun-jumping rules varies across the different regimes. In the EU, the EC can impose a fine of up to 10% of worldwide turnover. Similarly, in the U.S., the Department of Justice (DOJ) can impose fines of up to US$41,484 per day, per company for gun-jumping offenses. In China, however, the average amount of the fine imposed per penalized company is low (CNY190,000). It remains to be seen whether the State Administration for Market Regulation (the new agency consolidating the former three antitrust enforcement agencies) will take a stricter approach on gun-jumping cases and increase the fine on gun-jumping.

of an interim enforcement order — effectively the standstill obligation once an inquiry starts in the U.K.'s merger regime. These examples demonstrate that it is more important than before to take care with 'ordinary course' covenants and that the risks of closing over filing requirements are greater than they were previously.[3]

There are ways to manage gun-jumping risks. Some agencies, including the EC, have become more receptive to waiver requests from the standstill obligation or working with parties to speed up clearance in unproblematic cases. The EC has granted standstill derogations in almost all cases where the purpose is preserving the financial or competitive viability of the target business. Comparable derogations also exist in other jurisdictions such as Portugal, Greece, Norway, Romania, Brazil, Switzerland, etc.

## REQUESTS FOR INFORMATION — INTERNAL DOCUMENTS

The tougher implementation of procedural rules can also be seen in the increasing use of powers to request internal documents. In Australia, for example, the new merger review process recently broadened the competition authority's powers to obtain information, documents and evidence to improve evidence gathering. The CMA is also not afraid to aggressively pursue information on high-profile mergers.

In the EU, the amount of documentation that must be provided in difficult cases has increased dramatically. The *Bayer/Monsanto* review in 2018 involved a disclosure of more than a million documents. This massive disclosure obligation sits in addition to the enormous amount of information required in the 'Form CO.' Disclosure of such a large volume of internal documents creates a challenge for parties' to ensure consistency with their antitrust defense — as well as difficulties managing the review timetable. Requesting documents allows the EC to suspend the review of a merger ('stop the clock'), which significantly delays the clearance of the deal. In 2017, the EC has suspended the timetable in nearly half of the in-depth reviews initiated or concluded by the EC in 2017 (5 out of 11), and suspensions have ranged from 7 to 96 working days.

Even where authorities demand voluminous data and internal documents within tight time frames, parties need to pay careful attention to the documents provided, given that they can face heavy penalties for failing to disclose sufficient or correct information during reviews, or if they provide misleading responses to requests for information. On this basis, the EC has recently imposed €110 million fine on Facebook and is currently investigating against Merck and Sigma-Aldrich, and against General Electric and LM Wind. In each case, the EC alleges that the companies' failure to provide information impacted the ultimate outcome of the merger review. Similarly in Brazil, Conselho Administrativo de Defesa Econômica (CADE) imposed fines of €10.9 million on JBS and Rodopa for providing misleading information during the merger analysis. In November 2017, the CMA fined hungryhouse €23,000 for failing to adequately respond to an information request during the CMA's review of its acquisition by Just Eat.

Document review exercises in complex deals require careful project planning and sufficient resources for preparing and verifying submissions are watertight within the deadlines. Disclosure of facts and evidence must be full and accurate, even for future projects on product development or innovation. Parties should have a good understanding of what their documents say and be prepared to address documents that do not support their arguments and the defense presented during notification.

## LEGAL PRIVILEGE

Finally, parties may well be aware that the scope of legal privilege varies from one jurisdiction to another. This proves particularly challenging in cross-border deals where disclosure in one jurisdiction may lead to disclosure to authorities and courts in other jurisdictions. Records of legally privileged materials excluded from disclosure and the rationale used for claiming privilege can help justify future privilege claims.

## CONCLUSION

For companies with multi-jurisdictional operations engaging in complex transactions, evaluating the risks posed by procedural rules across jurisdictions can be particularly challenging; not only do the rules frequently lack clarity, but assessment by the regulators takes place on a case-by-case basis and there are often stark differences in approach between regimes. Competition authorities have recently shown that they are likely to enforce the rules rigorously as a deterrent to others. Given the increased enforcement activity from competition authorities across the world, businesses must be aware of the risks and take measures to mitigate these based on the individual circumstances of their case.

# 04

The Committee on Foreign Investment in the United States (CFIUS) is a committee of representatives of nine federal agencies tasked with reviewing investments in, or acquisitions of, U.S. companies by foreign investors for national security concerns and recommending to the President whether to block such transactions. CFIUS has traditionally lived in the shadows of the Department of Justice's and Federal Trade Commission's antitrust merger reviews, but with the rise of foreign investment in U.S. companies, particularly Chinese investment in the high-tech sector, and heightening global trade tensions, CFIUS has stepped into the limelight with a more aggressive posture, and Congress has enacted legislation to grant CFIUS new powers.

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# CFIUS REFORM

## A NEW CONCERN FOR FOREIGN INVESTORS

BY DJORDJE PETKOSKI AND BRIAN HAUSER

# 04

# CFIUS Reform: A New Concern for Foreign Investors

**CFIUS HAS STEPPED INTO THE LIMELIGHT WITH A MORE AGGRESSIVE POSTURE**

Between 2005 and 2015 (the only years for which reported data is available), the President blocked only three transactions based on national security concerns, although additional transactions were abandoned before the President formally blocked them. In the last two years, however, Presidents Obama and Trump have exercised their authority with increasing frequency, blocking four transactions involving Chinese foreign investors between December 2016 and March 2018.

Responding to increasing foreign investments in U.S. companies that, in Congress's view, could degrade the United States' technological advantage and imperil national security, Congress enacted the Foreign Investment Risk Review Modernization Act (FIRRMA) in August 2018. FIRRMA and the related implementing regulations affect many changes to CFIUS's review of foreign investments in U.S. companies, but among the most important are the expansion of CFIUS's jurisdiction and the new obligations imposed on foreign investors.

## FIRRMA EXTENDS CFIUS'S JURISDICTION

Prior to FIRRMA, CFIUS's national security review extended to 'covered transactions,' which were defined as any transaction that would result in ***foreign control*** of a U.S. business. 'Control' was not defined strictly by the size of its ownership stake but was construed broadly to encompass a foreign investor's ability to direct important matters of the U.S. company, such as selling the company, entering or terminating contracts, or closing production facilities. Even with this broad definition, U.S. regulators became concerned that a foreign investor's purchase of a ***noncontrolling*** interest could pose a national security threat in some contexts and that such transactions were evading CFIUS review. FIRRMA retains the functional definition of control, but expands CFIUS's jurisdiction to permit the review of transactions in which a foreign investor acquires a noncontrolling interest in a U.S. company involved with 'critical technologies,' 'critical infrastructure' or 'sensitive personal data of U.S. citizens' and will, among other things, have access to 'material nonpublic technical information.'

Although FIRRMA expands CFIUS's jurisdiction in many ways, it also provides a new exemption for ***passive*** investors. In particular, FIRRMA clarifies that a foreign investor who participates in a committee or advisory board of an investment fund may be deemed to be a passive investor outside of CFIUS's jurisdiction. To qualify for this exemption, the investment fund and the foreign investor must meet several requirements. First, the investment fund must be managed exclusively by a general partner who is not a foreign person. Second, the fund's advisory board or committee in which the foreign investor participates cannot have the authority to control investment decisions of the fund or investment decisions of the general manager. Third, the foreign investor cannot otherwise have the ability to control the investment fund by influencing important functions. Lastly, the foreign investor will not gain access to material nonpublic technical information through its involvement with the advisory board or committee.

## CFIUS ROLLED OUT A PILOT PROGRAM THAT REQUIRES FOREIGN INVESTORS TO SUBMIT A NOTIFICATION IN SOME SITUATIONS

Overall, outside of certain passive investments, FIRRMA expands CFIUS's jurisdiction to cover several additional categories of transactions involving foreign investors. The extension of CFIUS's jurisdictional reach has already introduced several new complexities for foreign investors, and it portends continued aggressive enforcement by CFIUS, particularly when the transaction involves a foreign buyer's access to sensitive technology.

### CFIUS FILINGS ARE NOW MANDATORY FOR CERTAIN TRANSACTIONS

Historically, CFIUS operated an entirely voluntary filing regime. This meant that for any transaction, a foreign investor could choose to notify CFIUS of its transaction before closing, or it could close the transaction without notifying CFIUS. Pre-closing notification to CFIUS was beneficial to foreign investors because once CFIUS reviewed and approved a transaction and the President did not block it, the President could not later order that the transaction be reversed. On the other hand, if a foreign investor did not submit a pre-closing notification and CFIUS and the President later determined that the transaction adversely impacted national security — even months or years after closing — the President could order the parties to unwind the transaction, including by requiring costly and onerous divestitures. Pre-closing notification thus provided certainty to the transacting parties.

FIRRMA and the related implementing regulations issued by CFIUS maintain the voluntary filing system for most transactions involving foreign investors. Because CFIUS determined that foreign investments in 'critical technologies' in certain industries pose an imminent national security threat, CFIUS rolled out a pilot program that ***requires*** foreign investors to submit a notification in some situations. Under the pilot program, a foreign investor must submit a declaration to CFIUS at least 45 days before closing on any transaction in which the foreign investor would acquire control of a company that develops, or gain access to material nonpublic information about, critical technology related to any one of 27 specifically listed industries. These industries include semiconductor manufacturing, wireless communications equipment manufacturing and missile propulsion manufacturing. For purposes of the pilot program, 'critical technologies' are defined as technologies that are subject to various export control regulations, such as the International Traffic in Arms Regulations or the Export Administration Regulations.

The new requirement for mandatory filings with respect to critical technologies, and how that requirement impacts deal risk and timing, may only be the beginning. FIRRMA authorizes CFIUS to implement other pilot programs and additional regulations to effectuate FIRRMA's goals. Accordingly, foreign investors must be aware of the changing landscape of CFIUS's national security review.

### TAKEAWAY: FOREIGN INVESTORS WILL FACE NEW CHALLENGES WHEN INVESTING IN SOME U.S. COMPANIES

CFIUS recognizes that foreign investment in the U.S. is generally beneficial because it provides U.S. companies with access to capital and creates jobs. FIRRMA and CFIUS's related regulations seek to balance these benefits against national security concerns stemming from foreign investment in certain types of U.S. companies. CFIUS is expected to continue its aggressive posture in investigating foreign investments, particularly those in the high-tech and military sectors. Foreign investors must be cognizant of these new requirements and consider how they affect the parties' ability to close the deal. Foreign investors should also be aware that CFIUS will likely continue to promulgate new regulations to implement FIRRMA that will impact different industries and may implement new disclosure requirements.

05

In a number of jurisdictions, antitrust authorities may challenge consummated mergers even when the parties were not required to report those deals in the first instance or where the parties reported the deals, but the authorities did not initiate challenges after their pre-closing review. This article identifies some examples of merger challenges in these circumstances and other antitrust risks that arise with nonreportable mergers, and discusses lessons parties should draw from the antitrust authorities' enforcement practices.

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# RISKS FOR CONSUMMATED DEALS EVEN WHERE NO NOTIFICATION REQUIREMENTS

**BY DJORDJE PETKOSKI, WILLIAM HAUN AND CAROLINE PRÉEL**

# Risks for Consummated Deals Even Where No Notification Requirements

# 05

**SECTION 7 OF THE CLAYTON ACT ALLOWS ANTITRUST AUTHORITIES TO CHALLENGE THE ACQUISITION OF STOCK OR ASSETS, AND WITHOUT REGARD TO WHETHER THE ACQUISITION REQUIRES A PRE-MERGER NOTIFICATION**

## UNITED STATES

Section 7 of the Clayton Act — which was enacted many years before the Hart-Scott-Rodino (HSR) Act pre-merger notification statute — allows antitrust authorities to challenge the acquisition of stock or assets, and without regard to whether the acquisition requires a pre-merger notification. Indeed, the antitrust agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC), have investigated and challenged several transactions that were not reportable under the HSR Act or that were reported by the parties but not challenged by the agencies following an initial, pre-closing review.

For example, in 2017 the DOJ sued Parker-Hannifin Corp. and CLARCOR Inc., alleging that Parker-Hannifin's US$4.3 billion acquisition of CLARCOR seven months prior created an unlawful monopoly for aviation fuel filtration systems. The DOJ sought a court order to partially unwind the deal, even though the parties went through the HSR notification process and the Act's waiting period expired. The timing of the DOJ's challenge was a function of when it learned about the overlap in fuel filtration products. The DOJ learned about overlaps in this area after its initial review and the expiration of the waiting period, as a result of post-merger complaints from customers. The case is a reminder that merging parties may need to be proactive in addressing certain overlaps during the review process, as well as anticipating and addressing potential customer complaints.

Earlier in 2017, the FTC challenged a consummated deal that was not subject to HSR reporting requirement. *FTC v. Mallinckrodt*, No. 1:17-cv-00120 (D.D.C. filed Jan. 18, 2017). In particular, the FTC alleged that Mallinckrodt subsidiary Questcor Pharmaceuticals, Inc. harmed competition by acquiring Synacthen Depot (a possible competitor to a Questcor product). In exchange for settling the allegations, Mallinckrodt agreed to pay US$100 million in equitable relief and sublicense Synacthen Depot for certain medical purposes.

In May 2019, following a full hearing on the merits, Chief Administrative Law Judge D. Michael Chappell upheld the FTC's challenge to a consummated, nonreportable transaction between manufacturers of microprocessor prosthetic knees. In September 2017, Otto Bock acquired Freedom Innovations for an undisclosed sum. The FTC challenged the transaction in December 2017 alleging that Freedom Innovations was Otto Bock's closest competitor. Finding that competition between Otto Bock and Freedom Innovations led to lower prices for customers and increased innovation in the relevant market for microprocessor prosthetic knees, Judge Chappell concluded that the FTC met its burden of showing that the merger may substantially lessen competition. Judge Chappell's order, subject to appeal, would require Otto Bock to divest all of Freedom Innovations' assets to a buyer approved by the FTC.

These cases are a reminder that regardless of the thresholds for HSR pre-merger notifications — there is no *de minimis* exception to the antitrust laws that would allow a deal to avoid antitrust scrutiny simply because it fell below the pre-merger notification threshold. When a nonreportable merger is likely to raise significant antitrust concerns or be subject to significant customer complaints, the parties should consider the risk of challenge and whether that risk can be mitigated effectively by bringing the merger to the agencies' attention before closing.

## UNITED KINGDOM AND AUSTRALIA

In the U.K. — and this is expected to remain post-Brexit — merger filings are done voluntarily. However, where the parties decide not to notify, they risk that the Competition and Markets Authority (CMA), within the four-month period following a transaction becoming public, will refer the merger for a Phase II review. Should that happen, an adverse report could follow, requiring divestment or other remedies. In some cases, where a merger is completed at the time of notification or while the review is in progress, the remedy imposed may require unwinding the deal.

This is what happened in 2016, when the CMA ruled against Intercontinental Exchange's (ICE) 2015 buyout of Trayport. The CMA concluded that the merger would result in substantially lessened competition in the supply of trade-execution services and trade clearing services to energy traders. Specifically, the CMA found that ICE could use its ownership of Trayport's trading platform to reduce competition between itself and rivals in wholesale energy trading. The CMA found that ICE's divestiture of Trayport was the only effective remedy.

This case is the first vertical merger since the CMA's 2014 formation that resulted in a full divestiture order in the U.K. It demonstrates that the risk of an acquisition being blocked does exist, even when pre-merger notification is voluntary.

Similar examples exist in other jurisdictions where merger notification is voluntary. The Australian Competition & Consumer Commission (ACCC), for example, in July 2018, blocked the proposed acquisitions of Aurizon's Queensland intermodal business and its Acacia Ridge Terminal by Pacific National. In face of ACCC opposition the Queensland intermodal business transaction fell through, with the asset ultimately acquired by Linfox in October 2018. Until the Federal Court removed constraints on the Acacia Ridge Terminal transaction on May 15, 2019, Aurizon had been prevented from closing and had to continue operating its loss-making intermodal freight business.

CONTINUED >

**WHERE A MERGER IS COMPLETED AT THE TIME OF NOTIFICATION OR WHILE THE REVIEW IS IN PROGRESS, THE REMEDY IMPOSED MAY REQUIRE UNWINDING THE DEAL**

05

# Risks for Consummated Deals Even Where No Notification Requirements

**GUN-JUMPING CASES CAN BE BROUGHT AGAINST MERGING PARTIES THAT DO NOT EVEN CONSUMMATE THEIR DEAL**

## OTHER PRE-MERGER RULES APPLY

Moreover, even where a transaction is not reportable, or does not require agency clearance, the parties must still comply with other competition rules in the pre-merger phase. This is true in the U.S., where the FTC issued updated guidance in March 2018 regarding information-sharing between merging parties before a transaction closes.

The guidance addressed what antitrust authorities refer to as gun-jumping, *e.g.*, pre-closing sharing of competitively sensitive information or coordinated business activities, which can violate the HSR Act as well as substantive antitrust laws. The guidance explains that "[u]*nlawful gun jumping may include the exchange of competitively sensitive information, but it typically also involves actual coordination of business activities*" prior to HSR clearance. The guidance included a discussion of past enforcement activities that illustrate, among other things, that the FTC will bring antitrust enforcement actions against anti-competitive conduct that is separate from the merger's own competitive effects. For example, the guidance highlighted the FTC charging aluminum tube manufacturers with FTC Act violations because they shared competitively sensitive information during due diligence. The FTC then separately challenged the merger itself as anti-competitive. Ultimately, the FTC required the buyer to divest two mills.

**IT IS CRUCIAL FOR THE MERGING PARTIES TO REMAIN INDEPENDENT COMPETITORS UNTIL CLOSING**

Similar rules apply in other jurisdictions. In July 2018, the ACCC instituted its first gun-jumping case, against Cryosite Limited (Cryosite), in connection with Cryosite's sale of its assets to Cell Care Australia (Cell Care). The two companies were competitors in cord blood and tissue banking services. Cryosite had agreed to refer all new customers to Cell Care even before the acquisition was completed, while Cell Care agreed that it would not market to Cryosite's existing customers. According to the ACCC, these restraints amounted to cartel conduct because they restricted or limited the supply of cord blood and tissue banking services, and allocated potential customers between Cell Care and Cryosite. On February 13, 2019, the Australian Federal Court fined Cryosite Limited A$1.05 million for engaging in cartel conduct in its asset sale agreement with Cell Care Australia Pty Ltd. Although, in January 2018, the parties announced that they would not go ahead with the proposed acquisition. Under Australian law, penalties can be both civil and criminal (up to 10 years imprisonment). Corporate penalties can be the greater of A$10 million (circa US$7 million), three times the total benefit from the violation, or 10% of the Australian annual turnover.

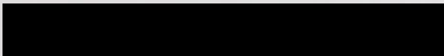
These enforcement actions serve as a reminder of gun-jumping risks regardless of whether a deal is subject to pre-merger notification requirements. Indeed, gun-jumping cases can be brought, as in the case against Cryosite, against merging parties that do not even consummate their deal.

## AVOIDING CLOSING RISKS

The key lesson from the above examples is that parties should not presume a merger will not be subjected to antitrust scrutiny or challenged merely because it was not reportable or because it was reported but not challenged following the original pre-closing agency review. On the contrary, even in these circumstances, parties should manage potential investigation and closing risks, in the event that some aspect of the deal faces agency scrutiny. Merging parties may want to consider advising the antitrust authorities of potential overlaps created by their deal and be prepared to address anticipated customer complaints. Anticipating those concerns by presenting a positive competitive analysis — including taking customer views of the deal into account — may avoid post-merger challenges.

It is also crucial for the merging parties to remain independent competitors until closing. Procedures should be considered to ensure the merging parties do not share competitively sensitive information (*e.g.*, current and future prices, customers, or strategies) and that they do not begin to coordinate their market actions before closing. Understanding the potential for antitrust exposure before proceeding with a transaction is essential. Without such an appreciation, parties may be confronted with lengthy, unanticipated, and costly investigations and/or litigation, and could even be required to unwind their deal.

# 06



The European Commission (EC) is increasingly invoking conglomerate theories of harm in its merger reviews. The complexity of these theories is resulting in more in-depth Phase 2 reviews and behavioral access commitments are relatively common for conglomerate mergers in the high-tech space.

*Continued overleaf*

# CONGLOMERATE EFFECTS

## AN EU RESURGENCE?

**BY MATTHEW READINGS AND SIMON THEXTON**

06

# Conglomerate Effects: An EU Resurgence?

**THE MERGED ENTITY WILL BE ABLE TO LEVERAGE A STRONG MARKET POSITION IN ONE PRODUCT MARKET ACROSS TO A COMPLEMENTARY OR SIMILAR PRODUCT MARKET IN WHICH THE MERGING PARTY IS ALSO ACTIVE**

## WHAT IS A CONGLOMERATE MERGER?

A conglomerate merger is a merger between companies active in closely related, but not competing, markets. Typically this involves the supply of complementary products or products that belong within the same product range.

## WHAT ARE CONGLOMERATE EFFECTS?

Conglomerate effects is the theory that the merged entity will be able to leverage a strong market position in one product market across to a complementary or similar product market in which the merging party is also active. The merged entity will be able to target a largely overlapping customer base for products that have a similar or related end use.

The main competition concern associated with a conglomerate theory of harm is anti-competitive foreclosure. Traditionally this has been alleged through 'tying' and 'bundling.' Tying is where a customer purchasing one product is also required to purchase a separate, and normally related, product. Bundling is where the supplier of a product will only sell that product with one or more related products. The supplier will not sell the components on an individual basis or will only do so on worse terms.

Tying and bundling are common commercial practices that can be pro-competitive. However, in certain circumstances these practices can have a detrimental impact on a potential rivals' ability to compete. In the long run this may reduce competitive pressure on the merged entity and increase prices.

More recently, interoperability has been an integral feature of a conglomerate theory of harm. The concern is that the merged entity will degrade essential interoperability of rival products compared to captive use. If interoperability is important for a rival to offer the downstream product, then this can be an effective foreclosure strategy. This is particularly relevant for software and other technological capabilities more so than traditional products and services.

## A HISTORY OF CONGLOMERATE EFFECTS

The EC prohibited two high-profile transactions primarily on the basis of conglomerate theories of harm back in 2001 (*M.2220 GE/Honeywell* and *M.2416 Tetra Laval/Sidel*). However, both these cases were subsequently overturned on appeal by the EU courts. By confirming a high evidentiary standard to substantiate future conglomerate theories of harm, these appeals no doubt left the EC more hesitant to intervene based on conglomerate concerns.

This was reflected in the enforcement activity in the decade that followed and in its enforcement guidelines. In 2008 the EC introduced its non-horizontal merger guidelines outlining how it will assess vertical and conglomerate mergers. The guidelines are clear that in the majority of circumstances conglomerate mergers will not lead to competition problems. The EC has not prohibited a merger on the basis of a conglomerate theory of harm since 2001.

## AN EU RESURGENCE?

More recently the EC has shown a renewed willingness to intervene on conglomerate concerns. This has resulted in a series of cases requiring commitments and/or an in-depth Phase 2 review to obtain approval.

In 2016 and 2017 alone the EC approved four mergers subject to behavioral commitments to remove conglomerate concerns (*M.7822 Dentsply/Sirona*, *M.7873 Worldline/Equens/Paysquare*, *M.8124 Microsoft/LinkedIn* and *M.8314 Broadcom/Brocade*).

More recently the EC launched in-depth Phase 2 investigations in three cases (*M.8084 Bayer/Monsanto*, *M.8306 Qualcomm/NXP* and *M.8394 Essilor/ Luxottica*) citing, among other things, conglomerate theories of harm in each.

Although in *Bayer/Monsanto* and *Essilor/ Luxottica* the EC cleared the transactions without requiring commitments to address conglomerate concerns, this was only after a lengthy Phase 2 review. These cases indicate an increased focus on conglomerate theories of harm in EU merger reviews.

## IMPLICATIONS FOR M&A

The recent increase in cases could simply be a coincidence. The EC of course has no control over the mergers that are notified to it. However, this trend has coincided with other merger reviews where the EC has adapted traditional analysis to be more interventionist for example by putting research & development, innovation and data etc. centrally within the scope of its theories of harm. In this wider context, these cases seem to reflect the EC's greater skepticism about mergers in concentrated sectors or involving essential input/ interoperability mergers.

We expect the EC will continue to focus on conglomerate issues in the coming year(s). This increases the prospect of an in-depth Phase 2 review, since conglomerate theories require detailed and complex economic defense. It is essential for companies to be able to identify conglomerate issues at an early stage.

**THE EC HAS SHOWN A RENEWED WILLINGNESS TO INTERVENE ON CONGLOMERATE CONCERNS**

CONTINUED >

06

# Conglomerate Effects: An EU Resurgence?

If remedies are required, conglomerate mergers are also more suited to behavioral commitments, which can be complex and difficult to agree on with the EC. This makes a Phase 1 clearance strategy more difficult unless these issues are raised with the EC early.

The following features may indicate conglomerate concerns in a transaction:

- **complementary products**: do the merging parties have product portfolios in similar or neighboring product markets? Conglomerate issues can exist in addition to traditional horizontal and/or vertical overlaps or in isolation;

THE 30% THRESHOLD IS USEFUL AS A RULE OF THUMB; THE HIGHER THE MARKET SHARE THE MORE LIKELY A FINDING OF MARKET POWER

- **market power**: will the merging parties have a market share in excess of 30% in any product market that is closely related to a product market a merging party is active in? At least one party must possess market power for a credible conglomerate theory of harm. This 30% threshold is useful as a rule of thumb; the higher the market share the more likely a finding of market power. Other market characteristics are relevant for this assessment;

- **interoperability**: do the merging parties have software capabilities that rivals must utilize to compete? If so, the EC is likely to assess whether such interoperability could be degraded to afford the merging parties a competitive advantage. Interoperability has been a key focus of recent commitments;

**INTEROPERABILITY HAS BEEN A KEY FOCUS OF RECENT COMMITMENTS**

- **intellectual property (IP) rights**: do the merging parties benefit from extensive IP rights that reinforce their market position? In *Qualcomm/NXP* the EC accepted commitments to not acquire certain standard essential patents (SEP) and to not enforce/grant worldwide royalties for other SEPs to ensure rivals would be able to compete fairly;
- **significant other barriers to entry**: do the markets in question have a history of new entrant failure? The EC may view such a trend as conducive to anti-competitive foreclosure; or
- **network effects**: do the merging parties' products benefit from the volume of other users? Network effects can turn competitively neutral conduct into conduct that is harmful to competition. In *Microsoft/LinkedIn*, the EC determined that LinkedIn's network effects would likely amplify the potential effects of Microsoft preinstalling LinkedIn on its machines. As a result, the parties entered into behavioral commitments to preserve an effective choice of installation for five years.

## CONCLUSION

As markets become more concentrated, the scope for conglomerate concerns will only increase. Consistent with the trend that the EC will flexibly adapt traditional theories of harm when investigating mergers, this is something companies should consider carefully when contemplating future acquisitions.

07

Both the United States and EC have signaled intent to increasingly focus antitrust policy on the protection of nascent competitors and the development of nascent markets. In the U.S., both agency statements and certain cases have cast some light on a shift in antitrust policy to more aggressively protect nascent competitors from domination or elimination by larger and more established rivals. European regulators have indicated that even major blockbuster mergers may be challenged should they result in a loss of competitive innovation, potential future competition and the suppression of research and development (R&D).

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# THE PROTECTION OF NASCENT COMPETITORS

## A U.S. AND EU PERSPECTIVE

**BY BEN GRIS, MATTHEW READINGS, MARK WEISS AND SIMON THEXTON**

# The Protection of Nascent Competitors: A U.S. and EU Perspective

07

**U.S. AGENCIES HAVE BEEN INCREASINGLY AGGRESSIVE IN ATTEMPTING TO PROTECT NASCENT COMPETITORS ON THE BASIS OF PRESERVING FUTURE COMPETITION**

## THE UNITED STATES

The U.S. agencies have been increasingly aggressive in attempting to protect nascent competitors on the basis of preserving future competition. Recent statements by leaders at the Department of Justice (DOJ) and the Federal Trade Commission (FTC) suggest that this approach will be more actively employed in the future across an array of industries. ≠≠The theory of harm here is well expressed by the Director of the FTC's Bureau of Competition — D. Bruce Hoffman — when he explained at a recent speech that while merger review has traditionally focused on pricing effects, the agencies will also focus on "*other likely effects of mergers. The Horizontal Merger Guidelines spell out in some detail not only price effects but also how to address potential quality, output, and innovation effects made possible by a merger.*" Hoffman suggests that the FTC will be more aggressive "*with regards to the technology industry — the acquisition of nascent competitors. The idea here is that large technology firms have developed a tendency to buy start-ups, and by so doing, are foreclosing the development of emerging rivals that might ultimately unseat them.*"

More recently, FTC Chairman Joseph Simons has echoed these sentiments in stating that "[o]*ne of our interests in this area will be with mergers of high-tech platforms and nascent competitors. These types of transactions are particularly difficult for antitrust enforcers to deal with because the acquired firm is by definition not a full-fledged competitor, and the likely level of future competition with the acquiring firm often is not apparent. But the harm to competition can nonetheless be significant.*"

In addition to public statements, the agencies have recently pursued cases that could serve as a blueprint for a method to protect nascent competitors from more dominant and established players. The FTC has a long history of challenging pharmaceutical mergers and acquisitions on the basis of preventing the loss of likely future competition. Recent challenges include Lupin Ltd.'s acquisition of Gavis Pharmaceuticals LLC and Mylan N.V.'s acquisition of Perrigo Company PLC. In both cases, the acquisitions included generic drugs that had not yet entered the U.S. market but were likely to be future competitors in concentrated markets. Historically, the FTC has typically limited its divestitures to drugs in at least phase III development — where approval is much more likely than drugs reaching only phases I or II. The FTC has recently demonstrated a willingness to push that boundary. For instance, *In the Matter of Mallinckrodt, Inc.*, Case No. 17-cv-120 (D.D.C. Jan. 25, 2017), the FTC brought a monopolization case claiming that Mallinckrodt's acquisition of the only competing foreign drug used to treat infantile spasms (a drug which had ***never*** even entered U.S. clinical trials) allowed Mallinckrodt to raise prices on its drug from US$40 per vial to over US$34,000 per vial and "*extinguish a nascent competitive threat to its monopoly.*" The case was ultimately settled with a fine and Mallinckrodt's promise to license the drug to a competitor. The departure from the FTC's normal protocol shows a willingness to pursue more difficult cases.

In 2015, the FTC sought a preliminary injunction to prevent the acquisition of Synergy Health plc by Steris Corporation. The FTC's Complaint alleged that the merger would result in the "*elimination of the likely future competition*" in the U.S. market for gamma sterilization facilities — one of three methods of sterilizing health products in medical facilities. The two merging parties were the second- and third-largest sterilization companies in the world; however, Synergy Health had not yet entered the U.S. market for sterilization. This forced the FTC to lay out significant evidence showing Synergy Health's consideration and plans to build facilities and expand into the U.S. in the near future. A U.S. District Court in the Northern District of Ohio, however, rejected the FTC's evidence that Synergy Health "*probably would have entered*" the U.S. market finding that despite significant consideration of U.S. entry, Synergy Health had abandoned those plans and was unlikely to receive required U.S. approvals. While the FTC was unsuccessful in this instance, the case shows how aggressively the FTC will fight to protect a nascent or potential competitor to safeguard even the possibility of future competition.

In March 2018, the FTC challenged CDK Global's proposed acquisition of Auto/Mate, Inc., an acquisition in the Dealer Management System software market that provides integrated software for new car dealerships. CDK, one of two major players in the market, sought to acquire Auto/Mate — a nascent competitor in the market holding a market share in the mid-single digits. The FTC alleged that Auto/Mate, despite currently being a marginal player in the industry from a market share perspective, was an upstart maverick that had already started to win contracts from the established players in the industry, and was poised to grow into a greater competitive threat to CDK through further innovation disruptive to the incumbent competitors such as CDK. The FTC was concerned that CDK's acquisition of a nascent competitor threatened that likely future competition. CDK abandoned the proposed acquisition in the face of the FTC challenge.

The DOJ has also taken actions tailored to preserve future competition. In the blockbuster merger of Monsanto and Bayer AG, the DOJ secured the largest ever negotiated divestiture in the U.S., including assets totaling over US$9 billion. The divestitures focused on Bayer's directly competitive and overlapping business segments with Monsanto. However, the required divestitures — all sold to Germany's BASF — were notably broader than the assets related to the relevant products. The DOJ explained in its Competitive Impact Statement that in order to create a viable and innovative competitor capable of challenging the merged entity currently and in the future, the U.S. "*is also requiring the divestiture of assets that are complementary to the competitive products or that use shared resources.*" In addition, to ensure "*the future competitive significance of the divested businesses*" the DOJ required

**THE CASE SHOWS HOW AGGRESSIVELY THE FTC WILL FIGHT TO PROTECT A NASCENT OR POTENTIAL COMPETITOR TO SAFEGUARD EVEN THE POSSIBILITY OF FUTURE COMPETITION**

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# The Protection of Nascent Competitors: A U.S. and EU Perspective

that Bayer divest pipeline research projects, intellectual property related to new or planned products, research data related to any R&D efforts and the related global R&D facilities. This approach is an indication that the DOJ recognizes that competition in competitive markets is not static and that in order to preserve future competition the DOJ will readily seek to ensure that the divested businesses have all assets required to remain relevant, including R&D resources to allow for technological innovation.

Both U.S. agencies have stated their intent publicly and taken concrete steps in the form of enforcement actions to effectuate stronger protections for nascent competitors. Accordingly, in mergers and conduct cases, counselors should be aware that the FTC and the DOJ will consider more than just static market shares in assessing competitive risk. It is advisable to consider any case's effect on future entry and the suppression of nascent competition.

**INNOVATION HAS ALWAYS BEEN WITHIN THE SCOPE OF EU MERGER CONTROL**

## EUROPEAN UNION

As in the U.S., nascent competition is a topic that continues to attract the attention of the European Commission (EC). The EC has increasingly been looking beyond existing horizontal product overlaps with future competition taking more prominence in a number of large transactions.

Innovation has always been within the scope of EU merger control. The EC's 2008 horizontal merger guidelines provide that "*effective competition may be significantly impeded by a merger between two important innovators.*" However, this was rarely applied beyond products in late-stage development and most commonly used in the pharmaceutical sector until recently. Within the pharmaceutical sector, an increased focus on innovation can be seen where the EC has started to look beyond phase III pipeline products (those closest to market) and required divestments of phase II and phase I pipeline products (see, for example, *M.7275 Novartis/GSK*, *M.7559 Pfizer/ Hospira* and *M.8401 J&J/Actelion*). This is despite significant uncertainty as to whether these products would ever develop to market.

Innovation as a distinct theory of harm has been in sharp focus since the EC's 2017 decision in *M.7932 Dow/ DuPont* where extensive divestments of DuPont's R&D business were required in addition to divestitures of actual product overlaps. This decision is significant because the EC looked at both individual

**IN THE U.S., MERGING PARTIES SHOULD CONSIDER THE LIKELIHOOD OF FUTURE ENTRY AND THE POSSIBILITY FOR SMALLER PLAYERS TO INNOVATE AND DISRUPT MARKETS**

product markets but also the possible effects of the merger on innovation at the industry level. The EC found that the merging parties were competing closely on innovation in certain narrow segments. Most significantly, the EC found that the merging parties were two of only five companies with sufficient R&D capabilities worldwide, and therefore, concerns on innovation exist at an industry-wide level, irrespective of particular product markets. The competitive rivalry between them was an important driver of innovation across the industry.

In 2018, the EC applied a similar theory of harm in *M.8084 Bayer/Monsanto*. The EC identified concerns in relation to various markets in seeds and traits, pesticides and digital agriculture, and concluded "*the transaction as notified would have significantly reduced competition on price and innovation in Europe and globally on a number of different markets.*" A remedy package in excess of €6 billion was agreed. This included divestments to address specific product concerns as well as the concentration of global R&D activities at a wider, industry level. For example, the parties agreed to divest Bayer's entire vegetable seed business, including R&D, to ensure the number of global vegetable seed R&D players remained the same.

One uncertainty is how robust the evidence needs to be for the EC to justify intervention. Merger control reviews are by their nature forward-looking, but future innovation is manifestly uncertain. In pharmaceuticals, billions of dollars are spent each year on products that don't make it to market. It is crucial for regulators to determine at what point an innovation theory or pipeline product is sufficiently certain to reach the downstream market. Even the prospect of success of third-stage pipeline pharmaceutical products is far from guaranteed.

In *Dow/DuPont* and again in *Bayer/Monsanto*, the EC took the view that the concentration of two significant innovators could ultimately have a negative impact on R&D and therefore impede future competition even without identifying concern regarding a particular product in development. To date, the EC has applied these theories primarily in markets characterized by high barriers to entry, and a relatively small number of firms pursuing innovation in a particular space; however, it is reasonable to expect the EC to push this theory beyond the agrochemical and pharmaceutical sectors to wherever the EC thinks innovation is an important competitive parameter and could be affected by the proposed merger. The EC will pay particular attention to industries where innovation is concentrated and will be prepared to look at innovation across the industry as a whole, not just in relation to particular product markets in which the merging parties overlap.

The EC has slightly more room to maneuver in this regard since its decisions are automatically binding. Parties must appeal to the European courts in order to test the EC's standard of proof. By contrast, in the U.S. the DOJ/FTC must justify intervention in court at the outset, which is likely to make them more reluctant to intervene on an innovation theory of harm.

## CONCLUSION

Increasingly, the mere analysis of price effects based on traditional antitrust metrics may be insufficient to gauge competitive risk in merger and conduct cases. Particularly in the U.S., merging parties should consider the likelihood of future entry and the possibility for smaller players to innovate and disrupt markets. The agencies are seeking to more aggressively protect upstart nascent competitors even with marginal market shares where a reasonable probability of expansion and serious future competition is possible.

In Europe, the EC has shown a willingness to challenge mergers on the basis of a loss of potential future competition towards the goal of preserving innovation and continued research and development in high-technology markets. On the pharmaceutical side, the EC has made clear that it will challenge mergers or require strategic divestitures to cure acquisitions even if the drug competition it is protecting has a low probability of ever coming to fruition.

08

Leniency programs have been one of the most effective tools for cartel prosecution over the past two decades. While there has been a proliferation of leniency programs across jurisdictions, established agencies such as the United States Department of Justice (DOJ) and the European Commission (EC) are experiencing a decrease in the number of leniency applications. This note examines possible explanations for the decline in leniency applications, but concludes that the benefits of leniency still outweigh those costs in most cases.

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# REDUCTION IN LENIENCY; DROP IN ENFORCEMENT?

**BY DJORDJE PETKOSKI, PATRICIA SANCHEZ-CALERO BARCO AND ALICIA BELLO**

# 08

# Reduction in Leniency; Drop in Enforcement?

**THE LENIENCY PROGRAM HAS BEEN THE AGENCY'S PRIMARY TOOL FOR IDENTIFYING AND PROSECUTING CARTEL CONDUCT. IN THE LAST THREE YEARS THERE HAS BEEN A SHARP DECLINE IN ENFORCEMENT ACTIVITY**

## A DECLINE IN FINES AT THE DOJ

This year the DOJ Antitrust Division celebrates the 25th anniversary of its leniency program. Originally developed in 1978, the leniency program provides incentives for companies to self-report cartel activity. The original iteration of the program was largely underutilized and typically triggered only one leniency application per year. In 1993, the DOJ significantly revamped the program by, for example, automatically granting amnesty to the first successful applicant where there was no pre-existing DOJ investigation, creating the possibility of amnesty even if an investigation had begun, and protecting the successful applicant's cooperating employees from prosecution. Following these revisions, leniency applications increased to approximately one per month.

Since the implementation of the new program, DOJ officials have repeatedly noted that the leniency program has been the agency's primary tool for identifying and prosecuting cartel conduct. In the last three years, however, there has been a sharp decline in enforcement activity, which suggests that there has also been a significant decline in leniency applications. For example, in FY2016, criminal antitrust fines collected by the Division totaled nearly US$3.6 billion and total fines in each of the preceding three years equaled or exceeded US$1 billion.[1] In FY2017, that number dropped to just over US$67 million. Similarly, the Division charged 16 companies for criminal antitrust offenses in FY2016, but only half that number in FY2017, and only three in FY2018.

Some have suggested that the decline in leniency applications and enforcement activity, more generally, is attributable to increased costs that come with leniency, including costs associated with the need to seek leniency in an increasing number of jurisdictions, certain recent adjustments to the leniency program and resulting exposure in follow-on civil litigations.

These costs are relevant considerations in a company's consideration of whether to seek leniency, but it is not clear that they would have tipped the scales so drastically to account for the significant decrease in enforcement activity summarized above. For example, while the number of jurisdictions with amnesty programs has increased, a company considering whether to seek amnesty will be focused on a discrete number of key jurisdictions that are either key players in the global economy (*e.g.*, the U.S., the European Union (EU), China and Japan) or that represent its major markets. Similarly, recent adjustments to the DOJ leniency program may have eroded some of the value of leniency (*e.g.*, by making it more difficult to secure amnesty for former employees), but the fundamental benefit of the bargain remains intact — a successful corporate leniency applicant secures amnesty from prosecution for itself and its current officers, directors and employees. The successful leniency applicant can also significantly limit its exposure in follow-on civil litigation through the ACPERA statute, which provides that a leniency applicant that meets the conditions of that statute is not subject to the joint and several liability and treble damages normally available in civil antitrust cases.

It is more likely that the decline in leniency applications and enforcement activity is a result of a number of forces operating in parallel. For example, the factors summarized above are likely interplaying with larger forces. In particular, criminal enforcement is cyclical, as DOJ officials have noted in response to recent questions about the continuing effectiveness of their criminal enforcement program. The DOJ has recently concluded a number of major investigations that were the drivers of the high fine levels in prior years, including investigations of the auto parts sector and the financial industry. The DOJ's enforcement activities before the recent decline may also have had some of the intended deterrence effect in decreasing cartel activity.

## A SIMILAR TREND IN THE EU

The EC's leniency program has also experienced a decline in the number of applications in recent years. The EC received 46 applications in 2014, but only 18 applications in 2017.[2] The decline in leniency applications has been linked to companies' exposure to civil actions following an infringement decision of the EC.

The EU Damages Directive,[3] which was designed to facilitate compensation for the victims of an infringement of competition law (Articles 101 and 102 TFEU), has now been fully implemented across the EU. Therefore, companies involved in infringements of competition law are more likely to be subject to civil actions claims following an EC or national competition authority (NCA) decision. Although the Damages Directive acknowledges the importance of leniency programs as a tool to fight against cartels and, in line with this, offers protection from disclosure to the leniency statements themselves, not all documents that are part of leniency applications are protected from disclosure. The protection offered by the Directive mainly applies to self-incriminating documents, which leaves other leniency material at risk of being disclosed in civil actions. This could work as a deterrent for companies that are considering whether to apply for leniency before the EC or NCAs.

In addition, because they receive immunity from fines, leniency applicants are less likely than others to apply for an annulment of the EC's infringement decision before EU courts. In this case, the decision of the EC will become final towards leniency applicants before other parties, which will render them an obvious first target for civil actions.

Directorate for Competition's Deputy Director General, Cecilio Madero, recently acknowledged the decrease of leniency applications. He explained that the number of leniency applications is indeed not "*going up.*"[4] Nevertheless, the Deputy Director General explained that new enforcement tools, such as the anonymous whistleblower tool that allows individuals to inform the EC anonymously of the existence of cartels and other infringements of competition law, are proving successful.[5] As regards the link between civil actions and a drop in the number of leniency applications, Director General Johannes Laitenberger explained that this link is merely speculative — "*does it have a chilling effect, or rather the contrary?*"[6]

In practice, as noted in the section above, companies must balance the costs of a leniency application with the benefits, and exposure to civil actions is certainly a relevant consideration. The costs associated with civil exposure will also need to be considered by the EC as it continues to assess the impact of the new Damages Directive on its leniency program.

## CONCLUSION

As cartel enforcement programs evolve, they may impose new costs on potential leniency applicants. While some have suggested that recent developments have pushed these costs too high, the fundamental benefit of the bargain created by leniency programs remains intact. A successful corporate leniency applicant secures amnesty for itself (and in the U.S. for its current officers, directors and employees), while its co-conspirators are subject to the potentially staggering liabilities. In most cases, the resulting cost-benefit analysis will counsel toward a decision to seek amnesty.

1. Nylen, L. (2018). US Corporate Charges Dip for Third Straight Year. [online] Available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1027151&siteid=191&rdir=1 [Accessed November 12, 2018].
2. GCR Rating Enforcement 2018.
3. Directive 2014/104/EU of the European Parliament and of the Council of November 26, 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU.
4. GCR, Conference Coverage, "*Leniency applications are 'not going up', says DG Comp official*" February 20, 2018.
5. *Ibid.*
6. GCR Conference Coverage "*Laitenberger: damages directive effect on leniency applications 'speculative'*" (September 15, 2017).

# 09

The European Union (EU) antitrust law concepts of 'undertaking' and 'single economic entity' allow fines to be imposed on parent entities of subsidiaries involved in cartel conduct, even where the parent was not itself involved or aware of the cartel. Recent case law developments in the cartels sphere have materially extended the circumstances in which such fines can be imposed on parents.

*Continued overleaf*

# PARENTAL LIABILITY FOR EU ANTITRUST INFRINGEMENTS

## NEW AND BROAD FRONTIERS

**BY MATTHEW READINGS AND RUBA NOORALI**

09

# Parental Liability for EU Antitrust Infringements: New and Broad Frontiers

**PARENTAL LIABILITY IS PRESUMED IN THE CASE OF A WHOLLY OWNED SUBSIDIARY**

## GENERAL PRINCIPLES

Undertakings are the entities subject to liability under EU antitrust law and are identified by reference to their economic activities rather than their legal status. Furthermore, multiple corporate entities that may be legally distinct can be captured under the EU antitrust law construct of a single economic entity, and therefore, considered a single undertaking for the purposes of antitrust liability, with the parent ultimately held liable for the subsidiary's conduct. This will occur where the subsidiary forms with its parent entity "*an economic unit within which* [the subsidiary] *has no real freedom to determine its course of action on the market*"[1] and applies to all infringements of EU antitrust law, although the most notable cases on this issue relate to cartel conduct.

## EARLY DEVELOPMENTS

In early cases, parental liability was imposed when parents specifically directed a subsidiary's anti-competitive behavior[2] or otherwise performed anti-competitive conduct through a subsidiary.[3] However, in *Stora*,[4] the Court of Justice established a rebuttable presumption to help adduce parental liability — namely, that parental liability arises where a parent exercises decisive influence over a subsidiary's commercial policy, which is presumed in the case of a wholly owned subsidiary. The 2009 *Akzo Nobel* judgment further held that decisive influence can be presumed ***without*** factually demonstrating any exercise of such influence. Such influence is identified when a subsidiary, despite having a separate legal personality, does "*not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company.*"[5]

The presumption has continually expanded, being applied in cases of: (i) almost 100% ownership (*e.g.*, 96% ownership[6]); (ii) a corporate family without formal legal ownership between entities;[7] and (iii) a 50:50 joint venture where the joint venture does not act independently of its parents.[8] The fact that very few claimants have successfully rebutted the presumption in practice also illustrates its broad nature.

## RECENT UPDATES

The first of the two most recent expansions of parental liability was the April 2017 *Akzo Nobel* judgment.[9] Here, the European Commission (EC) held a parent company liable as its subsidiaries had directly participated in the heat stabilizers cartel. There were two separate infringement periods. The EC was procedurally time-barred from imposing fines on the subsidiaries only implicated in the first infringement period. Nevertheless, it fined the parent for this period, as well as for the second infringement period. This was on the basis that the parent was held responsible for the overall infringement because of another subsidiary implicated in the second period (which was not time-barred). The Court of Justice, despite recognizing that a parent's liability derives from that of its subsidiary, ruled that a parent may not necessarily benefit from defenses available to subsidiaries, particularly where factors justify assessing its liability separately.

The second expansion was by the General Court in a July 2018 case.[10] Goldman Sachs (GS) was held jointly and severally liable with its 'subsidiary,' Prysmian (in which it held an indirect shareholding through a fund it managed), for Prysmian's direct involvement in the power cables cartel. Despite its shareholding being a pure financial investment and GS itself not being implicated in the misconduct, the parental liability was upheld on two main bases:

For the first infringement period, the ability to effectively exercise all voting rights in Prysmian while holding a high majority stake (between 84.4% and 91.1%, bar a period of 41 days where it held 100%) was held to be "*a similar situation to that of the sole owner of that subsidiary*" and confer "*total control over the conduct of that subsidiary without any third parties, in particular other shareholders, being in principle able to object to that control,*"[11] satisfying the presumption of decisive influence. This presumption was not rebutted by evidence that Prysmian independently determined its commercial strategy. This was notwithstanding that GS had reduced its shareholding through a number of divestments, on the basis that these divestments had been made on the condition that purchasers would be passive investors without voting rights.

- For the second infringement period, when the shareholding decreased to 32% following an initial public offering on the Milan Stock Exchange, the General Court confirmed that the EC could not rely on the presumption of decisive influence. The EC was instead required to analyze all factors relevant to the economic, organizational and legal links between the parent and subsidiary to decide liability. The Court found that the EC had made out its case adequately with reference to the ability to, (i) appoint and call for the revocation of board members; (ii) call shareholder meetings; (iii) have appointed board members in Prysmian's strategic committees; and (v) receive regular updates on Prysmian's commercial policy.

## CONCLUSION

The two cases indicate a continued expansion of the EC's net of parental liability for subsidiary conduct, capturing institutional investors and denying parents the defenses afforded to their subsidiaries. Investors will need to conduct careful antitrust diligence before investing, as to avoid antitrust liability would require demonstrating that their investment was purely financial and passive with no involvement in the management and control of the portfolio company in which they invest. Arguably, the EC's approach has become unduly broad and parental liability should be established based on a more nuanced assessment of the connection between a parent and its subsidiary, rather than on shareholding-based presumptions that are difficult to rebut in practice.[12] This would be more in line with other jurisdictions, such as France, where more concrete evidence of decisive influence is required in instances of 100% ownership, or the U.S., where a parent is generally not liable for a subsidiary's conduct unless circumstances justify piercing the corporate veil.

The EC has welcomed the confirmation that "*institutional investors can be treated like other corporate parents, by attributing parental liability to them in exactly the same way*," suggesting that its expansive approach to enforcing parental liability and in turn imposing higher and more deterrent fines is here to stay. Despite recent clarifications from the General Court that the EC must comply with the principle of equal treatment when apportioning fines between multiple successor parent entities,[13] there have been few checks and balances on the EC's approach to establishing parental liability. Potentially, the EC's broad approach will be reined in by the EU courts in GS's appeal — but in the meantime, multinational entities faced with cross-border investigations should be aware of the EC's tendency to impose fines on parent entities and the contrast with approaches in other jurisdictions.

1. Case C-15/74, *Centrafarm BV and Adriaan de Peijper v. Sterling Drug Inc.* (EU:C:1974:114), [41].
2. Case 48/69, *Imperial Chemical Industries Ltd. v. Commission* (EU:C:1972:70).
3. Case 107/82, *Allgemeine Elektrizitäts-Gesellschaft AEG-Telefunken AG v. Commission* (EU:C:1983:293).
4. Case C-286/98 P, *Stora Kopparbergs Bergslags AB v. Commission* (EU:C:2000:630).
5. Case C-97/08 P, *Akzo Nobel NV and Others v. Commission* (EU:C:2009:536), [49] and [58].
6. Case T-206/06, *Total SA and Elf Aquitaine SA v. Commission* (EU:T:2011:250).
7. Case C-407/08 P, *Knauf Gips KG v. Commission* (EU:C:2010:389).
8. Case C-179/12 P, *The Dow Chemical Company v. Commission* (EU:C:2013:605).
9. Case C-516/15 P, *Akzo Nobel NV and Others v. Commission* (EU:C:2017:314).
11. Goldman Sachs, [50] and [52].
12. AG Bot Opinion in Joined Cases C-201/09 P and C-216/09 P, *ArcelorMittal Luxembourg SA v. Commission*, (EU:C:2010:634).
13. Case T-640/16, *GEA Group AG v. Commission* (EU:T:2018:700).

# 10

Since the introduction of the European Commission's (EC) settlement procedure in 2008, just over one in five of all its settlement cases have involved at least one party dropping out of the settlement procedure.[1] This has usually led to settlement and standard infringement proceedings being pursued in tandem against the various participants of the same cartel. Such hybrid cases have turned out to be a more frequent occurrence than "*the exception*" that the EC had initially envisaged.[2]

*Continued overleaf*

# RECENT DEVELOPMENTS IN HYBRID SETTLEMENT CASES

**BY ELVIRA ALIENDE RODRIGUEZ AND AGOSTINO BIGNARDI**

# Recent Developments in Hybrid Settlement Cases

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**THE EC HAD, IN EFFECT, PREJUDGED THE OUTCOME OF ITS INVESTIGATION AGAINST ICAP**

Settlement negotiations, particularly if certain parties are at risk of dropping out, entail complex and strategic decision-making by the parties. The EC's future procedural practice in its hybrid cases, *i.e.*, whether it decides to run the settlement and non-settlement proceedings in parallel or by way of the adopting the settlement decision followed by the standard ordinary infringement decision, will have a significant influence on parties' settlement strategies in the future. The General Court's judgments in *ICAP* and *Pometon* have provided diverging assessments as to the legality of the EC's historical preference to run hybrid cases in a staggered procedure.[3] The EC's apparent practice in its first hybrid case since these judgments, *Forex,*[4] suggests that the EC has been comforted by the more recent *Pometon* judgment in order to continue running hybrid cases in a staggered format in the future.

## THE GENERAL COURT'S JUDGMENTS IN *ICAP* AND *POMETON*

ICAP, an interdealer broker, withdrew from settlement negotiations with the EC in relation to the *Yen Interest Rate Derivatives* (YIRD) cartel case in November 2013. In December 2013, the EC settled with all of the other banks and another broker involved in the same case. The EC reverted to standard infringement proceedings, sent a Statement of Objections to *ICAP* and then eventually fined *ICAP* in February 2015 for facilitating the cartels that had been established in the 2013 settlement decision.[5]

In ICAP's application for annulment against the EC's standard infringement decision, the General Court held that the EC had breached ICAP's rights of defense and, in particular, the presumption of innocence, by describing ICAP's role as a facilitator in the 2013 settlement decision[6] which was not addressed to ICAP. The EC had, in effect, prejudged the outcome of its investigation against ICAP prior to even formally starting its proceedings against it and ICAP had not been granted an opportunity to defend itself against the EC's allegations in the 2013 settlement decision. Nevertheless, the Court ruled that this did not vitiate the legality of the EC's infringement decision against ICAP as its substance would have been the same absent this breach of ICAP's rights of defense. The EC has appealed the General Court's judgment but only in respect of the General Court's annulment of the EC's fines imposed on ICAP on the grounds of insufficient reasoning for the EC's fining methodology.[7]

In *Pometon*, the General Court was again considering an appeal from the only non-settling party, Pometon, in relation to the EC's hybrid case against a steel abrasives cartel.[8] In contrast to ICAP, the Court rejected Pometon's allegations that the EC had infringed Pometon's rights of defense by referring to Pometon's involvement in the cartel in the settlement decision prior to Pometon being granted the formal opportunity to defend itself as part of the EC's standard infringement proceedings.

## JUDICIAL DEBATE OVER THE STAGGERED HYBRID PROCEDURE

In five out of six of its hybrid cases to date, the EC has concluded its settlement negotiations as quickly as possible and it has then, usually several months later, sent statements of objections to the non-settling party as part of its ordinary infringement proceedings.

Even if in *ICAP* the General Court's partial annulment of the EC decision was not due to a breach of the rights of defense from the

1. At the time of writing, there have been seven hybrid cartel cases investigated by the EC (most recently in Case AT.40135 *Forex* — see n. 4) out of a total of thirty one settlement cases.

2. See *e.g.* Joaquin Almunia speech, "*Fighting against cartels: A priority for the present and for the future,*" SV Kartellrecht, April 3, 2014.

3. Case T 180/15: *ICAP Plc and Others v. European Commission* (Case C-39/18 P) (*ICAP*); and Case T-433/16: *Pometon SpA v. European Commission (Pometon).*

4. European Commission Decisions of May 16, 2019, in Case AT.40135 *Forex*. At the time of writing, these were the most recent settlement decisions adopted by the EC.

5. See the European Commission Decisions of December 4, 2013 and February 2, 2015, in Case AT.39861 — *Yen Interest Rate Derivatives*.

6. *ICAP*, paras. 258–260.

7. Case C-39/18 P. Appeal brought on January 22, 2018, by the European Commission against the judgment of the General Court (Second Chamber, Extended Composition) delivered on November 10, 2017, in Case T 180/15: *ICAP Plc and Others v. European Commission.*

8. The EC adopted its settlement decision against the four settling parties, Ervin, Winoa, Metalltechnik Schmidt and Eisenwerk Würth, on April 2, 2014 and its prohibition decision against Pometon on May 25, 2016 — see Case AT.39792 — *Steel Abrasives*.

9. *ICAP*, para. 260.

10. *Pometon*, para. 68.

11. *Pometon*, paras. 99–100.

12. *ICAP*, para. 266. *Pometon*, paras. 70–71 and 101.

13. *ICAP*, para. 268.

staggered procedure, prior to the General Court's *Pometon* judgment it was believed that the EC may abandon its practice of running staggered hybrid proceedings as a result of the General Court's criticisms of the procedure. In *ICAP*, the General Court found that staggered procedures may be problematic since the EC's belief that ICAP had facilitated the YIRD cartel's collusion "*could easily be inferred*" from the earlier settlement decision.[9] The Court also held that any such inferences of liability cannot be remedied by the EC merely disclaiming that its settlement decision does not make any legal findings against the non-settling parties.

Given the series of events that can make up a cartel's infringement and the interdependence of cartelists' actions and of their common objectives, settlement decisions usually describe the participation of all of the cartelists and not just those of the settling parties. This leads to the question as to whether it is possible for the EC to set out the facts of a settlement decision without alluding to the involvement of cartelists that have dropped out of settlement negotiations.

In *Pometon*, the General Court may go some way towards answering this question by permitting the references to Pometon's involvement in the cartel in the EC's settlement decision as they were necessary to provide the complete factual description of the cartel and as the EC did not legally qualify Pometon's conduct or indicate that Pometon had already infringed Article 101 of the TFEU. After reviewing each of the references to Pometon in the EC's settlement decision, the Court did not find that any of them infringed the presumption of Pometon's innocence. According to the Court, the fact that the settling parties had admitted their participation in the cartel did not transform the references to Pometon into a "*disguised verdict*" of Pometon's guilt by the EC.[10] The Court therefore dismissed Pometon's ground of appeal that the EC had infringed its procedural rights of defense as unfounded.

As a consequence, the General Court's findings in *Pometon* are likely to encourage the EC to continue conducting staggered hybrid procedures. Indeed, the Court specifically proclaimed that a party dropping out from the settlement procedure does not require the EC to delay the adoption of its settlement decision against the remaining settling parties.[11]

**A PARTY DROPPING OUT FROM THE SETTLEMENT PROCEDURE DOES NOT REQUIRE THE EC TO DELAY THE ADOPTION OF ITS SETTLEMENT DECISION AGAINST THE REMAINING SETTLING PARTIES**

## DO PARALLEL HYBRID CASES HAVE A FUTURE IN EC ENFORCEMENT?

The General Court emphasized the importance of the procedural safeguards of the presumption of innocence and the right to a fair trial in both *ICAP* and *Pometon*, and in the former judgment, it stated that these considerations supersede the procedural efficiencies gained from settlement cases.[12] In cases where the EC considers that it will be difficult to establish the liability of settling parties without also taking a view on the participation of non-settling parties, the General Court advised that the EC should run hybrid cases in parallel in order to respect the essential procedural safeguards of the undertakings involved.[13] Given the potential difficulties of ensuring the protection of parties' rights of defense in staggered proceedings and that they are prone to legal challenges, it is possible, despite the Pometon judgment, that in some future cases the EC will prefer the more cautious approach of parallel cases.

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## Recent Developments in Hybrid Settlement Cases

**THE *FOREX* CASE MAY BE INTERPRETED AS THE EC RESURRECTING THE STAGGERED HYBRID PROCEDURE NOT WITHSTANDING THE CRITICISMS OF THE PROCEDURE IN THE GENERAL COURT'S ICAP JUDGMENT**

Nevertheless, the EC has not yet repeated its parallel approach to hybrid cases since its first ever hybrid case in *Animal Feed Phosphates* — in this case, both the EC's settlement and standard infringement decisions were adopted on July 20, 2010.[14] In its most recent judgment in *Pometon*, the General Court provided a sturdy defense of staggered hybrid cases.

Moreover, in the EC's first hybrid case since Pometon *(Forex),* regarding alleged cartels in the foreign exchange market implemented via trader chatrooms, the EC's procedural practice appears to have the characteristics of a staggered procedure. The EC has adopted two settlement decisions in relation to two chatrooms whilst continuing "*other ongoing procedures*" in the same *Forex* case.[15] By concluding its settlement procedures in advance of other proceedings, the *Forex* case may be interpreted as the EC resurrecting the staggered hybrid procedure notwithstanding the criticisms of the procedure in the General Court's *ICAP* judgment.

Staggered hybrid procedures are therefore the likely future direction of EC practice given the significant benefits provided by the flexibility of staggered hybrid procedures both to EC enforcement and to parties considering settlement.

### THE IMPLICATIONS OF THE EC'S FUTURE PROCEDURAL PRACTICE IN HYBRID CASES

One of the principal reasons behind the introduction of the settlement procedure was to allow the EC to swiftly conclude cases in order to free up its resources to take on additional cases. Hybrid cases run in parallel, however, may lead to a loss of the procedural efficiencies of settlement. Even if just one party drops

out of settlement negotiations, the EC's settlement efforts will have been wasted as it will have to wait for the full standard proceedings to conclude prior to adopting the settlement decision. This may diminish the initial attractiveness of entering into settlement negotiations for both the EC and for undertakings, which may lead to fewer settlement cases overall in the future. In addition, under a pure settlement or parallel hybrid dilemma, parties threatening to withdraw from settlement may have a stronger bargaining position. This is the opposite of the original aim of hybrid cases to allow the EC to "*use the settlement procedure without being held hostage*" to holdouts.[16]

On the other hand if, as appears more likely following *Pometon*, the EC continues with its staggered hybrid approach, this may pose difficulties for addressees to the EC's cartel decisions whilst potentially assisting claimants pursuing follow-on damages litigation against the cartelists. Splitting a factually and legally interwoven cartel into staggered EC decisions in accordance with the addressees' procedural preferences represents an inherent risk to the non-settling parties' rights of defense. By allowing the EC to publish an earlier settlement decision that includes references to the non-settling parties, the burden of proof is, in effect, shifted onto the non-settling parties to prove that the references to it in the settlement decision are unjustified. The subsequent standard proceedings then start on the basis of the facts of the earlier settlement decision and so a non-settling party may find it very difficult in practice to defend itself properly or to reverse or restrict the EC's publicized starting position. An early settlement decision also potentially opens up the non-settling party to damages claims that rely on the information provided in the early settlement decision.

## CONCLUSION

The General Court in *ICAP* held that the earlier settlement decision had breached ICAP's presumption of innocence but it stopped short of annulling the later standard infringement decision against ICAP on this ground. Whereas in its later judgment in *Pometon*, the Court concluded that the earlier settlement decision did not breach Pometon's rights of defense as there was no indication that the EC had already concluded that Pometon had infringed Article 101 of the TFEU — the Court confirmed that the EC may refer to the non-settling party in the settlement decision and that the EC is not precluded by EU law to run staggered hybrid procedures.[17] The EC's apparent adoption of a type of staggered procedure in *Forex* — its first hybrid case since the *Pometon* judgment — suggests that the EC relies on *Pometon* in order feel able to continue with its more historically frequent trend of running hybrid cases in staggered processes.

Nonetheless, the General Court's *ICAP* and *Pometon* judgments illustrate that earlier settlement decisions in staggered procedures will require careful handling in order to uphold the settling parties' rights of defense. It is not inconceivable that standard infringement decisions adopted later in staggered procedures will be subject to further judicial appeals in the future. The General Court will provide further guidance on the legality of staggered hybrid procedures in the upcoming appeals of non-settling parties in the staggered hybrid cases in *Euribor* and *Trucks*.[18]

**UNDER A PURE SETTLEMENT OR PARALLEL HYBRID DILEMMA, PARTIES THREATENING TO WITHDRAW FROM SETTLEMENT MAY HAVE A STRONGER BARGAINING POSITION**

14. European Commission Decision of July 20, 2010 in Case COMP/38.866 — *Animal Feed Phosphates.*
15. See EC Press Release "*Commission fines Barclays, RBS, Citigroup, JPMorgan and MUFG €1.07 billion for participating in foreign exchange spot trading cartel,*" May 16, 2019, available here: http://europa.eu/rapid/press-release_IP-19-2568_en.htm.
16. Joaquin Almunia speech, "*Fighting against cartels: A priority for the present and for the future*", SV Kartellrecht, April 3, 2014.
17. *Pometon*, paras. 72, 77-79 and 100.
18. See pending Cases: T-105/17 *HSBC Holdings and Others v. Commission*, T-106/17 *JPMorgan Chase and Others v. Commission* and T-113/17 *Credit Agricole and Crédit Agricole Corporate and Investment Bank v. Commission* (all appealing Case AT.39914 *Euro Interest Rate Derivatives*, decision of December 7, 2016); and T-799/17 *Scania and Others v. Commission* (appealing Case AT.39824 *Trucks*, decision of September 27, 2017).

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No-poach or non-solicitation agreements have been a focus of government examination for several years. In October 2016, the U.S. Department of Justice (DOJ) and the U.S. Federal Trade Commission (FTC) (collectively Antitrust Agencies) heightened their awareness of the issue with a detailed joint guidance document to human resource professionals and hiring managers (HR Guidance).

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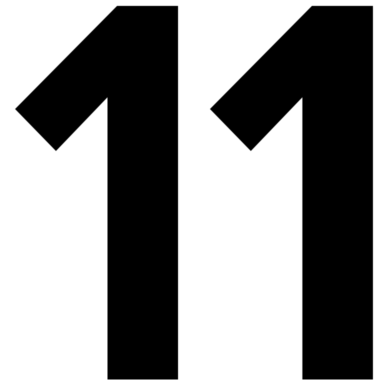
# NO-POACH AGREEMENTS RAISE ISSUES FOR COMPANIES WITH EMPLOYEES IN THE UNITED STATES

**BY TODD STENERSON AND MATT MODELL**



# No-Poach Agreements Raise Issues for Companies with Employees in the United States

**THE DOJ VIEWS ITS ENFORCEMENT AUTHORITY TO EXTEND TO NO-POACH AGREEMENTS BETWEEN ALL EMPLOYERS WITH ANY CONNECTION TO THE UNITED STATES**

The HR Guidance boldly claimed that 'naked' no-poach agreements will be treated as *per se* violations of the antitrust laws. That is, the Antitrust Agencies will not consider any possible pro-competitive benefits of such an agreement and the DOJ will consider the imposition of criminal liability. The HR Guidance also recognized, however, that some no-poach agreements may not be unlawful at all. "*Legitimate joint ventures…are not considered per se illegal under the antitrust laws,*" so a non-solicitation or no-poach agreement that is reasonably necessary for a legitimate collaboration will be viewed holistically. The open question is where the Antitrust Agencies and the courts will draw the line between these two extremes.

## WHAT IS A NO-POACH AGREEMENT?

A no-poach agreement is an agreement to restrain from cold calling, soliciting, recruiting, hiring or otherwise competing for employees. A no-poach agreement can be oral or written, and often will be contained in a variety of common commercial contracts. Of course, the scope of the non-solicitation provision will be a critical issue of importance — whether oral or written.

## ANTITRUST AGENCIES' GUIDANCE

The HR Guidance specifically highlighted both naked anti-poaching provisions, in which companies agree not to recruit each other's employees, as well as wage-fixing provisions, in which companies agree on salary or other terms of compensation. Antitrust Agencies will examine any written terms that exist, but also may examine an employer's hiring practices, communications and parallel behavior to decide whether a no-poach agreement can be inferred.

It is important to note that companies do not have to compete in the sale of the same goods and services to be considered direct 'competitors' for purposes of any no-poach analysis. Indeed, Antitrust Agencies have taken a broad view in defining competitors when it comes to these types of agreements. Firms that compete to hire or retain employees are considered direct competitors in the labor marketplace.

## ANTITRUST AGENCIES' ARE INCREASING ENFORCEMENT AGAINST NO-POACH AGREEMENTS

In light of the October 2016 HR Guidance, it should be no surprise that no-poach agreements have become an enforcement priority. The Antitrust Agencies' first no-poach case following the HR Guidance was filed in April 2018. In that case, the DOJ alleged that two railroad equipment supply companies, through communications between company executives, agreed not to solicit or poach one another's employees. In a broad consent decree, the DOJ extended its scope to include both employees located in the United States hired to work domestically or internationally,

and employees located internationally and hired to work in the United States. The DOJ brought this case under its civil enforcement authority because the conduct both began and ended prior to the issuance of the HR Guidance. However, the breadth of the consent decree reflects that the DOJ views its enforcement authority to extend to no-poach agreements between ***all*** employers with any connection to the United States.

More recently, Antitrust Agencies, including at the state level, have taken a close look at franchisee-franchisor agreements. While companies may not think this intra-brand relationship can create antitrust risk, given the Antitrust Agencies' broad view that all companies compete for employees, this has been a significant area of investigation for many companies. More than a dozen franchisors have reached settlements with government bodies with respect to intra-brand no-poach agreements. These settlements have also spawned follow-on private litigation for damages.

## PRIVATE LITIGATION INCREASING

As with nearly all government antitrust enforcement efforts, private class actions have quickly followed and exposed defendants to significant liability, including treble damages, under the Sherman Act.

In June 2017, a class of plaintiffs reached a US$169 million settlement with several animation studios. The DOJ agreed to a June 2011 civil consent decree with two of these companies over an alleged agreement not to solicit each other's digital animation employees, including an agreement that they would not make a counteroffer higher than the initial offer from the other company. The private class action mirrored the DOJ's claims as to those companies, but also added a number of other studios as alleged co-conspirators.

Private class actions have generally set forth a market-wide theory of impact to claim that these clauses commonly suppress industry wages of ***all*** employees — not just specific employees directly implicated by no-poach agreements.

## NEXT STEPS

No-poach or non-solicitation agreements can arise in a variety of contexts throughout a business. While the DOJ has not publicly filed criminal charges in a case to date, it has repeatedly warned of potential criminal liability and has been actively investigating potential no-poach prosecutions.

The Antitrust Agencies learn about these agreements in many different ways. For example, the Antitrust Agencies may become aware of a no-poach agreement through documents produced in a merger review, and investigations and litigation of these agreements are likely to increase. Companies should be proactive and diligent in identifying the existence of any no-poach agreements. Doing so will allow a company to determine and assess whether they create any litigation or investigational risk.

**THE DOJ HAS REPEATEDLY WARNED OF POTENTIAL CRIMINAL LIABILITY AND HAS BEEN ACTIVELY INVESTIGATING POTENTIAL NO-POACH PROSECUTIONS**

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The past several decades have seen a surge in trade deals, technology advancements and logistical developments that have culminated in the most liberalized markets in history. Today's economies are inextricably interdependent. Businesses reach across hemispheres. Raw materials and component products cross numerous boundaries before making their way into the hands of end consumers. This puts arbitrators of antitrust laws in a quandary: how deep into foreign territory can their laws reach in order to protect fair competition at home?

*Continued overleaf*

# EXTRATERRITORIAL APPLICATION OF MAJOR ANTITRUST REGIMES

**BY RYAN SHORES, GEERT GOETEYN, STACY RUEGILIN AND OLIVIA MERRETT**

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# Extraterritorial Application of Major Antitrust Regimes

This article discusses efforts to settle the boundaries of American and European antitrust regimes, and the unresolved matters that linger. It first explores the way American courts identify 'import commerce' subject to the Sherman Act when defendants are foreign participants in globalized supply chains. It then turns to the European Union's (EU) expanding approach to enforcement of foreign conduct, and its increasingly aggressive participation in international efforts to prosecute cartel members.

**FTAIA HAS RAISED MORE QUESTIONS THAN ANSWERS**

## THE U.S. — IDENTIFYING 'IMPORT COMMERCE' IN GLOBALIZED SUPPLY CHAINS

The Sherman Act, which is the primary U.S. antitrust law, applies sweepingly on its face, reaching virtually every form of agreement anywhere. Courts have long acknowledged that the text of the Sherman Act cannot be applied literally, yet they struggled to precisely define the Act's extraterritorial boundaries. In response to this, Congress passed the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA)[1] to codify limits on the Sherman Act's reach.

The FTAIA has raised more questions than answers. The American judiciary has labored for nearly four decades to interpret and apply the FTAIA, which commentators have criticized as being poorly drafted,[2] and which appellate courts have labeled "*ambiguous,*"[3] "*inelegantly phrased,*"[4] and "*a web of words.*"[5] Nevertheless, the Supreme Court distilled the meaning of the FTAIA as follows: all 'import commerce' is within the scope of the Sherman Act; all other commerce falls beyond its scope, *unless* it (1) has a "*'direct, substantial, and reasonably foreseeable effect' on American domestic, import, or (certain) export commerce*" ***and*** (2) that effect "*gives rise*" to an antitrust claim.[6]

The upshot of this is that, once conduct falls within the scope of the FTAIA, plaintiffs must meet an exacting standard to pull it back into conduct regulated by the Sherman Act. Plaintiffs' surest bet, then, is to characterize the conduct as 'import commerce' from the onset. Straightforward though it may sound, defining 'import commerce' is a tricky endeavor with today's globalized supply chains. It is particularly difficult when price-fixed component products sold abroad are incorporated into finished goods abroad, and then imported into the United States for sale to American consumers. Two lines of opposing thought have developed in response to this task, as exemplified by two cases involving many of the same parties and facts, but reaching contrary conclusions.

The first is *Motorola Mobility LLC v. AU Optronics Corp.*[7] This case arose from a price-fixing conspiracy among foreign manufacturers of liquid-crystal display (LCD) panels, which are a necessary component of many cellphones. Motorola, a cellphone retailer, owned foreign subsidiaries that purchased price-fixed LCD panels from defendants at supracompetitive prices. Motorola alleged that — as owner of the subsidiaries and importer of cellphones — it absorbed those supracompetitive prices.

1. The FTAIA exempts from the Sherman Act *"conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —*
*(1) such conduct has a direct, substantial, and reasonably foreseeable effect —*
*(A) on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or*
*(B) on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and*
*(2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section."*
2. 15 U.S.C.A. § 6a.
3. *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 156, 174 (2004).
4. *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 4 (1st Cir. 1997).
5. *United States v. Hui Hsiung*, 778 F.3d 738, 751 (9th Cir. 2015).
6. *Empagran*, 542 U.S. at 158, 162.
7. 775 F.3d 816 (7th Cir. 2015).
8. *Id.*
9. *Motorola Mobility*, 775 F.3d at 827.
10. 778 F.3d 738 (9th Cir. 2015).
11. Petition for Writ of Certiorari, 14, *Hsiung v. United States of America*, 2015 WL 1201366 (U.S.).
12. *Id.* at 755.
13. *Id.* at 743.

Writing for the Seventh Circuit, Judge Posner applied the Supreme Court's test to determine whether the FTAIA barred Motorola's claims. To start, he noted that defendants imported relatively few of their LCD panels — only about 1% of the panels sold to Motorola and its subsidiaries — into the United States. Judge Posner found that these panels were clearly 'import commerce.' However, the remainders of defendants' LCD panels — the 99% — were sold to Motorola's foreign subsidiaries abroad. Those subsidiaries then incorporated them into finished cellphones. And while some of these cellphones were sold to Motorola for import into the United States, most were sold abroad.

With regard to those LCD panels that made their way into cellphones imported into the United States, Judge Posner found that they were not 'import commerce,' because it was Motorola, not the defendants that imported them into the United States for retail sale to American consumers.[8] Thus, defendants' anti-competitive conduct qualified as 'non-import commerce' falling within the domain of the FTAIA. The inquiry then turned to whether it would fall within an exemption to the FTAIA. Finding that it did not, the court dismissed Motorola's claims.[9]

The same year, the Ninth Circuit issued its decision in *United States v. Hui Hsiung*,[10] an appeal of a criminal price-fixing case brought by the Department of Justice (DOJ) against several of the same LCD panel manufacturers named as defendants in *Motorola*. The facts of this case are substantially similar to those of *Motorola*, in that defendants sold most of their LCD panels to foreign intermediaries that incorporated the panels into consumer goods, some of which were ultimately sold to American consumers.[11] The DOJ's criminal indictment specifically charged defendants with fixing prices "*in the United States* ***and*** *elsewhere*" (emphasis added).

Defendants argued that because they sold most of their LCD panels to third parties abroad, their conduct could not be characterized as relating to 'import commerce.' The court acknowledged that defendants "*did not manufacture any consumer products for importation into the United States.*" Nevertheless, it rejected defendants' arguments, finding that any suggestion that defendants were not literal "*importer*[s]" "*misses the point.*"

It explained that defendants' anti-competitive activities indicated a substantial nexus to United States commerce, including: selling some products to customers in the U.S., negotiating the prices at which companies in the U.S. would purchase panels and instructing U.S.-based employees to discuss pricing for U.S. customers.[12] This, coupled with the substantial volume of goods ultimately sold to American consumers containing LCD panels, proved that defendants acted with intent to impact prices within the United States.[13] As such, the court held that defendants' activities were considered 'import commerce' beyond the scope of the FTAIA, and squarely within reach of the Sherman Act.

This divergence between *Motorola* and *Hui Hsuing* may be rationalized by several factors: *Hui Hsuing* was brought as a criminal action by the DOJ, which is sometimes granted more deference than private antitrust plaintiffs, and the volume of commerce represented in *Hui Hsuing* was substantially greater than that in *Motorola*. Nevertheless, it is significant to note that the same behavior — price-fixing LCD panels abroad — was characterized as 'import commerce' in one case, but dismissed as 'non-import' in the other.

The reasoning of *Motorola* has been adopted and expanded upon in other circuits,[14] and so too has the holding of *Hui Hsiung*, deepening the apparent split.[15] The Supreme Court denied requests to clarify the outer bounds of the import commerce standard, so the issue remains unsettled.[16] Foreign manufacturers should be aware that until the divide is mended, antitrust liability remains possible when component parts, having been incorporated into finished goods, are imported into the United States by a third party.

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# Extraterritorial Application of Major Antitrust Regimes

**THE QUALIFIED EFFECTS DOCTRINE PERMITS EC JURISDICTION TO EXTEND TO ANY CONDUCT THAT HAS AN IMMEDIATE, FORESEEABLE AND SUBSTANTIAL EFFECT ON COMPETITION IN THE EU**

## THE EU — EXPANDING THE EXTRATERRITORIAL APPROACH

Although the basis of antitrust enforcement in the EU is Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), the TFEU does not state how these provisions apply extraterritorially, only that the conduct in question "*must have an appreciable effect upon trade between member states.*" The European Commission (EC), supported by the Court of Justice of the European Union (CJEU), has interpreted this increasingly broadly — considering this in detail most recently in September 2017 in the *Intel*[17] judgment.

For the EC to have jurisdiction, the focus of the EC and CJEU is on the doctrines of implementation and qualified effects. The implementation doctrine allows the EC to assert jurisdiction over non-EU companies that sell directly into the EU irrespective of the companies' physical presence in the EU. The qualified effects doctrine — which has been recognized in both a merger and an abuse of a dominant position context — permits EC jurisdiction to extend to any conduct that has an immediate, foreseeable and substantial effect on competition in the EU. The *Intel* case applied this doctrine in a scenario where the effect on competition in the EU was indirect, illustrating the expanding reach of the EC.

The *Intel* case was an appeal by Intel against the €1.06 billion fine imposed on it by the EC for abuse of dominance concerning rebates offered by Intel in relation to its computer processing chips (CPUs). Intel argued that the EC did not have jurisdiction to investigate the alleged anti-competitive CPU manufacturing agreements because these agreements were concluded in China, involved only non-EU companies, and then the CPUs produced were sold outside of the EU. Although the Advocate-General in his opinion advised that the implementation test should be applied to assess jurisdiction, which would have meant there was no EU nexus to review these agreements, the CJEU disagreed and ruled that the qualified effects test — a much broader doctrine — should be applied. Therefore, because some computers containing the CPUs manufactured under the agreements were sold in the EU, this was enough to satisfy the qualified effects test and consequently for the EC to have jurisdiction to investigate. Companies therefore need to be aware that, even where there is no alleged anti-competitive conduct in the EU, this will not necessarily mean that the EC will not have jurisdiction — it is sufficient for the qualified effects doctrine for the effects to be more indirect, in this case because goods incorporating the cartelized product were sold in the EU.

Moreover, the scope of what will constitute an "*immediate, substantial and foreseeable effect*" in this context is still unclear. Some guidance has been offered by the General Court's (GC) July 2018 judgements on appeals brought in relation to the *Power Cables* cartel; however, this guidance only emphasizes how broad the qualified effects doctrine is. In particular, as regards the 'foreseeability' aspect, the GC stated that it is sufficient to take into account the 'probable effect of conduct' on competition.[18] Further, the GC held that effects must be assessed as a whole,

14. See, *e.g., In re: Refrigerant Compressors Antitrust Litig.*, No. 2:09-MD-02042, 2016 WL 6138600 (E.D. Mich. Oct. 21, 2016) (holding that a refrigerator manufacturer could not maintain antitrust action against foreign manufacturers of refrigerant compressors based on purchases made by a joint venture partially owned by the plaintiff); *In re Auto. Parts Antitrust Litig.*, No. 12-MD-02311, 2017 WL 7689654, at *9 (E.D. Mich. May 5, 2017) (finding that foreign auto parts suppliers that sold components to automakers abroad were not engaged in import commerce because it was the automakers, not the suppliers, that imported finished products into the United States).

15. The import commerce standard of *Hui Hsuing* has been applied to civil actions by district courts within the Ninth Circuit. See, *e.g., In re Capacitors Antitrust Litig.*, No. 14-CV-03264-JD, 2018 WL 4558265, at *4 (N.D. Cal. Sept. 20, 2018) (denying summary judgment in case involving "*capacitors sold and shipped by a foreign defendant to a foreign [] entity, and incorporated abroad into finished goods that were sold into the United States*"); *In re: Cathode Ray Tube (CRT) Antitrust*, No. C-07-5944 JST, 2016 WL 5725008, at *4 (N.D. Cal. Sept. 30, 2016) (denying summary judgment where plaintiffs imported finished products containing price-fixed cathode ray tubes); *Costco Wholesale Corp. v. AU Optronics Corp.*, No. C13-1207RAJ, 2014 WL 4718358, at *3 (W.D. Wash. Sept. 22, 2014) (denying summary judgment because *"Costco's purchases from foreign conspirators of finished products containing price-fixed panels are import commerce, regardless of the supply chain that brought the finished product to the conspirator who made the sale."*).

16. *Hui Hsiung v. United States*, 135 S. Ct. 2837 (2015); *Motorola Mobility LLC v. AU Optronics Corp.*, 135 S. Ct. 2837 (2015).

17. Case C-413/14 P, *Intel v. Commission* (EU:C:2017:632).

18. Cases T- 422/14, *Viscas v. Commission* (EU:T:2018:446), Case T- 444/14, *Furukawa Electric v. Commission* (EU:T:2018:454) and *Case T- 447/14 NKT v. Commission* (EU:T:2018:443).

19. Case C-191/16, *Romano Pisciotti v. Bundesrepublik Deutschland* (EU:C:2018:222).

and it is not a defense for undertakings to claim that — seen in isolation — an anti-competitive practice does not have an effect on competition in the EU if the total conduct does have such an effect.

Following the *Capacitors* cartel decision in March 2018, Commissioner Vestager reasserted that the Commission "*will not tolerate anti-competitive conduct that may affect European consumers, even if all anti-competitive contact takes place outside Europe*" — companies should expect the EC to continue with investigations that may at first glance appear to go beyond the scope of EU law, including by applying the qualified effects doctrine.

## THE EU — SUPPORT FOR EXTRATERRITORIAL APPLICATION OF CRIMINAL CARTEL REGIMES

The EU has also shown that although the EU cartel regime is administrative rather than criminal in nature, in itself that does not protect EU nationals from extradition where the national laws of the Member State allows for extradition to take place.

In the April 2018 *Pisciotti*[19] judgment, concerning the first successful extradition of an EU citizen to the U.S. for criminal cartel proceedings, the CJEU paved the way for further successful extradition attempts. Pisciotti, an Italian national, was under investigation in the U.S. in relation to his involvement in the *Marine Hose* cartel. For this purpose, the U.S. authorities requested his extradition under the EU-U.S. extradition agreement. In June 2013, Pisciotti was arrested in Frankfurt's airport on a flight stopover. Germany approved the extradition.

Following conviction and serving his prison sentence in the U.S., Pisciotti brought an action in the German courts seeking a declaration that Germany was liable for damages for granting his extradition, on the basis that Germany would not have extradited one of their own citizens and so had infringed the fundamental EU law principle of equal treatment of EU citizens.

However, the CJEU held that the key issue was whether Germany could have adopted a less prejudicial course of action by surrendering Pisciotti to Italy rather than extraditing him to the U.S. An extraditing Member State must notify the EU national's home state of the imminent extradition. As required, the Italian authorities had been kept fully informed of Pisciotti's situation by the German authorities and they had not sought his surrender. Further, the right of free movement can only be restricted by a legitimate objective, and in this case that objective was to ensure that Pisciotti did not escape prosecution. Given that the Italian authorities had not sought to intervene, this legitimate objective could not have been attained by less restrictive means and therefore the extradition was lawful.

Although the *Pisciotti* case is fact-specific, it serves as a timely reminder that jurisdictions with criminal cartel regimes such as the U.S. will prosecute against nationals of all states, and that the lack of an EU-wide criminal cartel regime and the existence of EU rights such as freedom of movement of which EU nationals benefit, do not prevent EU nationals from being extradited if such extradition is possible on the basis of the laws of the Member State where they are located and the proper procedures have been followed.

Antitrust enforcement has become increasingly sophisticated around the world. This article examines the trends of Australia, Brazil, China, Japan and Korea that are at the forefront of cutting-edge cases and some of the most active regulators outside the U.S. and the European Union (EU).

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# THE ANTITRUST ARMS RACE

## HOW INTERNATIONAL JURISDICTIONS ARE INCREASING ENFORCEMENT EFFORTS

**BY GEERT GOETEYN, KANA MORIMURA, ÖZLEM FIDANBOYLU, ELIZABETH VITT AND EDWARD RARITY**

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# The Antitrust Arms Race: How International Jurisdictions Are Increasing Enforcement Efforts

**THE ACCC HAS SHOWN THAT IT WILL NOT SHY AWAY FROM DIFFICULT CASES SUCH AS BRINGING CRIMINAL CARTEL CHARGES AND INVESTIGATING GUN-JUMPING**

## AUSTRALIA

In 2018, the Australian Competition & Consumer Commission (ACCC) has shown that it will not shy away from difficult cases such as bringing criminal cartel charges and investigating gun-jumping.

Australia has expanded the scope of the cartel joint venture exception. A joint venture in this sense does not have the same meaning as a corporate JV, but relates to two companies coming together to jointly carry out an activity relating to the production, supply or acquisition of goods or services regardless of whether or not they are in a partnership together or in the same corporate structure. The exception, allowing for restrictions to be agreed between competitors if it is specifically for the purposes of the joint venture, is reasonably necessary and does not lead to a substantial lessening of competition.

Financial services remains a hot topic for antitrust regulators worldwide and the ACCC is no different. Australia has brought criminal cartel prosecutions against a number of banks and six executives for involvement in a A$2.5 billion capital-raising. The investigation focuses on banks which jointly underwrote an Australia and New Zealand Banking Group (ANZ) capital-raising back in 2015. The investigation into the syndication centers around the allegation that the joint lead managers reached an understanding in relation to the supply of ANZ shares. The investigation is still at the early stages, but the decision to pursue criminal charges is interesting given that these are harder to bring and still rare in Australia. This case is also cutting-edge as Australia is one of the first countries in the world (after Spain) to bring a case investigating syndication.

In Australia, the merger regime is voluntary and non-suspensory, which means that it is for the parties to decide whether or not to make a filing, and parties are free to close the transaction without competition approval. Nevertheless, the ACCC is investigating 'gun-jumping' where Cryosite and Cell Care allegedly stopped acting as independent competitors prior to completion of the deal by allocating customers between themselves. This shows that despite having a voluntary regime, the ACCC will still take gun-jumping action against parties that act as though they have merged prior to completion of the deal.

## BRAZIL

Brazil's Administrative Council for Economic Defense (CADE) continues to be a leading enforcer of competition law as demonstrated by its recognition in 2018 as Agency of the Year in the Americas by the Global Competition Review, the fourth time the enforcement agency has received this distinction.

In Brazil, cartel enforcement remains a top priority with a particular focus on investigations of bid rigging related to public bids in the public procurement and infrastructure sectors. This is due to CADE's prioritization of cases derived from the Car Wash operation, an investigation of the largest corruption and cartel scheme in Brazilian history.

While many of the antitrust enforcers around the globe are looking at digital technologies for their potential use as a conduit to carryout anti-competitive conduct, CADE is harnessing the power of algorithms to expose cartel conduct. In addition to the leniency program and other traditional investigative tools used in cartel enforcement, CADE has developed a digital platform that detects cartel conduct by analyzing various data patterns in public bids. This technology provided the basis for an investigation CADE launched in October 2018, when it issued search and seizure warrants to 13 companies over alleged cartel conduct on bids made by federal agencies to contract outsourced services.

CADE is also promising to ramp up enforcement of non-cartel anti-competitive conduct. While the level of enforcement against unilateral conduct is still low in comparison to cartel cases, noteworthy developments in 2018 include the announcement in March 2018 that online travel agencies Booking.com, Decolar.com, and Expedia signed settlement agreements with CADE to suspend the inquiry into the use of price parity clauses in contracts with accommodation providers that use their online sales platforms. More recently, in October 2018, CADE reached a settlement with Brazilian stock exchange operator BM&FBovespa, agreeing to pay R$9.4 million — equivalent to 1% of the company's gross turnover — to suspend the agency's probe into the stock exchange operator for alleged monopolistic practices. Noting the payment rate was higher than in previous settlements negotiated in administrative investigations, CADE touted it as the competition authority's more incisive policy in combatting unilateral practices.

## CHINA

In the decade since China's Anti-Monopoly Law in 2008, China has engaged in increasingly aggressive enforcement activities. Most significantly, 2018 has seen China's three antitrust agencies combine into one new competition regulator, the State Administration for Market Regulation (SAMR). The consolidation is expected to result in more unified guidance on the interpretation and application of China's antitrust laws and regulations, with greater consistency in enforcement and more headline-grabbing enforcement actions.

CONTINUED >

**THE CONSOLIDATION IS EXPECTED TO RESULT IN MORE UNIFIED GUIDANCE ON THE INTERPRETATION AND APPLICATION OF CHINA'S ANTITRUST LAWS AND REGULATIONS**

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# The Antitrust Arms Race: How International Jurisdictions Are Increasing Enforcement Efforts

**A KEY ENFORCEMENT PRIORITY FOR JAPAN IS 'BIG DATA'**

SAMR replaced MOFCOM, the relevant merger authority in China, from May 2018 and looks to continue MOFCOM's active presence in merger enforcement. By June 2018, MOFCOM/SAMR had cleared 166 cases under simplified procedure, 24 under normal procedure and approved one case under conditional approval. The review of Bain Capital's *Microchip/ Microsemi* mega-merger in May 2018 took less than a month, calming fears that the creation of SAMR would lead to delays in reviews of major transactions. On the other hand, Qualcomm terminated its acquisition of NXP Semiconductors N.V. in July 2018, on the basis that China missed the deadline for approving the deal and Qualcomm's 10-Q quarterly report stated that the approval process was "*being impacted by the current state of U.S./China trade relations.*"

SAMR also looks to continue China's clamp down on cartels, having already conducted dawn raids on U.S. memory chip maker Micron Technology and its South Korean competitors Samsung Electronics and SK Hynix in May 2018. SAMR and the Shandong Administration of Industry and Commerce have also imposed fines on household appliances and furniture stores for entering into monopolistic agreements to boycott third-party trade shows, security door manufacturers for cartel behavior, car companies for suspected price collusion and river sand companies for price fixing.

Geopolitical tensions have continued to shape China's implementation of antitrust. Tensions with the U.S. antitrust authorities not only played out in the *Qualcomm/NXP* acquisition, but also in the *vitamin C* antitrust case, where the U.S. Supreme Court historically allowed the Chinese government to present arguments in an appeal. The Chinese government argued that the alleged price-fixing was mandated by Chinese law, raising questions of sovereign jurisdiction. More recently, commentators noted that China was unlikely to sign the DOJ's recently circulated draft of the Multilateral Framework on Procedures, due to conflicting provisions in China's Administrative Procedure act.

## JAPAN

Japan has built a reputation as one of the key antitrust authorities in Asia. In 2017, the Japanese Supreme Court confirmed that cartel enforcement could apply to cases when the alleged cartelists do not have a physical presence in Japan, provided that the conduct results in substantial effects on Japanese markets. The Japan Fair Trade Commission (JFTC) has continued to vigorously investigate international cartels and, like many international regulators, is taking a tough stance on financial market players, as can be seen in its opening of an investigation in April 2018 against global investment banks alleging that traders in London engaged in cartel conduct when trading bonds for a Japanese client. Ultimately, the JFTC dropped this case on the basis that steps had already been taken to comply with Japanese law.

Like many countries, a key enforcement priority for Japan is 'big data'. The JFTC has launched a recent probe into Google, Amazon and other major technology companies to assess whether the data that they possess allows them to abuse their dominant position and stifle innovation for Japanese companies. In particular, the JFTC is interested to see whether new entrants are blocked from the market because of the more established players hoarding customers' data.

Japan has also launched an e-commerce sector inquiry to examine how to create a domestic e-commerce policy that will enable it to promote competition while protecting data security and ensuring transparency. This follows its recent changes to the Distribution Guidelines in 2016 showing that the JFTC is quick to amend its rules to deal with online transactions.

## SOUTH KOREA

Korea's Fair Trade Commission (KFTC) is regarded as one of the region's toughest and most active competition authorities. In 2018, the KFTC published proposed changes to the country's competition laws. Among the key changes is the abolishment of the KFTC's exclusive right to make criminal referrals. To that end, KFTC chairman Kim Sang-Jo and the country's justice minister signed an agreement to begin sharing concurrent jurisdiction over cartel conduct. The KFTC also proposed doubling the maximum fines for price-fixing, abuse of dominance and unfair trade practices. The legislation, if enacted, would also add information exchange as a new type of prohibited practice.

The proposed legislative changes include enhanced regulations for conglomerates. Thus, it is expected that the KFTC will be more proactive and aggressive in its enforcement against abusive conduct or unfair trade practices, with a particular focus on abusive conduct by dominant South Korean conglomerates (*chaebols*). The KFTC has also signaled its intent to increase investigations into anti-competitive subcontracting and distribution practices in order to protect and support growth among small and medium-sized companies.

South Korea is also undergoing an initiative related to the development of policies in the e-commerce sector similar to the inquiry being performed in Japan, although the efforts are not part of the official KFTC agenda. Additionally, it is believed the KFTC is probing possible abuses of dominance by Google in the mobile gaming industry by forcing Korean gaming businesses to launch their programs exclusively on Google's Play Store and Korean search engine Naver over accusations that it blocked rivals on its shopping search service.

Effective February 27, 2019, the KFTC amended its merger review guidelines introducing new standards for reviewing mergers involving innovation and big data. The guidelines define 'big data' as 'information assets' and provide a framework for defining 'innovation market.' Among the amendments, the guidelines now provide alternative criteria for assessing market concentration and the competitive effects of mergers in innovation markets. In addition to the existing general factors to assess the anti-competitive effect, the guidelines provide additional criteria to assess the competitive effects of a merger involving big data. Though the amendments signal an effort to provide a more accurate assessment of competition concerns for innovation mergers and mergers involving big data, the KFTC has yet to provide further guidance on how the guidelines would be applied. Absent further clarification from the KFTC regarding application of the guidelines, it is difficult to predict exactly how the new criteria will actually affect future merger reviews.

**KFTC IS REGARDED AS ONE OF THE REGION'S TOUGHEST AND MOST ACTIVE COMPETITION AUTHORITIES**

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Financial technology companies, known as 'fintechs,' are an increasingly prominent and disruptive presence in the financial services market. While these technologies are having a significant impact on the competitive landscape, the European Commission (EC) and national competition authorities (NCAs) have expressed concern as to whether the current competition legal framework is equipped to deal with the challenges created by these new technologies, some of which we discuss below.

*Continued overleaf*

# HOW SHOULD COMPETITION LAW REACT TO FINTECH?

**BY ELVIRA ALIENDE RODRIGUEZ AND PATRICIA SANCHEZ-CALERO BARCO**

# 14

# How Should Competition Law React to Fintech?

BLOCKCHAIN'S STRUCTURE MAY ALLOW FOR MORE SOPHISTICATED IMPLEMENTATION OF AN AGREEMENT TO COLLUDE

## BLOCKCHAIN: NEW SCENARIOS FACILITATING COLLUSION?

Trade finance, payments, clearing and settlement, and syndicated loans have already started to embrace blockchain due to its speed, security and transparency.

But the spread of blockchain technologies has also drawn the attention of competition authorities, who question whether this new structure could facilitate collusion.[1] In most cases, the EC and NCAs already have the necessary enforcement tools to ensure compliance with competition law, although they must be alive to new challenges posed by the technology. For instance, blockchain's structure may allow for more sophisticated implementation of an agreement to collude, allowing for easier detection of deviation from the agreement and a more accurate retaliation method.

Blockchain also enhances transparency, which could prompt competition authorities to more readily bring allegations of tacit collusion.[2] In this regard, competition authorities should be reminded that whereas explicit collusion constitutes a 'by object' infringement, companies cannot be prevented from "*adapt(ing) to* [the] *existing and anticipated conduct of their competitors*"[3] as long as they do not overtly collude. Tacit collusion scenarios are much less clear and common and need to be assessed more rigorously under an effect-based assessment.

## REFUSAL TO GRANT ACCESS TO BANK USERS ACCOUNT DATA

Online payment services providers need access to the bank account user's data to operate, and this data is owned by the banks. Competition concerns could arise where the bank is found to have a dominant position (as it is the sole owner of its customers' data), in which case it could be an abuse to refuse fintechs access to its customers' data once the customer has agreed to provide access to it. This would be the case if it can be established that: (i) only the bank where the customer has an account has access to the payment data of that customer; (ii) payment service providers need account data, which is not substitutable for other information, hence it is indispensable or essential for fintechs to compete in the market; and (iii) banks have incentives to foreclose fintechs if they offer competing products on the basis of the bank account data. Therefore, potential enforcement of competition law in relation to Article 102 TFEU may be around the corner.

In October 2017, the EC carried out inspections of banks in Poland and the Netherlands under suspicion of access to bank customers' account data being blocked by banks even when customers gave their consent to it.[4] This investigation is currently ongoing but shows how these concerns may materialize in the EU.

1. For instance, the Swedish competition authority will publish in April a report on "*Blockchain Technology a Competition Law perspective*" as it considers that blockchain structures will raise competition challenges and the Spanish competition authority in its September 13, 2018 "*Report on the impact of new technologies in the financial services market*" highlights the risk of potential facilitation of collusion that blockchain technology could entail.
2. OECD, "*Blockchain Technology and Competition Policy*" (June 8, 2018), para. 18.
3. Case C-40/73, *Coöperatieve Vereniging "Suiker Unie" UA v. Commission*, (EU:C:1975:174), [174].
4. See EC-Fact Sheet "*Antitrust: Commission confirms unannounced inspections concerning access to bank account information by competing services*" October 6, 2017, MEMO/17/3761.
5. Parliamentary Questions, Answer given by Commissioner Vestager on behalf of the European Commission, Question Reference: P-004223/2018, October 1, 2018.
6. Decision of the ACCC of March 31, 2017, Bendigo and Adelaide Bank & Ors — Authorisation — A91546 & A91547.

## POTENTIAL INTEROPERABILITY PROBLEMS IN THE FINTECH SECTOR

Competition concerns have also been raised in relation to Apple's mobile payment system, Apple Pay, as Apple does not grant access to its near field communication (NFC) technology to other online payment services providers:

- At European Union (EU) level, Commissioner Vestager recently confirmed that the EC is paying attention to developments in this area, but referred to the fact that there currently operate in the market "*several mobile payment solutions based on existing card payment systems, where the mobile device acts as technical interface between the consumer and the merchants, while the transactions remain based on tokenised card credentials.*"[5] She noted as examples systems such as Google Pay and Samsung Pay. Therefore, while it seems the EC considers that consumers currently have access to alternative payments methods, it will be carefully monitoring developments in this market.

- Outside the EU, various banks asked the Australian Competition and Consumer Commission (ACCC) whether they could jointly bargain with and boycott Apple to get access to its NFC.[6] While the ACCC accepted that this would increase competition in mobile payment systems, it found that the public benefit of this would be outweighed by likely distortions of competition elsewhere, in particular: (i) it would affect Apple's business model by which it provides an integrated hardware-software offering to compete with Google's Android devices; (ii) it is uncertain how competition may develop in these nascent and rapidly evolving markets (*e.g.*, contactless card payments and mobile payments on smartwatches) and the ACCC did not want to artificially influence or hamper innovations in this area; and (iii) Apple Pay and other digital wallets could help increase competition among banks by facilitating switching between card providers.

The EC and NCAs will be closely monitoring developments in the mobile payment services market, and not just in respect of Apple.

## MERGER CONTROL CHALLENGES IN THE FINTECH SECTOR

For competition authorities, substantive merger analysis in the fintech sector can be complex since a traditional analysis of market shares and market definition can fail to capture the reality of fintech market dynamics. For instance, fintech mergers are data intensive, and the combination of datasets through mergers could give incumbents a competitive advantage which is not reflected in market shares.

In addition, as fintech target companies are often start-ups with either zero or very low turnover, they can escape merger control in turnover-based jurisdictions as the EU. In October 2016, the EC debated whether a reform of the merger jurisdictional thresholds is necessary, but it is unclear whether legislative reform can be expected any time soon or at all. Companies should be aware that some countries, including Austria and Germany, have introduced jurisdictional thresholds based on transaction value and that the EC may be monitoring the functioning of the new test when considering its own merger thresholds.

## CONCLUSION

Looking forward, there could be further significant changes in the financial services space if large high-tech companies, such as Facebook and Google, enter the market. Given the large amount of consumer data held by such companies, they could gain an unprecedented competitive advantage; *e.g.*, being able to factor in an individual's frequent internet searches to offer more tailored services. Competition authorities will no doubt pay attention to how this could potentially impact the competitive sphere.

The EC's focus on fintech is reinforced with the recent announcement of a new financial stability and financial technology unit within the EC's Directorate-General for Financial Stability, Financial Services and Capital Markets Union. Therefore, it is essential that companies operating in this sphere are aware of the competition issues that new market structures such as blockchain can present and how best to deal with these.

# 15

In recent years, Germany, like other European Union Member States, has seen various initiatives to address challenges to competition law by the digital economy. The Bundeskartellamt (BKartA) conducted administrative procedures against online hotel portals and against Facebook. In 2017, a number of amendments to the German Act against Restraints of Competition (GWB) came into force. Further amendments can be expected. In 2018, an expert report on "*Modernizing the law on abuse of market power*" for the German Ministry for Economic Affairs was submitted. The recommendations of the export report for legislative action are briefly summarized below.

*Continued overleaf*

# GERMANY

## MODERNIZING THE LAW ON ABUSE OF MARKET POWER FOR THE DIGITAL ECONOMY

**BY MATHIAS STÖCKER**

# Germany: Modernizing the Law on Abuse of Market Power for the Digital Economy

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IT MAY BE AN INDICATION FOR SUCH FUTURE COMPETITION THAT THE TARGET IS ACTIVE IN A MARKET THAT ADDRESSES THE SAME BASIC NEEDS AS THE ACQUIRER

## RECENT EXPERT PROPOSALS FOR LEGISLATIVE CHANGES

The expert report makes the following main recommendations:

**AMENDING THE SUBSTANTIVE TEST IN GERMAN MERGER CONTROL WITH A VIEW TO ACQUISITIONS OF START-UP COMPANIES.**
Germany last year introduced a supplementary new transaction-value-based reporting threshold, which however does ***not*** apply if the target is not active in Germany "*on a significant scale.*" According to guidelines published by the BKartA in 2018, there is no significance of domestic activities of the target "*if the target company* [in the last fiscal year] *generated a turnover below €5 million in Germany and if this turnover adequately reflects its market position and competitive potential. This is likely to be the case* ***if the company's products generate significant turnover abroad but not in Germany****, for instance, because the company has not (yet) established a sales structure in Germany.*" (Paragraph 82 of the guidelines; emphasis added). A company will in any event normally generate significant turnover, albeit not necessarily in Germany, if it is active in "*mature markets that are characterized by turnover generation*" (cf. paragraph 65 of the guidelines).

Following up on the new reporting threshold, the expert report proposes a supplementary amendment to the substantive test in German merger control with a view to acquisitions, in particular by large digital firms, of relatively small innovative start-up companies. The report notes that such acquisitions can have anti-competitive effects, in particular if firms that are already dominant succeed to systematically identify and acquire potential future rivals at an early stage. On the other hand, the BKartA may currently not be in a position to block such transactions under the existing substantive test, which requires, just like on the European level, that a concentration would significantly impede effective competition, in particular because it can be expected to create or strengthen a dominant position (§ 36(1) GWB).

According to the report, the relevant acquisition strategies typically concern transactions at an early stage where the start-up is still active in a niche market and there is typically no horizontal overlap with the acquirer. The substantive assessment gets particularly complicated where an acquisition strategy relates very broadly to innovative internet companies whose innovations and business models do not yet have a clear relationship with the core market of the acquirer but may turn into threats in the course of the dynamic development of technologies and markets that are difficult to predict. The report notes that harm to competition by the individual transaction can in such cases often not be established with the sufficient degree of probability through the established theories of harm and within typical prognosis periods of approximately three years.

## LARGE UNDERTAKINGS MAY BE PRONE TO STRATEGIES IMPEDING COMPETITION BY DIGITAL PLATFORMS WITH A GATEKEEPER POSITION

In light of this, the report recommends supplementing the substantive test by a sentence which would allow the BKartA to consider, when assessing the probability of a significant impediment to effective competition, the existence of an overall strategy of a dominant company to systematically acquire fast-growing companies with a recognizable and considerable potential to become competitors in the dominated market in the future. According to the report, it may be an indication for such future competition that the target — while only being a niche competitor to the dominant firm — is active in a market that addresses the same basic needs as the acquirer.

**INTRODUCTION OF A NEW CONCEPT OF 'INTERMEDIATION POWER.'**
The report recommends introducing a new concept of 'intermediation power' vis-à-vis suppliers of products or services, in addition to supply power and demand power. The idea is to clarify that the assessment of potential dominance of a transaction platform must take into account all circumstances that are decisive for the power of a platform intermediary. Depending on the conditions on the distribution side, in particular the habits of those who purchase goods or services through the platform, intermediation power should be assessed specifically with respect to products or product groups or, if product range effects are significant, with respect to a whole assortment of products.

**PROTECTION AGAINST ABUSE OF 'RELATIVE MARKET POWER' ALSO FOR LARGE ENTERPRISES.**
German competition law contains provisions prohibiting abusive unilateral conduct by undertakings below the level of dominance but with 'relative market power' or 'superior market power.' (§ 20(1) and (3) GWB). While these provisions, which have no equivalent in European competition law, did not have significant practical importance for public competition law enforcement in the past, they may gain increased relevance in the context of the digital economy.

The report recommends to no longer restrict the scope of protection against abusive conduct by undertakings with 'relative market power' to small- and medium-sized enterprises, noting that large undertakings may bilaterally depend on a customer or supplier as well. According to the report this may particularly be the case in the digital context where also large undertakings may be prone, for example, to strategies impeding competition by digital platforms with a gatekeeper position.

**EASIER INTERVENTION AGAINST UNILATERAL BEHAVIOR THAT MAY PROMOTE TIPPING.**
Intervention against unilateral conduct that actively facilitates or induces a market with strong positive network effects to tip, *i.e.*, to turn into a monopoly, is currently possible only if the respective actor has a dominant position or relative or superior market power.

The report recommends prohibiting platform providers in close oligopolies, or platform providers with superior market power, to obstruct competition, insofar as the behavior in question is found to have a dangerous probability to promote a tipping of the market. The obstruction of multi-homing or switching should be included into the provision by way of example. Multi-homing may for example be strategically obstructed by technical means like deliberate incompatibility or by tariff structures, like flat rates, that tend to make multi-homing unattractive. Smaller competitors should according to the recommendation, not be prevented from obstructing multi-homing in markets prone to tipping. Otherwise, such smaller competitors could be deprived from a defense strategy against the largest and fastest growing platform, which may actually prevent the market from tipping.

### CONCLUSION

Following submission of the export report, the Minister for Economic Affairs recently appointed an expert commission 'Competition Law 4.0' that is to make recommendations by autumn 2019. It remains to be seen which of the existing and future recommendations will ultimately become law in the next set of amendments to German competition law, which may currently be expected in the course of 2020. In any case, the regulatory environment for large digital firms and online platforms with market power can arguably be expected to become tougher.

# 16

For nearly two decades, reverse payments have been the perennial focus in the pharmaceutical industry and among antitrust professionals. But while courts continue to grapple with the implications of the Supreme Court's decision in *FTC v. Actavis, Inc.*, 570 U.S. 136 (2013), more attention is being brought to pharmaceutical companies' lifecycle management strategies.

*Continued overleaf*

# MOVING PAST *ACTAVIS* WITH EVOLVING LIFECYCLE MANAGEMENT STRATEGIES

BY JESSICA DELBAUM AND TIMOTHY SLATTERY

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# Moving Past *Actavis* with Evolving Lifecycle Management Strategies

With lifecycle management strategies like new product innovations, adjusting dosage or delivery for safety, efficacy, and patient compliance, and modifying the mode of action, pharmaceutical companies may successfully create a franchise that outlasts the original innovation. The Federal Trade Commission (FTC), state attorneys general, and private class actions have sought (with modest success) to use antitrust theories of harm to interfere with these lifecycle management strategies.

**BRANDS FACE THE REALITY THAT STATE AUTOMATIC SUBSTITUTION LAWS ALLOW OR REQUIRE PHARMACISTS TO SWITCH OUT THE BRAND FOR THE GENERIC AT THE PHARMACY**

## OVERVIEW OF LIFECYCLE MANAGEMENT

The Hatch-Waxman Act and principles of patent law provide innovators with a proscribed period of exclusivity as a reward for their invention and as a way to incentivize further innovation in pharmaceuticals. These exclusivity provisions, as contemplated by the statutory structure, permit incremental innovation and do not draw a line between ground breaking change and relatively minor (yet important) tweaks for patient safety, efficacy, and compliance concerns — instead, encouraging all innovation in pharmaceutical product development.

As generic companies file for (and receive) approval to launch in direct competition with their branded counterparts, brands face the reality that state automatic substitution laws allow or require pharmacists to switch out the brand for the generic at the pharmacy, and that insurance companies drastically reduce the co-pays due at the pharmacy for generic drugs, which effectively increases the cost for any consumers who still may want to use the brand. A brand that can somehow limit the impact of these triggers can create a lasting revenue stream.

Branded pharmaceutical companies may develop lifecycle management strategies to create new, iterative, and innovative versions of existing drugs nearing the end of their exclusivity window that can be protected from generic competition by new patents and new regulatory exclusivity. These strategies often leverage the goodwill created through the success of the original brand. Providers may change their prescribing habits and switch patients from the soon-to-be-generic market to a brand-exclusive market — a practice that antitrust enforcers and private plaintiffs call ‘product hopping.’ This switch minimizes price and market share erosion for the brand. Especially in light of government and private plaintiff challenges, the question becomes whether or at what point these actions may contravene the antitrust laws.

1. *Abbott Laboratories, Inc. v. Teva Pharmaceuticals USA, Inc.*, 432 F. Supp. 2d 408 (D. Del. 2006).

2. *Walgreen Co. v. AstraZeneca Pharmaceuticals*, 534 F. Supp. 2d 146 (D.D.C. 2008).

3. *New York ex rel. Schneiderman v. Actavis PLC (Namenda)*, 787 F.3d 638 (2nd Cir. 2015).

4. Importantly, the procedural posture of the Namenda case was founded on a district court's grant of a preliminary injunction sought by the New York Attorney General to keep Namenda IR on the market during the initial launch of generic competitors so the market would continue to exist during generic launch and prevent the move to Namenda XR, which, according to the complaint, would harm patients by increasing costs, forcing a switch, and with only a marginal benefit through the new extended-release formulation.

## ENFORCEMENT EFFORTS & EARLY DECISIONS

Early enforcement efforts and court decisions have drawn a distinction between a 'hard switch' and a 'soft switch,' finding that the 'hard switch' may create antitrust liability because it affirmatively removes the original branded product from the market, reduces the size and scope of the market left at generic entry, and forces patients to buy the new product (particularly when the original may have better outcomes or be safer). The 'soft switch,' on the other hand, is a branding-driven switch that, to a certain degree, relies on the relative value and innovation inherent in the new product.

The two leading-edge cases drew this distinction quite clearly. In *Abbott Laboratories*, Abbott reformulated its flagship TriCor product from a capsule to a tablet, stopped selling the old capsules, bought back the existing capsule supply, and changed the National Drug Data File code for the capsules, blocking automatic substitution at the pharmacy for generic capsules.[1] In *AstraZeneca*, AstraZeneca launched Nexium before patents for Prilosec expired, stopped promoting Prilosec and turned promotional efforts to Nexium, but left Prilosec on the market and continued to produce and sell Prilosec.[2] The two district courts faced with these facts found that the 'hard switch' in *Abbott* survived a motion to dismiss but that the 'soft switch' in *AstraZeneca* should be dismissed. The fundamental difference appears to be in the interference with the market for anti-competitive ends. In *Abbott*, the court found the brand sought to manipulate the market and eliminate competition by removing the mechanism for generic competition, but in *AstraZeneca*, the brand's efforts to switch the market were to allow the market (including providers and patients) to choose and to compete on the merits against generic competitors. This line encourages investment in the brand and new innovation, and seeks to reduce minor, perfunctory reformulations that may only drive higher prices.

In the 2015 *Namenda* decision, the Second Circuit was the first appeals court to decide on — and endorse (though tacitly and incompletely) — the *Abbott/AstraZeneca* factual distinction as a relevant antitrust distinction. Actavis, through its subsidiary Forest Laboratories, launched Namenda XR, an extended-release version of its blockbuster Alzheimer's drug Namenda IR, and prior to generic entry, Actavis withdrew Namenda IR from the market.[3] The court found that this 'hard switch' served to accelerate the move to Namenda XR and ensure there was no remaining market for Namenda IR when generics launched a few months later. In affirming the district court's granting of a preliminary injunction, the Second Circuit stated the withdrawal of the original product as a "*hard switch crosses the line from persuasion to coercion and is anticompetitive.*"[4]

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**'HARD SWITCH' MAY CREATE ANTITRUST LIABILITY BECAUSE IT AFFIRMATIVELY REMOVES THE ORIGINAL BRANDED PRODUCT FROM THE MARKET, REDUCES THE SIZE AND SCOPE OF THE MARKET LEFT AT GENERIC ENTRY, AND FORCES PATIENTS TO BUY THE NEW PRODUCT**

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# Moving Past *Actavis* with Evolving Lifecycle Management Strategies

**WARNER CHILCOTT BUILT A RECORD THAT ITS ACTIONS IN WITHDRAWING PRODUCTS FROM THE MARKET WERE TIED TO PATIENT SAFETY**

A year later, the Third Circuit affirmed summary judgment for a branded manufacturer, despite a 'hard switch,' on grounds that the generic still had access to the market and the product withdrawal was not a pretext for anti-competitive results.[5] Mylan, a competitor preparing to launch a generic Doryx product, claimed that Warner Chilcott aggressively repurchased and destroyed inventory, developed a new formulation with no patient benefits, and withdrew the original Doryx from the market as it launched the new formulation. The Third Circuit differentiated *Namenda* on grounds that generic competition existed for Doryx, that patents were not blocking competition and the new formulations were not patent-based, and that Namenda was on a preliminary injunction rather than on a full record at summary judgment. Importantly, Warner Chilcott built a record that its actions in withdrawing products from the market were tied to patient safety because the capsules caused esophageal problems that the tablets were designed to remedy, and the different dosages and tablet scoring allowed Doryx to compete with other acne products such as Adoxa and Solodyn, which were both offered in several dosage levels to allow precision treatment.[6]

5. *Mylan Pharms. Inc. v. Warner Chilcott Pub. Ltd. Co.*, 838 F.3d 421 (3rd Cir. 2016).

6. The *Mylan* court was also wary of the court's possible role as arbiter of the strength of innovation. *Id.* at 440 ("*At the same time, courts should also be wary both of second-guessing Congress's legislative judgment and of turning courts into tribunals over innovation sufficiency.*").

7. *In re Asacol Antitrust Litig.*, No. 18-1065, 2018 WL 4958856 (1st Cir. Oct. 15, 2018) (denying class certification in a product hopping case); *In re Suboxone Antitrust Litig.*, No. 13-2445, 2017 WL 3967911 (E.D. Pa. Sept. 8, 2017).

More recently, courts have continued to allow plaintiffs' claims that a brand engaged in anti-competitive lifecycle management strategies to survive motions to dismiss and proceed to discovery. In both *Asacol* and *Suboxone*, Warner Chilcott withdrew the original product from the market as it launched new reformulations and transitioned the market to the patent-protected version ahead of generic competition.[7] And, based on the 'hard switch,' both cases survived motions to dismiss.

## TAKEAWAYS & NEXT STEPS

Enforcement efforts and court interpretations are evolving on lifecycle management strategies, particularly on so-called product hopping allegations. The remaining (somewhat) bright line rule to reduce the risk of liability (but not necessarily scrutiny or a complaint from an enterprising plaintiff) is to avoid the 'hard switch' by keeping the original product on the market, and instead focus on building the 'soft switch' strategy that relies on the marketing efforts and strength of the new product innovation.

But *Namenda* does not clearly draw the distinction between the 'hard switch' and 'soft switch' strategies as a bright line rule, instead focusing on the provider and patient coercion aspect of the switch, arguably leaving the door open to future cases premised on a 'soft switch' that fall somewhere beyond *AstraZeneca*, though short of *Abbott* and *Namenda*. This theory remains untested, but is premised on showings of coercion absent a 'hard switch.' Importantly, the decision in *Mylan* squares with this untested, expansive view of the provider and patient coercion analysis in *Namenda* because a broader market with the existence of competing generics in *Mylan* removed concerns about coercion.

Interestingly, the FTC and Department of Justice have largely been quiet on product hopping and lifecycle management strategies, instead, leaving enforcement to state attorneys general and private litigants. Although the FTC was active in support of enforcement as an amicus in the *Mylan* case at the district court and the Third Circuit, it has yet to file a complaint in federal district court on a product hopping theory, although it has expressed an interest in doing so.

**THE FTC AND DEPARTMENT OF JUSTICE HAVE LARGELY BEEN QUIET ON PRODUCT HOPPING AND LIFECYCLE MANAGEMENT STRATEGIES**

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The economic value and utility of customer data has led to many technology companies devising successful business models on the basis of providing free access to their online platforms and services in return for access to their users' personal data. Data has therefore become an important input for online services and thus a parameter for market competition in the digital economy.

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# DEVELOPMENTS IN THE ANTITRUST ENFORCEMENT OF ONLINE PLATFORMS' USE OF DATA

**BY GEERT GOETEYN AND AGOSTINO BIGNARDI**

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# Developments in the Antitrust Enforcement of Online Platforms' Use of Data

**THE ABILITY TO GENERATE USEFUL DATA HAS BENEFITS FOR BOTH SIDES OF THE PLATFORM**

The 'Big Tech' companies have been able to harness the network effects of their platforms to obtain an ever-increasing trove of user data (for example, data generated by a social network). Central to the success of these technology companies has been their ability to commercialize their access to customer data through advertising, generating significant revenue, while allowing them to devise a wide array of more personalized services (in turn further enhancing the network effects of the platform). This arguably provided benefits for both sides: customers benefit from services empirically proven to satisfy their demand, while sellers and advertisers are able to analyze more granular information on customers. However, the platform providers' business model also raised the concern that both the sheer volume and substance of the data generated by their customers utilizing their broad platforms may be difficult for competitors to replicate, thereby potentially creating significant competitive advantages and barriers to entry.

At the start of its investigation against Facebook, the President of the German competition authority, the Bundeskartellamt (BKartA), proclaimed that its investigation signified the start of antitrust authorities scrutinizing more closely the "*machine room of data-driven platforms.*"[1] This investigation culminated in a decision in February 2019 that found that Facebook's collection of its users' data from both within and outside of Facebook's platform without "*voluntary*" user consent infringed German competition law. The BKartA's decision *is not yet final*[2] — Facebook has appealed against the decision to the Düsseldorf Higher Regional Court.[3]

Amazon's dual role as platform provider and seller on its Marketplace platform has also come under scrutiny. The European Commission (EC) is investigating Amazon's use of customer data whilst the BKartA,[4] the Austrian competition authority (the Bundeswettbewerbsbehörde (BwB))[5] and Italian competition authority (the Autorità Garante della Concorrenza e del Mercato (AGCM))[6] are all looking at Amazon's allegedly unfair terms and conditions imposed on third-party retailers on its Marketplace.

## DATA AND PLATFORM TERMS & CONDITIONS AS AN ABUSE OF DOMINANCE

The BKartA's decision in February 2019 concluded that Facebook had infringed German competition law by forcing German customers' access to its social network to be conditional on its processing of user data from services within the Facebook platform (*e.g.*, WhatsApp and Instagram) as well as in respect of third-party apps or websites without the effective consent of its users. Although Facebook's user terms and conditions allow it to collect data in this manner, according to the BKartA, the lack of alternatives to Facebook in the German social network market makes it difficult to prove that users have given their free consent to it amassing "*such a treasure trove*" of their data when users click to accept Facebook's terms and conditions as part of signing up to the social network.

Continuing the examination of platforms' exploitation of user data and terms and conditions in the national enforcement sphere; in November 2018, the BKartA initiated proceedings against Amazon

for abusing its dominance in the German online retail market by imposing unfair terms and conditions on third-party sellers on its Marketplace.[7] These third-party sellers include "*tens of thousands*" of small and medium-sized enterprises that Amazon directly competes with when it sells its own-brand products.[8] The terms and conditions, which the third-party sellers must accept in order to be able to sell on the Marketplace, govern the rules in which they can advertise and sell on the Marketplace and they may disadvantage the sellers' ability to compete with Amazon.

The BKartA's investigations appear to have had a domino effect. In 2019, the BwB in Austria, the AGCM in Italy and the Conseil de la Concurrence (CC) in Luxembourg all launched probes into whether Amazon's Marketplace platform has abused its market dominance by discriminating against third-party sellers and favoring its own products.[9] Whilst the AGCM's investigation focuses on whether Amazon's terms and conditions provide an unfair advantage to third-party sellers who use Amazon's own logistics services, the CC follows the EC's lead in also covering Amazon's collection of data in order to (allegedly) gain a competitive advantage. These investigations are still at preliminary stages and are yet to reach any conclusions as to whether Amazon infringed any domestic competition laws.

## THE EC INVESTIGATES AMAZON MARKETPLACE'S USE OF DATA

In September 2018, the EC commenced preliminary investigations (by, for example, sending questionnaires to third-party sellers) into Amazon's dual role on its Marketplace platform and how Amazon uses data generated from transactions on its platform.[10] Unusually, the EC's investigation was not prompted by a complaint from a competitor but from the EC's own market observations and its 2017 e-commerce sector inquiry.

More specifically, the EC is examining whether such data collection practices may provide Amazon with a unique competitive advantage by offering insights into how it can successfully develop and market its own products to customers. The EC may also be investigating a novel form of data-based leveraging in that, by collecting such data, Amazon is capitalizing on its pre-eminent market position in the online intermediary retail market in order to bolster its market position on the upstream retail market by developing consumer products itself.

Another theory of harm that the EC may be formulating is whether sellers are afforded equal access to potentially competitively sensitive information regarding rival Marketplace sellers such as prices, sales numbers and customer search information. Even if third-party sellers are allowed equal access, this may lead to other competition law issues such as the risk of sellers using Amazon's Marketplace as a hub-and-spoke platform for price-fixing among themselves.[11] Amazon could, in principle, still be liable for any such infringement of competition law if it was shown to have facilitated and to have been reasonably aware of the collusion.

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**UNUSUALLY, THE EC'S INVESTIGATION WAS NOT PROMPTED BY A COMPLAINT FROM A COMPETITOR BUT FROM THE EC'S OWN MARKET OBSERVATIONS AND ITS 2017 E-COMMERCE SECTOR INQUIRY**

1. Germany threatens curbs on Facebook's data use, The Financial Times (January 25, 2018).
2. Bundeskartellamt, Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources (February 7, 2019), https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.
3. See here: https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf?__blob=publicationFile&v=3 (page 12).
4. Bundeskartellamt initiates abuse proceeding against Amazon, Bundeskartellamt (November 28, 2018), available here: https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2018/29_11_2018_Verfahrenseinleitung_Amazon.html.
5. Austrian Federal Competition Authority initiates investigation proceedings against Amazon, BWB (February 14, 2019), available here: https://www.bwb.gv.at/en/news/detail/news/austrian_federal_competition_authority_initiates_investigation_proceedings_against_amazon/.
6. Amazon: investigation launched on possible abuse of a dominant position in online marketplaces and logistic services, AGCM (April 16, 2019), available here: https://en.agcm.it/en/media/press-releases/2019/4/Amazon-investigation-launched-on-possible-abuse-of-a-dominant-position-in-online-marketplaces-and-logistic-services.
7. See n. 4.
8. German cartel office launches investigation into Amazon marketplace, The Financial Times (November 29, 2018).
9. See n. 5, 6 and Amazon faces Luxembourgish antitrust probe, PaRR (April 3, 2019), available here: https://app.parr-global.com/intelligence/view/prime-2813761.
10. See Q&A on Amazon from the Press conference by Margrethe Vestager on Luxembourg McDonalds' State aid case (September 19, 2018), available here: http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I160574.
11. The Decision of the CMA, Case 50223, Online sales of posters and frames, Trod Limited and GB eye Limited (2016), found that two U.K. sellers agreed to fix the prices of the posters and frames sold on Amazon Marketplace. There was no indication in this decision that Amazon provided the sellers with non-public competitively sensitive information or that Amazon facilitated the infringement of U.K. competition law.

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# Developments in the Antitrust Enforcement of Online Platforms' Use of Data

**TIGHTER RESTRICTIONS ON THE FREEDOM OF TECHNOLOGY COMPANIES TO USE DATA MAY HAMPER THEIR ABILITY TO GENERATE REVENUES**

Amazon finds itself in an unusual situation of being simultaneously investigated by both a number of national authorities in Europe and the EC for its alleged conduct on its Marketplace, particularly as the national authorities formally announced their investigations after the EC had already commenced its own inquiries. While the BKartA's theory of harm incorporates the use of the Marketplace's allegedly unfair terms and conditions, the EC's investigation is significant as it exclusively focuses on Amazon's unique access to data as platform provider in order to gain an unfair competitive advantage.

Commissioner Vestager has admitted that there may be "*completely legitimate*" reasons for Amazon collecting the data in order to improve the service of its Marketplace for both sellers and buyers.[12] It remains to be seen whether the EC's ongoing investigation will lead to it commencing formal proceedings against Amazon.

## REGULATING 'DOMINANT' ONLINE PLATFORMS USE OF DATA

There is a material risk that technology companies' platforms are deemed to be dominant by a competition authority. In its decision, the BKartA judged Facebook to possess a dominant position in the German social network market, whilst its preliminary investigation against Amazon has found "*indications*" that Amazon may be dominant in online marketplace services market.[13]

A dominant online platform may become subject to additional obligations with regard to the way it uses user/competitor data if such data is deemed to be vital to be able to compete effectively on the platform. Platforms may be required to provide access to such data to its competitors on non-discriminatory terms or they may find that a refusal to provide access to such data may infringe competition law. An example of potentially problematic behavior could be the allegations made by a U.K. Parliamentary Committee that Facebook had threatened to cut off user data to potential rivals, while giving preferential access to app developers that had paid for advertising.[14] Regulators could potentially use such obligations on the use of data as a means of encouraging the sharing of data between market participants in order to stimulate effective competition in the digital economy. However, any such intervention raises delicate questions as to whether data can be seen as truly essential justifying the imposition of a far-reaching access obligation.

The various regulatory interventions also indicate that popular technology companies should be careful of the substance as well as the manner in which they impose terms and conditions both on data-rich customers as well as on potential competitors utilizing their platform. The BKartA found that, given Facebook's dominant market position, a mere "*obligatory tick on the box to agree to the company's terms' of use*" was not sufficient and that Facebook must do more in order obtain effective consent from its joining users.[15] If Facebook fails to do this, it must substantially restrict or cease its data collection in particular from sources outside of the Facebook platform in order to comply with the BKartA's decision.[16]

Tighter restrictions on the freedom of technology companies to use data may hamper their ability to generate revenues from advertising and other data-related services, or they may revert to asking consumers for remuneration rather than their data.

12. See n. 8.

13. See the Bundeskartellamt's press release at n. 4 above.

14. Note by Damian Collins MP, Chair of the DCMS Committee, Summary of key issues from the Six4Three files, available here: https://www.parliament.uk/documents/commons-committees/culture-media-and-sport/Note-by-Chair-and-selected-documents-ordered-from-Six4Three.pdf.

15. See n. 2.

16. Background information on the Bundeskartellamt's Facebook proceeding, pages 1–2, available here: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf?__blob=publicationFile&v=6.

17. The General Data Protection Regulation (EU) 2016/679.

18. Section 19(1) of the German Competition Act.

19. Background information on the Facebook proceeding, Bundeskartellamt (December 19, 2019), see Q6, available here: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=6.

20. Background information on the Facebook proceeding, Bundeskartellamt (December 19, 2019), see Q6, available here: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Diskussions_Hintergrundpapiere/2017/Hintergrundpapier_Facebook.pdf?__blob=publicationFile&v=6.

21. Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27, 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

22. *Shaping competition policy in the era of digitisation*, further information available here: http://ec.europa.eu/competition/scp19/.

## THE RELATIONSHIP BETWEEN ANTITRUST AND DATA PROTECTION ENFORCEMENT

The implications of the BKartA's Facebook decision to the continuing debate surrounding the interface between data protection and antitrust enforcement may be limited to German enforcement. The BKartA relied on German case law in order to use Facebook's alleged breach of the EU General Data Protection Regulation (GDPR)[17] to prove that Facebook's data processing practices constituted an abuse under German competition law (*i.e.*, "*exploitative business terms*").[18] The GDPR breach, according to the BKartA, was that Facebook had no effective justification in order to collect its users' data from other apps and services without their effective consent.[19]

It could be questioned, however, whether the BKartA was the best authority to assess the underlying breach of the GDPR and to pursue such data protection concerns, or whether the German data protection authority would have been better placed to deal with them. Whilst the BKartA "*closely cooperated with data protection authorities*" in its investigation,[20] there is currently no clear framework in Germany or across Europe for consistency of enforcement if both data protection and competition authorities are able to sanction the same conduct.

Given the importance of data in the digital economy and the increased spotlight on the data protection practices both from an antitrust perspective as well as more generally with the enforcement of the GDPR from May 2018,[21] it is likely that data issues will be influential in future antitrust cases. The EC hosted a conference in January 2019 on the competition issues of data access, sharing and pooling "*in a world of ubiquitous data*" as well as the market power of digital platforms.[22]

## CONCLUSION

In light of the EC and national competition authority investigations and of the BKartA's Facebook decision, it is evident that antitrust authorities are increasingly scrutinizing the role of data in competition and, particularly, in competition on online two-sided platforms. Given the combination of concerns regarding the alleged market power of the big technology companies and the role of data as a parameter to competition and as an important input for digital services, increased enforcement in this area can be expected.

It is clear that antitrust authorities will consider data issues when they are seeking to establish anti-competitive behavior. In addition to fines imposed (which can be up to 10% of the infringer's global turnover for EC fines), any behavioral or structural remedies imposed as a result of such cases may well have a significant impact on the business model of technology companies that have, until now, been very successful at utilizing customer data in order to develop a profitable ecosystem of diverse products and services.

**THERE IS CURRENTLY NO CLEAR FRAMEWORK IN GERMANY OR ACROSS EUROPE FOR CONSISTENCY OF ENFORCEMENT IF BOTH DATA PROTECTION AND COMPETITION AUTHORITIES ARE ABLE TO SANCTION THE SAME CONDUCT**

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With three cases recently closed, Google has been in the crosshairs of European Union Competition Commissioner Vestager and her team for the last few years. Google's fines so far amount to more than €8.2 billion in total.

Yet this was not the only problem arising from the European Commission's (EC) attention. Google has initially struggled to comply with the remedies the EC imposed in 2017 in its *Google Search (Shopping)*[1] decision *(Google Shopping)*. Eventually, in March 2019, Commissioner Vestager referred to Google's initiatives to tackle the EC's concerns as positive.

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# GOOGLE AND COMPLIANCE WITH THE *GOOGLE SHOPPING* DECISION

**BY GEERT GOETEYN AND PATRICIA SANCHEZ-CALERO BARCO**

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# Google and Compliance with the *Google Shopping* Decision

**GOOGLE HAD PROPOSED COMMITMENTS ON THREE OCCASIONS IN AN ATTEMPT TO ADDRESS THE COMPETITION CONCERNS IDENTIFIED BY THE EC**

## BACKGROUND TO THE *GOOGLE SEARCH (SHOPPING)* CASE

On June 27, 2017, the EC imposed a fine on Google totaling €2.42 billion. The EC concluded that Google had abused its dominant position and therefore infringed Article 102 of the Treaty on the Functioning of the European Union (TFEU) by favoring its own shopping comparison service in its general results pages over the services of its competitors. As well as imposing commitments on Google, the EC decision included a cease and desist order binding Google and its mother company Alphabet Inc., ordering Google to immediately bring the infringement to an end.

Since the opening of the investigation in 2010, Google had proposed commitments on three occasions in an attempt to address the competition concerns identified by the EC.

The first set of commitments was submitted to the EC in April 2013 following the EC's preliminary assessment in which it considered that Google could be abusing its dominant position in four different ways.[2] However, Google's proposal failed to convince the EC and the market players that had been invited to comment. In November 2013, Google therefore offered amended commitments, which it considered made changes to provide a greater visibility for rival services and tackle other specific concerns raised by the EC; however, the EC disagreed.

In February 2014, in a third attempt to assuage the EC's concerns, Google agreed to promote, on its general search web, three rival services on the basis of objective criteria every time it promoted its own services. The EC was receptive to these commitments, but received negative comments during its market test. Therefore, as Google failed to offer remedies that convincingly addressed the EC's concerns, the latter issued a statement of objections (SO) in April 2015.

The EC considered that Google held a dominant position in the general search market with a market share of more than 90% in many of the countries in which the infringement was taking place and that it had abused its dominant position by favoring its own shopping comparison service in its general search results. According to the EC, Google was leveraging its dominant position in internet search to gain a competitive advantage for its shopping services, and therefore instead of competing on merit, Google was illegally promoting its services to the detriment of its competitors.

The EC considered that Google should treat its own comparison shopping services the same way as those of its competitors'.[3]

## COMMITMENTS AND THE PATH FORWARD

In its final *Google Shopping* decision, the EC confirmed its preliminary position as set out in the SO and imposed a multi-billion euro fine. In addition, it stated that Google had "*90 days from the date of the notification of this Decision to implement measures that bring the infringement*

1. European Commission Decision of June 27, 2017 in Case AT.39740 *Google Search (Shopping)*. Google lodged an action for annulment against the decision before the European General Court on September 11, 2017 in Case T-612/17 *Google and Alphabet v. Commission*.

2. EC Press Release "*Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns*" April 25, 2013. The EC considered in its preliminary conclusion that Google could have abused its dominant position by (i) favoring within Google's general search engine Google's specialized web search services; (ii) using original content from third party web sites without consent; (iii) concluding agreements with publishers which obliged them to obtain all or most of their online search advertisements from Google; and (iv) by including restrictive clauses on the transferability of online search advertising campaigns and the management of such campaigns across Google's AdWords and rival search advertising platforms.

3. EC Fact-sheet "*Antitrust: Commission sends Statement of Objections to Google on comparison shopping service*," April 15, 2015.

4. Case AT.39740 *Google Search (Shopping)* [701].

5. EC Press Release "*Antitrust: Commission fines Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service*," June 27, 2017.

6. Case AT.39740 *Google Search (Shopping)* [700].

7. Statement by Commissioner Vestager on Commission decision to fine Google €2.42 billion for abusing dominance as search engine by giving illegal advantage to own comparison shopping service, June 27, 2017.

8. *Ibid.*

9. Statement by Commissioner Vestager on Commission decision to fine Google €1.49 billion for abusive practices in online advertising, March 20, 2019.

10. American Bar Association Antitrust Section Spring Meeting 2019, Washington DC, March 27–29, 2019. Write-up available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1078254&siteid=190&rdir=1.

11. See, for example, "*Google's shopping changes don't remedy EU abuse, Kelkoo says*," April 3, 2019, available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1080234&siteid=190&rdir=1 and "*Google rivals: Search giant's antitrust fix worse than Almunia's settlement*," February 28, 2018, available at: https://www.politico.eu/article/Google-rivals-vestagers-solution-worse-than-almunias/.

12. "*Consumer concerns with Google's non-compliant remedy in Antitrust Shopping case*," April 5, 2019, available at: https://www.beuc.eu/publications/beuc-x-2019-020_google_non-compliant_remedy_in_antitrust_shopping_case.pdf.

13. "*Comment: Google jobs-search scrutiny sees EU revisit questions of web-traffic diversion*," March 1, 2019, available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1070296&siteid=190&rdir=1.

14. European Commission Decision of March 20, 2019 in Case AT. 40411 *Google Search (AdSense)*.

15. "*Comment: Google jobs-search scrutiny sees EU revisit questions of web-traffic diversion*," March 1, 2019, available at: http://www.mlex.com/GlobalAntitrust/DetailView.aspx?cid=1070296&siteid=190&rdir=1.

*effectively to an end."*[4] With no further indication as to what it should do, it was left to Google to devise a satisfactory remedy. If it failed to do so, the EC reserved the right to impose *"a daily periodic penalty payment of 5% of Alphabet's average daily turnover in the business year preceding such a failure to comply."*[5]

The EC decision further stated that whatever remedial measures Google chose to adopt must: "*(a) apply to all devices, irrespective of the type of device on which the search is performed; (b) apply to all users of Google situated in the thirteen EEA countries in which the Conduct takes place* [...]; *(c) subject Google's own comparison shopping service to the same underlying processes and methods for the positioning and display in Google's general search results pages as those used for competing comparison shopping services* [...], *(d) not lead to competing comparison shopping services being charged a fee or another form of consideration that has the same or an equivalent object or effect as the infringement established by this Decision.*"[6]

Therefore it was up to Google to craft effective remedies that would put an end to its illegal conduct. The looseness of the *Google Shopping* decision in relation to the remedies Google must implement is surprising given the various commitment packages Google submitted to the EC over the course of the 7 years that the EC investigation was ongoing. Rather than setting out a detailed remedy package, in its final decision the EC limited itself to the statement of principle that it expected Google to "*compl*[y] *with the simple principle of giving equal treatment to rival comparison shopping services and its own service.*"[7] Commissioner Vestager explained that "*It is Google's sole responsibility to ensure compliance and it is for Google to explain how it intends to do so.*"[8]

Google devised the following remedy: everybody can bid for ad placements in Google's Shopping search engine without having a specific slot reserved for Google Shopping or other comparison shopping services. Users can also choose whether the shopping service shows links to comparison shopping sites or directly to sites where merchants and products are available. Commissioner Vestager described these developments as "*positive*" in March 2019, though she noted that the EC would continue to monitor the market.[9] Other EC officials have also welcomed the changes; Nicholas Banasevic, Head of Unit at EC's Directorate General for Competition, who led the investigation, stated that Google's changes were "*an example of engagement where we see the remedy working.*"[10]

However, doubts as to the effectiveness of the remedy remain. Rivals of Google have argued that the changes do not give sufficient prominence or detail to rival search results.[11] The consumer protection association BEUC has also expressed concerns; in April 2019, it wrote to Commissioner Vestager challenging what it describes as "*signals*" displayed by the EC that Google's changes are compliant with the decision.[12]

## WHAT WILL HAPPEN NEXT?

Although the EC considers that Google is on the right track, continued full compliance with the decision will be necessary or it will face another fine. Indeed, companies have been fined for failure to adequately implement remedies. In 2013, Microsoft was fined €561 million for non-compliance with commitments it had offered in 2009 to address the EC's concerns in relation to the tying of its web browser, Internet Explorer, to its PC operating system, Windows.

Nor did Google's woes end with the *Google Shopping* case. In 2018, Google faced a second EC decision imposing a fine of €4.34 billion, in the *Google Android* case[13] (at the time of writing of this article, the decision is not yet public) and in 2019 a third decision imposing a fine of €1.49 billion in the *Google Search (Ad Sense)*[14] — though it is unlikely that there will be compliance issues in that case, as the EC found that the infringement had ended in 2016. Additionally, March 2019 also saw reports of EC interest in the Google for Jobs search tool following a complaint in 2018, with criticisms of the tool including, again, the facts that Google allegedly favors its own results over those of rivals.[15]

# 19

Under the Trump administration's leadership, the Antitrust Division of the Department of Justice (DOJ) appears to be changing its enforcement approach toward intellectual property (IP) issues arising in the context of standard-setting organizations (SSOs).

*Continued overleaf*

# U.S. POLICY SHIFTS IN INTELLECTUAL PROPERTY ANTITRUST ENFORCEMENT

**BY JESSICA DELBAUM AND GEERT GOETEYN**

# 19

# U.S. Policy Shifts in Intellectual Property Antitrust Enforcement

In particular, statements made over the past year by Assistant Attorney General (AAG) Makan Delrahim signal a clear departure from prior agency policy regarding the role of antitrust law in addressing violations of fair, reasonable and non-discriminatory (FRAND) commitments made by standard-essential patent (SEP) holders as part of the standard-setting process. While the DOJ and Federal Trade Commission (FTC) have historically taken the position that the antitrust laws may reach such violations, Delrahim has indicated that the DOJ under his watch will focus instead on potential antitrust violations by SEP licensees and on the potential for collusive behavior by SSOs and their participants.

**THE STANDARD-SETTING PROCESS ALSO CAN REDUCE COMPETITION AND CREATE ANTITRUST RISK**

## BACKGROUND

SSOs are industry groups that establish compatibility standards, which enable interoperability of products made by different manufacturers. Such standards are a critical part of the digital technology sector in particular, where interconnectivity would not be possible without the widespread adoption of standardized technologies. Thus, antitrust agencies have long recognized that standard-setting supports growth and innovation, and is usually pro-competitive and efficiency-enhancing.

By its very nature, however, the standard-setting process also can reduce competition and create antitrust risk. The process typically involves groups of competitors who collectively choose between competing technologies to

**ANTITRUST ENFORCEMENT IN THE UNITED STATES HAS PREVIOUSLY FOCUSED LARGELY ON INTERPRETING AND ENFORCING FRAND COMMITMENTS**

establish the basis of competition. The selected technology may lack effective substitutes precisely because the SSO chose to include it in the standard and it may be costly to switch to a different technology after the standard is set.

Standards often include patented technology and a patent that protects technology essential to a standard is referred to as an SEP. Once the industry is locked into a standard that lacks competitive alternatives, the SEP holder may have the power to extract higher royalties, or impose less favorable licensing terms, than it otherwise could have gained in a competitive market. Such costs may be passed down to consumers.

To ensure that any would-be SEP holder does not abuse its bargaining power, SSOs typically require intellectual property (IP) rights holders — in order to be considered for inclusion in a standard — to agree to make licenses to their patented technologies available to industry participants on FRAND terms. Such commitments are intended to strike a balance between, on the one hand, the interests of SEP owners to have the 'winning' technology and to be appropriately compensated and, on the other hand, the interests of SEP implementers to have effective access to the standard.

Antitrust enforcement in the standard-setting context in the United States has previously focused largely on interpreting and enforcing FRAND commitments. The FTC in particular has taken seven significant enforcement actions over the past two decades — across both Republican and Democratic administrations. Most recently, for example, the FTC filed a complaint against Qualcomm, Inc. in January 2017 alleging, in part, that Qualcomm refused to license its cellular SEPs, and otherwise extracted non-FRAND rates and license terms, in violation of Section 5 of the FTC Act. In a partial summary judgment a federal district court ruled, on November 6, 2018, that Qualcomm must make its SEPs available for licensing, including to its competitors. On May 21, 2019, the district court ruled that the FTC had demonstrated monopoly power in the market for certain modem chips. It further found that the licensing practices violate sections 1 and 2 of the Sherman Act and constitute an unfair method of competition under Section 5 of the FTC Act.

## DOJ POLICY SHIFT

While the DOJ has not historically pursued antitrust enforcement action against FRAND violations, it had, prior to AAG Delrahim assuming the position of head of the Antitrust Division of the DOJ, articulated policy views consistent with the FTC's enforcement efforts. Befitting his status as the first registered patent lawyer to head the Division, Delrahim has repeatedly spoken publicly to explain how the DOJ under his leadership will approach legal issues at the intersection of antitrust and IP.

In November 2017, Delrahim expressed concern that antitrust enforcers had strayed too far in the direction of accommodating the concerns of technology implementers over IP creators. Rather than focus on the patent 'hold-up' problem, in which an SEP holder threatens to delay licensing until its royalty demands are met, Delrahim said that the more serious impediment to innovation is the 'hold-out' problem, which arises where SEP implementers underinvest in the technology, or threaten not to take a license at all, until their royalty demands are met. Delrahim expressed skepticism about using antitrust law to address the hold-up problem, noting that SSOs and their members are in the best position to police private licensing commitments through contractual and other common law or non-antitrust statutory remedies. Antitrust authorities should instead focus on the potential for collusive behavior by SSOs and their participants. Indeed, in 2018, the DOJ reportedly opened an investigation into potential collusion relating to a WiFi connectivity standard under development at the Institute of Electrical and Electronics Engineers SSO.

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# U.S. Policy Shifts in Intellectual Property Antitrust Enforcement

## THE NEW MADISON APPROACH LAYS OUT FOUR PRINCIPLES

In March 2018, Delrahim outlined the DOJ's 'New Madison' approach (so named after founding father James Madison's views on the necessity for strong patent protection) to the antitrust-IP nexus. Strongly favoring SEP holders, the New Madison approach lays out the following four principles:

1. Antitrust law should not play a role in enforcing FRAND commitments;
2. SSOs' policies should not skew conditions in favor of SEP implementers;
3. SSOs should protect patent holders' right to exclude; and
4. A unilateral and unconditional refusal to license a patent should be *per se* legal.

Delrahim's new approach in effect provides technology implementers with no protection under the antitrust laws from abusive conduct by SEP licensees. The approach thus diverges from the DOJ's past policies, and it also represents a departure from the enforcement policies of the FTC and many other antitrust agencies around the world. To this end, Delrahim explained in September 2018 that, under the New Madison approach, the DOJ also will be increasing its domestic and international advocacy efforts in order to 'modernize' global antitrust policy concerning IP. As further evidence of its new approach, in December 2018, the DOJ withdrew from the 2013 'Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary FRAND Commitments' that it had jointly made with the U.S. Patent and Trademark Office. In January 2019, the DOJ also stated that it planned to file a 'statement of interest' in a private lawsuit in which one company (U-blox) accused another (InterDigital Inc.) of antitrust law violations from charging excessive royalties for SEPs.

### FTC

At the FTC, a new slate of five Commissioners took office last year, including Joseph Simons, who in May 2018 was sworn in as Chairman. In September 2018, Simons expressed his agreement with Delrahim that breach of a FRAND commitment, and even a fraudulent promise to abide by a FRAND commitment, is not on its own an

**JOSEPH SIMONS RECOGNIZED THAT BOTH HOLD-UP AND HOLD-OUT CAN BE PROBLEMATIC**

antitrust issue, although he recognized that both hold-up and hold-out can be problematic, and indicated the FTC would continue economically grounded and fact-based antitrust enforcement in the IP context. It remains to be seen whether Simons' comments represent his personal views only or more broadly signal a change in enforcement policy at the FTC.

As part of its ongoing Hearings on Competition and Consumer Protection in the 21st Century, the FTC in October 2018 held discussions concerning innovation and IP policy.

## EUROPE

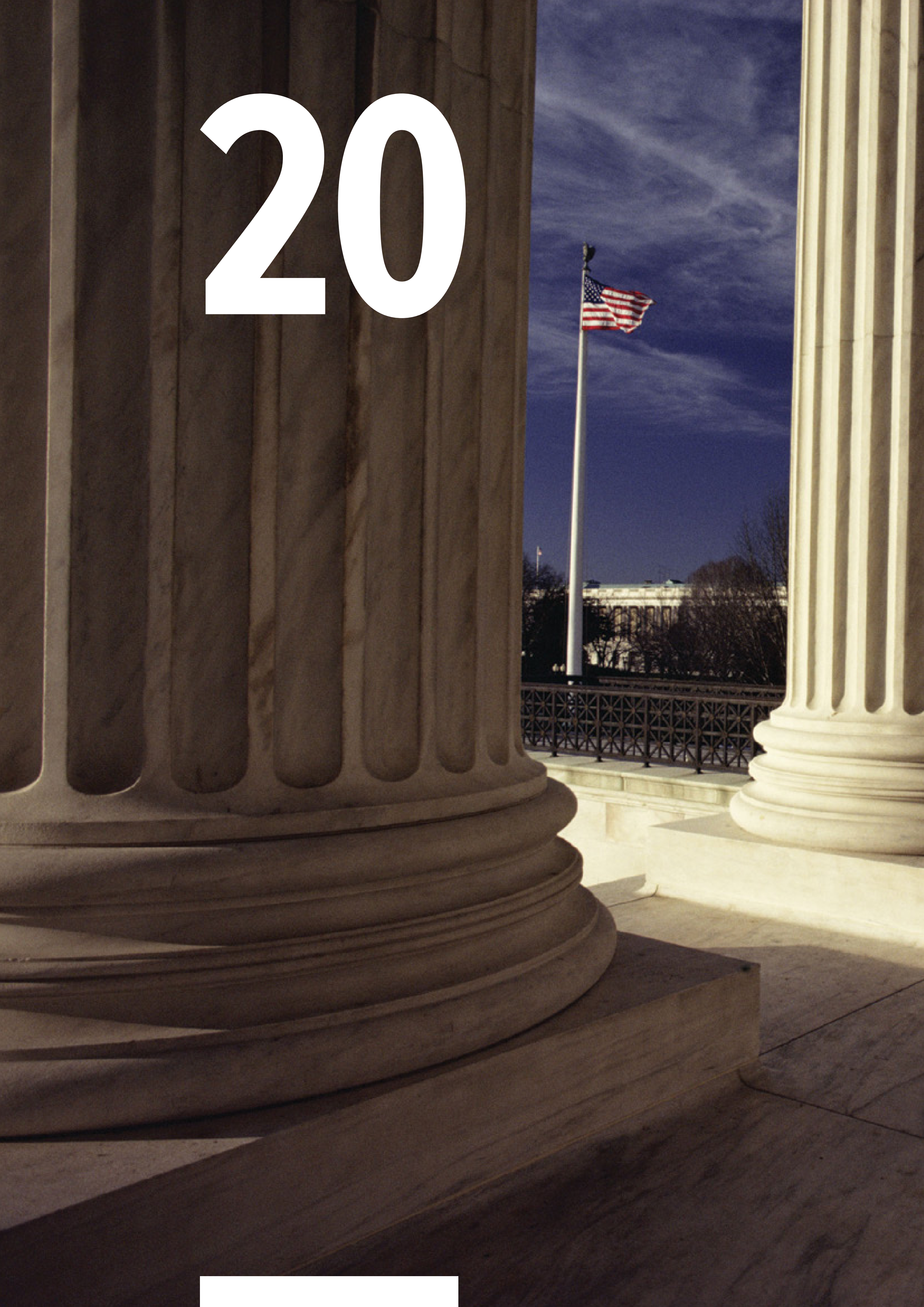
Both the Court of Justice of the European Union in *Huawei v. ZTE* and the European Commission (EC) in its *Motorola Mobility* and *Samsung Electronics* decisions recently affirmed that, in Europe, hold-up is fundamentally a competition problem and competition law is an appropriate tool to enforce FRAND commitments. They also clarified the limits, under European Union competition law, of the SEP holder's right to seek an injunction against an implementer willing to enter into a license on FRAND terms.

In November 2017, the EC issued non-binding guidelines concerning SEPs, which, among other things, discuss general principles for FRAND. The guidelines encourage industry participants to develop best practices concerning FRAND licensing, and indicate the EC will monitor progress and take appropriate action, as necessary.

## CONCLUSION

AAG Delrahim's statements have garnered mixed reactions from both the SSOs and antitrust communities. While the New Madison approach appears to signal a significant shift at the DOJ, its application to antitrust enforcement of IP disputes remains to be seen. Similarly, it is unclear whether Chairman Simons' remarks will translate into changing enforcement actions by the FTC.

It will be worth watching how both U.S. agencies (and the courts) navigate the intersection of antitrust and IP issues on a going-forward basis, and to what extent they stray from antitrust enforcers outside the United States.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On June 25, 2018, the U.S. Supreme Court, in a 5-4 decision by Justice Thomas, held that provisions in American Express Company's contracts with merchants that restricted the ability of these merchants to steer customers to other credit or charge cards did not violate the Sherman Act. *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2280 (2018). In doing so, the Court recognized the importance of examining the effects on an alleged restraint on both sides of a two-sided platform market.

*Continued overleaf*

# UNITED STATES SUPREME COURT ACCEPTS THE IMPORTANCE OF TWO-SIDED MARKETS ANALYSIS

**BY JOHN COVE AND ALEXANDER SANYSHYN**

# 20

# United States Supreme Court Accepts the Importance of Two-Sided Markets Analysis

This ruling has important implications for antitrust analysis, not only for the credit card industry, but for other industries that operate in two-sided, or even multi-sided platform markets where firms must compete simultaneously for different groups of customers whose demands are distinct but interrelated.

**BECAUSE THE NDPS ARE VERTICAL RESTRAINTS SUBJECT TO THE RULE OF REASON, THE SUPREME COURT BEGAN WITH MARKET DEFINITION**

## BACKGROUND

American Express contracts with merchants to accept charges on its charge and credit cards in return for its agreement to reimburse merchants for those charges, minus a designated merchant discount fee. American Express's merchant contracts typically contain non-discrimination provisions (NDPs) in which the merchant agrees not to discriminate against American Express by, *inter alia*, indicating a preference for another card or attempting to dissuade cardholders from using the card. *United States v. American Express Co.*, 838 F.3d 179, 191 (2d Cir. 2016). The plaintiffs (the U.S. Department of Justice (DOJ) and 17 state Attorneys General) challenged the NDPs under Section One of the Sherman Act, arguing that the NDPs unreasonably restrained competition because they allegedly reduced competitors' incentives to reduce merchant fees because reducing merchant fees would not necessarily result in greater volume. *Id.* at 192. After a lengthy bench trial, the District Court agreed, finding that the NDPs were unreasonable restraints in violation of the Sherman Act. *United States v. American Express Co.*, 88 F. Supp. 3d 143 (E.D.N.Y. 2015). Based on this finding, the court entered a sweeping injunction that not only prohibited

**THE COURT FOCUSED ON THE INTERCONNECTED NATURE OF THE RESPECTIVE DEMANDS ON EACH SIDE OF THE MARKET**

American Express from enforcing the NDPs, but prohibited American Express from unilaterally treating merchants differently based on whether they steered or not. *United States v. American Express Co.*, 2015 WL 1966362 (E.D.N.Y. Apr. 30, 2015). On appeal, the Second Circuit reversed the District Court's order, holding that the plaintiffs had failed to prove the NDPs violated the Sherman Act. The state plaintiffs, but not DOJ, petitioned for *certiorari*, which the Supreme Court granted.

## THE SUPREME COURT'S DECISION

Because the NDPs are vertical restraints subject to the rule of reason, the Supreme Court began with market definition. The District Court had found that the relevant market was for the provision of "*network services*," meaning the "*core enabling functions provided by networks, which allow merchants to capture, authorize, and settle transactions for customers who elect to pay with their credit or charge card*" and expressly rejected the idea that the market should be evaluated as a "*single platform-wide market for transactions*" that encompassed both merchant and consumer interactions. 88 F. Supp. 3d at 171–72. The Court rejected this approach, agreeing with the Second Circuit that the credit card industry operates in a two-sided market that simultaneously provides service to two different groups: cardholders and merchants. 138 S. Ct. at 2280.

In evaluating how the NDPs affect competition, the Court focused on the interconnected nature of the respective demands on each side of the market — demand for merchants to accept a network's card and the demand for consumers to use it — explaining that a credit card "*is more valuable to cardholders when more merchants accept it, and is more valuable to merchants when more cardholders use it.*" *Id.* The Court described the dynamic relationship between these groups as an example of "*indirect network effects*," a feature of two-sided platforms where the value of the platform to one group depends on how many members of another group participate. *Id.* at 2280–81. Indirect network effects, the Court observed, are critical considerations for competition among two-sided platforms, which "*must take these indirect network effects into account before making a change in price on either side*," or they risk creating "*a feedback loop of declining demand*." *Id.*

The Court found that the plaintiffs failed to take these two-sided considerations into account in defining the relevant market and that the plaintiffs' focus on merchant fees improperly ignored competition on the other side of the market: the competition for cardholders. *Id.* at 2287. Plaintiffs' evidence of fee increases to merchants, the Court found, "*cannot by itself demonstrate an anticompetitive exercise of market power*" because "*Amex uses its higher merchant fees to offer its cardholders a*

CONTINUED >

# United States Supreme Court Accepts the Importance of Two-Sided Markets Analysis

20

*more robust rewards program, which is necessary to maintain cardholder loyalty and encourage the level of spending that makes Amex valuable to merchants.*" *Id.* at 2287–88. Thus, higher prices charged by Amex to merchants were not an anti-competitive effect of the NDPs in its merchant contracts, but rather evidence that competition for cardholders — in the form of better cardholder rewards funded by those increased merchant fees — was in fact flourishing. *Id.* at 2288–90.

## LESSONS FROM THE *AMERICAN EXPRESS* CASE

The *American Express* case contains several lessons for antitrust analysis and antitrust litigation, and these are not limited to two-sided markets. While some of these lessons are not particularly novel, they bear repeating because they found an unusual application in this case and because they are sometimes forgotten, including by regulators and enforcers.

**ANTITRUST ANALYSIS MUST CONSIDER THE TOTAL MARKET AFFECTED BY A RESTRAINT, INCLUDING TWO-SIDED PLATFORM MARKETS WHERE APPROPRIATE**

First, antitrust analysis must consider the total market affected by a restraint, including two-sided platform markets where appropriate. Here, the plaintiffs and their expert acknowledged that the market was two-sided but made minimal efforts to incorporate that fact into their analysis. The District Court took the same approach, not wishing to take "*the concept of two-sidedness too far.*" 88 F. Supp. 3d at 172–73. The Supreme Court, on the other hand, devoted substantial discussion to the proper approach to two-sided analysis. 138 S. Ct. at 2280–81. In light of this analysis, it will be difficult for future litigants to simply pay lip service to

## ENFORCERS SHOULD CAREFULLY CONSIDER THE BENEFITS OF DIFFERENTIATED PRODUCT COMPETITION BEFORE CHALLENGING A RESTRAINT DESIGNED TO PROMOTE SUCH COMPETITION

two-sided issues when they are properly presented. In all two-sided platform markets, the firm must balance the value offered on one side of its platform with the value offered on the other. Often, the firm sets the price on one side of the platform as free or even negative to generate demand on the other side and thereby maximize its total revenue. Analysis of competition in platform industries must consider the effects of the restraint on both sides of the platform, including the kind of feedback loop and network effects that were central to the Court's analysis here.

Second, price increases standing alone do not demonstrate market power. The Court rejected the District Court's reliance on merchant fee increases as proof of either market power or anti-competitive effects because this analysis did not consider prices on the other side of the platform. *Id.* at 2288. Nor did the plaintiffs attempt to establish by any other means that American Express' pricing or margins on transactions were supracompetitive. *Id.*

Third, strong consumer demand for a product does not equate to market power where continuing investment and price competition are necessary to maintain that demand. If a vertical restraint does not enable a firm to relax its competitive efforts, the restraint simply does not increase or maintain market power.

Fourth, vertical restraints that protect differentiated product competition are important and valuable. The plaintiffs' case was both remarkably simple and remarkably narrow — merchant fees were higher than they would be absent the NDPs; they ignored the admitted innovation, competition and consumer benefits that characterized the industry in recent years. By contrast, the Court found that NDPs "*promote interbrand competition*" by protecting American Express's investments in cardholder rewards, which in turn enable American Express to pursue a differentiated business model that "*focuses on cardholder spending rather than cardholder lending.*" 138 S. Ct. at 2282, 2288. While enforcers have an understandable desire for lower prices generally, they should carefully consider the benefits of differentiated product competition before challenging a restraint designed to promote such competition.

Finally, antitrust litigants who ignore evidence of output do so at their peril. As the Supreme Court noted, the plaintiffs did not and could not attempt to prove that the NDPs reduced output. 138 S. Ct. at 2288–89. In fact, the evidence showed that output of transactions was skyrocketing and competition for consumers was intense, manifesting itself in any number of ways, not the least of which was consumer rewards.

# 21

In January 2018, the U.S. Supreme Court granted *certiorari* in *In re vitamin C Antitrust Litigation*, the first lawsuit in U.S. history where the Chinese government has intervened to take a position in a case. The request for Supreme Court review followed a September 2016 decision by the Second Circuit that set aside a US$147 million treble damages verdict for the U.S.-purchaser plaintiffs. In setting aside the verdict, the Second Circuit held that the district court had failed to follow the reasoning in a submission by the Chinese Ministry of Commerce about the meaning and effect of Chinese competition law.

*Continued overleaf*

# *IN RE VITAMIN C* ANTITRUST LITIGATION

**BY BRIAN BURKE**

# 21

## *In re vitamin C* Antitrust Litigation

**THE DEFENDANTS, AS MEMBERS OF A CHAMBER OF COMMERCE IN CHINA, WERE REQUIRED TO IMPLEMENT THE MINISTRY'S REGULATIONS**

The sole question on review for the Supreme Court was whether U.S. courts must defer to a foreign government's reasonable construction of its own laws. On June 14, 2018, the Supreme Court unanimously reversed the Second Circuit's ruling, holding that a foreign sovereign's interpretation of its own law is not "*conclusive*" for U.S. courts, and that courts need only give "*respectful consideration*" to foreign sovereign submissions.

### THE DISTRICT COURT RULING

Plaintiffs were purchasers of vitamin C in the United States who alleged that the defendants, Chinese vitamin manufacturers, formed an agreement to sell vitamin C in the U.S. at artificially high prices in violation of U.S. antitrust law. The defendants did not contest that they agreed to fix prices; instead, they filed a motion to dismiss on the basis that applicable Chinese regulations ***required*** them to do so.

In a historic move, the Ministry of Commerce of the People's Republic of China filed an *amicus curiae* brief with the district court in support of dismissal, explaining that the defendants, as members of a chamber of commerce in China, were required to implement the Ministry's regulations regarding the vitamin C trade, which compelled manufacturers to set prices "*at or above the minimum acceptable price set by coordination through the Chamber.*"

Despite the Ministry's intervention, the U.S. District Court for the Eastern District of New York denied the motion to dismiss and instead ordered the parties to engage in discovery on the issue of whether the defendants were indeed compelled by Chinese law to fix prices. Following discovery, the defendants once again asked the Court to dismiss the lawsuit on summary judgment, and the Court again denied the defendants' motion, expressly "*declining to defer to the Ministry's interpretation of Chinese law*" in light of certain provisions in the Chinese regulations that appeared to undermine the Ministry's interpretation. In other words, the District Court refused to credit the Chinese government's explanation of its own law.

The case went to trial and in March 2013, a federal jury found the Chinese vitamin manufacturers (those who had not yet settled with plaintiffs) liable for violating Sherman Act Section 1, and awarded the plaintiffs nearly US$147 million in treble damages. The Chinese manufacturers appealed.

### SECOND CIRCUIT'S DECISION

On appeal, the Second Circuit considered whether the District Court abused its discretion by improperly asserting jurisdiction on international comity grounds. Finding in the affirmative, the Second Circuit vacated the District Court's order denying the defendants' motion to dismiss and returned the case to the lower court with instructions to dismiss with prejudice.

**IT IS CLEAR THAT FOREIGN COMPANIES CANNOT OUTRIGHT RELY ON THEIR SOVEREIGN'S INTERPRETATION OF ITS OWN LAW TO AVOID LIABILITY UNDER U.S. ANTITRUST LAWS**

The Second Circuit's analysis hinged on the first factor of a multi-factor balancing test that courts use to determine whether a 'true conflict' exists between U.S. law and Chinese law. The first factor is the appropriate level of deference to afford the Chinese government's submission about its own laws. The Second Circuit explained that "[i]*f deference by any measure is to mean anything, it must mean that a US court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, even if that representation is inconsistent with how those laws might be interpreted under the principles of our legal system*."

Because the Chinese government submitted a "*sworn evidentiary proffer regarding the construction and effect of its laws and regulations*," and such interpretation demonstrated a true conflict between U.S. and Chinese competition law, the Second Circuit held that a U.S. court is duty-bound to defer to the Chinese and abstain. The Second Circuit also held, in contrast to the District Court, that a true conflict does not require evidence of government compulsion to follow the law in question, proof that the laws in question were actually enforced, or proof that the defendants sought approval from the government for their actions. Instead, "[i]*t is enough that Chinese law actually mandated such action, regardless of whether Defendants benefited from, complied with, or orchestrated the mandate*." The Court further concluded that China's interests outweighed any U.S. antitrust enforcement interests.

## SUPREME COURT DECISION

In evaluating the Second Circuit's ruling, the Supreme Court first addressed whether the Chinese Ministry's submission should be treated as an issue of fact or an issue of law. Writing on behalf of the Court, Justice Ginsburg held that the Federal Rules of Civil Procedure require that a determination by a federal court of foreign law "*'must be treated as a ruling on a question of law,' rather than as a finding of fact,*" and thus the Court "*may consider any relevant material or source… whether or not submitted by a party*." Because the Ministry's submission was but one of many relevant sources in the record, the Court concluded that the District Court was correct in ruling that it was not bound by the submission. The Court held that federal courts should "*accord respectful consideration to a foreign government's submission, but* [they are] *not bound to accord conclusive effect to the foreign government's statements*."

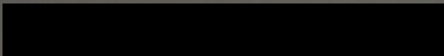
While the Court did not set forth a bright-line rule, Justice Ginsburg's opinion listed several factors that courts should consider in determining whether to defer to a foreign government's position on its own law, including: the plain language of the foreign statute, its clarity, support for the sovereign's characterization of its law, the foreign sovereign's prior interpretations of the law, the transparency of the foreign legal system, and expert testimony about how the law is applied in the foreign country. Here, Justice Ginsburg held that the Second Circuit failed to consider the inconsistencies that the District Court identified in the Ministry's position and vacated the decision. On remand, the District Court will give "*substantial but not conclusive weight*" to the Ministry's submission, and may consider other evidence, which tends to undermine the Ministry's submission.

## IMPLICATIONS GOING FORWARD

The Supreme Court's decision to grant *certiorari* in this case demonstrates that there was a lack of clarity for cases involving issues of international comity. While the decision still leaves some uncertainty, it is clear that foreign companies cannot outright rely on their sovereign's interpretation of its own law to avoid liability under U.S. antitrust laws. Instead, foreign defendants must be prepared to present expert evidence on how the law in question is understood and applied. In this process, courts will be on the lookout for inconsistencies or shortcomings in the government's position.

The decision could also have ramifications for U.S.-China relations. Because China has never previously intervened in a U.S. lawsuit, and the Supreme Court unanimously chose not to follow the Ministry's submission, it's unlikely that China will intervene again anytime soon. The decision also came amid already strained relations with China under the Trump administration, which had imposed sweeping tariffs on Chinese imports earlier in 2018, sparking what many have deemed a trade war with China.

# 22



As of mid-2018, the Damages Directive (Directive) has been incorporated across all European Union (EU) Member States. The European Commission (EC) has closed its previous probes against Member States for failing to implement the Directive by the original December 27, 2016 deadline, but is continuing to assess whether certain transposing national laws are sufficient. In the meantime, a multitude of claims have been and continue to be brought across the EU. The extent to which this trend will continue or whether the landscape of EU antitrust litigation will change is yet to be seen.

*Continued overleaf*

# EU ANTITRUST LITIGATION

## AN UPDATE

**BY GEERT GOETEYN AND RUBA NOORALI**

# 22

# EU Antitrust Litigation: An Update

COLLECTIVE ACTIONS MAY ALSO BE MORE GREATLY ENCOURAGED FOLLOWING APPROVAL OF THE EC'S SUGGESTED COLLECTIVE CONSUMER CLAIMS REGIME

## KEY DEVELOPMENTS

By the end of 2017, 98 cartel damages claims were reported as having been brought across 12 EU countries, 94 of which were follow-on claims (71 from national competition authority decisions and 23 from EC decisions) and the remaining four of which were brought on a stand-alone basis.[1] According to public sources, 2018 has seen at least approximately 25 cartel damages claims brought across Europe, largely constituting claims in the U.K. following on from the EC's Trucks decision as well as additional claims against Visa and MasterCard regarding their multilateral interchange fees (MIFs). The appetite for pursuing damages claims is therefore continuing.

**ACTIVE JURISDICTIONS: THE UNITED KINGDOM**

The U.K. has been one of the most active jurisdictions in antitrust litigation in the last year. In October 2018, the U.K. High Court (HC) made its first award of damages in a follow-on cartel claim in *BritNed v. ABB* based on ABB's involvement in the Power Cables cartel. Following subsequent review, €11.7 million worth of damages were granted to BritNed, only a fraction of the original €180 million claim (suggesting close scrutiny of the economic evidence presented). The award is nonetheless promising to the multitude of claimants who have brought similar follow-on claims in the U.K. in the last few months.

U.K. courts have also been active in ordering broad disclosures of the EC file to claimants in follow-on claims, a trait which has traditionally made the U.K. an attractive damages claim forum. In two separate judgments relating to follow-on proceedings for *Trucks*, the HC ordered disclosure of: (i) the entirety of the EC's file into a confidentiality ring, running to approximately 32,000 documents out of a total set of 39,000 (save for leniency and privileged material); and (ii) a redacted confidential version of the EC's decision as well as other documents from its file. Permission to appeal the approach in (i) to the U.K. Court of Appeal (CA) was subsequently denied, suggesting that the U.K.'s reputation for permitting broad disclosures is here to stay.

The MIFs-related litigation against Visa and MasterCard has also dominated the U.K. antitrust litigation sphere for a number of years, resulting in three contradictory first instance decisions from the U.K. courts: (i) a July 2016 U.K. Competition Appeal Tribunal (CAT) judgment granting £69 million in damages to Sainsbury's against MasterCard; (ii) a January 2017 HC judgment finding that MasterCard's MIFs did ***not*** infringe competition law (and would in any event have satisfied the conditions of Article 101(3) Treaty on the Functioning of the European Union (TFEU)); and (iii) a November 2017 HC judgment denying Sainsbury's damages claim on the basis that the U.K. MIFs did not amount to a restriction of competition by effect.

After hearing appeals related to all three claims, the CA held in July 2018 that the use of default MIFs without bilaterally agreed interchange fees breached Article 101(1) TFEU and confirmed that the claimants were not required to prove the unlawful level of the MIFs. Instead, relevant EU competition law provisions should be applied to determine whether the default MIFs were either wholly or

1. *Cartel damages claims in Europe: How courts have assessed overcharges (2017 ed.)*, Jean-François Laborde (Concurrences, No 4 2017).

2. Case C-451/18, *Tibor-Trans* (pending). There are also two other pending preliminary requests related to the Damages Directive: Case C-637/17, *Cogeco Communications*, regarding the interpretation of limitation periods, and Case C-724/17, *Skanska Industrial Solutions and Others*, regarding the potential to claim damages against parents of breaching subsidiaries that no longer exist.

partially unlawful before quantifying the applicable damages to award. All three cases were remitted to the CAT for determination on this basis, rather than the HC, given the CAT's specialized nature and ability to better deal with complex competition law issues. The outcome of the CAT's determination, as well as of the continuing multitude of claims brought in relation to Visa and MasterCard's MIFs in the last few months, is likely to shed more light on the scope of this already long-running dispute.

**COLLECTIVE CLAIMS: NEW FRONTIERS?**
MIFs-related claims against Visa and MasterCard may potentially even continue on a collective basis, following the CA's November 2018 confirmation that it is able to review the CAT's July 2017 rejection of an attempted MIFs-related collective claim brought on behalf of 46 million U.K. consumers. Three separate collective actions have also recently been filed in the U.K. following on from *Trucks* — the outcome of the pending approvals of such claims may provide long-awaited guidance on the possibility for collective antitrust damages actions, provision for which is ultimately left open to Member States in paragraph 13 of the Directive's preamble. Participants in the *Trucks* cartel were otherwise reported to have faced collective damages claims in the Netherlands and Sweden at the end of 2016.

Collective actions may also be more greatly encouraged following approval of the EC's suggested collective consumer claims regime, formally proposed in April 2018 to allow qualified entities to launch collective claims for damages on consumers' behalf from businesses breaking the law. The proposal has been progressing slowly through the necessary reviews before finalization, and has recently been reported as facing significant delays due in part to pre-existing similar mechanisms across at least 19 Member States. The scope of the specific harms in respect of which the proposal will apply is also yet to be determined — although antitrust infringements are not specifically referenced, it has been suggested that the proposal be broadened to accommodate this. The proposal's continuing progression and its eventual adoption may in any case have an encouraging impact on collective claims within the antitrust sphere.

## CONCLUSION: WHERE NEXT?

2018 has seen a strong continuation of damages actions across Europe. Whether this will continue, particularly in light of the completed implementation of the Directive, is yet to be seen.

In particular, the U.K.'s current status as a popular jurisdiction for damages claims may well change following its exit from the EU. The U.K. government for example has made it clear from materials published in October 2018 that in a 'no deal' Brexit scenario, claimants will no longer be able to base follow-on damages claims on EC decisions issued post-Brexit. The November 2018 draft Brexit Agreement also does not explicitly address the status of EC decisions for the purposes of such claims, despite including some competition law provisions. As a result, claimants may be limited to bringing stand-alone actions based on U.K. Competition and Markets Authority infringement decisions — however, in practice, it remains to be seen whether EC decisions still have some persuasive or evidential weight in U.K. damages actions post-Brexit.

In any case, these developments could lead to a decline in the U.K.'s popularity as a key damages forum and encourage claimants to look to other jurisdictions for their claims. The scope of such a 'forum shopping' exercise is likely to be elaborated on further by the Court of Justice in the pending preliminary request submitted by DAF Trucks (related to a follow-on claim brought in Hungary where DAF has asked, among other questions, whether indirect purchasers can bring claims in jurisdictions where harm has been suffered, despite the harmful event not occurring nor the cartel participant being based in such jurisdiction).[2]

Finally, despite the predominantly cartels-focused nature of current EU antitrust litigation claims, claims based on other competition infringements may come to the fore. The pending U.K. action filed by Unlockd against Google in April 2018 on the basis of abuse of dominance, together with the Commission's recent dominance enforcement trend, may well encourage a more diverse set of EU antitrust claims in the near future.

# 23

In this article we examine a recent landmark case[1] where the European Court of Justice recognized that if a creditor challenges a national banking resolution process on the grounds that it has suffered damage, it should ***also*** have legal standing to bring a case against the relevant State aid decision as these processes are inextricably linked.

*Continued overleaf*

# THE EUROPEAN COURTS RECOGNIZE CREDITORS' INTERESTS IN STATE AID DECISIONS

**BY JAMES WEBBER AND ÖZLEM FIDANBOYLU**

# 23

## The European Courts Recognize Creditors' Interests in State Aid Decisions

**THE EUROPEAN COMMISSION APPROVED THESE MEASURES THE SAME DAY THEY WERE NOTIFIED**

This may now provide a plausible route for creditors to attack State aid approvals of bank resolution, something that has been very difficult to date — despite the extraordinary damage that such decisions do to creditors.

In August 2014, the Portuguese authorities put Banco Espírito Santo (BES) into resolution under the Portuguese national resolution framework — this was at a time before the Bank Recovery and Resolution Directive (BRRD) had come into force. In order to carry out an orderly resolution, the Portuguese authorities designed a number of support measures, including State aid, which involved the following:

- the sound business activities of BES were transferred to a Bridge Bank called Novo Banco;
- the other residual assets and liabilities remained with BES which would be wound-down within the next two years;
- the Bridge Bank received State funds of €4.8 billion to provide it with initial share capital, before it was sold off in order to ensure that there is no distortion of competition;
- the Portuguese authorities agreed that none of the claims of the shareholders and holders of subordinated debt or any hybrid instruments could be transferred to the Bridge Bank. Therefore, such claims were retained by BES; and
- The European Commission (EC) approved these measures the same day they were notified in its August 2014 State aid decision (the EU State aid decision). The subordinated creditors stuck in BES appealed the State aid decision to the General Court and also appealed the national resolution proceedings in the Portuguese courts.

Before the General Court, the creditors faced a challenge to establish standing. They argued that the State aid decision had caused them damage. In particular the resolution approved by the EC meant they went from holding bonds in a valuable (if undercapitalized) bank, to holding bonds in bank with no valuable assets, no ability to conduct new business and whose banking license was to be withdrawn after a short winding-up period. This meant that they had suffered substantial losses and their legal position was changed.

The General Court held the creditors had no standing to appeal the State aid decision. In particular, it held that the proceedings before the national courts in Portugal had a different subject matter to the appeal of the EU State aid decision — which of course was inevitable given that an appeal against a State aid decision can only be brought in the General Court — and the annulment of the latter could not have an effect on the Portuguese court's interpretation of Portuguese laws that were the subject of the national court proceedings. The General Court therefore found that the creditors had no standing on the basis that annulment of the EC's State aid

1. Case C-544/17 P, *BPC Lux 2 S. à r. l. v. Commission* (EU:C:2018:880).

2. Case C-269/12 P, *Cañas v. Commission* (EU:C:2013:415), [17].

3. Case C-33/14 P, *Mory and Others v. Commission* (EU:C:2015:609), [81].

4. Case C-544/17 P, *BPC Lux 2 S.àr.l. v. Commission* (EU:C:2018:880), [55].

decision could not affect their legal position. The General Court also held that the value of the creditors' claims was not affected by the EU State aid decision, but rather the decision to put BES into resolution.

The creditors appealed to the Court of Justice, arguing that the annulment of the EU State aid decision would significantly increase the likelihood of success of the proceedings that had been brought before the Portuguese courts against the decision to put BES into resolution — because the lawfulness of that resolution depended in part on the lawfulness of the State aid used to support it. The creditors argued the two things are inextricably linked. The creditors added that this success could either result in the annulment of the decision to put BES into resolution or in their right to claim damages for the losses that had been incurred due to the unlawful resolution of BES.

In previous cases, the Court of Justice held that a party retains a legal interest in the outcome of an action for annulment where that action may constitute the basis of an action for damages.[2] The Court of Justice has also held that an interest in bringing proceedings could arise from any action before the national courts in the context of which the possible annulment of the contested act before the EU Courts is capable of benefiting the applicant.[3]

On November 7, 2018, the Court of Justice found for the creditors of BES and set aside the General Court's decision to find their appeal inadmissible. Since the creditors had already brought an action before the Portuguese courts for the annulment of the decision to put BES into resolution, the annulment action could benefit the creditors — generating sufficient legal interest to maintain standing. It was not for the General Court to assess whether the creditors' claim before the national courts was well founded, as the EU courts do not have any legal basis to do that.

The Court of Justice agreed that even though the appeal of the State aid decision before the Court of Justice and the appeal of the BES resolution in Portugal necessarily had different subject matters, these cases were inextricably linked because the State aid decision was granted in the context of the resolution of BES.[4] On this basis, the Court of Justice found that the General Court was wrong to conclude that the creditors had no legal standing to bring an appeal against the State aid decision. The case has now been returned back to the General Court.

**THE COURT OF JUSTICE FOUND THAT THE GENERAL COURT WAS WRONG TO CONCLUDE THAT THE CREDITORS HAD NO LEGAL STANDING**

# 24

In 2018, the European Commission (EC) concluded two more investigations into whether the tax ruling practices of Member States breached European Union (EU) State aid rules: the first, a finding of unlawful State aid resulting from tax rulings by Luxembourg in favor of Engie; the second, a rare finding of no aid in respect of the treatment by Luxembourg of McDonald's under the Luxembourg-U.S. double taxation treaty. These decisions are discussed below.

*Continued overleaf*

# THE INCREASING LINK DRAWN BY REGULATORS BETWEEN STATE AID & TAXATION SYSTEMS

**BY JAMES WEBBER AND MARK STEENSON**

# The Increasing Link Drawn by Regulators Between State Aid & Taxation Systems

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***MCDONALD'S* IS THE FIRST TIME THAT AN EC INVESTIGATION INTO ALLEGED AID BY VIRTUE OF TAX RULINGS BY A MEMBER STATE HAS RESULTED IN A FINDING OF NO AID**

The EC also had a success in the General Court, which ruled in a series of cases that the EC was right to find that a particular measure for the amortization of financial goodwill under the Spanish tax regime was selective in nature and amounted to incompatible State aid.[i]

## THE DEFINITION OF STATE AID

State aid is defined as an advantage in any form (including tax measures) conferred on a selective basis to businesses by public authorities. General measures open to all businesses do not constitute State aid. Since tax rulings are available to any tax payer who needs them they are not a problem *per se*; however, where they — or any other taxation measure — result in favorable treatment vis-à-vis the general taxation regime, they will fall foul of the State aid rules. Navigating this distinction in practice is difficult especially for tax rulings which are by definition individual.

## THE *LUXEMBOURG/MCDONALD'S* CASE

The Luxembourg-U.S. double taxation treaty provided that Luxembourg cannot tax the profits of a company that can be taxed in the U.S. by virtue of them having a 'permanent establishment.' McDonald's Europe Franchising — a Luxembourg based corporation with two branches, one in the U.S. and one in Switzerland — received royalties from franchisees using the McDonald's brand in Europe, Russia and Ukraine. The Swiss branch licensed the franchise rights and the royalty profits were sent from Luxembourg to the U.S. branch.

Under Luxembourg tax law, the U.S. branch was considered a 'permanent establishment,' so its revenues could not be taxed by Luxembourg. However, under U.S. tax law the same branch was not considered a 'permanent establishment,' meaning the profits from the royalties were not subject to taxation in the U.S. either. Luxembourg granted tax rulings in favor of McDonald's Europe Franchising, which confirmed the profits were not taxable in Luxembourg, while removing any obligation to prove that they were taxable in the U.S., with the effect that McDonald's paid no tax on certain royalty payments.

The EC opened an in-depth State aid investigation to assess whether the tax rulings gave McDonald's a selective advantage by derogating from the provisions of national tax law and the Luxembourg-U.S. double taxation treaty. However, the EC's investigation found that "*the reason for double non-taxation in this case is a mismatch between Luxembourg and US tax laws, and not a special treatment by Luxembourg. Therefore, Luxembourg did not break EU State aid rules*."

This decision is significant because it is the first time that an EC investigation into alleged aid by virtue of tax rulings by a Member State has resulted in a finding of no aid. However, the outcome that McDonald's will not pay tax anywhere on these revenues is unpalatable for the EC since opposing aggressive tax avoidance was a big part of the motivation for and communication strategy around the EC's case against Apple's Irish tax treatment for example. The EC's approach does show some belated deference to the

1. Case T-207/10, *Deutsche Telekom v. Commission* (EU:T:2018:786), Case T-227/10, *Banco Santander v. Commission* (EU:T:2018:785), Case T-239/11, *Sigma Alimentos Exterior v. Commission* (EU:T:2018:781), Case T-405/11, *Axa Mediterranean v. Commission* (EU:T:2018:780), Case T-406/11, *Prosegur Compañia de Seguridad v. Commission* (EU:T:2018:793), Case T-219/10, *RENV World Duty Free Group v. Commission* (EU:T:2018:784) and Case T-399/11, *RENV Banco Santander and Santusa Holding v. Commission* (EU:T:2018:787).

Organization for Economic Co-operation and Development's (OECD) base erosion and profit shifting (BEPS) project, which is a much more coherent way to tackle tax avoidance strategies that exploit gaps and mismatches in tax rules than State aid.

The frustration, however, was expressed by Commissioner Vestager, who noted "*the fact remains that McDonald's did not pay any taxes on these profits — and this is not how it should be from a tax fairness point of view.*" However, she has got her way indirectly. Luxembourg has already tabled draft legislation to amend its tax code to bring the relevant provision into line with the BEPS project to prevent future double non-taxation.

## THE *LUXEMBOURG/ENGIE* CASE

Engie had established intra-group financing structures involving its subsidiaries in Luxembourg, which enabled two companies, LNG Supply S.A. (LNG Supply) and GDF Suez Treasury Management S. à r. l. (GSTM) (each a 'Relevant Company') to pay corporate tax at an effective tax rate of 0.3%.

According to the EC, the financing structure was similar in both cases. A convertible loan was provided by an Engie lender subsidiary to a Relevant Company (via an intermediary). The Relevant Company used the loan to justify making deductions from its taxable profits, which reduced its tax burden. However, the Relevant Company did not in fact make any interest payments under the loan to justify the deductions. The Relevant Company retained its profits until Engie converted the loan, at which point the profits passed to the Engie lender subsidiary (via the intermediary) in the form of shares. The Engie lender subsidiary later cancelled the shares and instead received the value of the profits in cash, which is exempted from tax under Luxembourg law. This arrangement was endorsed by Luxembourg in a series of tax rulings.

The EC's in-depth investigation found that the tax rulings endorsed tax treatment that allowed for a reduction of the tax base of the Relevant Companies in Luxembourg, such that they paid lower tax on their profits. The EC found this amounted to more favorable treatment than would otherwise be the case under the general rules of taxation; therefore, Engie received a selective advantage that amounted to State aid. The EC has ordered Luxembourg to recover from Engie €120 million in unpaid taxes (plus interest). The decision has been appealed by Luxembourg.

**THE ARRANGEMENT WAS ENDORSED BY LUXEMBOURG IN A SERIES OF TAX RULINGS**

CONTINUED >

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# The Increasing Link Drawn by Regulators Between State Aid & Taxation Systems

THE CJEU RULED THAT THE ASSESSMENT OF SELECTIVITY IN THIS CASE MUST BE BASED ON A THREE-STEP ANALYSIS

## SPANISH AMORTIZATION RULES ON GOODWILL IN FOREIGN COMPANIES

The general Spanish tax regime only allowed for the amortization of goodwill for tax purposes in the event of mergers. The Spanish government subsequently introduced a measure that enabled companies resident in Spain for tax purposes to treat as tax deductible the amortization of financial goodwill arising from the acquisition of shareholdings of at least 5% in a foreign company.

At issue was whether the measure was selective in nature. The European Courts have struggled to arrive at a coherent approach to selectivity in tax cases and have applied different methods for determining selectivity. The General Court had originally applied a 'general availability' test and considered that the measure was not selective because it did not exclude any category of undertakings in the national territory because it was aimed at a category of economic transactions (even if not all national undertakings would benefit from the measure).

However, the Court of Justice of the European Union (CJEU) ruled that the assessment of selectivity in this case must be based on a three-step analysis: first is to determine the 'normal' tax regime as a reference framework. Second, determine whether the measure derogates from the normal tax regime insofar as it differentiates between economic operators that are in a comparable factual and legal situation in light of the objectives pursued by the tax regime. Third, establish if the tax differentiation is justified by the nature and logic of the tax regime.

Following referral back from the CJEU, the General Court applied the three-step test and confirmed the EC's original assessment that the measure should be considered in light of the general provisions of the corporate tax system, specifically the rules on the tax treatment of the financial goodwill. Against this reference system, the General Court concluded that the measure could be selective even if it was available to all companies resident in Spain for tax purposes; the basis for the selectivity is the difference in treatment depending on the company's commercial decision-making (*i.e.*, acquiring a foreign company vs. acquiring a domestic company).

This is a significant development in the application of the three-step test because it confirms that selectivity can be established on the basis of the commercial behavior of undertakings. This approach will give the EC more flexibility in establishing selectivity in future cases — and increases the encroachment of State aid rules into Member States fiscal power.

## CONCLUSION

State aid enforcement does — and will continue — to have a role to play in achieving reform of tax planning by multinational companies. The EC has concluded seven high profile investigations in this area and has found unlawful State aid in six of them, resulting in recovery orders totaling over €14 billion (plus interest) in respect of 40 companies — the most high-profile being the €13 billion (plus interest) recovery order in the *Ireland/Apple* case.

Companies cannot negotiate tax rulings with EU Member State tax authorities as they do with sovereign states elsewhere in the world. They must take into account that the EC has the power and desire to use State aid rules for *ex post* supervision. The boundaries of this supervision are slowly becoming clear.

The *Luxembourg/McDonald's* decision is interesting as for the first time it illustrates a limit of State aid enforcement in this area. It is encouraging that the EC chose not to stretch these rules forever to advance policy objectives that may be better achieved through alternative mechanisms, such as legislative change or international cooperation, such as through the work of the OECD.

The EC still has two ongoing investigations in this field. One in respect of possible State aid resulting from tax rulings issued by the Netherlands in favor of Inter IKEA and another concerning a U.K. tax scheme for multinationals.

The judgment of the General Court in the Spanish tax scheme case will strengthen the EC's hand in these cases. In particular, it makes it easier for the EC to define the 'reference' system — the starting point for selectivity assessments — in a way that shows the beneficiaries' position as differentiated.

**THE APPROACH WILL GIVE THE EC MORE FLEXIBILITY IN ESTABLISHING SELECTIVITY IN FUTURE CASES — AND INCREASES THE ENCROACHMENT OF STATE AID RULES INTO MEMBER STATES FISCAL POWER**

# 25

The draft agreement on the U.K.'s withdrawal from the EU (the Draft Withdrawal Agreement), published on November 14, 2018, still sets out the only agreed terms of the divorce element of the U.K.'s withdrawal — despite the delays and extensions.

It provides for a transition period (currently up to December 31, 2020 — although this date will presumably be amended to take account of extensions to the Article 50 process) during which it will be 'business as usual'. The Draft Withdrawal Agreement also contains a Protocol designed to maintain an open border between Northern Ireland (NI) and the Republic of Ireland (RoI), should the U.K. leave the transition without securing a deal to govern its future relationship with the EU (this is known as the Irish backstop).

*Continued overleaf*

# U.K. STATE AID IN A POST-BREXIT WORLD

BY JAMES WEBBER AND MARK STEENSON

# U.K. State Aid in a Post-Brexit World

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**THE PROHIBITION IS DESIGNED TO ENSURE A LEVEL PLAYING FIELD FOR TRADE IN THE INTERNAL MARKET**

This article considers some of the implications of Brexit under the Draft Withdrawal Agreement on State aid. It outlines key aspects of EU State aid rules, describes the current state of play with regard to a future U.K. State aid regime, and explores some of the issues that may arise with its implementation, in particular, in the event the controversial backstop comes into play.

## THE CURRENT STATE AID LEGAL FRAMEWORK

The EU State aid rules prohibit public authorities from granting subsidies (in any form) that selectively advantage a business in a way that could potentially distort competition and trade in the EU. The prohibition was originally designed to ensure a level playing field for trade in the internal market and to prevent a company from gaining an unfair competitive advantage through government subsidies.

Despite the general prohibition, the rules do enable aid to be granted lawfully in certain circumstances in order to benefit the economy and to support other important policy objectives (*e.g.*, in areas involving research, development, innovation, the environment, etc.).

The State aid legal framework only exists at the EU level. Unlike in antitrust and merger control there is no national law equivalent — nor is State aid control common internationally. State aid is defined in the Treaty on the Functioning of the European Union, which is interpreted by the European Courts and enforced by the European Commission (EC). Aid measures must be block exempted or notified to and approved by the EC before being implemented.

As with other Member States, there was previously no U.K.-specific legislation relating to State aid and the U.K. did not have a national agency for State aid enforcement.

## STATE AID IN A POST-BREXIT ENVIRONMENT

While it is unclear whether the U.K. and EU will agree on an all-encompassing deal for a future relationship, it is clear that the U.K.'s future arrangements relating to State aid will be an important part of the discussion, and inextricably linked with the terms of any future trade deal.

The U.K. government's stated policy is that "*the UK strongly supports a rigorous state aid system — this is good for taxpayers, consumers, and for businesses,*" and in a guidance paper on State aid published in August 2018, committed to incorporating the existing EU State aid framework, rules and guidance into U.K. law, even in the event of a no-deal Brexit.

The Draft Withdrawal Agreement reflects this, but also provides that the EC and EU institutions will remain competent to handle State aid procedures concerning the U.K. during the transition period (and in respect of aid granted and procedures initiated during the transition period).

Introducing The State Aid (EU Exit) Regulations 2019 into Parliament in January 2019, the U.K. government has confirmed that the Competition and Markets Authority (CMA) will take on the EC's monitoring and enforcement functions in respect of State aid and will have powers equivalent to the existing powers of the EC. The Regulations "*transpose* [ ] *the EU State aid regime into domestic law and, in the event of no*

1. Article 6(1), Protocol on NI.
2. As contained in Annex 8 to the Protocol.
3. Article 12(1), Protocol on NI.
4. Article 7(1), Annex 4 to the Protocol on NI.
5. Article 12(3), Protocol on NI.
6. Article 10(3), Annex 4 to the draft Withdrawal Agreement.
7. Article 10(4), Annex 4 to the Draft Withdrawal Agreement.
8. Article 10(4), Annex 4 to the Draft Withdrawal Agreement.
9. Political Declaration, para. 79.

*deal, gives the CMA the function of being the UK state aid enforcement authority, in place of the European Commission,*" and do not materially alter the substance of the EU framework.

The Regulations also require that the CMA adopt existing EU guidelines as statements of policy, to be published prior to the U.K.'s departure. Minimal changes to existing guidance is intended to ensure that such guidelines are understood by stakeholders and operable from the exit date. The Regulations are currently awaiting Parliamentary approval and are not yet in force they would not be needed except in a "*no deal*" outcome as, under the Draft Withdrawal Agreement, the U.K. would enter the transition period upon departure and the EC would retain jurisdiction.

## CONSEQUENCES OF THE 'BACKSTOP' AGREEMENT

Assuming the Draft Withdrawal Agreement is ratified and the U.K. leaves under its terms, the most interesting implications for State aid arise from the Irish backstop. Either because it comes into force directly or because of the way its presence colors the future relationship.

In the backstop scenario, the U.K. and the EU will be a "*single customs territory,*" which is comprised of an EU customs territory and a U.K. customs territory.

EU law (including in respect of State aid) will apply to the U.K. "*in respect of measures that affect that trade between* [NI] *and the* [EU]" such that, while the backstop is in place, the EC and European Courts will retain competence to decide State aid in cases that affect trade between NI and the EU, in accordance with EU law.

In addition, and concurrently, the CMA will have competence to decide State aid cases in respect of those measures granted by the U.K. that affect trade within the U.K. customs territory (*i.e.*, including between NI and Great Britain), also in accordance with EU law.

This is significant because under the EU rules the EC/European Courts take a very expansionist approach as to what "*affects trade between Member States.*" In particular, it is established that there is no requirement to demonstrate actual effects. Rather measures need only be capable of affecting trade between Member States, and the effect need not be significant. As a result, this part of the test usually receives only a cursory examination before being deemed satisfied, particularly in respect of measures concerning liberalized markets with cross-border trade. This approach played a major part in expanding the EC's jurisdiction in State aid into policy choices the Member States might reasonably have thought would be for them.

This concept creates a concern for companies that operate from the U.K. across the EU. Under the backstop, the U.K. and the EU will be a "*single customs territory*." If the EC (supported by the European Courts) continues to take a broad interpretation to measures that affect trade across borders, it would mean that a U.K. aid measure relating to a business in Great Britain would require approval not only by the CMA, but also by the EC on the basis that the measure affects trade within the single customs territory.

Under the backstop, the balance of procedural rights very strongly favors the EC. The EC is under an obligation only to "*ensure that the United Kingdom is kept fully and regularly informed of the progress and outcome of the examination of that measure.*"[5] While the CMA's decision in any such case will be without prejudice to the EC's decision, meaning the EC would effectively have the final say on all U.K. government aid measures. The CMA is also required to exchange views and information with the EC on a case-by-case basis in respect of procedures it initiates, giving the EC the opportunity to comment in such cases.[6] The CMA will also consult the EC on all draft decisions and give the EC up to three months to communicate its opinion, and will not adopt any decision until it has received the opinion and taken it into account.[7] The EC can stop the clock on this three-month period in order to request additional information to the extent required to formulate its opinion.[8] It is likely that in practice the CMA will be so closely supervised by the EC as to exclude independent decision making or differential views on the treatment of evidence.

Aside from the additional burden that this would place on companies during a dual review process, it could result in challenging situations where the EC opposes aid that the CMA could approve. As such, decisions are inextricably tied to policy considerations and priorities, it is easy to see how the system is likely to result in political conflict.

Given that the U.K. is not permitted to leave the backstop without the agreement of the EU, and the future relationship is anticipated as "*building on the level playing field arrangements provided for in the Withdrawal Agreement,*" the likelihood of the U.K. having a differentiated State aid regime (even procedurally or though operation of discretion) is low.

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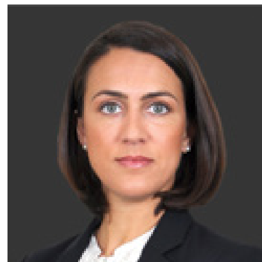

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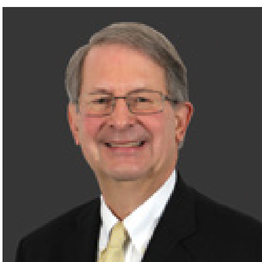

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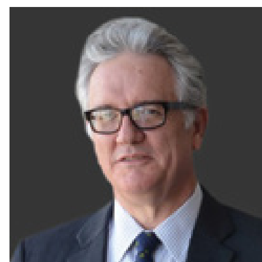

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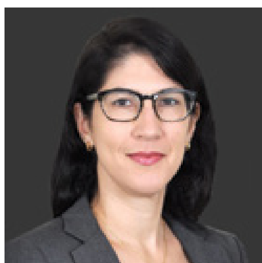

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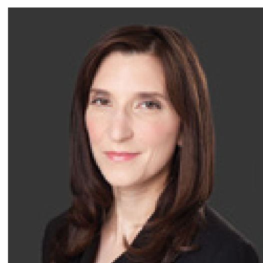

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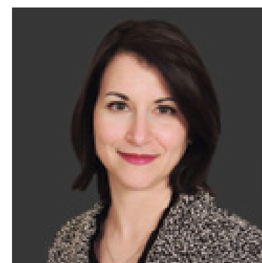

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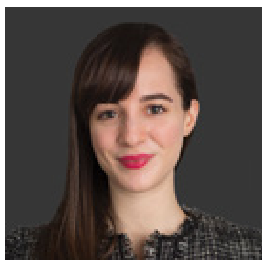

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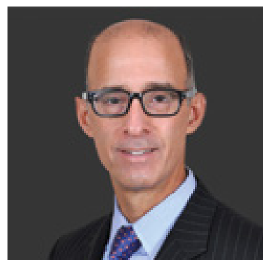

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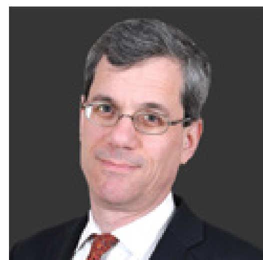

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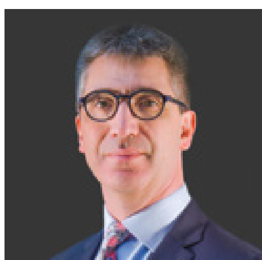

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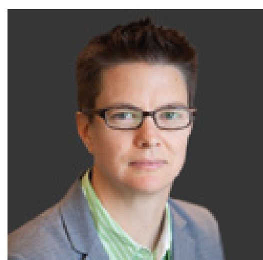

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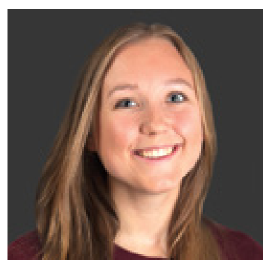

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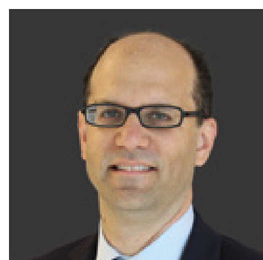

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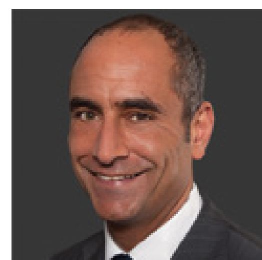

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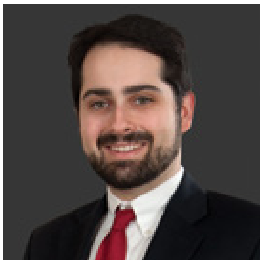

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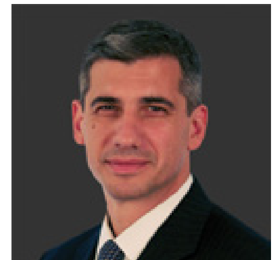

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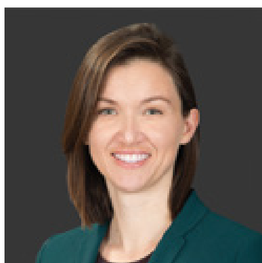


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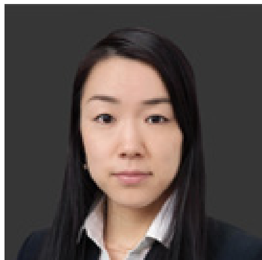


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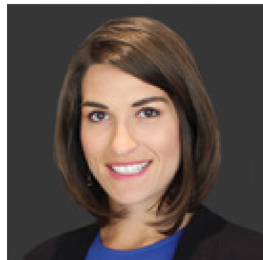


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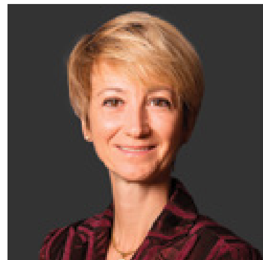


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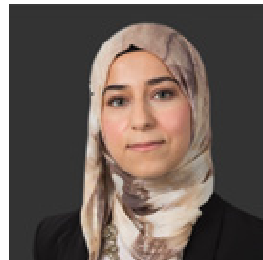


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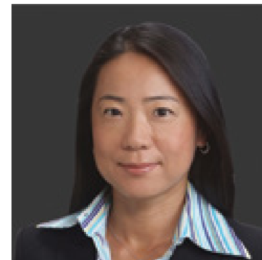


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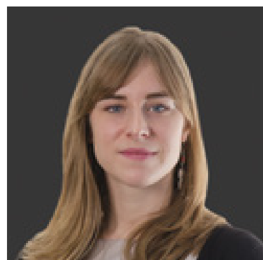


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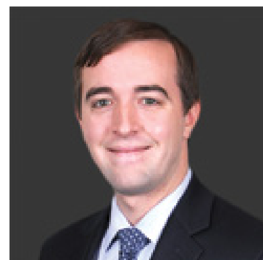


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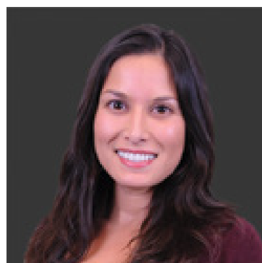


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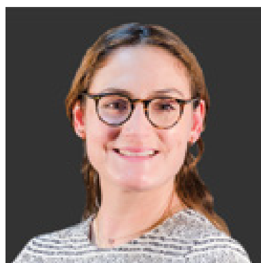


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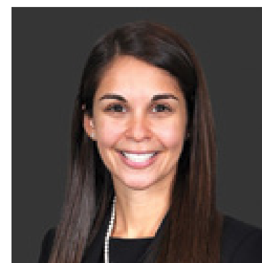


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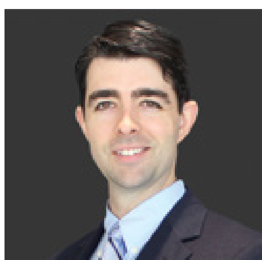


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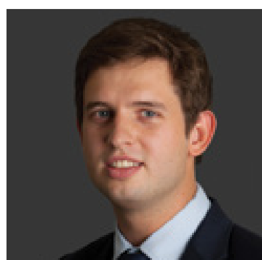


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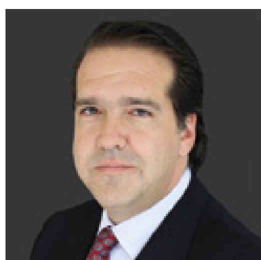


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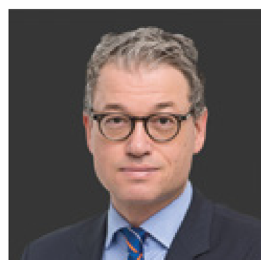


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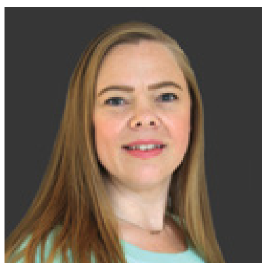

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# Thought Leadership

## ACADEMIC ROLES

**COLLEGE OF EUROPE**
Elvira Aliende Rodriguez | Summer School Competition Law

**GEORGETOWN UNIVERSITY LAW CENTER**
Wayne Dale Collins | Adjunct Professor of Law | Antitrust

**LEIDEN UNIVERSITY**
Geert Goeteyn | Guest Lecturer | EU Competition Law and its Application in the Aviation Industry

**NEW YORK UNIVERSITY**
Wayne Dale Collins | Adjunct Professor of Law | Antitrust

**OXFORD UNIVERSITY**
Matthew Readings | Guest Lecturer | Competition Law (Undergraduate level)

**WORLD INTELLECTUAL PROPERTY ORGANIZATION**
Paolisa Nebbia | Visiting Professor | IP

## AWARDS AND RECOGNITIONS

**GLOBAL COMPETITION LAW REVIEW**
Shearman & Sterling was recognized as one of the 'Global Elite' firms — 2019–2016

**WHO'S WHO LEGAL**
David Higbee, Matthew Readings, Jessica Delbaum, Geert Goeteyn and Wayne Dale Collins are included in the 2019 Who's Who Legal's Competition List.

Elvira Aliende Rodriguez and James Webber feature in the 2019 Competition — Future Leaders list.

## BLOGS

**ANTITRUSTUNPACKED.COM**
A blog providing concise but operationally meaningful content to in-house counsel and senior management on important antitrust and competition law topics

**CARTELDIGEST.COM**
A repository of key data on global cartels with significant enforcement activity in the past 30 years

## PUBLICATIONS

**AMERICAN BAR ASSOCIATION**
Pharmaceutical Industry Antitrust Handbook | Chapter '*Regulatory and enforcement framework*' | Timothy Slattery | November 2018

**ANTITRUST ADVISOR**
'*Sample shaming: FDA's open letter on access to samples under REMS Programs publically calls out branded drug manufacturers to aid generic entry*' | Timothy Slattery | October 2018

**ICLG**
International Comparative Legal Guide to: Cartels & Leniency 2018 | '*Cartel updates: Recent trends in fine calculations and cartel liability*' | Elvira Aliende Rodriguez, Geert Goeteyn | October 2018

**ICLG**
International Comparative Legal Guide to: Cartels & Leniency 2018 | Chapters on EU, Germany, Italy and UK | Elvira Aliende Rodriguez, Geert Goeteyn, Matthew Readings, Paolisa Nebbia, Mathias Stöcker and Ruba Noorali | October 2018

**GLOBAL COMPETITION REVIEW**
Know-how IP & Antitrust | Chapter on United States | Jessica Delbaum and David Higbee | October 2018

**GLOBAL COMPETITION REVIEW**
The Antitrust Review of the Americas 2019 | Chapter on US Cartels | David Higbee, Djordje Petkoski, John Cove, Jessica Delbaum, Ryan Shores, Todd Stenerson and Mark Weiss | October 2018

**LEXOLOGY**
Cartels in Italy | Paolisa Nebbia | October 2018

**LEXOLOGY**
Merger Control in Italy | Paolisa Nebbia | October 2018

**GLOBAL COMPETITION REVIEW**
The Merger Guide to Remedies | Chapter '*Giving effect to remedy*' | David Higbee, Geert Goeteyn, Djordje Petkoski, Jessica Delbaum, Özlem Fidanboylu, Aleksandra Petkovic and Caroline Préel | September 2018

**ICLG**
International Comparative Legal Guide to: Competition Litigation 2019 | Chapter on the U.S. | Todd Stenerson and Ryan Shores | September 2018

**JECLAP**
'*The Italian Unilever judgment on exclusive dealing: Helpful clarification or misguided limitation of the Court of Justice's Intel ruling?*' | Geert Goeteyn | September 2018

**GETTING THE DEAL THROUGH**
Air Transport 2019 | Chapter on European Union | Geert Goeteyn | September 2018

**GETTING THE DEAL THROUGH**
Market Intelligence Cartels 2019 | '*Damages actions in the EU and US*' | John Cove and Geert Goeteyn | August 2018

**GLOBAL COMPETITION REVIEW**
The EMEA Antitrust Review 2019 | Chapter on EU Cartels and Leniency | Elvira Aliende Rodriguez, Geert Goeteyn and Ruba Noorali | August 2018

**MILANO FINANZA**
'*Ecco cosa cambia per chi acquista online*' | Paolisa Nebbia | April 2018

**THOMSON REUTERS TAXNET PRO WEBSITE**
'*Bayer Monsanto: European Commission continues its trend of more aggressive divestments to address innovation concerns.*' | Geert Goeteyn, Matthew Readings, James Webber and Ruba Noorali | March 2018

**ECONCURRENCES**
'*The EU Commission considers potential harm to innovation as part of its merger assessments, particularly in R&D driven sectors such as pharmaceuticals and technology (Bayer/Monsanto)*' | Geert Goeteyn, Matthew Readings, James Webber and Ruba Noorali | March 2018

**JECLAP**
'*Case T-180/15 ICAP v. Commission: The Facilitator Doctrine and other cartel concepts in hybrid settlements*' | Elvira Aliende Rodriguez and Ruba Noorali | February 2018

## SPEAKING ENGAGEMENTS

**UK STATE AID LAW ASSOCIATION AND SHEARMAN & STERLING**
Introducing the UK's independent State aid regime | James Webber (moderator) | December 10, 2018

**KNECT365**
Advanced EU Competition Law Brussels | November 20–21, 2018

- '*Cartel settlements and appeals*' | Elvira Aliende Rodriguez
- '*Review of current competition law developments in the digital sphere*' | Geert Goeteyn

**EUROPEAN AIR LAW ASSOCIATION**
30th Annual Conference | Interview with Henrik Holelei | Geert Goeteyn | November 9, 2018

**KLUWER LAW**
South Korea: 7th Annual International Arbitration, Compliance & Competition Law Summit | Geert Goeteyn | October 24, 2018

- '*Cartel enforcement: It's a global game*'
- '*Antitrust's new frontier: Does today's technology need new enforcement tools?*' (panelist)

CONTINUED >

# Thought Leadership (cont'd)

**CONCURRENCES AND SHEARMAN & STERLING**
Towards more competition in high-tech markets? European perspectives | October 24, 2018

- '*Fintechs: New titans vs incumbents?*' | Elvira Aliende Rodriguez (panelist)
- '*Mergers in the high-tech sector*' | David Higbee (moderator)

**CONCURRENCES AND SHEARMAN & STERLING**
Gun-jumping implications of recent case law | James Webber (moderator) | October 8, 2018

**INTERNATIONAL FINANCIAL LAW REVIEW (IFLR)**
European M&A Forum | '*Merger controls: Key planning considerations*' | Geert Goeteyn (moderator) | September 25, 2018

**TRANSACTION ADVISORS**
M&A Conference | '*Navigating regulatory and antitrust issues in M&A*' | Jessica Delbaum (moderator) | September 26–27, 2018

**KLUWER LAW**
Japan: 5th Annual International Arbitration, Compliance and Competition Law Summit | '*Merger control in Asia*' | James Webber | September 6, 2018

**GLOBAL COMPETITION REVIEW**
GCR Live 10th Annual Brussels Conference: The bigger picture | July 9–10, 2018

- '*Deal breaking or mischief making: Are non-horizontal theories of harm in mergers back with a vengeance?*' | Matthew Readings
- '*Deal risk*' | James Webber (panelist)

**KLUWER LAW**
7th Annual Competition Law & Regulatory Global Forum | '*Managing cartel investigations*' | Matthew Readings | July 5, 2018

**GLOBAL COMPETITION REVIEW**
GCR Live New York | '*Innovation in merger analysis*' | Jessica Delbaum (moderator) | June 7, 2018

**KNECT365**
EU Merger Control conference | '*Practical challenges in merger control*' | James Webber | May 24, 2018

**KNECT365**
Competition Law in the Financial Sector | '*Compliance for financial services*' | Matthew Readings | May 22, 2018

**KNECT365**
Advanced EU Competition Law London | May 14–15, 2018

- '*Review of competition law developments in the digital world*' | Paolisa Nebbia
- '*Practical challenges in merger control*' | James Webber
- Conference Chair Day 2 | Geert Goeteyn

**KLUWER LAW**
China 3rd Annual Arbitration, Compliance and Competition Law Summit | '*Dealing with cartels—What to look out for in 2018*' | Geert Goeteyn and Djordje Petkoski | April 24, 2018

**GLOBAL COMPETITION REVIEW**
GCR Live Cartels | '*The interplay between public and private cartel enforcement*' | Djordje Petkoski (panelist) | April 10, 2018

**KLUWER LAW**
3rd Annual India International Arbitration, Regulatory and Compliance Summit | Geert Goeteyn | March 24, 2018

- '*Advising on merger control*'
- '*2nd Grand Panel: The growing importance of compliance — Essential tips for international and local companies*' (panelist)

**ACOS**
'*Cross border merger & acquisitions*' | Geert Goeteyn | March 23, 2018

**SIFMA**
C&L 2018 Annual Seminar | '*Global antitrust litigation and investigations*' | Matthew Readings (panelist) | March 23, 2018

**AMERICAN BAR ASSOCIATION**
Fundamentals of Antitrust Economics Series | '*Data and discovery for economic analysis in antitrust litigation*' | Mark Weiss | March 16, 2018

**GLOBAL COMPETITION REVIEW**
GCR Live Singapore 7th Annual Asia-Pacific Law Leaders Forum | '*Assessing mergers in the e-commerce sector: Challenges and countermeasures*' | Matthew Readings (panelist) | March 9–10, 2018

**KNECT365**
Competition Law Challenges in the Aviation Sector | '*Article 101 developments including information exchange*' | Geert Goeteyn | March 6, 2018

**COMMERCIAL DISPUTE RESOLUTION (CDR)**
CDR Winter Competition Litigation Symposium | February 22, 2018

- '*Expert evidence in multinational class action proceedings*' | Todd Stenerson (panelist)
- '*Abuse of dominance cases: A new horizon — Part I*' | Geert Goeteyn (panelist)

**AMERICAN BAR ASSOCIATION | INTERNATIONAL BAR ASSOCIATION**
ABA/IBA International Cartel Workshop | '*Negotiating a disposition in the United States*' | Djordje Petkoski (panelist) | February 15, 2018

**INTERNATIONAL FINANCIAL LAW REVIEW (IFLR)**
European In-house Counsel Summit | '*Competition outlook 2018*' | Matthew Readings | January 24, 2018

**SHEARMAN & STERLING**
'*Big data, algorithms and competition — Antitrust authority facing the intangible challenges*' | Paolisa Nebbia | January 22, 2018

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