

ANTITRUST MATTERS

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EDITORIAL

By David Bamberger

Sitting at my desk in Washington, DC, I imagine myself being a business executive in Europe or Asia, trying to make sense of news reports that I regularly hear about United States courts and enforcement agencies asserting that companies all over the world are within the reach of the US antitrust laws. The vast majority of global companies try to conduct themselves in accordance with proper ethical and legal standards, and yet so many have found themselves in recent years on the wrong end of United States antitrust law, sometimes repeatedly, for conduct and communications that occurred many thousands of miles from the United States. If my company only makes a component of a finished product that may be sold one day by others in the United States, do I really need to worry that some conduct or communications among our workers might possibly subject our company to hundreds of millions of dollars in fines or civil damages or even imprisonment for some individuals? Unfortunately, the short answer is: yes. But how can that happen?

The answer lies in a short but surprisingly complex United States statute, enacted in 1982, known as the Foreign Trade Antitrust Improvement Act, often called the FTAIA for short. This law has enormous consequences for global companies. In essence, the FTAIA defines the extent to which the United States Sherman Antitrust Act can reach conduct outside the United States, and, in recent years, there have been two developments that have caused issues surrounding the FTAIA to rocket to the top of antitrust concerns for global companies. First, business itself has become so much more globalized, with international supply chains that are sometimes so complex that it is hard to tell the "sellers" from the "buyers." Second, there have been enormous advances in the extent to which competition enforcement authorities in countries around the globe cooperate with each other. A company can no longer assume that local conduct will be subject to scrutiny only by local or regional authorities, and companies can be subjected, simultaneously, to investigations and enforcement actions from multiple

global authorities for the very same conduct. Thus, if an investigation starts in Europe, for example, actions by the United States Department of Justice (DOJ) and private plaintiffs in the United States are sure to follow.

In light of these developments, a clear understanding of the extent to which United States antitrust laws can reach conduct outside the United States would be extremely useful, even essential, for global companies. But key provisions of the FTAIA have never been fully clarified. The nation's highest courts continue to have difficulty coming to a consensus on the interpretation of language at the heart of this short but highly impactful statute, and the Supreme Court has not yet had occasion to clarify its meaning.

In F. Hoffman-La Roche Ltd. V. Empagram SA, a 2004 decision, the Supreme Court summarized the FTAIA as follows:

This technical language initially lays down a general rule placing all (non-import) activity involving foreign commerce outside the Sherman Act's reach. It then brings such conduct back within the Sherman Act's reach provided that the conduct both (1) sufficiently affects American commerce, i.e., it has a "direct, substantial and reasonably foreseeable effect" on American domestic, import, or (certain) export commerce, and (2) has an effect of a kind that antitrust law considers harmful, i.e., the "effect" must "give" a rise to a [Sherman Act] claim.

There have been numerous cases in recent years concerning different aspects of the statute, but most recently, the sharpest disagreements among the courts seem to be crystallizing around the requirement that the conduct must have a "direct, substantial and reasonably foreseeable effect" on US commerce. If a company is involved in a cartel, and the cartel members collude to sell their price-fixed finished goods in the

United States, the reach of the Sherman Act may be readily established. But does the Sherman Act also cover the conduct of a foreign component maker, where the components are sold only to foreign companies, but at least some of the finished products are then later sold in the United States? The courts are struggling with such questions, and the consequences for global companies can be enormous.

Just in the last seven months, at least three US Courts of Appeals have issued decisions in this area that are difficult to reconcile, and one of them could be an occasion for the Supreme Court to intervene and offer further clarification of the FTAIA. In Motorola Mobility LLC v. AU Optronics Corp., the Seventh Circuit issued a decision that seemed to severely limit the potential liability of foreign component makers who sell only to foreign purchasers, finding the effect of the component price-fixing in the United States was too indirect to support a Sherman Act claim. But the court withdrew its opinion a few months later, granting a request for rehearing after the United States filed an amicus brief criticizing the court's approach. The United States argued that the court's bright-line approach was too restrictive, as it may be possible to establish a sufficient causal connection between the foreign price-fixing of components and US commerce in finished products. (The rehearing has just occurred, but the result is not yet known.)

In Lotes Co. v. Hon Hai Precision Industry Co., the United States Court of Appeals for the Second Circuit took a more nuanced approach, suggesting that courts must look at each case on its facts and determine whether there is a "reasonably proximate causal connection" (a standard advocated by the DOJ) between the foreign conduct and injury in the United States.

Then, in *United States v. Hui Hsiung*, the Ninth Circuit affirmed the convictions of defendants from Taiwan and Korea for fixing prices of LCD screens that were incorporated into finished products sold in the United States. The court did not base its ruling squarely on the "direct effects" language of the FTAIA but observed, nevertheless, that foreign conduct has a "direct" effect if it follows as an "immediate consequence" of the defendants' activity, a standard that is more stringent than the "reasonably proximate" standard applied by the Second Circuit.

So what is the proper standard for assessing the international reach of the Sherman Act to conduct elsewhere in the world involving products with complex supply chains? One can only hope that the Supreme Court will step in soon to resolve the disparate interpretations of the FTAIA. In the meantime, companies that manufacture components for products that ultimately may be sold in the United States are well-advised to consider the possibility that the United States antitrust laws may be found to apply to at least some of their conduct, no matter where it occurs. Ignoring or underestimating that risk could have dire consequences.





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EUROPEAN UNION

The effect of the object – object or effect?

By Bertold Bär-Bouyssière

Article 101 (1) TFEU prohibits agreements, vertical or horizontal, "which have as their object or effect the restriction or distortion of competition." Competition lawyers in the European Union are brought up on the idea that there are two types of competition law offences under Article 101 TFEU: restrictions by object and restrictions by effect. In layman's terms, restrictions by object are those that are by their very nature so deleterious to competition that their negative effect on the market can be presumed.

Underpinning their basic belief is the European Court of Justice's 1966 ruling in *Société Technique Minière v. Maschinenbau Ulm*¹ that the words *object* and *effect* must be read disjunctively. Where a restriction is found to be by object, it is not necessary for the authority or the court to prove that the restriction had anti-competitive effects.

Not surprisingly, over the decades of evolving decisional practice and case law, those restrictions that were intuitively "hardcore" were found to be restrictions by object: naked price fixing, geographic market allocation, output limitations – all of which are horizontal

restrictions – but also certain vertical practices that are obviously harmful to competition, such as territorial restrictions in distribution agreements or export bans.

The "object box" has evolved over time, and some forms of conduct may from time to time be downgraded from object restriction to effect restriction. However, of much bigger concern to companies and practitioners is that in recent years the European Commission has tended to fold an increasing number of restrictions into the object box – rather more restrictions than one may intuitively have expected, thus avoiding the need for it to carry out a detailed effects analysis while increasing the burden on the companies to prove countervailing efficiencies.

It is thus a welcome development that the ECJ, in *Groupement des cartes bancaires* (CB),² made it clear that restriction by object class must remain somewhat exclusive. We can compare it to entering a VIP lounge at the airport. Indeed, even before the ECJ's recent ruling, Advocate General Nils Wahl had already made that point in his conclusions delivered in March 2014.

AG Wahl acknowledged that classifying conduct on the basis of a standardised approach, rather than on a case-by-case basis, saves valuable enforcement resources and increases predictability as well as deterrence. But these advantages, he noted, can only materialize where the object restrictions are clearly defined. Over the years case law has blurred the distinction between restriction by object and restriction by effect. The increasing use of quantification methods in the process of qualifying conduct has generated confusion between the identification of object restrictions and the effects analysis that needs to be carried out for all other cases. This, Wahl pointed out, could lead to inconsistencies: a conduct qualified as sufficiently deleterious to competition based on economic theory could thus be prohibited even when in a particular case it did not appreciably restrict competition according to the same economic theory (e.g. horizontal price fixing between companies with tiny market shares).

¹ Case 56/65 [1966] ECR 235, P. 249.

² Case 67/13 P, Judgment of 11 September 2014.



Wahl said: "Nonetheless, and despite the fact that, to some extent, case-law has contributed to blurring the boundary between the concepts of restriction by object or restriction by effect, I take the view that recourse to that concept must be more clearly defined." He continued, "Because of these consequences, classification as an agreement which is restrictive by object must necessarily be circumscribed and ultimately apply only to an agreement which inherently presents a degree of harm. This concept should relate only to agreements which inherently, that is to say without the need to evaluate their actual or potential effects, have a degree of seriousness or harm such that their negative impact on competition seems highly likely. Notwithstanding the open nature of the list of conduct which can be regarded as restrictive by virtue of its object, I propose that a relatively cautious attitude should be maintained in determining a restriction of competition by object."

The ECJ followed AG Wahl's recommendations. It recalled that "certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects," because "certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper

functioning of normal competition". To qualify conduct as a restriction by object, "regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question". The "essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition 'by object' is the finding that such coordination reveals in itself a sufficient degree of harm to competition."

The ECJ went on to state that the "concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition. The fact that the types of agreements covered by Article 81(1) EC do not constitute an exhaustive list of prohibited collusion is, in that regard,

irrelevant." The ECJ also confirmed that the methodology used to qualify the conduct at issue must not overlap with the effects analysis to be conducted where a restriction does not meet the by-object standard.

It remains to be seen whether this ruling will have a significant impact on the Commission's future practice. In recent years, the Commission has stretched the concept of object-restriction significantly, and its Staff Working Document on "by object" restrictions of 25 June 2014 lists some cases as examples that actually do not belong in that class. But this should not discourage us; one should never exclude the hope that things can change for the better.





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Belgian Competition Authority issues new fining guidelines

By Carole Maczkovics and Pierre Sabbadini

The Belgian Competition Authority (BCA) has decided to repeal its 2011 Communication on the calculation of fines and replace them with a new set of guidelines which are more in line with European Commission practice.

The BCA explains that its objective is to provide more transparency and legal safety to companies under investigation as to the level potential of fines.

The new Guidelines, issued in late summer, state that, as a matter of principle, fines will be calculated on the basis of the European Commission's methodology mutatis mutandis, i.e. apart from the concepts of turnover, leniency and recidivism which are specifically defined in the new guidelines to be applied to investigations in Belgium.

For example, the turnover to take into account as a basis of the fine will be, in principle, the turnover that was generated by the company under investigation in Belgium and which is directly or indirectly related to the potential infringement.

The new guidelines came into effect as of

1 November 2014 and apply to all cases, provided that no motivated decisions has been transmitted to the decisional body of the Belgian competition Authority (Collège de la concurrence), except for cases where both the college of the prosecutor has already communicated a range of fines and parties have reached a settlement with the BCA.

The Guidelines are available on the website of the BCA at here.

Should you have any questions about competition issues in Belgium, please do not hesitate to contact the authors.





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Compensatory collective redress introduced in Belgium

By Pierre Sabbadini and Boris Marschall

Recent reform of economic legislation in Belgium included the creation of a collective redress action, which is available since 1 September 2014 under Belgian Economic Code (Book XVII, Title 2).3 As an exception to the rules of Belgian Judicial Code, several consumers can join force in a group which will be headed by an appointed representative to seek redress for a harm deriving from potential violation of by a company of either one of its contractual obligation or by a European regulation or one of many statutes listed in the Code which provide protection to consumer in a certain area of law.

Specific rules apply regarding the nature of the harm, the representation of the group of consumer, the procedure and there is a requirement that for an action for collective redress to be admissible, it has to be more efficient than available actions under civil and commercial law.

According to the Economic Code, such an action may only be initiated by a group representative, i.e. (I) a consumer association with a legal personality and represented on the Consumers' Council or those which are recognised by the Minister of Economic Affairs or; (II) other associations provided that they fulfill three

conditions, i.e. they (i) have had legal a personality for a period which is more than three years, (ii) they are recognised by the Minister of Economy and (iii) that their social purpose is directly related to the collective harm; or (III) the public service of mediation for consumers which may represent a group of consumers only during the negotiation phase of the procedure.

The harm for which redress may be sought must be constituted by a potential violation of by a company of either one of its contractual obligation or by a European regulation or one of the many statutes listed under Art. XVII.37 of the Economic Code (i.e. statutes providing protection to consumers in the fields of competition law, unfair commercial practices, payments and credits, IP, Digital Economy, pharmaceutical products, health protection, insurance, product safety, data protection, etc.).

It should be noted that transitional provisions state that the claim may only be filed for a harm based on a common cause for the consumers which occurred after the entry into force of this law introducing collective redress, i.e. not prior to 1 September 2014.

An action for collective redress which is to be filed only before the Courts of Brussels, follows a three steps procedure where (i) the judge decides on the admissibility of the action based on the description of the group, the representative, the common harm, the choice of the representation system (i.e. opt-in or opt-out), then if the action is deemed admissible (ii) the representative and the defendant have the possibility to negotiate a settlement which would be homologated by the judge and finally (iii) if no settlement is reached the normal procedure is resumed and the judge may rule that the defendant has to indemnify the group of consumers. In practice, a trustee will be appointed to manage the list of consumers and handle the grant of damages.

This collective redress regime does not come with any big surprise features. The aim to avoid abusive litigation, by defining narrowly what type of entity is entitled to represent a group of consumers for the purpose of collective redress, and by making sure early in the process that manifestly unfounded cases are not continued, is typical of the European tendency to look at US class actions with suspicion. In this regard,

³ Belgian Economic Code (Book XVII, Title 2), Official Gazette of 12 May 2014, p.35201 – p. 35212.



the Belgian system is similar to the French regime, introduced earlier this year, and coherent with the recommendation published by the European Commission in June 2013.

It is however quite notable that unlike France, and probably inspired by the Netherlands, Belgium has chosen to allow the opt-out representation system (at least regarding consumers living in Belgium).

In any event, in the field of competition law, additional care is now advisable whenever there is a risk of successful collective redress action in Belgium.





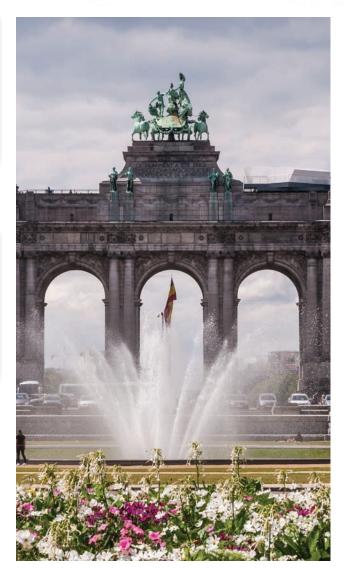
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FCO takes actions against ban on platform sales

By Gregor Schroll

Online marketplaces are Internet platforms that are not operated by a dealer itself, but merely provide the hosting performance for dealers. Germany's Federal Cartel Office (FCO) has for some time been expressing concerns about the competition law compliance of restrictions of sales via online marketplaces. The concerns primarily relate to distribution agreements of manufacturers of brand products, which often contain clauses that restrict or prohibit the sale of the manufacturer's products via online marketplaces. Well-known manufacturers of sportswear are among the manufacturers that insist on such distribution agreements.

Brand manufacturers typically operate selective distribution systems to sell their products. These systems require that the contract goods are sold only to distributors that were previously selected based on defined characteristics, e.g. quality requirements. The distribution agreements applied by a well-known German sportswear manufacturer, in the view of the FCO, encompassed a ban on the sale of products via online marketplaces. Following extensive investigations in 2013, including a web survey of about 3,000 retailers, the FCO stated its objections as regards the legality of these restrictions. According to the view of the FCO, preventing sales via platforms would de facto restrict the possibility – especially for smaller distributors – of selling online. Because the undertaking in question

then changed its Internet sales conditions following the statement of objection by the FCO, the case was recently closed (see press release of the FCO from 02/07/2014, available here).

The case against a Japanese sportswear producer, which was also reprimanded by the FCO because of limitations on online trading, is still in process. Notably, despite the settlement reached in the proceedings illustrated above, in practice a huge number of distribution agreements in the EEA still contain similar restrictions. Thus, the question of the consequences of the FCO's view is of significance to the general public.

It is common ground that the general prohibition or restriction of online sales contradicts German as well as European competition law (ECJ, judgment of 13 October 2011, C-439/09 – Pierre Fabre). However, under European law (see Guidelines to Regulation (EU) No. 330/2010, Vertical Block Exemption Regulation or VBER, para. 54), a supplier may expressly require that its distributors use third-party platforms to distribute the contract products only in accordance with the standards and conditions agreed between the supplier and its distributors. For instance, where the distributor's website is hosted by a third-party platform, the supplier

may require that customers do not visit the distributor's website through a site carrying the name or logo of the third-party platform.

In view of the fact that selling via online marketplaces is necessarily associated with the presentation of the name or logo of these platforms, one may conclude that the EU Commission considers the prohibition of sales via online marketplaces in the context of selective distribution systems to be legal. Since the VBER is also applicable under German law, prohibition of sales via online marketplaces was permissible under German law according to the previous understanding. This interpretation was in line with previous case law: in recent decisions; the ban on selling goods via a thirdparty platform was not considered illegal as such, provided that the distribution system was applied in a non-discriminatory way. In this context, the Appellate Court of Berlin found that the distribution conditions of a manufacturer of high-end school satchels, which prohibited sales via online marketplaces based on the reasoning that this would harm the exclusive brand image, were discriminatory, because the manufacturer itself distributed its products via discount stores at the same time (KG Berlin, judgment of 19.09.2013 – 2 U 8/09).



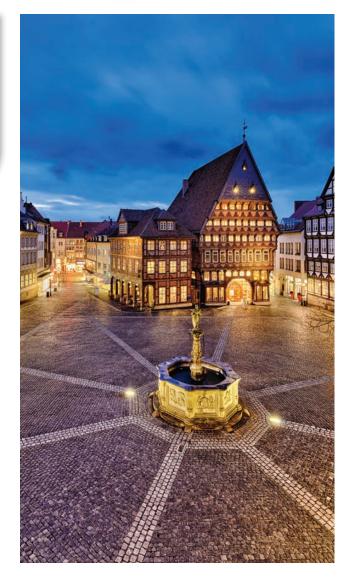
However, in contrast to the explicit wording of the Guidelines on Vertical Restraints as well as former German case law, the FCO now holds the view that the per-se prohibition of online marketplaces constitutes an infringement of Art. 4 lit. c) VBER, as this would lead to a restriction of passive sales to end users if not objectively and individually justified. This interpretation, following the FCO's approach, was recently confirmed by the Higher Regional Court of Schleswig-Holstein (OLG Schleswig-Holstein, 05.06.2014 – 16 U 154/13 (Kart) and the District Court of Frankfurt (LG Frankfurt a.M., 18.06.2014 – 2-03 O 158/13).

In addition, the FCO claims to have aligned its approach with other national authorities and the EU Commission. Thus, at least with regard to distribution contracts having effects in Germany, a careful approach may lead to a reassessment of existing distribution agreements. In view of para. 54 of the Vertical Guidelines, a number of distribution agreements in the EEA were drafted excluding platform sales. Restrictions of online sales may only be permissible under German practice under strict requirements of proving objectively that noncompliance of a specific marketplace with the quality standards set up by the manufacturer. Thus, an individual case-by-case assessment is necessary. A per-se prohibition of platform sales may, following the clear message sent by the FCO, endanger undertakings for antitrust proceedings, including possibly fines, in Germany.





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HUNGARY

When market researches are anti-competitive

By Kornél Szabó

The Hungarian Competition Authority (HCA) recently ruled on whether the exchange of past business information, in the framework of a quarterly circulated market research paper, is anticompetitive or not. Finding that such an information exchange system, in certain circumstances, should be regarded as a restriction of competition, the HCA imposed a fine on all of the parties involved except for the immunity applicant. The case concerned Hungarian contact lens distributors who exchanged their past individual sales volumes and values through a market research system. The exchanged information was entirely from the previous quarter – and it was not publicly disclosed, but only circulated by the market research company to the enterprises involved in the HCA's proceedings.

The decision is unique: this is the first time a European competition authority has ruled on an infringement of competition rules that consisted exclusively of the exchange of purely past information.

The main message of the decision, which is under judicial review, is that even an exchange of past information in itself can be restrictive of competition. As a result, companies need to reassess the market research they are involved in on a case-by-case basis, even if the research involves only exchanging information from the past.

Although a case-by-case assessment is necessary, the decision detailed below gives a quite complete list of the aspects that need to be reviewed when assessing a market research system. It is also a good insight into the methodology of a national competition authority dealing with market researches.

During the investigation, the HCA sought to determine if the enterprises' conduct was capable of restricting or distorting competition, considering the specifics of the market for contact lenses and accessories in Hungary and the specific characteristics of the information exchange. The HCA found that the enterprises, by exchanging their detailed company- and product segment-specific information (which could not be obtained from public sources) regarding their recent income and sales volumes, were operating an information system that was capable of restricting competition.

According to one of the HCA's position statements, information exchange systems, the purpose or effect of which is to lower the risks stemming from the behaviour of competitors, are anti-competitive. Such reasoning follows the European Court of Justice's decision in *T-Mobile Netherlands*: "An exchange of information between competitors is tainted with an anti-competitive object if the exchange is capable of removing uncertainties concerning the intended conduct of the participating undertakings." The underlying question: is the exchange of past information capable of removing uncertainties concerning intended conduct?

In the given case, the HCA carried out a step-by-step analysis of the main aspects and principles laid down by the European Commission in its 2011 Horizontal Guidelines and by the ECJ in its decision in Asnaf-Equifax. i.e., (i) purpose of the information exchange; (ii) access to the market research; (iii) terms and conditions of joining to the system; (iv) type of information exchanged (public or confidential, aggregate or individual, future or past information and their significance in determining prices, sales volumes or other commercial terms). The result of such analysis, which is also a list of the aspects to be reviewed by every company involved in market research, are as follows:

Market coverage

The parties covered 80 percent of the relevant market, the market was heavily concentrated and no new market entry could be expected. Only one market player was not involved in the exchange system. Furthermore, the relevant markets can be divided into certain segments in which only one to three market players were active, which made the exchange even more sensitive.



Lack of public information

As no similar public information was accessible to other market players and customers, the exchange system offered by this research significantly increased the transparency of the market to the companies concerned. Moreover, there no other source afforded other market players similar information. Retail prices could be collected from retailers, but wholesale prices could not be estimated based on retail prices because distributors offered varying discounts to retailers.

Age of information and frequency of the exchange

Market players made business decisions on an annual basis, i.e., they determined prices once a year for the entire coming year. Therefore, a quarterly data exchange should be regarded as a frequent, non-historic information exchange.

Strategic, detailed information

The market research consisted of sales volumes and values, market shares and average wholesale prices split by product categories. Such information should be regarded as strategic information, according to the HCA. In an oligopolistic market, regularly exchanged sales data allows the parties to observe any alteration in the business strategy of their competitors, e.g., a new marketing campaign or a price cut. This led to a situation in which the parties were able to eliminate market uncertainties.

Publicity of information

The exchange significantly increased market transparency only for participants of the exchange system, resulting in an information asymmetry that harmed consumers and downstream market players.

Use of information exchanged

It was shown that the market research was used and assessed in strategic business decision making. According to the HCA, benchmarking could be a pro-competitive use of the market researches, but such pro-competitive purposes could have been achieved by the exchange of aggregated data as well.

Potential of influencing business decisions

The parties involved in the proceedings argued that the market research was unable to influence business decisions, therefore could not be anti-competitive, due to the fact that business strategies were determined by the headquarters and not by the local management who were involved in the market research. The HCA did not accept this reasoning as it was confirmed that local management fine-tuned and localized overall business strategies emanating from headquarters.

The result of the analysis was that even if there was no evidence of any effect on the market due to this market research and even if it consisted of only past information, it was anti-competitive.





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Seeking clarity on leniency applications made to both the EU and national authorities

By Edoardo Cazzato

The Italian Supreme Administrative Court (Consiglio di Stato) is seeking guidance from the European Court of Justice on how to deal with applications for the leniency program when they are made both to the European Commission and national competition authorities. The core question is to assess how an application made to the European Commission affects a related "simplified" application in Italy.

The case hinges on a 2011 decision by the Italian competition authority (the AGCM) to fine 19 road freight companies a total of €77 million for running a cartel. The AGCM made this ruling at the conclusion of an investigation into more than five years of price fixing from 2002 to 2007. The cartel members were Agility, Albini & Pitigliani, Alpi Padana, Brigl, Cargo Nord, Dhl Global Forwarding, Dhl Express, Francesco Parisi, Gefco, Geodis Wilson, I-Dika, Italmondo, Italsempione, Itk Zardini, ITX Cargo, Rhenus, Saima, Schenker, Sittam, Spedipra, Villanova and Armando Vidale, with Fedespedi (the sector federation) participating in an active organizational role. Antitrust sanctioning powers were also prescribed for Alpi Padana and Spedipra.

Schenker avoided fines by applying for clemency and helping to identify the other cartel members. Schenker was granted immunity because of the critical

contributions it made to identifying the other cartel members and fine-tuning the inspections. Agility, Dhl Global Forwarding, Dhl Express and Sittam confirmed and reinforced the evidential framework provided by Schenker. In light of this, the AGCM reduced their fines by 50 percent, 49 percent, 49 percent and 10 percent, respectively.

Although DHL won immunity from the EU Commission, it found itself behind DB Schenker at the end of the investigation before the AGCM. Indeed, according to the AGCM, the EU leniency application of DHL did not specifically cover international shipping. As a consequence, DHL challenged the AGCM's decision before the Italian Administrative Court of first instance (the Tribunale Amministrativo Regionale del Lazio), arguing that the AGCM was wrong to place it behind Schenker and Agility, since it overlooked the link between the simplified leniency application in Italy and the leniency application already made to the EU Commission.

The TAR Lazio rejected DHL's appeal (decision No. 3034/2012), highlighting that the law is not concerned with the relationships between a leniency application before the EU Commission and one before the AGCM. According to the TAR Lazio, no "necessary presupposition" exists between the above said applications.

The Consiglio di Stato, as court of last instance, then decided to refer the case to the ECJ in order to obtain the proper interpretation of the relationships between leniency applications submitted both at the European Union level and the national level.





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THE NETHERLANDS

Dutch Appeal Court allows passing-on defense in follow-on cartel damages litigation

By Léon Korsten and Sophie Gilliam

Several damage actions for breach of competition law have been brought before civil courts in the Netherlands against Dutch as well as foreign defendants. The available case law has recently been supplemented with an interesting judgment in appeal in the case of TenneT, the Dutch national grid operator, versus several entities of Swiss company ABB. This case follows the cartel fines imposed by the European Commission on several manufacturers of gas-insulated switchgear, including ABB. This judgment is most notable because it confirms the availability to defendants in such litigation of the so called passing on defence and gives guidance as to how to apply this defence.

TenneT was initially successful in its cartel damages claim. In September 2013, the District Court in first instance ruled that ABB had to compensate TenneT for the damages it sustained as a result of ABB's collusive behavior. The court considered it highly likely that TenneT had suffered damages, as the cartel by its nature and object was aimed at raising the prices for customers like TenneT. With regard to the amount of damages (to be established in separate proceedings), the District Court considered that, based on a comparison between offers made to TenneT by ABB during and

after the cartel, the overcharge could have been as high as 54 percent. ABB had argued that TenneT did not suffer any loss because it passed on the overcharge to its customers. This argument was rejected by the District Court, considering that TenneT's customers would in turn be compensated in the form of reduced electricity prices.

ABB appealed the judgment of the District Court. The judgment of the Arnhem-Leeuwarden Appeal Court of September 2014 deals with several questions, including liability of an ABB entity that was not an addressee of the Commission decision (accepted on principles of Dutch law), the start of the limitation period (in this case not before the date of the Commission decision) and the passing-on defense (allowed).

With regard to the passing on defense, the Appeal Court reasoned as follows. Damages should bring the aggrieved party to the situation it would have been had it not suffered loss as a result of the unlawful act (the counterfactual). Taking away cartel profits is not the prime consideration in a decision on damages. The starting point to determine the counterfactual is the moment the damages are sustained – in this case the moment of purchase of the equipment – but later events can be taken into account. If

TenneT had passed on the overcharge, there would no longer have been a loss for TenneT, since this loss would have been compensated by higher revenues instead of by a damages award.

The Appeal Court considered that allowing the passingon defense is in line with case law of the European Court of Justice and the draft EU Directive on antitrust damages actions. The Appeal Court argued that this was moreover necessary to ensure that indirect purchasers had a legitimate course of action in cases where the overcharge had been passed on and to prevent double recovery by claimants against defendants. Unfortunately, the Appeal Court did not rule on the division of the burden of proof when the question is whether damages have been passed on and to what extent they have been passed on.

The passing on of damages results in the relocation of damages down the supply chain. Customers of TenneT are likely to claim compensation from ABB of the damages that TenneT was able to pass on to its customers. Direct and indirect purchasers in other cases have found solutions to consolidate their damages claims. For example, in the cartel damages litigation initiated by DB before the Dutch courts against manufacturors of pre-stressed steel, purchasers of claimant DB have assigned their claims to DB.



Amsterdam partners Léon Korsten and Sophie Gilliam have been involved in most follow-on cartel damages actions in the Netherlands. Their recent article on competition litigation in the Netherlands can be found here and appeared in the 2015 edition of *The International* Comparative Legal Guide to: Competition Litigation.



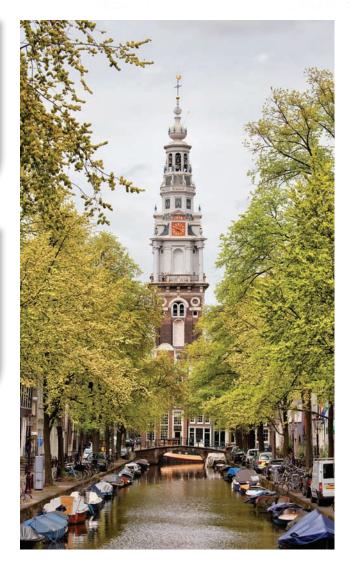


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SLOVAKIA

Latest amendments to Slovak Anti-Competition law

By Michaela Stessl

Slovakia has amended its Anti-Competition Law to simplify certain statutory procedures, introduce a more attractive leniency program and provide for greater legal certainty and transparency in proceedings at the Slovak Antimonopoly Office (the "Slovak AMO").

The changes to Act No. 136/2001 Coll. on the Protection of Competition (the "Act") and on amendments and supplements to the Act of the Slovak National Council No. 347/1990 Coll. on the Organization of Ministries and other Central Bodies of State Administration of the Slovak Republic as amended (the "Amendment") came into effect as of 1 July 2014. The Amendment stipulates that the Slovak AMO may reward a cartel participant by not imposing a fine or by reducing it up to 50 percent when that participant proactively provides relevant evidence of a cartel to the Slovak AMO.

This change aims to increase the effectiveness of the application of the Anti-Competition Law in the private sector within EU member states. A new rule is included in the Act, under which a successful applicant for nonimposition of a fine (i.e. for absolute immunity) shall receive immunity against any private claims of potentially damaged parties. This new rule, taken together with

the already existing criminal immunity, offers cartel participants protection against administrative, criminal as well as private consequences of a breach of the Anti-Competition Law, if these participants provide the Slovak AMO with relevant cartel evidence on their own initiative.

Within the supervision of concentration under the provisions of the Act, the Amendment introduces several pro-business changes. The thresholds relevant for determining whether there is a concentration will no longer be calculated on the basis of the last closed accounting period, but on the basis of the last accounting period, even if such period was not closed yet.

Further, for those wishing to notify the AMO of such a concentration, the new decree has made the task simpler, introducing a simplified questionnaire that the relevant person may submit. The questionnaire is to be used:

- (i) in the case of the acquisition of exclusive control over the entrepreneur, over which the relevant person already exercises joint control
- (ii) where no horizontal or vertical overlay between activities of the concerned parties occurs in Slovakia and

(iii) where the concerned parties' joint market share in the relevant market is smaller than 15 percent in the case of horizontal concentrations, or when the market share of any party or the joint market share of the parties on the relevant market is less than 30 percent.

In addition, the Amendment also introduces so-called "settlement" as a form of alternative dispute resolution. Settlement shall replace the former valid non-binding guideline and shall apply in cases where the factual status of the relevant case sufficiently justifies the assumptions that the provisions of the Act were violated. Consequently, the Slovak AMO will be entitled to negotiate for the purpose of reaching a settlement, either ex officio or on the basis of the entrepreneur's proposal. When an entrepreneur admits that it breached the provisions of the Act, this may even result in a reduction of an imposed fine.

The Amendment also changed various other aspects of the competition protection. For instance, it contains new provisions relating to such aspects of dawn raids as a more transparent procedure and stricter protection of information.



Altogether, the Amendment aims to address the practical issues that have arisen during the past years due to the problematic application of certain provisions of the Act and to ameliorate these concerns in ways that are specifically pro-business.





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UNITED STATES

How to miss a mandatory HSR filing: 5 points about compliance

By Steven Levitsky

Everyone knows that buying more than US\$75.9 million in voting stock triggers a Hart-Scott-Rodino filing requirement in the US. And most people know that the penalty for not making a required HSR filing can be US\$16,000 per day.

As a result, practically everyone involved in a typical M&A transaction is very careful to check on the need to make a filing. There are exemptions, but HSR clearance is always on the transaction checklist.

But what some people don't consider is that more subtle acquisitions of voting stock can also trigger a filing requirement. One good example is the exercise of a warrant. Another possibility is the conversion of non-voting stock to voting stock. These incremental acquisitions, combined with your existing holdings, can push you over an HSR filing threshold. But many people miss these types of mandatory filings. As we will see, it really pays to have a compliance program.

This article covers some of the types of failures to file and also explains the need for a "corrective filing."

The danger

Here's the problem. The HSR test is triggered when an acquisition will push your total holdings over a threshold. So, for example, if you already own US\$75 million in stock, and want to exercise a warrant to buy \$1 million

more, you'll still cross the mandatory US\$75.9 million threshold. Sometimes a very small extra stock purchase triggers the filing obligation.

Naturally, the "commerce" and "size-of-person" tests need to be met. This means that one party to the transaction has to have assets or sales greater than US\$15.2 million and the other assets or sales greater than US\$151.7 million. When corporations are involved, these tests are easily met. But successful corporate executives, particularly ones who are paid in stock, could also get caught.

Generally, the antitrust agencies waive the fine if there is a good reason. A good reason means an honest mistake. But you're entitled to only one honest mistake, because part of the settlement with the FTC involves a commitment to install compliance procedures to make sure it doesn't happen again.

Variations

Here are some notable examples of failures to file. To make it simpler to understand, we've applied labels to the different types of mistakes.

A private investor exercises a warrant and violates the HSR Act

James Dondero, a hedge fund manager, controlled Highland Capital. Because he controlled it, he was deemed to own its stock for HSR purposes. Highland bought about US\$33 million of Motient Corp. and Dondero was elected to the Motient board. Motient then granted options to each of its board members for 10,000 shares. The options vested on February 28 and expired March 1 (yes, the next day). By exercising his option, Dondero now owned US\$94 million in voting securities, far above the HSR threshold (his own stock, plus the stock that Highland owned). There were other HSR complications, but the exercise of the warrants was the more interesting feature.

Dondero made a corrective filing two months later. But, once before, he had failed to made mandatory HSR filing. With his first violation, the FTC did not impose a fine, based on his commitment to start an HSR compliance program. But this time, when it happened again, the FTC fined him US\$250,000.

A corporate executive made an HSR filing but clearance ran out

Brian Roberts, the president of Comcast, made an HSR filing in 2002. His HSR clearance allowed him to buy more shares in Comcast over a five-year period,



until September 2007. In October, 2007 — one month after his clearance ran out — he acquired more stock. In August he made a corrective filing.

The FTC noted that "the violation was inadvertent and technical" and that it "was apparently due to faulty advice from outside counsel." Still, Roberts had made the same mistake back in 1999 and 2000, and was not fined then. This time, the FTC imposed a fine of \$500,000.

A corporation made an HSR filing but clearance ran out

A large corporation made an HSR filing in February 2007. It received HSR clearance that allowed it to buy more stock in the same target over the next five years. Five years later, it did made another purchase. But it made the purchase in June 2012. In other words, the clearance expired a few months before.

In United States. v. MacAndrews & Forbes Holdings Inc., Civil No. 1:13-cv-00926 (D.D.C. filed June 19, 2013), the FTC imposed a US\$720,000 fine. The fine was not waived because the company had already missed a filing requirement once before. The first time, the FTC had warned the company that it needed to establish a compliance program to prevent the same mistake.

A corporate executive doesn't notice he crept over the filing threshold

Barry Diller, an individual investor, bought 120,000 shares of Coca Cola in November, 2010. Over the next 18 months, he bought 650,000 more shares. This pushed his total holdings of Coca-Cola voting stock above the filing threshold.

In United States v. Barry Diller, Civil No. 1:13-cv-01002 (D.D.C. filed July 2, 2013), the FTC imposed a fine of US\$480,000. The fine was not waived because Diller had already missed a filing requirement for a different company back in 1998, when he also pushed over a filing threshold without making a filing. When Diller made his corrective HSR filing in 1998, the FTC warned him that he need to make sure there was a compliance program.

Each of these violations was the result of negligence, not deliberation. But of course, there are those who miss HSR filing thresholds intentionally. Two examples stand out.

A company misuses the "investment only" exemption

The HSR Act has an exemption for the purchase of up to 10% of the voting stock of a company "solely for the purpose of investment." This means that when the buyer buys, it has no intention of participating in the management or basic business decisions of the target.

In United States v. Biglari Holdings, Inc., Civ. No. 1:12-cv-01586 (D.D.C. filed September 25, 2012), the buyer claimed that its acquisition was exempt from an HSR filing requirement because it was for "investment only." In fact, according to the FTC, one week after the purchase, the buyer's officers started calling the target with advice on "basic business decisions" and requests that they be put on the target's board.

Eventually, Biglari did make an HSR filing. But it was too late. The FTC found that Biglari had intended to become active in the target's management when it bought the stock. The FTC imposed a failure-tofile fine of US\$850,000. That was 50 percent of the possible maximum, of \$1.71 million.

A conspiratorial failure to file

The largest failure-to-file penalty actually involved an international transaction and foreign parties.

Mahle GmbH, a German piston manufacturer, acquired Metal Leve S.A., a Brazilian competitor. According to the FTC complaint, US counsel had warned both parties they needed to make an HSR filing. The complaint also alleges that, because they were worried about getting antitrust clearance, they "considered ignoring HSR reporting requirements and evaluated the HSR reporting obligation as a tradeoff between the costs of compliance with the Act and the potential risks of noncompliance with the Act."



Mahle and Leve finally made an HSR filing one month later. The FTC investigated, issued a "second request," and finally demanded divestiture of Leve's piston businesses. The FTC also imposed a record US\$5.6 million fine for failure to file. This was not only the maximum penalty, but it was paid by both the buyer and the target.

What to do if you've already made the mistake

The FTC has a "corrective filing" procedure. If you think you've missed a filing, consult an expert and then file quickly if you need to. Delay exposes you to a fine of US\$16,000 per day.

Five points to remember

Most of the cases we discussed involved large and normally responsible parties. But some of them not only missed mandatory filing dates, they missed them repeatedly. And they missed them even after they promised to set up compliance programs. To avoid problems, consider these five rules:

- 1. Set up a careful compliance program that monitors all acquisitions. This means not just the big M&A deals, but the incremental acquisitions through warrants and options.
- 2. Make sure that the holdings of individuals get monitored too. The cases we looked at show that corporate executives often miss filings for small (or even large) incremental acquisitions.

- 3. The value of your stock holdings is the market price at the time of the transaction. It is not your acquisition price. Stock you bought for US\$50 million could now be worth US\$75.9 million. Just one more share could take you across a filing threshold.
- 4. Remember you may need to combine stock holdings held in different names. For example, the HSR law deems a corporation or individual who is the "ultimate parent" to control all the stock it holds, plus all the stock its controlled companies hold. If a parent holds US\$75 million of voting securities in company X, its subsidiary can't buy US\$1 million of stock without pushing the entire group over the filing threshold.
- 5. **Don't forget the other HSR thresholds.** There are actually five HSR thresholds. You need to check them all:
- US\$75.9 million
- US\$151.7 million
- US\$758.6 million
- 25 percent (if the value of the voting securities to be held is greater than \$1,517.1 billion)
- Control (crossing the 50 percent line).





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Is the DOJ Antitrust Division coming for you? A recent warning, plus what the Leniency Program can mean

By Steven Levitsky

Everyone knows that buying more than US\$75.9 million in voting stock triggers a Hart-Scott-Rodino filing requirement in the US. And most people know that the penalty for not making a required HSR filing can be US\$16,000 per day.

We don't normally report on speeches, but the recent speech by Bill Baer, Head of the Antitrust Division, entitled "Prosecuting Antitrust Crimes," demands attention. Maybe his news was not really new, but his declaration of aggressive and relentless criminal antitrust enforcement is a message that bears repeating.

In essence, what Baer said was that the DOJ:

- (1) expects companies to have "effective" antitrust compliance programs (meaning programs that actually work)
- (2) offers leniency or other mitigation to companies that discover and immediately halt their involvement in antitrust violations, accept responsibility for their crimes, and cooperate with the DOJ investigations and
- (3) will relentlessly and fiercely prosecute companies and individuals that show no remorse for their cartel activities.

Baer emphasized that the DoJ has been successful in raising its already high record for securing criminal sanctions against price-fixers:

Courts have imposed criminal fines on corporations totaling as much as \$1.4 billion in a single year; the average jail term for individuals now stands at 25 months, double what it was in 2004. Those penalties tell only part of the story. Perpetrators also must confront private and state civil suits seeking treble damages and risk other collateral consequences for their crimes.

Major themes of Baer's speech were:

1. The Leniency Program produces 2/3 of all leads to new cartels investigations.

In other words, faced with potential jail sentences, people will turn in almost anyone to save themselves. I personally have worked on cases where people turned in their brothers-in-law, best friends from high school and even their part-time minister (he worked as a salesman). Never discount the threat of going to a federal penitentiary!

2. The Leniency Program is a "first-in-the-door" test.

Only the first one in gets a chance to rat on his or her co-conspirators. They go free. The others will probably go to jail.

For this reason, if you think your company or employees could be potential targets of a criminal investigation, you need to consider whether you call the DOJ and try to get a "leniency marker" on an *urgent* schedule. There are well-known cases when a company missed qualifying for leniency by only 15 minutes. Time means potential freedom. (Note: companies that come in "second" can sometimes get mitigation of the penalties, but this is quite different from getting full amnesty.)

By the way, it is very difficult to tell when a cartel member is just about to break off, seek leniency and confess. Some cartel members get very apprehensive when co-conspirators stop showing up at cartel meetings. On the other hand, in the famous Christie's/Sotheby's price-fixing conspiracy, one of the lead conspirators (called the "Golden Hamster") left a cartel meeting in London, flew directly to Washington, DC, and confessed to the DOJ. He got off, while the other leading US company executives either pleaded guilty or were convicted after a trial.



3. If you apply for leniency, be sure you qualify.

First, the Leniency Program is not open to what the DOJ calls "the leader" or "the originator" of the conspiracy, if there is one. On the other hand, if there is shared responsibility, then all the conspirators are eligible for leniency.

Second, the Leniency Program is not open to companies that did not "promptly terminate" their participation in the cartel conspiracy after discovering it. The DOJ states that, as a matter of public policy, it will not reward a company that knowingly decides to continue reaping the benefits of cartel involvement

4. If you apply for leniency, make sure your confession is complete.

Many companies that apply for leniency in one cartel are actually involved in multiple cartels at the same time. The DOJ has an "Amnesty Plus" program that rewards companies for confessing to their activities in a different market from the one being investigated.

WARNING: if you seek leniency, and don't confess to all your cartel involvements, you can expect even higher fines. The DOJ has frequently noted that corporations have come in asking for leniency in one market, even while they are actively committed to an ongoing criminal antitrust conspiracy in another market. Trying to deceive the DOJ will inevitably lead to what the DOJ calls "Penalty Plus." This means that the DOJ will consider the failure to confess to the other conspiracies to be an "aggravating factor," and will seek fines or sentences at the highest levels of the Sentencing Guidelines.

Along these lines, in an earlier speech, another DOJ official warned, "For a company, the failure to selfreport under the Amnesty Plus program could mean the difference between a potential fine as high as 80 percent or more of the volume of affected commerce versus no fine at all on the Amnesty Plus product. For the individual, it could mean the difference between a lengthy jail sentence and avoiding jail altogether."

5. If you seek leniency, you will need to impose an "effective" compliance program.

An "effective" program essentially means one that works.

Having a compliance program, and then finding yourself in the Leniency Program, are mutually exclusive concepts. Baer warned, "It is unlikely that a corporate defendant's pre-existing compliance and ethics program will be considered effective enough to warrant a slap on the wrist when it failed to prevent the company from violating the antitrust laws."

He emphasizes that an effective compliance program means "making an institutional commitment to change the culture of the company. Companies should be fostering a corporate culture that encourages ethical conduct and a commitment to compliance with the law."

6. Compliance also means cleaning out the stables.

Baer pointed to companies that have confessed to cartel involvement – but still employ the people responsible for the cartel activity. He warned that this just won't work.

"If any company continues to employ such individuals in positions of substantial authority; or in positions where they can continue to engage directly or indirectly in collusive conduct; or in positions where they supervise the company's compliance and remediation programs; or in positions where they supervise individuals who would be witnesses against them, we will have serious doubts about that company's commitment to implementing a new compliance program or invigorating an existing one. Indeed, the Sentencing Guidelines go so far as to suggest that companies that do so cannot be said to have an 'effective' compliance program."

7. If you don't clean up, the DOJ will do it for you.

Where a company doesn't develop an "effective" compliance program, the DOJ is willing to resort to courtsupervised probation, including the use of monitors, to make sure the company complies with the antitrust laws.

As an example, Baer used the case of AU Optronics. AUO was a co-conspirator in the cartel that fixed prices on thin-film transistor, liquid crystal displays. A jury found the company and its executives guilty, and concluded that the company had made a \$500 million gain as a result of the conspiracy.

Baer observed, "Far from demonstrating a commitment to future antitrust compliance, AUO continued to employ convicted price fixers and indicted fugitives. In those circumstances, the division argued that not only was probation necessary, but also a compliance monitor was appropriate. The district court agreed."



In fact, the court imposed a \$500 million fine (matching the largest antitrust fine on record), and imposed threeyear jail sentences on senior executives (the longest jail sentences ever imposed on foreign nationals for antitrust violations). Note that the DOJ had actually asked for a \$1 billion corporate fine and 10-year jail sentences on the senior officials, based on their refusal to admit their guilt.

Benefits, but also enormous long-term costs

Participation in the "Leniency Program" can eliminate criminal charges, avoid fines and keep your executives out of jail. But even though the benefits are great, there are also enormous long-term costs of being in the program, not the least of which is extensive "cooperation" with the government investigation and the restitution of illegal gains.

To avoid these risks, companies need to have effective **compliance programs** to make sure that all players – from salespeople to very top executives – are really complying with the program.

Considering the number of new antitrust indictments every month, it is clear that many companies still haven't successfully learned how to enforce their compliance programs. Do you really know what's going on in all your markets? It could be time to check on your compliance programs, and then back them up with antitrust audits. Show that your company means business when it comes to antitrust compliance.





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HONG KONG

Hong Kong Competition Commission Publishes Draft Guidelines a key step toward bringing the Competition Ordinance into full force

By Jing Wen Zhu

The Hong Kong Competition Commission (the "Commission") has published a set of draft guidelines (the "Guidelines") on 9 October 2014 for public consultation. These guidelines, upon finalisation, will be submitted to the Legislative Council for consultation and adoption. The Commission expects that this process will be complete in the first half of 2015, and then the Hong Kong Competition Ordinance (the "Ordinance"), passed in June 2012, will come into full force.

The draft package includes three procedural (items 1-3 below) and three substantive (items 4-6 below) guidelines. The public is invited to submit views and comments on the procedural guidelines before 10 November 2014 and those on the substantive guidelines before 10 December 2014. Following are the Guidelines:

- 1. Guideline on Complaints
- 2. Guideline on Investigations
- 3. Guideline on Applications for a Decision under Section 9 and 24 (Exclusions and Exemptions) and Section 15 Block Exemption Orders
- 4. Guideline on the First Conduct Rule

- 5. Guideline on the Second Conduct Rule
- 6. Guideline on the Merger Rule.

The Guidelines show lots of commonality with competition rules and practices of other jurisdictions with long established competition regimes. The Commission recognizes the benefit resulting from a competition regime that is consistent with the international best practice. Below are a few highlights for those doing business in Hong Kong.

Investigations

The Commission can launch an investigation on its own initiative, upon complaints, upon referrals from the government, the courts or other statutory bodies or authorities. Investigations will be conducted in two phases: (1) the initial assessment phase, during which the Commission determines the sufficiency of the evidence and the worth of further investigation; it will seek information on a voluntary basis; and (2) the investigation phase, which is triggered when the Commission has reasonable cause to suspect a contravention of competition rules; during this phase, the Commission may exercise its power to compel the production of evidence. To enter and search specific premises, the Commission will first have to obtain a search warrant

from a judge of the Court of First Instance. The premises can include those of a supplier or customer of the firm under investigation. Similar on-site inspections and searches are usually referred to as dawn raids in the European Union; note that the Commission undertakes that in Hong Kong such searches will normally start during usual office hours. Detailed rules are provided to specify the scenarios in which the Commission may conduct a dawn raid, how such a raid should be carried out, and protections regarding confidentiality and legal privilege. The Hong Kong procedural guides should help ease concerns in the business community over the future conduct of such raids in the Special Administration Region following a recent storm of raids carried out by competition regulators in the neighboring Mainland China. The Guideline on Investigationa provides that commitment can be made at any stage of the investigation to end the investigation.

Complaints

Although anyone can make a complaint to the Commission of a suspected violation of the Ordinance, the Commission will have the discretion to decide which cases to pursue. This will ensure that the Commission's resources focus on protecting the public interest instead



of the interest of the complainant. The Guideline on Complaints sets out a range of factors that the Commission will consider when making such a decision.

Exemptions and exclusions

The Guideline on Exemptions and Exclusions sets out criteria and procedures for application of an exemption or exclusion order. However, obtaining a prior decision or (block) exemption order from the Commission is not a precondition for asserting the benefit of an exemption or exclusion provided in the Ordinance. The Commission encourages firms and industries to conduct a selfassessment on the compatibility of their conduct with the Ordinance. The Commission sees a sector-specific block exemption order (exempting certain categories of agreements) as an exceptional measure and will grant one only in limited cases. As the assessment of a block exemption order is often costly in terms of time and resources, the Commission will balance the resource requirement with the expected public benefit of issuing a block exemption order.

Resale price maintenance

In a vertical agreement (typically a distribution agreement), if a supplier imposes a fixed or minimum resale price onto its distributors or retailers ("resale price maintenance" or "RPM"), the Commission views the arrangement as having an illegal object. In such cases, whether the arrangement causes any anti-competitive effects in the market is irrelevant. Possible scenarios in which efficiencies may arise include, among others,

the introduction of new products, launch of a promotion campaign and prevention of free rides. However, the Commission's assessment will be made on a case-bycase basis. The Commission notes that RPM may in certain cases amount to serious anti-competitive conduct under the Ordinance, with the consequence that (1) the Commission may commence proceedings before the Tribunal without issuing a warning notice to the parties and (2) the *de minimis* threshold (exempting companies whose combined turnover does not exceed HK\$200 million) does not apply.

RPM has been actively enforced in Mainland China for the past two years. Heavy fines have been imposed on liquor producers, baby milk formula companies, optical manufacturers and automakers. However, as China put in place its nascent Anti-Monopoly Law, it did not deliberately prioritize the RPM enforcement; rather, the RPM enforcement was driven by a series of complaints from disgruntled distributors and facilitated by the availability of evidence.

Hong Kong, where retail and consumer business accounts for an important part of the city's economy, seems to plan to prioritize the anti-competitive issues in distribution chains as it commences the enforcement of the new law. In a radio interview in Hong Kong on 17 October 2014, a member of the Commission indicated that the Commission will take an active enforcement approach towards RPM practices in Hong Kong.

Trade associations

The Guideline on First Conduct Rule clarifies that information exchanges at trade associations, or price recommendations by a trade association or professional body – practices which may have been common in Hong Kong for decades – can be seen as having an anticompetitive object or effect. It also discusses such issues as standard contractual terms promoted by the trade association, terms of membership in trade associations and the practice of certifying or awarding quality labels to member companies for meeting certain minimum industry standards. The Commission sets out scenarios in which such activities are unlikely to raise Commission concerns and scenarios in which these activities may have an anti-competitive object or effect.

Substantial market power

The Second Conduct Rule of the Ordinance addresses the abuse of substantial market by engaging in anticompetitive conduct. Examples of such abusive behavior include predatory pricing, tying and bundling, margin squeezes, refusal to deal, exclusive dealing. During the Ordinance's legislative process there was a debate over where to set market share thresholds. Ultimately, the Guidelines do not set a market share threshold. The Commission wants to take an economic approach to defining substantial market power, and market share is only one factor in the assessment of market power. The Commission will further consider a set of factors.



among them the firm's pricing power and market entry barriers. As the new competition regime begins, this approach is likely prudent for an economy which is dynamic and open to international businesses.

Joint ventures

In many jurisdictions, joint ventures are an usual subject of merger control. As Hong Kong's merger control rules apply only in telecommunication sector, there is no cross sector merger control for joint venture business. However, a joint venture which does not "perform, on a lasting basis, all the function of an automatous economic entity" (similar to the EU distinction between full-function and non-full-function joint ventures) will have to ensure that the cooperation business complies with both Conduct

Rules addressing agreements and dominance under the Ordinance. Such deals include, for example, joint production, joint purchasing, joint commercialisation and joint R&D ventures. The Commission provides a few useful criteria for determining the full functionality of a joint venture.

Next steps

The Commission intends to release three further documents in the coming months covering small- and medium-sized enterprises, leniency and enforcement policy. We will provide further updates as they become available. If you would like to discuss any aspect of the Guidelines or evaluate their impact on your business, please feel free to contact us.





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EUROPEAN UNION

Boris Marschall

Inspections carried out by the European Commission.

Following unannounced inspections in July 2014 at the premises of a number of telecommunications companies across the EU active in the provision of Internet connectivity, the Commission has now closed its investigation, but will continue to monitor the sector. Furthermore, the Commission has carried out unannounced inspections in the biofuel sector in two member states, following similar inspections by the EFTA Surveillance Authority in May 2013. Find out more.

European Commission wants to make enforcement of competition rules more effective throughout the

EU. This summer, the Commission has adopted a communication on "Ten years of Antitrust Enforcement – achievements and future perspectives", accompanied by two staff working documents. The Commission reviews past enforcement by itself and the national competition authorities (NCAs) and lists areas in which it wishes that further progress was made, most notably the strengthening of the NCA's position within the respective national institutional landscape, a further convergence of procedures and inspection powers and the power for each NCA to provide for effective, proportionate and dissuasive sanctions. The relevant documents can be downloaded here.

European Commission adopted a revised De Minimis

Notice. As underlined by the Commission, the main change is that restrictions by object (having an anticompetitive object) cannot benefit from the safe harbour for minor agreements, which already existed in the previous version of the De Minimis Notice for companies whose market shares do not exceed 10 percent (15 percent for agreements between non-competitors). The Notice and the accompanying staff working document can be downloaded here.

Extension of the maritime consortia block exemption regulation regime until April 2020. The European Commission has again extended the existing legal framework that conditionally exempts liner shipping consortia from EU antitrust rules, after a market investigation in 2013 and a public consultation early 2014 confirmed that the basis of the Commission's approach is still valid. Find out more.

State aid: Commission publishes overview of decisions and investigations related to the temporary state aid framework adopted in the context of the financial crisis. The overview includes relevant Commission communications and decisions adopted by the Commission during the period 2008 to 2014. Find out more.

State aid: revised guidelines for supporting nonfinancial firms in difficulty. The new guidelines replace those adopted in 2004 and entered into force in August. New features include the possibility of a simplified restructuring plan and certain forms of state support to be granted to SME's for up to 18 months. The European Commission also stressed the definition of better filters to avoid state aid where it is not needed, and new rules for investors to share the financial burden of the firm's restructuring. Find out more.



NETHERLANDS

Sophie Gilliam

The powers of the Netherlands Authority for Consumers and Markets have been harmonized. The Streamlining Act (Stroomlijningswet) is now in force. This Act harmonizes the different powers, enforcement tools and procedures of the three predecessors of the Netherlands Authority for Consumers and Markets (ACM): the Netherlands Competition Authority (NMa), the Netherlands Independent Post and Telecommunication Authority (OPTA) and the Netherlands Consumer Authority. The Streamlining Act also introduced new merger thresholds. A merger should be notified in the Netherlands if the combined worldwide turnover exceeds €150 million (formerly the cutoff was €113.45 million) and at least two parties have a Dutch turnover of more than €30 million. Link here

The ACM has published new fining policy rules and a more attractive leniency policy. The ACM's new fining policy and a new leniency policy are in force. The rules were recently changed with the purpose of making it easier and more attractive for businesses and individuals to confess their involvement in a cartel. Immunity will

be granted to the first applicant that reports a cartel; it will also be granted in the event that ACM has already launched an investigation into that cartel. Until recently, such situations warranted a reduction of the fine between 60 and 100 percent. Further, under the new policies, the second leniency applicant may receive a higher reduction than before. Link here

NORWAY

Kjetil Johansen, Line Voldstad

Dawn-raid in the aviation sector. In June 2014, the EFTA Surveillance Authority (ESA), assisted by the NCA, carried out unannounced inspections at the premises of airline company Widerøe's Flyveselskap AS. ESA has not provided further information about the duration of its inquiries or the specific case, but there has been turmoil in relation to Widerøe's operations on domestic routes in Norway, with allegation of exclusionary conduct being made by regional politicians. Link here

Appointed expert committee launches public consultation in the establishing of a competition complaint tribunal. The expert committee appointed in May 2014 with a mandate to make recommendations in establishing a competition complaints board is currently undertaking a public consultation on the organization, composition, form of procedure and other aspects in relation to establishing such a tribunal. Currently, the Ministry handles complaints on the NCA's intervention decisions in merger cases, which has given rise to concerns that the decisions may be affected by political motivations.

NOK 25 million fine accepted by Norgesgruppen.

Following a public dispute between NCA and the largest grocery retail chain in Norway, Norgesgruppen, whether certain lease premises agreements amounted to a concentration, the latter has decided to accept a fine of NOK 25 million for gun jumping. Link here

KEY CONTACTS

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

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

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

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