Hogan Lovells

Antitrust, Competition and Economic Regulation Quarterly Newsletter

Summer 2017

Contents

A renaissance for the excessive pricing abuse in the competition authority toolkit?

There has been a spate of cases around Europe in which pharmaceutical companies have been accused of pricing at an excessive level. These started with national authorities, but the European Commission announced on 15 May 2017 that it too has begun an investigation. Does this mark a renaissance for the long-neglected excessive pricing abuse in the competition authority toolkit?

The law and the practice

European competition law on excessive pricing by dominant undertakings is well-settled, even if hard to apply. Such pricing is an abuse of a dominant position, in breach of Article 102 of the Treaty on the Functioning of the EU. In *United Brands* (ECJ C-27/76 [1978]) the Court of Justice found that a price is excessive where it bears "no reasonable relation to the economic value of the product".

The Court applied a two stage test:

– whether the differences between the costs actually incurred and the price actually charged is excessive; and, if so

– whether a price has been imposed which is either unfair in itself or when compared to competing products.

In practice there are real questions about how this test should be applied. Which costs should be considered? What margin is excessive? Which comparator products should be used?

At least in part because of these practical difficulties, there have been few excessive pricing cases in the forty years since *United Brands*. Indeed, the European Commission has never adopted a pure excessive pricing case. The Commission (and European national competition authorities) have focussed instead on abuses of a dominant position which entrench or leverage market power to exclude rivals: "exclusionary" abuses.

However, Commissioner Vestager, speaking in November 2016, gave a hint of the tension between current policy pressures to act against the Commission's long-standing view that such interventions are unhelpful.

"Often people's health relies on drugs that are sold by just one company [...] That isn't a problem in itself, if prices stay at a reasonable level. But there can be times when prices get so high that they just can't be justified..."

"So we need to act carefully when we deal with excessive prices. The best defence against exploitation remains the ability to walk away. So we can often protect consumers just by stopping powerful companies from driving their rivals out of the market. But we still have the option of acting directly against excessive prices. Because we have a responsibility to the public. And we should be willing to use every means we have to fulfil that responsibility."

The UK decision

The UK Competition and Markets Authority ("CMA") has recently concluded an investigation into the prices charged by two pharmaceutical companies (Pfizer and Flynn) to the NHS for phenytoin sodium capsules, an anti-epilepsy drug. On 7 December 2016 it announced its decision to fine the companies £84.2 million for excessive pricing.

– Flynn had purchased from Pfizer the UK distribution rights for the drug, then debranded it and increased its price "by up to 2,600% overnight".

– To find dominance, the CMA has adopted a very narrow market definition (the specific product itself only, not even competitor versions of the same molecule also in capsule form) based on its view of epilepsy prescription guidance and practice.

– It is not clear whether or how much the CMA applied a comparison to prices for other products. All of its public statements have focussed on the fact that prices rose. The scale of the price increase was clearly a very important factor in, and driver of, the CMA's case and findings.

- There is very little indication of what might be an acceptable/legal price (or price increase).
  - The CMA seems to have focus on there being no recent innovation or investment which would justify a high price.
  - The CMA used a "cost plus 6% margin" test as a possible upper bound for what would be legal. However, it has thus far given little indication of whether a margin above this level might be acceptable, whether in fact a lower price might still be excessive or what costs were to be included. This "6%" test itself comes from the NHS purchasing scheme PPRS – but is intended in that context not as a per-product cap, but a limit on a portfolio of products sold to the NHS and based around a broad concept of cost.
  - The CMA decision is being appealed. Meanwhile, some of these pricing issues have already been played out (though not settled) in the Competition Appeal Tribunal in an interim hearing. Flynn has expressed frustration with the CMA including this rule of thumb 6% level, while declining to give clear guidance on exactly what it may legally do.
- The parties' turnover in the relevant market was modest, but the fine on Pfizer in particular was very high. Subject to any appeal on how the fines were determined, this may point to any future fines in this area being at the top end of the spectrum.

It is not clear how the CMA's decision (and any appeals) might translate into a range of other situations: sales to private healthcare providers; sales of a product still on patent; sales by the originator rather than a later acquirer; sales in countries other than the UK; sales of non-pharmaceutical products. In such situations it is possible to imagine different decisions being taken both on whether to launch an investigation at all and on whether a given price level is excessive.

Other cases in the UK and beyond

The CMA has another live case on excessive pricing of pharmaceuticals. This relates to the pricing of hydrocortisone tablets by Actavis. The CMA sent Actavis a formal "statement of objections" in December 2016. Some of the fact pattern which the CMA reports is similar to the Pfizer/Flynn case: a debranded product sold to the NHS with a very large price increase.

The CMA has at least two other active cases in the pharmaceutical sector, still at an early stage. It is not yet known whether these cases also include suspicions of excessive pricing.

In Italy, Aspen Pharma was fined €5 million by the Competition Authority in October 2016 for excessive pricing of a number of anti-cancer products.

Investigations into Aspen have now been announced by the Spanish Competition Authority (3 February 2017) and by the European Commission itself (15 May 2017). These appear to be into the pricing of the same products. Defending the European Commission investigation against suggestions of price regulation by the back door, Commissioner Vestager has described the Commission's actions as taking "a closer look".

Meanwhile in Russia, the Federal Antimonopoly Service has announced what appears to be an excessive pricing investigation into a Novartis product.

Why pharma?

The pharmaceutical industry has long been a target for antitrust enforcement. There are a number of plausible reasons for this. Markets may be defined narrowly, so possible dominant positions are more common. Related to this, intellectual property lies at the heart of most pharmaceutical markets, and European competition enforcers have repeatedly shown themselves to be suspicious of the protection against competition which IP rights may grant.

There may also be a policy preference to investigate pharmaceutical markets because these seem intrinsically important given the benefits which pharmaceuticals may bring. The press releases by the CMA and the Commission in the recent cases emphasised that the products were *"an important drug … relied on by many thousands of patients"* and *"life-saving … drugs to save or prolong our lives"*.

Some other features of the pharmaceutical sector may attract attention but also make excessive pricing cases particularly hard. The benefits brought about by the pharmaceutical sector overall rely on huge R&D investment, much of which is ultimately unfruitful. Looking after the fact only at the research which led to a successful drug clearly gives a wrong view of what true costs of a pharmaceutical company. The question of how to account for that expenditure when thinking about what the "right" price for a product is becomes central – feeding directly into the "cost" limb of the *United Brands* case.

This need to assess costs is complicated when a product is no longer being manufactured by the company which developed it. There is some risk that competition authorities conduct a "moral" assessment, at least in prioritising cases, deciding that an acquiring company is not entitled to profits which the originator company might have deserved. Whether by chance or not, the UK and Aspen cases involve such third party acquirers.

With this background, pharmaceutical firms are certainly showing an interest in proactive audits to assess and manage any potential exposure. Any such audits will need to take account of the developing nature of the case law in this area as well as the company's business model and data.

Who is learning from whom?

The cases also show an interesting direction of intellectual flow: national competition authorities taking cases ahead of the Commission. In the case of Aspen, this is investigation of the very same behaviour.

The limit to this flow may be the Atlantic Ocean. Competition enforcers in Europe and America do exchange views and influence each other's thinking. However, here this may be a step too far. The US has historically been more relaxed than Europe about high returns, seeing them as the profit signals which drive innovation. A senior US Department of Justice official has recently echoed this as the continued DOJ position on excessive pricing.

In Europe however, it seems highly likely that there will be more cases brought along similar lines, as enforcers turn their attention to pharmaceutical pricing. How much this happens – and whether we see this spread to markets beyond pharmaceuticals - is likely to depend on the near-inevitable appeals of the cases noted above.

Angus Coulter
Partner, London
T +44 20 7296 2965
angus.coulter@hoganlovells.com

Alice Wallace-Wright
Senior Associate, London
T +44 20 7296 5922
alice.wallace-wright@hoganlovells.com

Where's the beef?

5 minutes for the highlights of German Competition Act reform

The 9th reform of the German Competition Act entered into force on 9 June 2017. It primarily transposes the EU Cartel Damages Directive into German law. On top, it brings a number of other amendments. Here is a summary of the reform's highlights.

5:00 New rules for enforcing cartel damage claims

It is the reform's aim to facilitate the enforcement of cartel damage claims. A whole number of changes, most of which are based on the EU Cartel Damages Directive, is meant to serve that purpose.

4:45 Where there's a cartel there's a damage...

The new law brings a legal presumption that cartels cause damage. The presumption covers both the existence of damage as such as well as the antitrust infringement as its cause.

To rebut the presumption, the cartel overcharge may in particular be demonstrated to have been passed on to downstream market levels. Alternatively, an economic expert analysis might serve as evidence of lack of a cartel overcharge.

... but which?

It remains up to the individual company to demonstrate that it suffered damage itself. That can be difficult, depending on whether the case involves direct purchases from cartelists, indirect purchases via distributors (that may have passed on a cartel overcharge), or purchases from third parties (allegedly at an excessive price level due to the cartel, the so called "umbrella effect"). Likewise, the company claiming damages must demonstrate the amount of the alleged damage. The legal presumption will therefore likely be of (merely) partial help to the claimant.

... and at the expense of whom?

Cartelists facing damage claims can defend themselves arguing that the claimant passed on the overcharge to its own customers (so called "passing-on defence").

This is not new, but had already been made clear by the Federal Supreme Court in "ORWI". While the conditions set up by the court were very difficult to satisfy for defendant cartelists, it seems now easier to bring a successful passing-on defence under the new rules.

Even better off are now indirect purchasers. They are entitled to damages if the cartel overcharge was passed on to them. This is now easier for them to demonstrate as the new law brings a legal rebuttable presumption in their favour, presuming that the cartel overcharge was passed on to them. The presumption does not cover the amount of the pass-on. Cartelists may not rely on this assumption.

3:55 Help me out, and I'll protect you

Cartelists that were rewarded with immunity from fines for their cooperation in a cartel investigation are privileged in the context of follow-on damage claims. They only owe instant and full compensation damages to their own (direct and indirect) customers. All other claimants only have subsidiary claims against them and must therefore turn to the other cartelists first. In relation to the other cartelists, the immunity applicant's liability in the context of contribution claims is limited accordingly.

3:35 Tell me what you now

Under the new rules, claimants for damages and cartelists can claim from each other and from third parties access to information and disclosure of evidence relevant for bringing or defending a claim. Beyond what the EU Cartel Damages Directive requires, the new German law provides that access to information can not only be claimed as an annex in the context of damages proceedings, but also on a stand-alone basis.

As before, the requested evidence needs to be described sufficiently clearly; it will now however suffice to describe categories of evidence by type, subject, production date or other criteria. Leniency applications are generally exempt from disclosure.

3:20 More time!

Practically useful is the extension of the limitation period for cartel damage claims from three to five years applicable to cases where the claimant has knowledge of the circumstances relevant for the claim. In cases following official proceedings, the limitation period is now suspended for a full year. Important note to cartelists: Their contribution claim against co-cartelists does not start to expire before damages have been paid to the original claimant.

3:05 Parental liability for siblings

In European competition law, parent companies have long been fined for their subsidiaries' cartel infringements. The new law brings such joint liability to German law in cases where the two concerned companies formed an "economic unit" at the time of the infringement. That is the case at least where one company has sole control over the other. It can also be the case in joint control situations.

2:45 All sixes and sausages.

2011 case law from the Federal Supreme Court had made clear that companies could use specific restructurings to let the fined company disappear legally and economically. In those cases, the decision imposing the fine missed its target. One meat processing company in particular used this possibility to avert a fine through restructuring, which is why the legal loophole became known as the "sausage gap".

The new law is meant to make such specific restructurings of groups of companies aiming at fine evasion more difficult in the future. The liability for fines in cases of universal succession is extended to cases of partial succession through split-up. Moreover, the merely "economic" successor becomes liable as well.

2:05 Extended merger notification obligations

So far, mergers require German merger clearance if at least two involved companies have sufficient German turnover. The new law modifies that rule: Even if only one involved company has German turnover over €25m, a merger event needs now to be notified if (a) the "value of consideration for the transaction exceeds € 400 m and (b) the acquired company is "substantially active" in Germany.

The change is meant to allow the Federal Cartel Office to review the competitive effects of mergers where one involved company, despite its very low or lacking turnover is valued highly and achieves a high purchase price (as in the Facebook / WhatsApp merger).

The new rule is not easy to apply. The "value of consideration" at the time of the merger will often be hard to determine (e.g. in respect of earn out agreements with no clearly identifiable value). Similarly, one may question what it takes to assume "substantial activity" in Germany. Possibly even fairly small research and development or distribution activities in Germany could suffice for that.

0:55 New rules for digital markets

Competition authorities have for a while taken the view that for the purpose of competition law a "market" could not only exist where services are rendered against payment. Residual doubts however remained. The reform now clarifies that "markets" can exist also where goods or services are rendered free of charge. Accordingly, competition authorities may now also examine markets in merger or dominance cases even if there is no financial consideration.

In this context another newly-arrived provision comes into play: Companies' market position on multiple-sided markets (in particular platform markets) is no longer to be assessed only on the basis of "classic" dominance criteria (like market shares). Rather, network effects, customers' costs for switching between services, access to competitively relevant data and innovation-driven competition pressure are to be taken into account, amongst other factors.

Jan Eggers
Counsel, Hamburg
T +49 40 419 93 0
jan.eggers@hoganlovells.com

Vincent Stier
Senior Associate, Hamburg
T +49 40 419 93 0
vincent.stier@hoganlovells.com

Hong Kong court upholds bar on stand-alone private actions under the competition ordinance?

The Hong Kong Competition Ordinance ("Ordinance") does not currently provide for the right to bring stand-alone private actions for contraventions of competition rules. In a decision handed down on 27 April 2017, the High Court for the first time confirmed that private litigants could not subvert the scheme of the Ordinance by relying on an act said to infringe a competition conduct rule to make good a separate cause of action.

Loyal Profit's reliance on the Ordinance

Loyal Profit sought injunctions against certain directives issued by the Travel Industry Council ("TIC"), one of which required travel agencies to bring Mainland Chinese tourists only to shops that registered under a Refund Protection Scheme. Loyal Profit – a Hong Kong travel agency, and itself a member of the TIC – alleged that the Scheme was anti-competitive.

Loyal Profit's cause of action was based on a contravention of the Companies Ordinance, pursuant to which a company's exercise of powers is limited by its articles of association. According to the TIC's articles, one of the objects for which the TIC was established was to discourage unfair competition. The travel agency submitted that if the Scheme contravened the "first conduct rule" in the Ordinance (which prohibits anti-competitive agreements), it must also be in breach of the TIC's articles. It was in this context that Loyal Profit sought to rely on a contravention of the first conduct rule.

The Court's decision

The Court firmly rejected Loyal Profit's approach, and held that it was not possible to rely on an act said to contravene the first conduct rule "*to make good a cause of action for breach of agreement and requiring the Court to embark on the exercise reserved by the [Ordinance] to the Competition Tribunal.*"

The Court went on to hold that even if this were wrong, Loyal Profit's evidence had failed to demonstrate any harmful effect on competition. Importantly, citing a UK case and Hong Kong's first antitrust judgment in the TVB case, the Court endorsed the following approach for considering this issue in the context of a private action:

1. identify the market in which the effect of the allegedly infringing agreement or provision is to be gauged.
2. articulate a theory of harm.
3. assess the allegedly harmful effect by reference to what the position would have been in the absence of the allegedly infringing agreement or provision.

Finally, the Court refused to refer the matter to the Competition Tribunal under section 113 of the Ordinance. The Court was not satisfied that there was a matter to be investigated by the Competition Tribunal on the basis of the evidence before the Court.

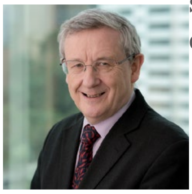
Other grounds relied by Loyal Profit against the directives were also dismissed by the Court.

Notably, the Court ordered costs to be assessed on an indemnity basis (i.e. a basis higher than the usual party-and-party costs) in relation to the competition arguments on the basis that this part of Loyal Profit's case "*should not have been advanced.*"

Conclusion

The Loyal Profit case is an important case for private litigants wishing to test the limits of the bar on stand-alone actions under the Ordinance. The key takeaway from the decision is that litigants should think carefully before advancing arguments based on contraventions of the Ordinance even if the cause of action is not based on the Ordinance. Such advances are likely to be rejected by the courts much earlier on in the proceedings in the future.

Unfortunately, the Court in the Loyal Profit case did not delve into the issue of whether it was mandated by section 113 of the Ordinance to refer the matter to the Competition Tribunal. The approach of the courts to section 113 remains to be seen in future cases.



Henry Wheare
Counsel, Hong Kong
T +852 2840 5087
henry.wheare@hoganlovells.com

PJ Kaur
Associate, Hong Kong
T +852 2840 5634
pj.kaur@hoganlovells.com

Your newest instagram follower, the FTC

The Federal Trade Commission (FTC) reminded celebrities, social media influencers, and marketers that failing to disclose material connections to the products they endorse is #notokay. On 19 April 2017, the FTC announced it had sent over 90 letters to such personalities and businesses stating that they must clearly and conspicuously disclose commercial relationships when promoting or endorsing products.

The letters the FTC sent out outlined when and how marketers and influencers should disclose "material connections" in an endorsement. A material connection can be a business or family relationship, monetary payment, or the gift of a free product. In other words, "a connection that might affect the weight or credibility that consumers give the endorsement." The letters explained that if the connection is not clear from the context of the endorsement, a clear and conspicuous disclosure is required. To be considered clear and conspicuous, the FTC explained "consumers should be able to notice the disclosure easily, and not have to look for it."

Specifically, the letters highlighted Instagram posts in which influencers endorse products. Because of how Instagram works, a consumer may only see a few lines of a post when scrolling through the app on her mobile device. To see the rest of a message, where an endorser may have disclosed his connection with the marketer of the product highlighted in the post, the consumer would have to click "more." The FTC explained that the disclosure must be displayed above the "more" button, so that consumers do not have to click through to see it.

In the letters addressed to marketers, the FTC added the extra onus that "marketers should advise endorsers of their disclosure responsibilities and should monitor their endorsements to ensure that appropriate disclosures are made."

#Latergram: The FTC's Prior Policy and Guidance on Endorsements and Native Ads

So, have these letters come out of the blue? The short answer is no. The FTC has increasingly expanded its endorsement and advertising guidance for companies and individuals to apply to new forms of media. The guidance is to help companies avoid violating Section 5 of the FTC Act, which prohibits "unfair or deceptive acts or practices in or affecting commerce." (15 U.S.C. § 45(a)). Additionally, demonstrating its enforcement readiness, the FTC has taken several actions in the last few years against marketers and endorsers (even publishers) for failing to adequately disclose commercial content or relationships[1]. Likewise state [2] and non-U.S. consumer protection enforcers[3] have brought their own actions.

The long answer starts in 2015 when the FTC issued two sets of new guidance for businesses and for individuals relating to the potential for deception in endorsements and native advertising, particularly with respect to digital media.

The FTC's Endorsement Guides are longstanding, having been last updated in 2009, but the FTC issued a set of FAQs related to the application of the Endorsement Guides in the context of bloggers, Instagram, and YouTube celebrities — in other words, social media. The basic tenet of the Guides is that endorsements must be honest and not misleading. One way to potentially avoid misleading consumers is by disclosing the material connection that endorsers have with the company whose products they are recommending on the grounds that knowing the connection would affect how consumers would evaluate the endorsement.

New for 2015, but also based on existing principles, were the FTC's Enforcement Policy Statement on Deceptively Formatted Advertisements and accompanying guide regarding "native advertising" for businesses. Like the Endorsement Guides, the FTC has long provided guidance relating to advertisements but the 2015 policy explicitly extended its application to native advertising, a new form of media. Native advertising is content that blurs the line between advertising and

1 For example, the FTC settled charges with the department store chain Lord & Taylor in March 2016 that it deceived consumers by paying for native advertisements in the online publication, Nylon, or on Nylon's Instagram account, without disclosing the posts were paid promotions for Lord & Taylor. Additionally, the complaint stated that Lord & Taylor paid 50 online fashion influencers to post pictures on Instagram of themselves wearing certain Lord & Taylor apparel without disclosing its payments to endorse the products.

2 For example, New York's Attorney General, along with the FTC, settled charges under New York's consumer protection statute with Machinima, Inc., a video entertainment company that produces and distributors content relating to video games and gaming culture, that the company paid video gaming influencers to post YouTube videos endorsing Microsoft's Xbox One gaming console and several games without disclosing the compensation Machinima paid for the posts.

3 The U.K.'s advertising regulator, the Advertising Standards Authority (ASA), cited BuzzFeed and Dylon, a clothing dye manufacturer, for an October 2015 native advertisement, entitled "14 Laundry Fails We've All Experienced," that mimicked BuzzFeed's style and tone. According to the ASA, Dylon and BuzzFeed had not made the piece "obviously identifiable" as commercial in nature, a violation of the U.K.'s Committee on Advertising Practices Code.

objective content such as news, feature articles, product reviews, entertainment (such as video games), and other online material. The same doctrines that apply to endorsements extend to native advertisements; that is, such promotional material must not be deceptive or misleading. As with endorsements, one way to potentially avoid misleading consumers about the commercial nature of the content is to disclose its source (if it is not obvious). For example, if a feature article describes the benefits and features of a product but the article does so in a way that appears to be objective reporting, it could be misleading if there is no disclosure that the article was sponsored by the manufacturer of the product.

In the context of digital social media, the line between endorsements and native advertisements can be muddy. Imagine a scenario where a content aggregation site publishes articles on various subjects. One of those subjects is an article, written in the same tone and style of the other articles on the site, profiling a celebrity's enthusiasm for a particular brand of juicer. If the manufacturer of the juicer has paid either the celebrity to endorse the juicer or the content aggregation site to write the article profiling the celebrity's love of the juicer and none of these material connections is disclosed, all three parties could potentially run afoul of the law. Under the FTC's rules, the lack of disclosure could be deceptive because knowing the connections between the parties would be material to a reasonable consumer's evaluation of the claims or benefits of the products described in the article.

#NoFilter: The Bottom Line for Companies Who Market Using Social Media and Native Ads

Social media, the use of influencers as endorsers, and native advertising can be powerful marketing tools. As a result, using these techniques requires companies to keep in mind a few points:

– Disclosures should be clear. The FTC does not require endorsers or marketers using native advertising to use any specific language to indicate the commercial relationship or nature of the content. In the context of endorsements, it has, however, said that certain vague terms, like "Thank you [marketer]," "#partner," and "#sp" are not sufficient because they do not explain the relationship. Likewise, with respect to native advertisements, the FTC has said that terms like "Promoted" or "Promoted Stories" and, depending on the context, "Presented by [x]," "Brought to you by [x]," "Promoted by [x]," or "Sponsored by [x]" may be too ambiguous to disclose the fact that the marketer prepared or influenced the content. In either case, the disclosure must clearly indicate the relationship between the endorsement or the native content and the marketer.

– Disclosures should be obvious. The FTC guidance states that disclosures must be easy to identify. If a consumer has to do something, like click on "more" as in Instagram, or dig through a bunch of other terms with hashtags to get to the disclosure, the FTC will not view the disclosure as sufficient. Disclosures should be located as close as possible to the endorsement or advertising message. The guidance is the same for video endorsements or native advertisements.

– Marketers have a responsibility to ensure endorsers disclose the connection. Think you're not responsible for what the celebrity or endorser discloses about your relationship with them? Think again. The FTC has said marketers must inform endorsers of their responsibilities and monitor their compliance. If the FTC finds a violation of the FTC Act, the endorser and the marketer could both be held liable.

In short, a social and digital media review can help keep the FTC from knocking. Don't get #CaughtOffGuard.

Meghan Rissmiller
Partner, Washington, D.C.
T +1 202 637 4658
meghan.rissmiller@hoganlovells.com

Court upholds DOJ antitrust lawsuit challenging Carolinas healthcare system's anti-steering provisions

Despite a recent decision by the Second Circuit suggesting that anti-steering contractual provisions in other industries may not be anticompetitive, DOJ's lawsuit (*United States v. Carolinas HealthCare System*) against Carolinas HealthCare System's (CHS's) contracting practices continues forward after surviving a motion for judgment on the pleadings. On 30 March, a North Carolina federal judge found that DOJ's lawsuit targeting CHS's direct and indirect anti-steering provisions preventing insurers from steering patients to lower-cost providers alleged plausible antitrust violations and should continue to discovery.

DOJ's complaint alleges that the anti-steering provisions in the contracts of CHS violate Section 1 of the Sherman Act. According to the complaint, CHS, a hospital system with an alleged 50 percent market share in the Charlotte area, includes provisions in its contracts with Aetna, Blue Cross Blue Shield, Cigna, and United that make it difficult for insurers to steer patients to lower priced hospitals. These provisions do so directly by preventing insurers from offering either narrow networks that exclude CHS or tiered networks that incentivize patients to use CHS' competitors. The provisions also indirectly restrict steering by preventing the insurers from providing information to their enrollees about where they can obtain lower cost or higher quality healthcare services. DOJ alleges these provisions insulate CHS from competition, allowing CHS to maintain higher prices.

Last year CHS filed a motion for judgment on the pleadings arguing that its anti-steering provisions do not abuse its market power, but rather allow CHS to offer lower rates by ensuring access to a larger patient population. CHS also argued that there is no evidence of harm from these provisions. While the motion was pending, the Second Circuit issued an opinion in *United States et. al. v. American Express Co.* finding that American Express's use of "non-discriminatory provisions" – akin to the anti-steering provisions in the CHS case – did not harm competition by preventing merchants from encouraging customers to use credit cards that charge lower fees. In its supplemental brief before Judge Conrad, CHS called the decision a "major blow" to DOJ's case.

Similar to *American Express*, CHS argued that health insurers should not be permitted to attract subscribers seeking access to CHS and then steer those subscribers

to other hospitals. Judge Conrad disagreed, however, giving little weight to the Second Circuit's decision. He found that credit cards are an entirely "different product and a different market" than healthcare and, moreover, that the Second Circuit reached its decision only after extensive discovery and a 7-day bench trial and not on a motion on the pleadings.

Despite Judge Conrad's ruling, DOJ's path to victory remains uncertain. Indeed Judge Conrad found that "CHS has raised serious and robust questions about the purposes, effects, and legality of its contractual steering restrictions and steering restrictions generally, but those questions are best resolved after the benefit of discovery."

The lawsuit continues to have major potential implications for both health insurers and healthcare providers:

– While the *American Express* case upholds anti-steering provisions in the credit card industry, companies should not take the opinion as carte blanche for such provisions in other contexts or industries.

– The case continues to affirm DOJ's view that selective contracting plays a key role in assuring competitive healthcare markets and that DOJ is willing to fight aggressively to remove impediments to steering patients to low cost or high quality providers through narrow or tiered provider networks.

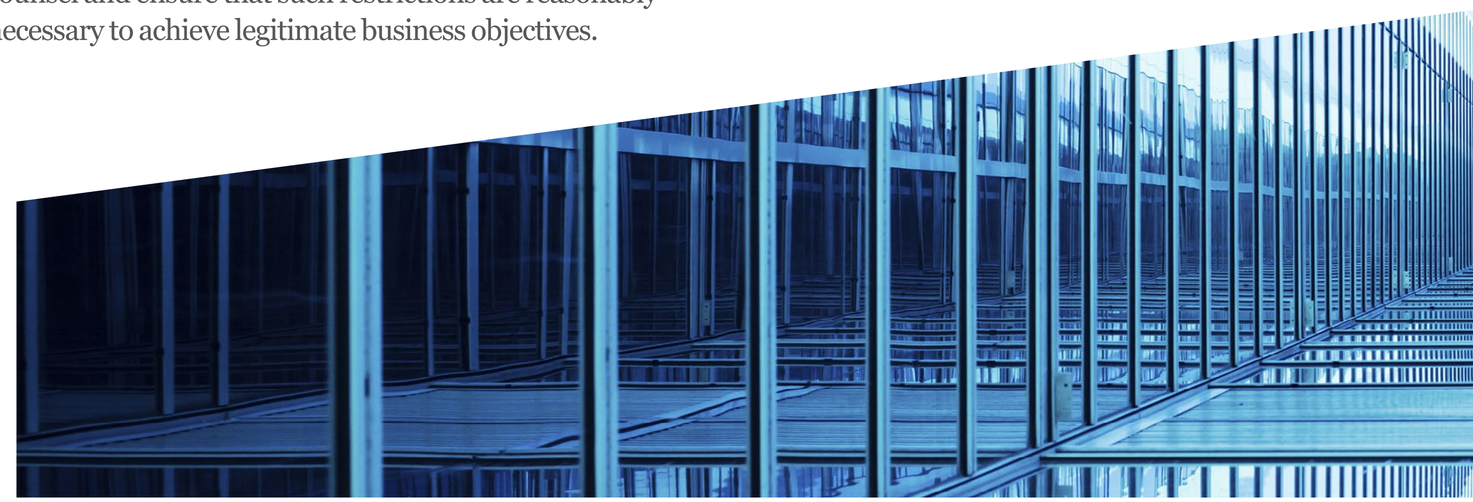
– As noted above, although this was an important DOJ victory, the case is still at a very early stage, and there are significant hurdles it will have to overcome to prevail once the full factual record is developed.

– Healthcare providers contemplating contractual restrictions on insurer steering should consult with counsel and ensure that such restrictions are reasonably necessary to achieve legitimate business objectives.

Robert F. Leibenluft
Partner, Washington, D.C.
T +1 202 637 5789
robert.leibenluft@hoganlovells.com

Justin W. Bernick
Partner, Washington, D.C.
T +1 202 637 5485
justin.bernick@hoganlovells.com

Caitlin M. Russo
Senior Associate, Washington, D.C.
T +1 202 637 3656
caitlin.russo@hoganlovells.com



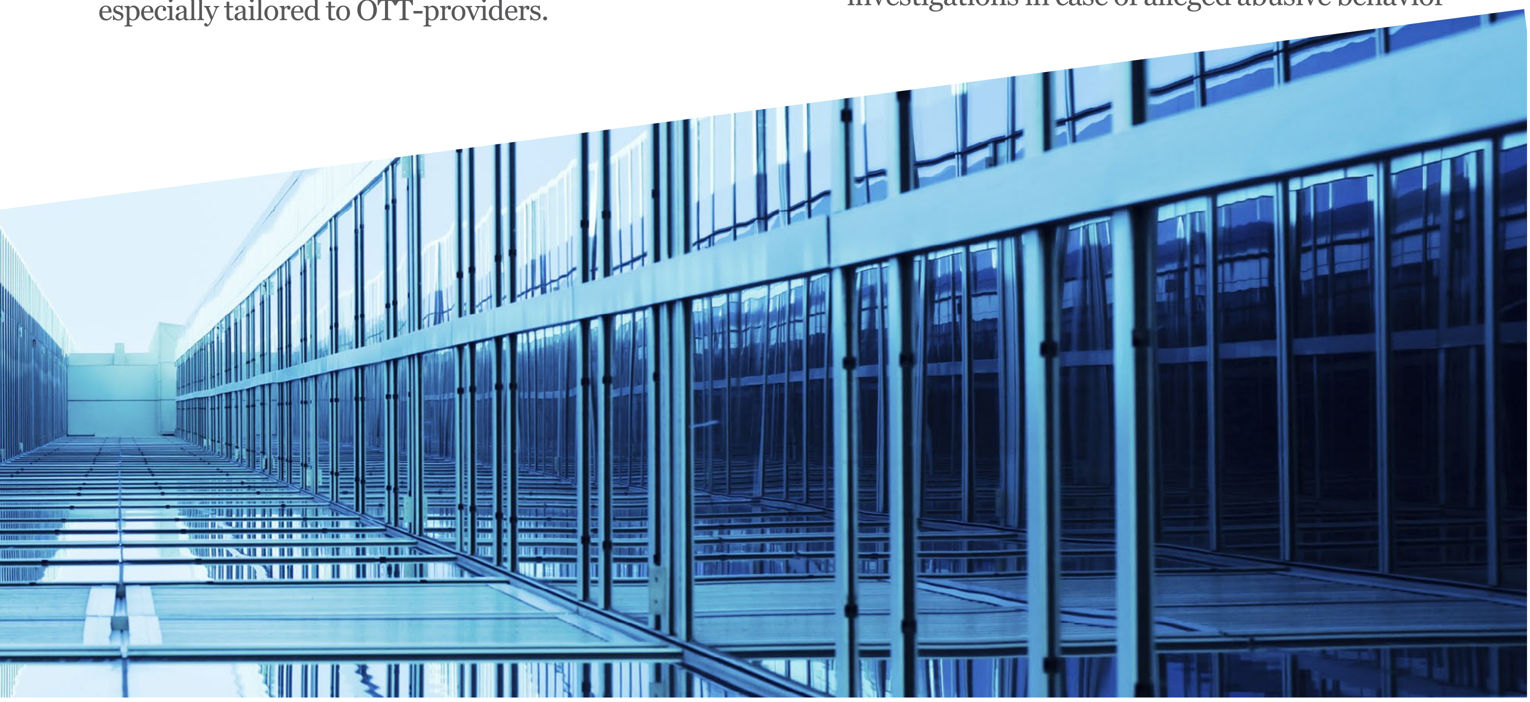
Germany suggests ramping up regulation of digital platforms by establishing a "digital agency"

Will Germany establish a "Digital Agency" to monitor compliance with competition law rules in digital markets? Will a German "Digital Antitrust Enforcer" become a role model for a European protectionist approach against American and Asian platform providers?

The German Federal Ministry for Economic Affairs and Energy seems to see a pressing need for regulation in digital markets. The White Paper "Digital Platforms", published on the 20 March 2017, provides an outlook on possible forms of digital regulatory policy in Germany and potentially also in Europe. Of particular interest from a competition law perspective is the proposal to establish a new "Digital Agency".

The White Paper aims at creating the foundation for fair competition conditions in order to strengthen competition in digital platform markets in Germany and Europe. The Federal Ministry therefore proposes the following measures:

- **Creation of a "Level Playing Field"** between the traditional telecommunication companies and Over-the-Top-Players (OTT-Players), e.g. online messengers such as WhatsApp and VoIP providers like Skype. Through the introduction of an ePrivacy Regulation, as proposed by the European Commission in January 2017, especially non-EU OTT-Players providing their services in Europe, should be obliged to abide by the European data privacy standards. In addition, the White Paper considers the introduction of new regulation on consumer protection and security especially tailored to OTT-providers.
- **Implementation of a dual, proactive competition law** through the creation of a new "Digital Agency" for active and systematic market control through an "early warning system". In view of the dynamics of digital markets, the Federal Ministry considers consistent control of digital platform markets necessary to guarantee compliance with competition law rules. For this purpose, ex-post competition law enforcement should be accompanied by an active and systematic market control by a still to-be-created "Digital Agency" which, complementary to the tasks of the German Federal Cartel Office (Bundeskartellamt) and the Federal Network Agency (Bundesnetzagentur), should be equipped with specific sovereign tasks and intervention powers. The systematic market monitoring should enable the "Digital Agency" to act proactively in the event of abusive behavior from established market players.
- **Acceleration of antitrust investigations** by lowering the threshold for the imposition of interim measures in antitrust investigations. The proactive application of competition law in digital markets should be further facilitated by faster intervention in case of suspected market abuse. Antitrust investigations in case of alleged abusive behavior



should not depend on conclusive evidence of a company's dominant position. In addition, it should be possible to prohibit any behavior which is suspicious from an antitrust or unfair competition law perspective before the closure of on-going investigations in order to prevent damage to consumers and competitors.

The White Paper aims to further push the European Commission's Digital Single Market initiative (for more information see our Hogan Lovells DSM Watch site). The proposed mechanisms should expressively strengthen the discourse on a European level and could, in the view of the Federal Ministry, serve as a role model for potential European regulations.

However, the proposals put forward in the White Paper deviate significantly from the European Commission's position. In particular, the European Commission so far considers existing competition rules and enforcement agencies as being sufficient to address new antitrust challenges posed by platforms. The Bundeskartellamt itself criticized the proposal for a new "Digital Antitrust Enforcer" in its Position Paper on the precursor to the White Paper, the Green Paper. The Federal Ministry's initiative is particularly surprising on account of the fact that the 9th amendment of the German Act Against Restraints of Competition (GWB) aiming at adjusting the GWB to the needs of the digital economy entered into force on 9 June 2017. These new proposals of the Federal Ministry played no role in the legislative procedure.

With concerns about increasing global protectionism and with German elections later this year the regulation of digital markets and platforms may become part of the political campaign. Market players should carefully monitor these developments and consider sharing their perspectives with decision-makers in Berlin and Brussels.

Martin Sura
Partner, Dusseldorf
T +49 211 13 68 0
martin.sura@hoganlovells.com

Christoph Wunschmann
Partner, Munich
T +49 89 290 12 0
christoph.wuenschmann@hoganlovells.com

Falk Schoening
Partner, Brussels
T +32 2 505 0911
falk.schoening@hoganlovells.com

Christian Ritz
Senior Associate, Munich
T +49 89 290 12 128
christian.ritz@hoganlovells.com

Antitrust cartel cases: what companies can expect under a Trump administration

In this interview, partners Megan Dixon and Kathryn Hellings discuss the trends they are seeing related to domestic and international cartel cases and offer a perspective on what could happen under a Trump Administration. They also explore the factors that make these cases so complex and the importance of having the right law firm and cartel team in place to craft an informed global strategy.

Have antitrust cases become more global in nature? What trends are you seeing?

Hellings: Purely domestic cartels were historically the primary focus in the United States. In the past ten years or so, however, the Department of Justice (DoJ) has focused on international cartels cases, and domestic cases have become more the exception than the rule. In that time, we have also seen an increase in enforcement activity outside the United States. Simply put, multi-national companies engaged in cartel conduct face an increased risk of investigation not only in the U.S., but also in an increasing number of jurisdictions across the globe.

We are also seeing an increase in hybrid cases — cases in which the U.S. DoJ is investigating both antitrust violations and corruption. DOJ has an increased awareness that frequently where there is cartel conduct there is also corruption and bribery. Frequently DOJ charges defendants with fraud and antitrust violations.

We are also seeing more investigations and cases being brought in highly regulated industries, such as the airline and pharmaceutical industries. In the past, the U.S. DoJ had been reticent to investigate highly regulated industries because these cases are frequently very complicated. Not anymore. DoJ now aggressively pursues highly regulated industries regardless of the complexities in these cases.

How has the DoJ's Antitrust Division responded to criticism that it has focused solely on international companies and individuals?

Hellings: In the last few years, DoJ has filed a number of domestic cartel cases. While overall cartel enforcement is increasingly international, DoJ has pursued a number of domestic cartel cases, some of which have been heavily publicized. I think that this is, at least in part, a response to the criticism levied against the Antitrust Division for focusing almost solely on international companies and individuals.

A high percentage of the cases that DoJ filed in the past decade were against international companies and individuals, and I think there was a general criticism that DoJ was not investigating cartel conduct here at home. President Trump has talked about increasing infrastructure spend in the United States. If in fact that happens, there will likely be an increase in bid rigging investigations in the U.S. It is likely that the Antitrust Division is going to look at the resulting government contracts for cartel conduct. The Trump Administration will not want the U.S. government to be victimized by cartel conduct. So in that way, I think domestic cartels might still be something that DoJ is focused on under the new Administration.

Dixon: Traditionally a lot of the domestic cartel cases that the Division tended to investigate and prosecute were in public heavy construction projects — roads, bridges, and the like. So if in fact there is an increase in infrastructure spending, there will inevitably be cheating and we would absolutely expect to see the Trump Administration going after domestic companies for defrauding the government on these types of projects.

How will the Trump Administration shape the antitrust and cartel space?

Dixon: It is very difficult to predict how the trends and policies that have evolved over the past decade will play out in a Trump Administration. The President has already make some picks for antitrust leadership that suggest — consistent with his overall pro-business platform — that antitrust enforcement is going to decrease in some areas. The cartel space will be an interesting one to watch because on the one hand Trump is definitely a pro-business president but on the other hand he ran on a populist platform and the consumer protection side of antitrust enforcement is a very foundational populist belief — particularly where American consumers are being disadvantaged in some way. I can absolutely see that being something Trump

would want to aggressively pursue, particularly where foreign companies are selling price-fixed products into the U.S. market. If Trump makes the foreign companies the big, bad wolf stealing from U.S. consumers, he could get a lot of mileage out of pursuing those kinds of cases.

A lot of this is up in the air. President Trump hasn't been very vocal about antitrust policy specifically, so we can only speculate based on the planks of his overall platform and the appointments he is pursuing. Hogan Lovells has a real advantage because of our deep roots in Washington, D.C. and London. We have people in the firm who can help keep clients abreast of the political situation that's unfolding with Brexit — which could have a huge impact on competition — and the Trump Administration. We are well positioned to advise our clients about what their exposure is moving forward across the competition space.

Has the number of countries where the threat of criminal prosecution exists increased?

Hellings: It used to be the case that when a company was under investigation, it could expect that it would be investigated by only a few cartel enforcement agencies — the U.S. DoJ, maybe the European Commission (EC), the Japan Fair Trade Commission (JFTC) — maybe a few others. In recent years, we've seen a real proliferation of cartel enforcement laws. Increasingly, companies are facing a real threat of severe punishment — and not just in a couple of jurisdictions. Additionally, there is an increasing threat of criminal punishment.

There are governments that are pursing these matters criminally, governments that did not pursue these cases years ago, and the potential penalties for corporations and individuals are severe.

With numerous regulators involved and an increasing number of jurisdictions with criminal sanctions and civil remedies for victims, how does this influence a company's strategy of how, when, what, and to whom to report on the results of an ongoing internal investigation?

Hellings: It is a landmine for companies that are under investigation. It's typically the case now that multiple jurisdictions investigate the same conduct and levy separate and severe penalties. There is a real pile-on effect. You have to really think about how to approach an investigation; you have to think about how an investigation in one jurisdiction might impact another jurisdiction. A company under investigation might find that one jurisdiction requests or requirements directly conflict with the requests and requirements of another jurisdiction. You must consistently and regularly balance the rules in one jurisdiction against the rules of another.

How do you help companies facing an investigation craft an informed global strategy?

Hellings: You have to be attuned to what the issues are from the outset. You have to be able to know what to anticipate and expect. It's not just in the initial agency investigation, but also the inevitable follow-on civil litigation. And that litigation is no longer just in the U.S. There is a huge risk to companies from the very beginning and there are things that the investigation team can do from the outset to manage that risk.

Dixon: Because of the complexity of the hybrid cases we are seeing more of and regulations governing them that are different in each jurisdiction, you often need counsel in supporting practices in addition to a strong cartel team. This is where Hogan Lovells has a real strategic advantage over some firms. For example, in some jurisdictions there are significant data privacy issues, there are employment issues around how you deal with individuals within the company who are allegedly involved in wrong doing, and there are political and strategic issues that require the input of seasoned lawyers with experience in these legal areas in all of the relevant jurisdictions.

We have a cartel team that is forward looking and understands the complexity of these cases. We are able to identify when we need others at the firm to advise on other legal issues that will arise in conjunction with a cartel case. This is an area where we have a competitive advantage. Other firms may have more cartel lawyers but they don't have this same level of support on the ground in all the various jurisdictions where these affiliated issues may arise.

Being able to identify the scope of the potential problem up front — whether that's how many jurisdictions are going to be involved and how many different types of legal issues are going to be implicated — is critical so that you can properly advise the client and help them understand why an investment up front can really pay off and also save money later in the investigation.

Megan Dixon
Partner, San Francisco
T +1 415 374 2305
megan.dixon@hoganlovells.com

Kathryn (Katie) Hellings
Partner, Washington, D.C.
T +1 202 637 5483
kathryn.hellings@hoganlovells.com

EU antitrust enforcement 2.0

European Commission raises concerns about algorithms

The European Competition Commissioner Margrethe Vestager has emphasised two important developments for EU antitrust enforcement, which have emerged from technological advancements:

– The Commission is taking proactive steps to consider whether the increasing reliance on computers to handle business processes and decisions raises competition law issues. One area of current concern is the use of algorithms, in particular whether algorithms may be being used illegally to establish cartels or make them more effective.

– The Commission wants to improve its methods for cartel detection. In addition to companies' cooperation through leniency applications, it wants to encourage individual whistleblowers to come forward anonymously. The Commission has launched a new messaging system that will improve the opportunities for individuals to provide information to the Commission about anti-competitive behaviour and safeguard their anonymity.

Algorithms

In a speech given on 16 March 2017, Commissioner Vestager set out in some detail how the use of algorithms could, in her view, infringe EU competition law. She commented:

– The Commission's e-commerce sector inquiry has discovered that the use of algorithms is widespread. The inquiry "*has shown that two thirds of retailers who track their competitors' prices use automatic systems to do that. Some of them also use that software to adjust prices automatically*." Last year, the German and French competition authorities published a joint paper on data and competition, which considered the potential competition law concerns raised by algorithms.

– There is a risk that automated systems can lead to more effective cartels, for example through their ability to monitor prices.

– Algorithms can be intentionally used to engage in price-fixing or retail price maintenance.

– Businesses may be deemed to be acting in collusion as a result of the way their algorithms operate. She commented: "*Illegal collusion isn't always put together in back rooms. There are many ways that collusion can happen, and some of them are well within the capacity of automated systems".*

– "*Pricing algorithms need to be built in a way that doesn't allow them to collude.*"

– Whilst the Commission's cases to date have dealt with agreements that were established by humans (but implemented by computers), this does not mean that the Commission will not investigate automated systems that collude. "*As competition enforcers, I think we need to make it very clear that companies can't escape responsibility for collusion by hiding behind a computer program*".

Commissioner Vestager's concerns echo those raised already by influential academic lawyers and national enforcers. The UK Competition and Markets Authority has focussed on such software. Semi-autonomous automated repricing software played a key role in its August 2016 infringement decision on online selling of posters and frames. It has subsequently made clear that it is considering the possibility to bring cases where there may be fully-autonomous software "colluding" with no need for any human intervention.

New anonymous whistleblower tool

Commissioner Vestager also took the opportunity to highlight the launch of a new anonymous whistleblower tool for cartels and other anti-competitive practices.

The tool provides the opportunity for individuals to supply information regarding anti-competitive behaviour through an independent agency to the Commission. In the past, individuals have been able to tip off the Commission by contacting it directly, but the Commission has not been able to follow up with the individual if he/she wants to remain anonymous.

The new tool consists of a specially-designed encrypted messaging system that allows two-way communications. The system is run by a specialised external service provider, which acts as an intermediary relaying only the content of received messages without forwarding any metadata that could be used to identify the individual providing the information. In particular, the tool provides individuals with the option of asking the Commission to reply to its messages, and allows the Commission to seek clarifications and details.

The Commission is hoping that this initiative will increase the likelihood of detection of anti-competitive practices, by increasing the number of tip-offs as well as the quality of the information being provided.

The Commission initiative follows efforts by other competition authorities to encourage whistleblowing by individuals. The Commission's system is similar to an anonymous whistleblower system that was set up in Germany in 2013, and which the Commission has regarded as having worked well. For instance, the FCO fined parts manufacturers EUR 75 million in 2015 after an anonymous tip received through its online whistleblower system. The UK also has a system in place where individuals can be paid financial rewards of up to £100,000, if they provide accurate, verifiable and useful information which helps the CMA in the detection and investigation of cartels, and which leads to the imposition of fines or criminal prosecution.

The new tool increases the chances of cartel detection in the EU. This is particularly important for the Commission in a climate where the increasing threat of follow-on damages actions is regarded as discouraging companies from coming forward to disclose cartels. For companies, this new trend raises a couple of problematic issues, e.g. whether employees will still feel encouraged to use established internal whistleblowing systems that many companies have set up, and how a cartel which has been revealed by a tip-off from a member of staff affects the company's ability to apply for leniency.

The Commission's new system is expressly not limited to cartels, but also covers other anti-competitive practices, including vertical restrictions in distribution chains.

New frontiers of detection and enforcement

Technological advances have both increased the risks of detection for competition law infringement as well as opened up new areas of competitor interaction for the regulator to investigate. Business needs to adjust to the new reality, namely that competition authorities are increasingly prepared to look beyond the traditional forms of cartel conduct, such as agreements made in smoke-filled rooms, and to use technology to expand their powers of detection. Competition authorities are actively examining whether they have the appropriate IT and analytical tools to detect technology-based collusion.

Peter Citron
Counsel, Brussels
T +32 2 505 0905
peter.citron@hoganlovells.com

Matthew Levitt
Office Managing Partner, Brussels
T +32 2 505 0903
matthew.levitt@hoganlovells.com

Gianni De Stefano
Counsel, Brussels
T +32 2 505 0967
gianni.destefano@hoganlovells.com

Angus Coulter
Partner, London
T +44 20 7296 2965
angus.coulter@hoganlovells.com

Outlook for disgorgement remedies in the Trump administration

With the departure of now former Chairwoman Edith Ramirez, among the most discussed vacancies in the new administration these days is the post of permanent Chair of the Federal Trade Commission (FTC). According to reports, one leading candidate is Acting Chairman Maureen Ohlhausen, and her selection could also have significant implications for FTC policy areas—particularly with respect to disgorgement remedies in antitrust cases. Specifically, should she become the permanent Chairman, Acting Chairman Ohlhausen's record and recent comments indicate a potential shift away from disgorgement as a remedy in FTC cases.

From the beginning of her tenure as Commissioner, Acting Chairman Ohlhausen has been an outspoken critic of the FTC's pursuit of disgorgement remedies in the vast majority of antitrust cases. In 2012, when the FTC voted to withdraw its Policy Statement on Monetary Remedies in Competition Cases ("Policy Statement"), which had articulated a three-part standard under which the FTC would ordinarily not seek disgorgement absent a clear violation of the antitrust laws, then-Commissioner Ohlhausen issued a statement dissenting from the decision. In that statement, she explained that she had "significant concerns" about sending a signal "that the Commission will be seeking disgorgement in circumstances in which the three-part test... is not met, such as where the alleged antitrust violation is not clear or where other remedies would be sufficient to address the violation.[1]"

In the wake of this policy shift, Acting Chairman Ohlhausen has continued her criticism as the FTC sought disgorgement in five cases since 2012[2] —more than it did during the previous nine years during which the Policy Statement was in effect[3]. In addition to concerns regarding transparency, she emphasized that in its pursuit of disgorgement (which can only be obtained in federal court), the FTC "neglect[ed] its special mission to develop the antitrust laws through Part III litigation and other unique tools.[4]" Acting Chairman Ohlhausen described, in the specific situation of pay-for-delay cases, that it is an "unfortunate mistake" for the Commission to "look[] past Part III for monetary relief reasons...[5]" Thus, Acting Chairman Ohlhausen indicated a preference to pursue cases in Part III, meaning that disgorgement and other monetary relief would not be a priority for the FTC in such matters.

On the other hand, disgorgement remedies may not disappear entirely under an Ohlhausen-led Commission. She has supported the pursuit of disgorgement in two cases during her tenure, including the 2015 *Cephalon* case and most recently in the case alleging Shire ViroPharma violated the antitrust laws by making "repetitive, serial, and meritless filings to the [U.S. Food and Drug Administration] and courts" to delay the FDA's approval of generic Vancocin Capsules[6]. In the context of *Cephalon*, then-Commissioner Ohlhausen issued a separate statement together with then-Commissioner Joshua Wright explaining they believed disgorgement was appropriate in that case because the allegations met the three-part test under the (then-withdrawn) Policy Statement—namely that the alleged violation was "clear" because "there is reason to believe that Cephalon should have known that it was violating the antitrust laws" and there was also a reasonable basis for calculating the disgorgement amount. Although Acting Chairman Ohlhausen did not issue a statement in connection with the Shire complaint, her endorsement of seeking disgorgement against *Shire* is consistent with the views she expressed in the context of *Cephalon*. Regardless, using the Part III process would avoid disgorgement in such cases altogether.

1 Statement of Commissioner Maureen K. Ohlhausen Dissenting from the Commission's Decision to Withdraw its Policy Statement on Monetary Equitable Remedies in Competition Cases, July 31, 2012, available at https://www.ftc.gov/sites/default/files/documents/public statements/statement- commissioner-maureen-k.ohlhausen/120731ohlhausenstatement.pdf.

2 FTC v. Shire ViroPharma Inc., No. 1:17-cv-00131-UNA (D.Del. filed Feb. 7, 2017); FTC v. Endo Pharma, No. 2:16-cv-1440 (E.D.Pa. Mar. 30, 2016); FTC v. Cardinal Health, No. 15-cv-3031 (S.D.N.Y. Apr. 20, 2015); FTC v. AbbVie, Inc., No. 2:14-cv-05151 (E.D.Pa. Sept. 8, 2014); FTC v. Cephalon, Inc., No. 2:08-cv-2141 (E.D.Pa. Nov. 18, 2013).

3 While the policy While the Policy Statement was in effect, the FTC pursued disgorgement in only two cases: FTC v. Ovation Pharms., Inc., Civ. No. 08-6379 (D. Minn. filed Dec. 16, 2008) and FTC v. Perrigo Co., No. 1:04CV01397 (D.D.C. filed Aug. 12, 2004).

4 Speech by Maureen K. Ohlhausen, Commissioner, Federal Trade Commission, Dollars, Doctrine, and Damage Control: How Disgorgement Affects the FTC's Antitrust Mission (April 20, 2016), https://www.ftc.gov/system/files/documents/public statements/945623/160420dollarsdoctrinespeech.pdf.

5 Id.

6 Complaint, FTC v. Shire ViroPharma Inc., No. 1:17-cv-00131-UNA (D.Del. filed Feb. 7, 2017) at 11143.

Against this well-established track record, should she be confirmed as the permanent Chair, Ohlhausen's leadership may drive a significant policy shift on disgorgement, including potentially re-issuing the Policy Statement and a transition away from federal court litigation to Part III administrative activity. While these changes could have significant implications for a wide range of companies, they may have the greatest impact on the pharmaceutical industry, which has been a primary enforcement priority for the FTC for some time now and has also been the target in every case in which the FTC has sought disgorgement since 2012.

Logan Breed
Partner, Washington, D.C.
T +1 202 637 6407
logan.breed@hoganlovells.com

Lauren Battaglia
Senior Associate, Washington, D.C.
T +1 202 637 5761
lauren.battaglia@hoganlovells.com

M&A activity in the connect vehicles sector: more antitrust filings on the horizon?

M&A activity in the connected vehicles sector might need to be notified to antitrust authorities, even when the target has limited revenues, as shown by the recent Intel/Mobileye deal.

Connected vehicles (or, taking it one step further, self-driving cars) are computers on wheels and represent a rapidly changing area raising major challenges – including compliance with legal and regulatory obligations. The future mergers and acquisitions between car manufacturers and suppliers, technology companies, insurers and/or others might need to be notified to the different antitrust/merger control authorities around the world, even when the target in these deals has limited revenues.

Under merger control rules, a merger filing is usually required when the merging parties have significant local revenues or local asset levels in a certain country or jurisdiction. However, some jurisdictions – such as the European Commission, Germany and Austria – have been examining whether certain high-value transactions (i.e. with a high price tag) involving targets with no or low local revenues may have a significant impact on competition in the jurisdiction and, if so, whether to modify their merger notification thresholds to address this limited class of transactions.

Intel has recently entered the self-driving car sector through the acquisition for over US$15bn of Mobileye, an Israeli company making sensors and cameras for self-driving cars. With the acquisition, Intel enters the sensors and chips manufacturing in the automotive industry along with Google and Uber that have already invested in their own technology in the field. While the deal price is very high (over US$1bn), Mobileye global revenues are limited (just above US$358m in 2016). While this time the Intel/Mobileye deal is not being notified in Europe (neither at the EU level to the European Commission, nor at the Member State level to national antitrust agencies), future deals might have a different outcome and have be notified. Germany and Austria have already introduced reforms of their merger notification thresholds to be able to review deals mainly based on the purchase price (along with some other requirements to make sure that there is a material nexus to their territory). And the European Commission has recently completed a consultation where it had asked various industry stakeholders whether they agree that the EU should change its merger control rules to allow notifications in case of deals with a high purchase price, even when the target has limited presence in terms revenues in Europe.

The German reforms entered into force on 9 June 2017 (see article above for more detail); the Austrian reforms will enter into force on 1 November 2017; and the European Commission is to release its findings on the consultation soon. Other jurisdictions may follow this path. One thing is certain today: any future mergers in the automotive sector will have to be carefully assessed to determine possible merger filings to antitrust authorities around the world.

Gianni De Stefano
Counsel, Brussels
T +32 2 505 0967
gianni.destefano@hoganlovells.com

Notes

Alicante
Amsterdam
Baltimore
Beijing
Brussels
Budapest
Caracas
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Rio de Janeiro
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar
Warsaw
Washington, D.C.
Zagreb

Our offices
Associated offices

www.hoganlovells.com