IN
INTERNATIONAL NEWS

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SPOTLIGHT ON COMPETITION LAW

A LOOK INSIDE

McDermott
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IN
INTERNATIONAL NEWS

IN THIS ISSUE

In line with the evolution of the economy and the ongoing growth of online business and global trade, we're seeing a corresponding increase in competition regulation and a rise in enforcement across all authorities.

The growth of the online economy has triggered the US Federal Trade Commission's (FTC) update of its 20 year old .com Disclosures: How to Make Effective Disclosures in Digital Advertising guide, and the development of an analytical framework for all digital distribution across the European Union. In just one seismic shift under the new EU Vertical Block Exemption Regulation 2022/720, dual-pricing, *i.e.*, setting different wholesale prices for online/offline sales by the same distributor, is no longer considered a hardcore restriction unless its purpose is to prevent the effective use of the internet to sell the goods or services.

In the United States, there is an increased focus on anticompetitive mergers and acquisitions (M&A). The Biden Administration, the Department of Justice Antitrust Division, and the FTC have all stated that the regulatory landscape needs to be reshaped to better reflect dynamic markets, and their priority is the aggressive pursuit of litigation against offending parties rather than the granting of consent decrees. The tendency to "sin first and beg forgiveness later" will emphatically no longer work, as a recent French gun-jumping case demonstrates.

Both the United States and the European Union have also turned their attention to investigating wage fixing and no-poach labour market violations that are not connected with M&A or business collaborations. It's clear that competition/antitrust authorities are determined to expand their remit.

Please contact the authors directly if you have any comments on our articles, or would like to discuss any of the issues raised.

PUBLICATION EDITORS
Aileen Devlin
Kate Hinze

CREATIVE SERVICES
Kristen Wexler

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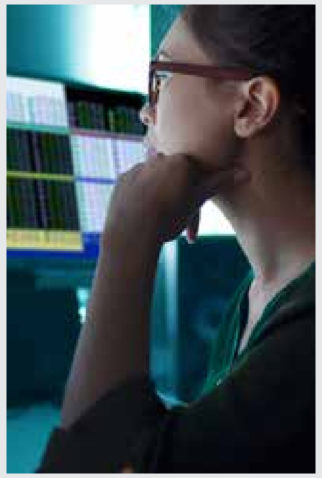

UNIQUE GUN-JUMPING CASE SANCTIONED BY FRENCH COMPETITION AUTHORITY

Frédéric Pradelles

A new European gun-jumping decision, following the European Court of Justice 2022 Marine Harvest judgment, sends a very strong message to companies that initially acquire minority, and gradually acquire controlling, interests in targets.

In April 2022, the Autorité de la concurrence, the French Competition Authority (FCA), fined the Compagnie Financière Européenne de Prises de Participation (Cofepp) up to €7 million, for having closed its takeover of Marie Brizard Wine & Spirits without first notifying the deal to the FCA and prior to the FCA granting authorisation.

The decision helpfully provides some clarification of the tipping point between absence of control and control, and therefore between no notification and mandatory notification.

Through a series of transactions that started in 2015, Cofepp, which is active in the wine and spirits sector (Poliakov, Label 5, Porto Cruz, Saint James), gradually acquired interests in its competitor MBWS (Marie Brizard, William Peel, San José). Between 2015 and 2017, Cofepp made six declarations to the Autorité des marchés financiers, the French financial market regulator, that its acquisition of MBWS shares had pushed it over the threshold for acquisition of control. The first threshold of 5% was crossed in June 2015, and the 27.5% threshold in September 2017. Cofepp became the main shareholder of MBWS in 2017, ahead of Diana Holding and DF Holding, which held 21% and 7% respectively.

Over the successive transactions, Cofepp gained increased influence, both in the general shareholders' meeting and on MBWS board of directors. Since June 2017, Cofepp has been able to appoint three of the 11 representatives to the MBWS' board of directors, and these individuals also held key positions within Cofepp: chairman of the management board, vice-chairman of the board of directors, and managing director/international marketing director.

As a result, according to the FCA's decision, Cofepp could not only directly intervene in MBWS' strategic and operational decisions, but could also obtain information about its competitor's past and future commercial and budgetary policy, which would then be passed on to Cofepp employees. Cofepp and MBWS also strengthened their business and financial relationship, which increased the convergence between the companies.

In December 2018, Cofepp subscribed to a reserved capital increase, at the end of which it would hold more than 47% of the capital and voting rights of MBWS. Cofepp notified the FCA in January 2019, and conditional approval was granted in February 2019. At the same time, however, the FCA carried out inspections and seizures at the premises of Cofepp, MBWS, and Castel, among others, which resulted in a fine decision against Cofepp on 12 April 2022.

The FCA decided that Cofepp violated the obligation to notify under Article L. 430-3 of the French Commercial Code and the obligation to standstill under Article L. 430-4 of the same Code. It further noted that Cofepp risked a sanction up to 5% of the acquirer's and the acquired company's combined turnover in France in the last fiscal year under Article L. 430-8.

> “Precautions must be taken in the event of a gradual increase in the capital of a company

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DECISIVE INFLUENCE

In line with its previous decisions and its new 2020 merger control guidelines, when assessing this case, the FCA first recalled the definition of "control" and its application to a *de facto* controlling situation. A merger is deemed to have taken place when the acquirer obtains decisive influence (*i.e.*, the ability to take strategic decisions on plans, capped investments, budgets, appointments and dismissals of key managers) over all or part of the target's activities, without necessarily holding a majority of the shares.

> **It is irrelevant if the gun-jumping infringement is attributable solely to the acquirer**

To assess whether or not there is control based on a *de facto* situation, the FCA takes into consideration the manner in which strategic decisions are adopted, as well as the involvement of the controlling company in the day-to-day management of the controlled company. The implementation of commercial relationships, or exchanges of information with the purpose or effect of making the transaction a merger, may also constitute circumstantial evidence.

In this case, the FCA considered that Cofepp was, indeed, able to exercise decisive influence over MBWS and thus had *de facto* control over MBWS prior to the notification of the January 2019 merger. The FCA particularly noted the following circumstantial elements:

- In 2017, Cofepp became the most important shareholder of MBWS in terms of capital and voting rights.
- Being part of MBWS' board of directors, Cofepp had access to its sensitive information, including budgetary and commercial information. Exchanges of information happened during the board meetings and through direct contact with certain key MBWS employees. In addition, monthly board packs containing detailed data on MBWS' business and marketing prospects were sent to the board of directors. These exchanges carried on after July 2018, despite a confidentiality agreement and the constitution of a "clean" team.
- Cofepp and MBWS also strengthened their business and financial relationship through two supply agreements concluded in March 2016 and May 2018. Under these, Cofepp became one of the most important suppliers of whisky and port to MBWS.
- Cofepp was involved in strategic and operational decisions taken by MBWS, such as the appointment of MBWS' managing director, its operational and commercial policy-setting, and in the day-to-day management of the business.

The FCA therefore set the date of Cofepp's *de facto* acquisition of MBWS as being April 2018, which is the date of the appointment of MBWS' managing director, not the date of formal notification in January 2019, which resulted in its conditional approval in February 2019.

The FCA considers that Cofepp effectively violated its notification obligation in April 2018, in violation of Articles L. 430-3 and L. 430-8, I of the French Commercial Code and, as the *de facto* merger was completed before the transaction was notified to and cleared by the FCA, the transaction was closed prior clearance, in violation of Article L. 430-8 II of the French Commercial Code.

In addition, according to the FCA, Cofepp carried on having a decisive influence over MBWS between January and February 2019; there were still exchanges between employees of both companies and Cofepp was even more involved in the management of MBWS.

Articles L. 430-4 and L. 430-8, II of the French Commercial Code are intended to ensure that no structural changes or exchange of information can take place in the event that the parties to the transaction abandon the transaction, either as a result of the merger control procedure or for their own reasons. Furthermore, these articles seek to prevent a merger from starting to produce its effects on the market before the FCA has been able to assess them and, if necessary, to issue mandatory remedies, as it was ultimately the case in this instance.

AN INSTRUCTIVE DECISION

The acquisition of minority interests in competitors is common, but such transactions draw the attention of competition authorities because of their strategic importance. In July 2021, when Orange acquired a 54% interest in TKR, the European Commission required Orange to divest the 30% interest it was going to indirectly acquire from TRMC, on the grounds that it would have given Orange access to commercially sensitive information on one of its strategic competitors.

Specific precautions must be taken in the event of a gradual increase in the capital of a company, whether or not it is a competitor, in order to ensure that the acquirer will not secure *de facto* control over it, which will be considered as having occurred prior to merger clearance. These precautions are all the more necessary when an acquisition is ultimately notified. As can be seen with Cofepp/MBWS, this is because it exposes the companies to having to eventually justify why they did not notify at an earlier stage, and to the subsequent risk of being sanctioned if the previous transactions were subject to notification to the FCA.

If the infringement is established, it is irrelevant if the gun-jumping infringement is attributable solely to the acquirer.

Finally, the FCA's decision highlights the role of clean teams, which are widely used in M&A transactions and systematically used in the case of mergers between competitors. These teams must fulfil their role effectively, both in the pre-notification and post-notification phases, and protect commercially sensitive information that may be shared internally between the signing and the completion of a merger. In this case, the clean team did not prevent an exchange of sensitive information between target and acquirer, and this was a contributory factor in the FCA's decision.

FRÉDÉRIC PRADELLES
Partner
Paris
fpradelles@mwe.com

DOT COM DISCLOSURES AND DARK PATTERNS

Lesli C. Esposito and Reese E. Poncia

The US Federal Trade Commission (FTC) is considering updating and reissuing its guidance document on digital advertising, with the aim of tightening legislation against online consumer manipulation.

The FTC recently requested comments on potential updates to its *.com Disclosures: How to Make Effective Disclosures in Digital Advertising* guide, which aims to ensure online advertisers disclose information clearly and conspicuously on websites or mobile applications to avoid deceptive statements that may harm consumers.

The FTC issued the guide in 2000 to address illegal online advertising and marketing practices that impact companies and consumers globally. It was revised in 2013 and, although its principles are timeless, much has changed in the digital advertising environment in the last two decades, requiring additional considerations and input from the Commission and the public. Specifically, the FTC seeks input on addressing "dark pattern" designs and advertising used to manipulate consumers on websites and mobile applications; hyperlink use and labelling; determining online disclosure adequacy when there are multiple webpages consumers must pass through; mobile device and space-constrained advertising; multi-party selling arrangements (online markets, website referrals, *etc.*); and social media sponsorships and promotions.

The FTC has focused its efforts on increasing enforcement against illegal dark patterns that may deceive or trap consumers into signing up for subscriptions. For example, some websites employ "negative option" marketing, where a consumer's silence or failure to affirmatively reject a service or product is considered consent; examples include automatically renewed subscriptions, free trials, and pre-notification plans.

Websites may also require consumers to navigate through multiple screens or checkboxes to avoid extra charges for unwanted services, or sneak extra products into a consumer's online shopping cart without the consumer's awareness or consent. In October 2021, the FTC released an enforcement policy statement forewarning companies that they will face legal consequences if their sign-up processes do not require obtaining a consumer's informed consent, fail to provide clear and conspicuous information prior to signing up, and make cancellation difficult for a consumer.

> "The FTC has focused its efforts on increasing enforcement against illegal dark patterns

The FTC aims to increase enforcement in the digital advertising space and seeks to address many of the technology changes that have emerged in the online advertising space in recent years. However, by focusing on clear and conspicuous disclosure, obtaining consumers' express and informed consent, and ensuring ease of cancellation for consumers, companies selling products and services online worldwide can avoid legal action and consequence.

LESLI C. ESPOSITO
Partner & Head of Consumer Protection Practice
Washington, DC
lesposito@mwe.com

REESE E. PONCIA
Associate
Washington, DC
rponcia@mwe.com

UNITED STATES ANTITRUST ENFORCEMENT AGENCIES SEEK TO OVERHAUL REGULATORY APPROACH TO ANTICOMPETITIVE MERGERS AND ACQUISITIONS

Gregory E. Heltzer and Graham J. Hyman

At a high level, the US Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) have laid out clear intentions to reform the antitrust regulatory regime. Their stance has serious implications for the success of future transactions.

It is no secret to commentators and stakeholders that the Biden Administration has ushered in a period of antitrust enforcement that is notably aggressive when compared with past administrations. In a speech delivered on 18 January 2022, Assistant Attorney General (AAG) Jonathan Kanter stated that DOJ's overarching goal is to reshape the regulatory landscape to better reflect dynamic markets.

The agencies have laid out an aggressive enforcement plan both in their conduct and public comments which includes i) aggressively regulating mergers and acquisitions (M&A) generally, ii) increasing scrutiny of private equity transactions, and iii) pursuing litigation against merging parties rather than consent decrees.

HOSTILITY TOWARDS M&A DEALS IS HERE TO STAY

The FTC and DOJ have taken aggressive steps to slow the pace of M&A transactions. In a panel discussion at the American Bar Association 2022 Antitrust Spring Meetings, Commissioner Noah Phillips, offering his own views rather than the Commission's (but nonetheless delivering some "inside baseball"), indicated that this broad strategy was intended to "throw sand in the gears" and raise costs, thereby deterring transacting parties from pursuing M&A deals.

The agencies began this offensive last year, issuing a joint statement on 4 February 2021 that indicated there would be an overhaul of the merger review process, and instituting a moratorium on the early termination programme for Hart-Scott-Rodino (HSR) merger reviews. Prior to this suspension, early termination was commonplace for mergers that did not merit further review owing to a lack of clear anticompetitive effects; early termination was granted in 73.5% of instances it was requested by parties in 2019. Despite the suspension of the early termination programme initially being characterised as temporary, there are no signs or expectations of it being lifted in the foreseeable future.

In addition to delaying the time to close M&A deals, the agencies have begun issuing "Close at your Risk" letters after the termination of the statutory HSR 30-day waiting period. These letters indicate that the agencies may continue to investigate and bring an enforcement action even after the deal is closed. In an interview with the *New York Times*, FTC Chairwoman Lina Khan, stated "...our investigation is ongoing, and they shouldn't take the lapse of that expiration period as a sign of somehow the FTC approving the deal." Commissioner Phillips stated, at the Spring Meeting, that these letters

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seek to add "red tape" to the transactional process and possibly result in companies having second thoughts and backing out of the deal. In a speech on 25 February 2022, at the George Mason Antitrust Law Review Symposium, he noted that of the 50+ letters that had been sent since August 2021, he was not aware of any active investigation for those impacted transactions.

> **"Leadership has directly called out private equity as an area that must be regulated more strictly**

Lastly, and most importantly, the agencies are in the process of issuing revised Horizontal and Vertical Merger Guidelines to purportedly better address conduct in present day dynamic markets. Kathleen O'Neil, the Senior Director of Investigations and Litigation for the DOJ Antitrust Division, indicated during a Spring Meeting panel that the new guidelines will place greater emphasis on direct evidence such as

- Past head-to-head competition resulting in lower prices, more innovation, or higher quality
- Evidence that premerger coordination will worsen through the elimination of a maverick firm
- Evidence that the rationale for the transaction is the elimination of competition.

Chairwoman Khan has also explained that the guidelines will place greater scrutiny on deals that eliminate nascent or potential competition and negatively impact labour markets.

PRIVATE EQUITY IN THE CROSSHAIRS

As part of this increased scrutiny, agency leadership has directly called out private equity as an area that must be regulated more strictly. In an interview with the *Financial Times*, AAG Kanter stated that the motives of private equity firms are often "designed to hollow out or roll-up an industry and essentially cash out," which "is often very much at odds with the law, and very much at odds with the competition we're trying to protect." Chairwoman Khan further ramped up the rhetoric, in a different interview with the *Financial Times*, warning of "life and death consequences" when Wall Street controls large sections of the economy.

DOJ leadership has also made claims, without specifying parties or improper conduct, that private equity firms have been deficient in notifying the agencies of proposed deals, with Deputy Assistant Attorney General (DAAG) Andrew Forman stating that DOJ is aware of "HSR filing deficiencies in the private equity space." It is unclear what DAAG Forman was referring to, but practitioners believe it may relate to improper North American Industry Classification System code classifications, failure to provide certain Item 4 documents (which are used by companies to analyse competition aspects of a transaction and must be shared with the government), and the reporting of associate entities that overlap with the target.

Chairwoman Khan and AAG Kanter have stated that this focus on private equity will manifest through the following regulatory action:

- The agencies will focus on bringing enforcement actions where they identify that a private equity firm is engaging in a "roll-up strategy", which occurs when a single firm has engaged in serial acquisitions within the same industry.
- Kanter stated that DOJ will bring more enforcement actions for "interlocking directorates," which are defined as a single firm, often a private equity firm, appointing officers and directors at multiple competitors.
- The FTC and DOJ will scrutinise private equity firms acting as divestiture buyers under consent orders. This heightened scrutiny of divestitures is a result of what Kanter called "concentration creep", whereby the divested assets are acquired by a buyer that does not effectively deploy them, allowing the former owner to continue aggregating market power.

LITIGATION RATHER THAN NEGOTIATION

These aggressive tactics are not intended to cease or be mollified with a negotiated consent order; in fact, the agencies have made it clear that they prefer to litigate to block alleged anticompetitive transactions rather than accepting a fix. In her *New York Times* interview, Chairwoman Khan explained that "we're definitely focusing our resources on litigating." Further, AAG Kanter stated that consent decrees should be "the exception, not the rule." Consent decrees are viewed unfavourably by the present US antitrust leadership, given their belief that these settlements are often ineffectual because divested assets are frequently not properly deployed.

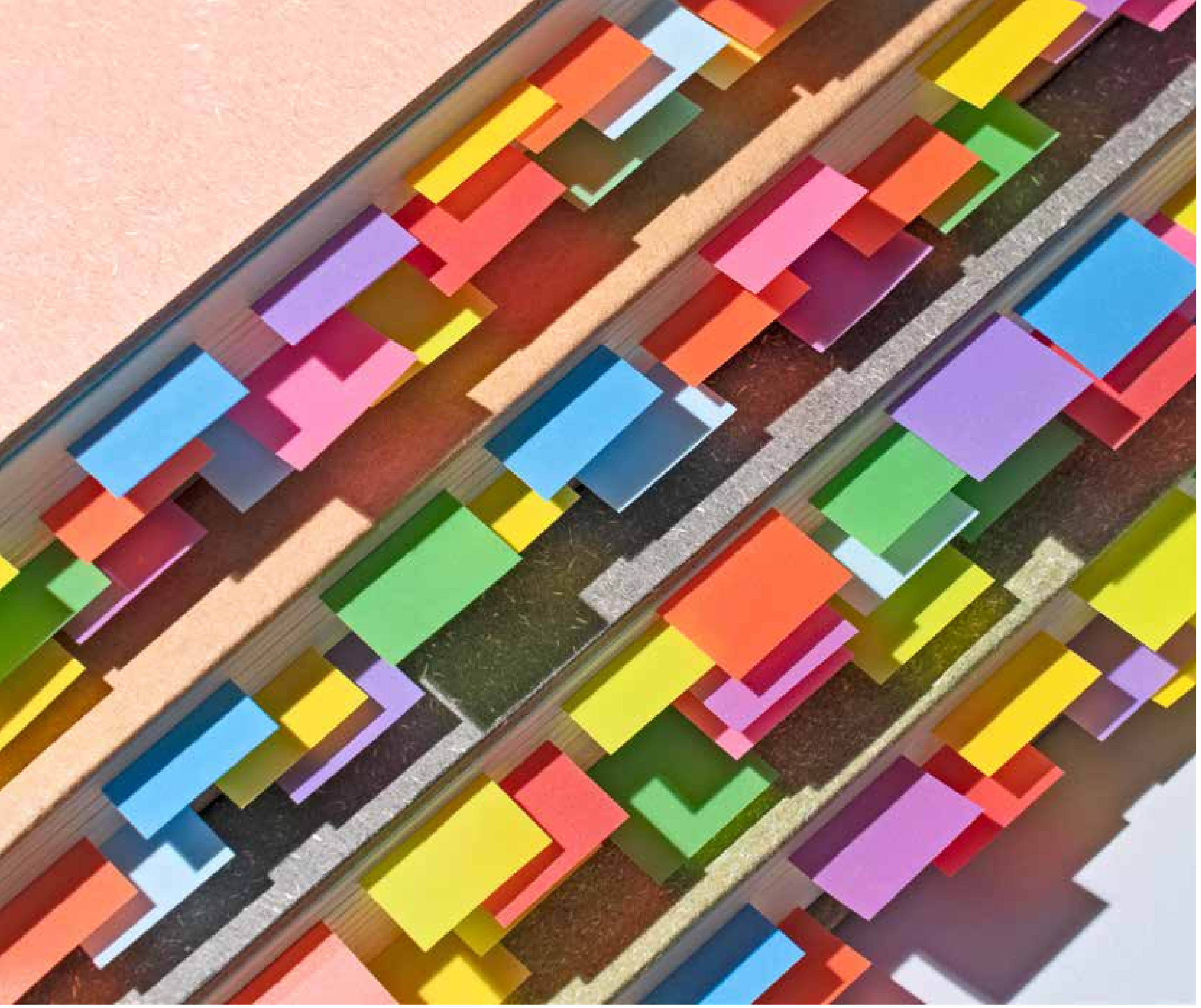
The agencies believe antitrust jurisprudence is lagging behind market realities. By litigating more frequently, it serves the goal of moving the law forward by generating judicial opinions supporting aggressive enforcement. In a significant departure from past practice, at the Spring Meeting, Principal Deputy AAG of the Antitrust Division, Doha Mekki, stated that, in order to get to court quicker, DOJ may file suit while an investigation is still pending and before merging parties certify substantial compliance in instances where the potential anticompetitive harm is clear.

Given budgetary constraints, the agencies will have to be selective when determining which matters they litigate, but merging parties should be prepared to confront the government in court. At a minimum, even if the agencies don't ultimately litigate, merging parties will face increasing costs and challenges to closing their deals when pursuing transactions presenting potential horizontal and vertical issues.

The future is not, however, entirely bleak. Despite these enforcement changes, there is still plenty of latitude to get deals consummated through robust antitrust advocacy that socialises the agencies to the benefits of the deal, dispels concerns of anticompetitive effects, and conveys a conviction to litigate with the government if the parties' positions are not reasonably considered.

GREGORY E. HELTZER
Partner
Washington, DC
gheltzer@mwe.com

GRAHAM J. HYMAN
Associate
Washington, DC
ghyman@mwe.com

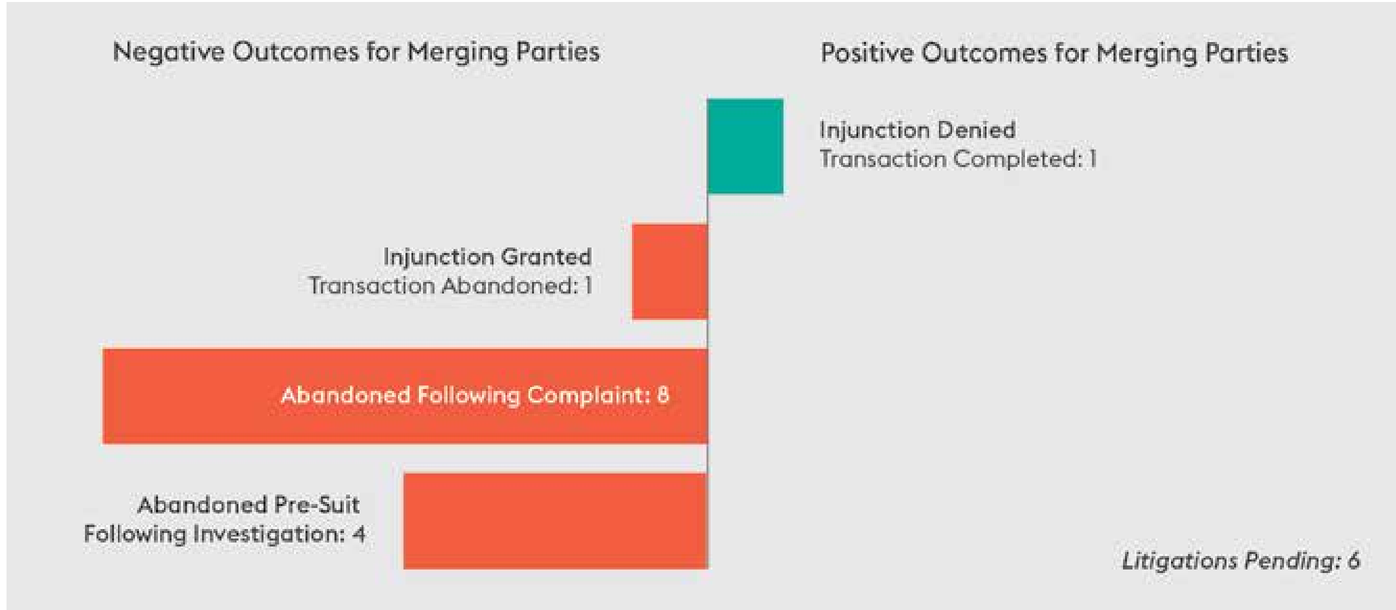


PRESIDENT BIDEN'S ACTIVIST ANTITRUST AGENDA INCREASES CHALLENGES OF NAVIGATING THE MERGER REVIEW PROCESS

Lisa P. Rumin

As noted in the previous article, under the Biden Administration, the US has a new antitrust playbook intended to create uncertainty, heighten risk, and raise the transaction costs of doing deals.

FIGURE 1: OUTCOME OF RECENT ENFORCEMENT ACTIONS



The purpose of the new playbook is to slow the pace of US M&A, and perhaps prevent companies and investors from even getting in the game in the first place.

A primary tool the US antitrust agencies are using to accomplish this goal is challenging transactions outright rather than negotiating a remedy. It is enlightening to review the transactions challenged by the FTC and the DOJ from January 2021 to July 2022, either through the filing of a complaint and subsequent litigation, or the threat of litigation following an investigation, to identify patterns and the overall direction of agency enforcement.

> **"Merger litigation is costly, lengthy, and carries significant risk.**

OUTCOME OF RECENT ENFORCEMENT ACTIONS

So far during the Biden Administration, 18 transactions have been challenged through litigation or the threat of litigation; see Figure 1. Challenges to two additional transactions were carried over from the previous administration and have been resolved in federal court.

Two thirds of the challenged transactions were abandoned. Eight after the FTC or DOJ initiated litigation in federal or administrative court seeking to block the parties from consummating their proposed transaction. Another four cases were abandoned by parties after the FTC or DOJ conducted a detailed investigation and told the merging parties that the agency had significant concerns with the transaction and would recommend a challenge. Merger litigation is costly, lengthy, and carries significant risk; when the FTC or DOJ challenge a transaction, the parties will often walk away.

The courts have ruled on two pre-closing merger challenges during this administration. Although the complaints were filed in 2020 during the Trump Administration, the transactions have been included in this overview because a significant portion of the litigation or pivotal decision regarding the litigation occurred after 1 January 2021. In *FTC v. Thomas Jefferson University*, a federal district court judge denied the FTC's motion for a preliminary injunction. The FTC appealed the district court's decision to the US Court of Appeals for the Third Circuit, which summarily denied the FTC's request for an emergency stay to prevent the transaction from closing pending the appeal. The FTC then withdrew its complaint in March 2021, allowing the merging parties to close the transaction. In the second case, *FTC v. Hackensack Meridian Health, Inc.*, a federal district court judge granted the FTC's motion for a preliminary injunction to block the transaction in August 2021. The Third Circuit affirmed the preliminary injunction in March 2022 and, shortly thereafter, the merging parties abandoned the transaction.

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Six additional transactions challenged during the Biden Administration are currently in various stages of litigation. These pending proceedings present a good opportunity to see if courts will adopt the aggressive and non-traditional theories of antitrust harm that the FTC and DOJ have pursued during the Biden era. The five federal court cases are ongoing: trials in three cases are complete (or substantially complete) and trials in the remaining three cases are scheduled for later in 2022. The sixth matter, which is proceeding in the FTC's Administrative Court, is awaiting a decision from the FTC's administrative law judge following a trial in August 2021.

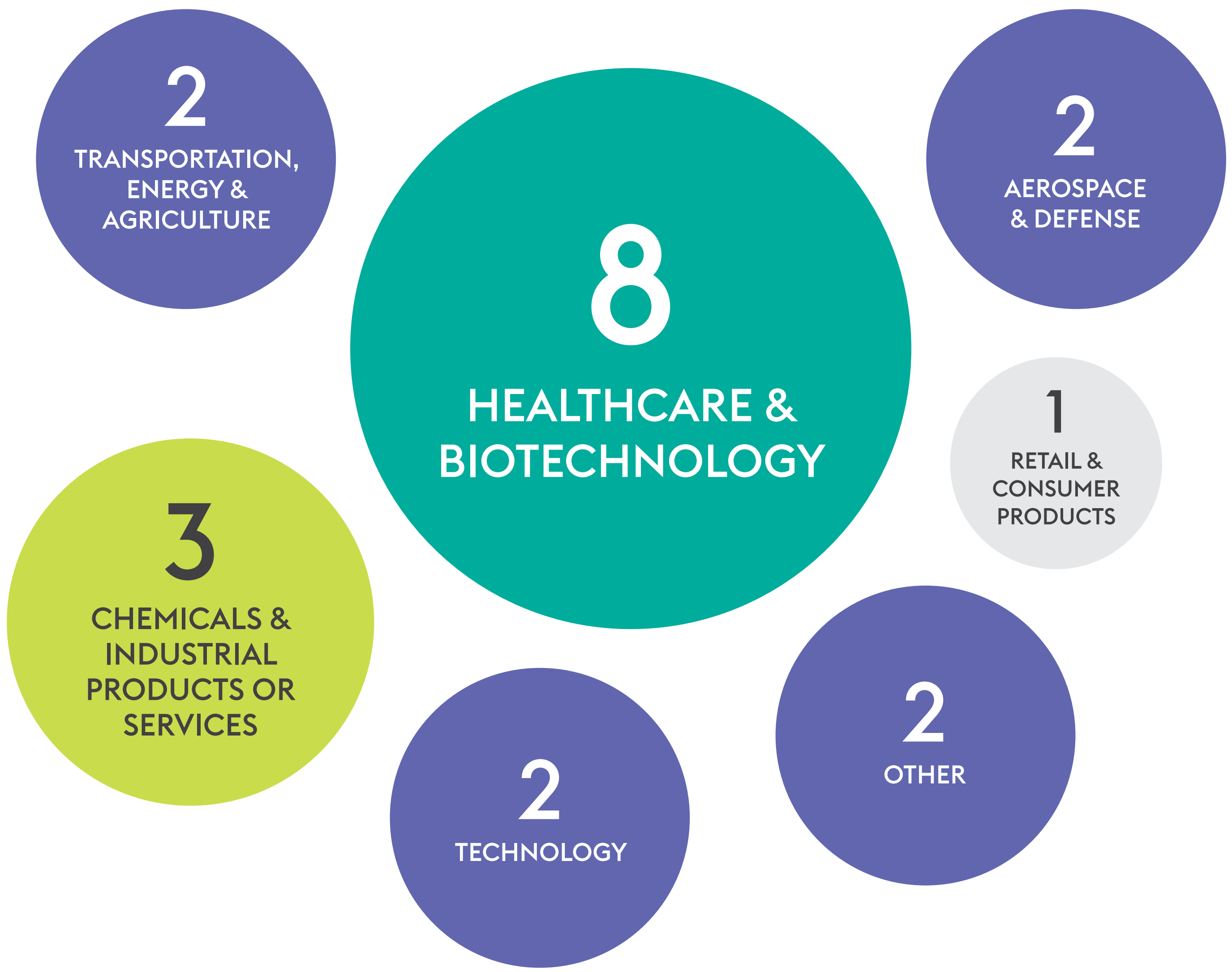
Both the FTC and DOJ are seeking increased financial resources to support more vigorous merger enforcement. Leadership at both agencies has made it clear that they will continue to bring cases to preserve competition and will place less weight on cost as a gating factor to litigation. DOJ has also stated it intends to seek faster access to the courts where there is obvious harm to competition, initiating litigation even where the parties have not yet complied with a Second Request in an in-depth investigation.

INDUSTRIES IMPLICATED IN AGENCY CHALLENGES

Figure 2 illustrates the industries implicated in merger challenges over the last year and a half. M&A in the healthcare and biotechnology industry remains a top priority for the antitrust enforcers, so parties should expect heightened antitrust scrutiny in these sectors.

The FTC and DOJ have, however, challenged a variety of transactions across a wide spectrum of industries. While the antitrust agencies may publicly claim a focus on a particular industry, no transaction is immune

FIGURE 2: INDUSTRIES IMPLICATED



from scrutiny and potential litigation if the agencies perceive the transaction will result in a substantial lessening of competition.

ANTITRUST ENFORCEMENT PRIORITIES

Vertical Transactions

Traditionally, the FTC and DOJ have been less likely to litigate vertical mergers or acquisitions, which combine companies at different levels in the supply chain and often result in procompetitive effects such as cost savings and other efficiencies. However, four of the 18 challenged transactions in the last year and a half were vertical transactions. A fifth was abandoned following an in-depth investigation after FTC staff recommended a challenge particularly owing to potential vertical harm.

These challenges emphasise that current FTC and DOJ leadership are more hostile to vertical transactions than they have been in decades and are rethinking the traditional approach to vertical integration. This includes continued scepticism toward efficiencies, as well as opposition to behavioural, *i.e.*, conduct or firewall, remedies.

Innovation and Nascent Competition

The FTC and DOJ have undoubtedly increased scrutiny of transactions involving emerging competitors. They have also emphasised that the antitrust agencies need to better analyse how a proposed acquisition of a small-but-growing company by an established firm may harm future competition. Indeed, several recent challenges involved acquisitions of a nascent or disruptive competitor or alleged harm to innovation.

FTC and DOJ officials have commented that the existing merger guidelines often fail to capture competitive harm relating to innovation and future competition owing to over-reliance on structural theories of harm. Any new merger guidelines issued by the agencies are likely to address this concern.

Labour

While the antitrust agencies have been assessing the competitive effects of mergers on labour markets for several years, it has become a high priority under the current administration. The focus is on questioning whether mergers of significant employers will lessen competition for workers and thereby reduce workers' ability to obtain competitive wages and benefits. The FTC and DOJ have investigated labour market concerns in some of the 18 transactions challenged during the Biden Administration. Recent Second Requests issued as part of in-depth merger investigations have also included demands for detailed documents, data, and other information relating to labour. Further, recent memorandums of

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FIGURE 3: TIMELINE OF CHALLENGED TRANSACTIONS (AVERAGE TIME FROM ANNOUNCEMENT)

understanding between the FTC and DOJ and the National Labor Relations Board facilitate increased information sharing and coordination between the agencies regarding competition in labour markets.

> No transaction is immune from scrutiny and potential litigation.

DOJ's lawsuit challenging Penguin Random House's acquisition of Simon & Schuster alleges the merger will lower compensation for authors, who rely on fierce competition between publishers to obtain fair payment. It will be interesting to see whether future FTC and DOJ merger challenges under the Biden Administration pursue more aggressive theories of harm regarding labor markets.

See p. 24 for more on how antitrust enforcers are also aggressively pursuing "naked" (standalone, not related to an M&A deal or other business collaboration) wage fixing and no-poach labour market violations.

TIMELINE OF CHALLENGED TRANSACTIONS

Figure 3 shows the average length of time between the announcement of a transaction and the merging parties' decision to either abandon or close the transaction following agency action between January 2021 and July 2022, as well as the average time for the antitrust agencies to initiate litigation.

On average, it took around 11.5 months for the FTC and DOJ to conduct an in-depth investigation and determine that a transaction would result in a substantial harm to competition such that the agency would seek to block the transaction. This timeframe is roughly the same regardless of whether the parties decided to abandon the transaction pre-suit or if the FTC or DOJ filed a complaint initiating litigation.

Where parties abandoned a transaction after the filing of complaint, the average length of the transaction lifecycle was slightly longer, averaging 13.5 months from transaction announcement to abandonment. Parties took anywhere from 1 week to 2.5 months to abandon their transactions following suit by the FTC or DOJ to block the transaction.

For the two transactions litigated through the federal court system, it took approximately 31.5 months from the announcement of the transaction to proceed through an agency investigation and trial, receive decisions from a federal district court and appellate court, and for the losing party to either abandon the transaction (in the case of a win by the antitrust agency) or withdraw from further litigation proceedings (in the case that the merging parties prevailed).

It will be interesting to see how antitrust merger enforcement continues to evolve under the Biden Administration. But, if the first year and a half of the Biden-led FTC and DOJ is any indication, increased antitrust litigation will remain on the horizon.

LISA P. RUMIN
Partner
Washington, DC
lrumin@mwe.com

THE EUROPEAN COMMISSION'S REVISED "VERTICAL COMPETITION RULES" IN A NUTSHELL

Hendrik Viaene, Karolien Van der Putten and Hannelore Wiame

The new Vertical Block Exemption Regulation 2022/720 (VBER) and accompanying 2022 Vertical Guidelines (replacing the 2010 Vertical Guidelines) impact all types of distribution in and into the European Union, at all levels of the distribution chain.

The long-awaited revised VBER and Vertical Guidelines entered into force in June 2022. The VBER provides a competition law "safe harbor" for vertical agreements falling within its scope. If a vertical agreement is covered by the VBER, no further competition law analysis is required, and the agreement is enforceable throughout the European Union.

If an agreement falls outside of the scope of the VBER, an individual assessment under Article 101 of the Treaty on the Functioning of the European Union (TFEU) is required to determine whether or not it may infringe Article 101(1) TFEU and, if so, whether or not it can be justified under Article 101(3) (the efficiency defence). Infringing agreements are entirely or partially unenforceable, and may result in fines and damages claims.

THE "HARDCORE" RESTRICTIONS

Agreements that come under the restrictions listed in Article 4 VBER will result in the entire agreement losing the benefit of the safe harbor.

Article 4 separately lists a number of exceptions, relating to exclusive distribution systems, selective distribution systems (SDS) and those that are neither selective nor exclusive ("free" distribution systems).

Of particular importance is that Article 4 codifies the case law of the Court of Justice of the European Union over recent years, stipulating that the prevention of the effective use of the internet by the buyer or its customers to sell the contract goods or services are hardcore restrictions. Online sales are an important area of focus and the 2022 Vertical Guidelines provide further guidance.

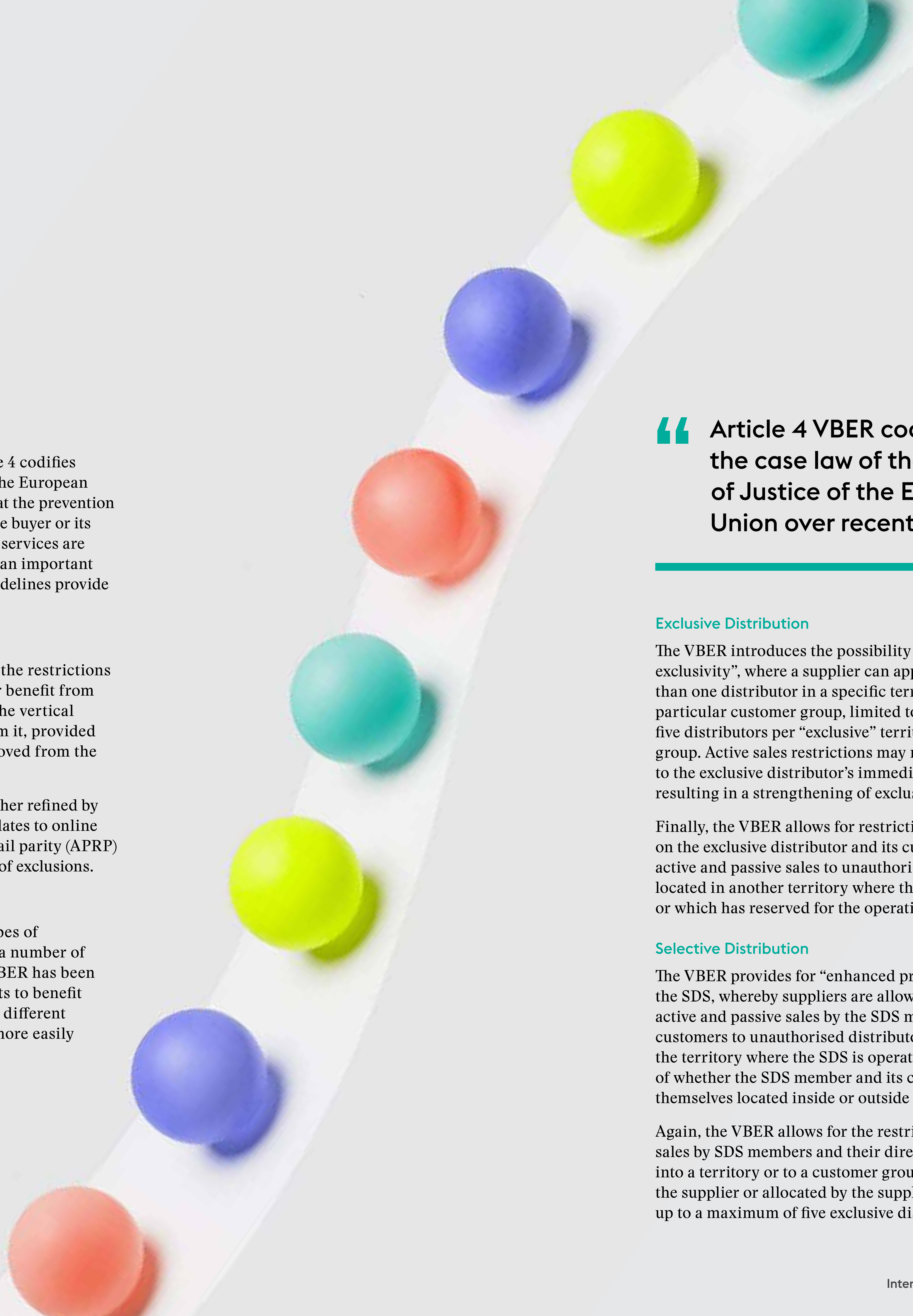
THE "EXCLUDED" RESTRICTIONS

Elements of an agreement that trigger the restrictions listed in Article 5 VBER will no longer benefit from the safe harbor, but the remainder of the vertical agreement can continue to benefit from it, provided that the clause in question can be removed from the rest of the agreement.

The scope of certain restrictions is further refined by Article 5, but the main change again relates to online sales. For example, across-platform retail parity (APRP) obligations have been added to the list of exclusions.

DISTRIBUTION SYSTEMS

The VBER always covered different types of distribution systems, but the scope of a number of distribution systems covered by the VBER has been widened, allowing for more agreements to benefit from the safe harbor, and allowing for different distribution systems to be combined more easily throughout the European Union.



> "Article 4 VBER codifies the case law of the Court of Justice of the European Union over recent years

Exclusive Distribution

The VBER introduces the possibility of "shared exclusivity", where a supplier can appoint more than one distributor in a specific territory or for a particular customer group, limited to a maximum of five distributors per "exclusive" territory or customer group. Active sales restrictions may now be passed on to the exclusive distributor's immediate customers, resulting in a strengthening of exclusivity.

Finally, the VBER allows for restrictions to be imposed on the exclusive distributor and its customers to prevent active and passive sales to unauthorised distributors located in another territory where the supplier operates or which has reserved for the operation of an SDS.

Selective Distribution

The VBER provides for "enhanced protection" of the SDS, whereby suppliers are allowed to restrict active and passive sales by the SDS member and its customers to unauthorised distributors located within the territory where the SDS is operated, regardless of whether the SDS member and its customers are themselves located inside or outside that territory.

Again, the VBER allows for the restriction of active sales by SDS members and their direct customers into a territory or to a customer group reserved to the supplier or allocated by the supplier exclusively, up to a maximum of five exclusive distributors.

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DUAL DISTRIBUTION

A dual distribution system occurs where

- The supplier is either a manufacturer, wholesaler or importer upstream, and is also an importer, wholesaler, or retailer downstream; while the buyer is an importer, wholesaler, or retailer downstream, and does not compete at the upstream level where it buys the contract goods; or
- Where the supplier provides services at several levels of trade, while the buyer provides its services at the retail level and does not compete at the level of trade where it purchases the contract services.

The main change relating to the dual distribution exemption (in Article 2(4) VBER) is that wholesalers and importers are now explicitly covered under the dual distribution definition.

The VBER has also introduced its own rules on information exchange within the context of dual distribution. Specifically, for the information exchange to benefit from the VBER exemption, the exchange between the supplier and buyer needs to be directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services. Although the 2022 Guidelines aim to provide more clarity, the fact remains that, ultimately, it will be up to the parties' own judgment to assess the risk of illegal information exchanges.

ONLINE INTERMEDIATION SERVICES

Much attention has been devoted to developing an analytical framework for all digital distribution. Online intermediation services (OIS), such as e-commerce marketplaces, app stores, price comparison tools, social media services, *etc.*, are categorised as "suppliers" under the VBER, including where they are party to a transaction that they facilitate. Companies offering goods or services via OIS are categorised as buyers in respect of those OIS, irrespective of whether or not they pay for the OIS services.

Importantly, the VBER does not automatically exempt vertical agreements relating to the provision of OIS entered into by OIS providers with a hybrid function; these require individual assessment. The OIS provider is deemed to have a hybrid function when it sells goods and/or services in (potential) competition with undertakings to which they provide OIS.

PARITY CLAUSES

Parity clauses, "most favoured nation" clauses, or "across platform parity" agreements are obligations that require an undertaking to offer the same or better conditions to its contract party as those offered on any other sales/marketing channel, *e.g.*, other platforms, or on the company's direct sales channel, *e.g.*, its own website(s).

With the exception of APRP obligations, all other types of parity obligations in vertical agreements may—assuming the conditions are met—benefit from the VBER exemption.

APRP obligations are direct or indirect retail parity obligations (regarding price, inventory, terms and conditions, *etc.*) imposed by OIS suppliers, which cause buyers of those services not to offer, sell, or resell goods or services to end users under more favourable conditions using competing OIS. Such obligations are considered excluded restrictions and require individual assessment under the 2022 Guidelines.

ONLINE SALES

In addition to online sales bans being enshrined in Article 4 VBER, in the SDS context, the criteria imposed by suppliers in relation to online sales no longer have to be "overall equivalent" to those imposed on bricks-and-mortar shops. Furthermore, a total ban on the use of online marketplaces by buyers, or imposing qualitative requirements that marketplaces must meet, are covered by the VBER, if all other conditions are met.

Answering the call from businesses, dual-pricing, *i.e.*, setting different wholesale prices for online/offline sales by the same distributor, is no longer considered a hardcore restriction unless its object is to prevent effective use of the internet to sell the contract goods or services.

Finally, restrictions that ban the use of an entire online advertising channel are considered hardcore restrictions, whereas restrictions, rather than an overall ban, on the use of a specific price comparison tool or search engine, are permissible.

> " Online sales are an important area of focus

NEXT STEPS

The changes brought about by the revised vertical rules are not superficial. Any company engaging in distribution in or into the European Union should use the transitional period, which runs until 31 May 2023, to assess its existing agreements and practices to align them with the new regulatory framework. Enforcement is expected to continue, and to pick up pace once the transitional period has ended.


HENDRIK VIAENE
Managing Partner, Brussels Office
Brussels
hviaene@mwe.com


KAROLIEN VAN DER PUTTEN
Associate
Brussels
kvanderputten@mwe.com


HANNELORE WIAME
Associate
Brussels
hwiame@mwe.com

THE NASH EQUILIBRIUM AND THE CHALLENGE OF SIMULTANEOUS-MOVE PRICE-SETTING

Frédéric Pradelles and Carlo Serrano*

The Nash equilibrium, a decision-making theorem within game theory, offers an interesting insight into the dynamics of price leadership maneuvering between businesses, and how this interacts with antitrust law.

The Nash equilibrium is commonly cited as a strategy for achieving an optimal balance in non-co-operative situations, such as price-setting. Recent research has, however, demonstrated how the achievement of Nash equilibrium can be seen as tacit co-operation between businesses.

Companies reacting independently to market trends, without collusion, is the most desirable market dynamic. True equilibrium occurs when, at a given market price, neither firm has an advantage in adopting another strategy. This means that the firms have independently reached the position they would have undertaken by agreement, without actually co-operating; according to John Nash: "each player's strategy is the best response to the other player's strategy".

The non-co-operative ideal promoted by antitrust law must, however, handle a reality in which the difference between collusion and accepted business activity is difficult to pinpoint. This is particularly challenging in the case of price leadership, as confirmed by two leading European commission decisions: *Dyestuffs, Imperial Chemical Industries Ltd v Commission of the European Communities* and *T-Mobile Netherlands BV v Raad van bestuur van de Nederlandse Mededingingsautoriteit*. If two firms are forced to charge a given generic price (x), they have no incentive to cut their prices to under a monopoly level as they know they will be unable to gain market share before their competitor reacts by cutting their own price.

This non-co-operative dynamic thereby reveals an implicit parallel practice, fueled by the common tendency of businesses to maximise joint profits. By applying this principle to a price increase, it turns out that oligopolists can achieve higher price-cost margins without expressly forming a cartel, despite adopting a behaviour that could regarded as "concerted". If firm a independently raises the price to y, it may make sense for competitor b to match that price, otherwise a would immediately move back to price x.

In Europe, the collusive nature of price-leadership walks a fine line. Article 101 of the Treaty on the Functioning of the European Union prohibits "all agreements between undertakings" and "concerted practices" that could restrict competition. According to the Court of Justice of the European Union in *Dyestuffs* and *T-Mobile*, concerted practices require a finding of contact among competitors and, while it is certainly "strong evidence" of such a finding, parallel price increases are not always in themselves sufficient to trigger a presumption that concerted practices occurred.

In comparison, US courts have historically been reluctant to find price leaders guilty of price fixing, because of the risk of an innocent firm being found guilty of violating antitrust laws simply because rivals follow its pricing.

Simultaneous-move price-setting as explained by the Nash equilibrium renders the line between collusion and fair business very thin, and requires specific clarification by antitrust authorities to protect businesses from unfair allegations of price fixing, and the market from unfair collusive price fixing.

**Carlo Serrano, trainee, co-authored this article.*

FRÉDÉRIC PRADELLES
Partner
Paris
fpradelles@mwe.com

> "US courts have historically been reluctant to find price leaders guilty of price fixing

LABOUR MARKET INVESTIGATIONS: US AND EUROPEAN PERSPECTIVES

Justin P. Murphy and Frédéric Pradelles

The focus of an antitrust cartel investigation has traditionally been on alleged conspiracies relating to pricing, sales, products, or geographic areas. Antitrust authorities on both sides of the Atlantic are now expanding their focus to direct attention to the labour markets.

In the United States and Europe, antitrust enforcers are aggressively pursuing novel theories of liability for "naked" (standalone, not related to an M&A deal or other business collaboration) wage fixing and no-poach labour market violations, and enforcement actions are increasing. Importantly, enforcers continue to signal strongly that labour market investigations will remain a core focus into the future.

THE US PERSPECTIVE

In the United States, the Department of Justice (DOJ) is trying to create a new area of potential criminal liability for labour market investigations. Historically, government enforcement of alleged anti-competitive labour market practices occurred in the civil context, which meant fines for companies and individuals if inappropriate practices were found to have occurred. In late 2016, DOJ began its campaign to expand Section 1 of the Sherman Act to include naked wage fixing and no-poach agreements. Since then, labour market investigations have become a core aspect of DOJ's investigative priorities. This policy shift has resulted in numerous investigations and more than a dozen criminal cases filed against individuals and corporations to date.

DOJ's first two prosecutions for alleged labour market crimes went to trial in spring 2022, and the Department's attempts to jam a square peg into the round hole of a *per se* antitrust law violation resulted in full acquittals on the charged Sherman Act conduct in both instances. In *United States v DaVita, Inc. and Kent Thiry*, DOJ indicted the defendants on three counts of criminal conspiracy to allocate the market for employees by allegedly entering into non-solicitation agreements with three other companies. In *United States v Jindal*, DOJ alleged the defendants entered into a conspiracy to suppress competition by agreeing to fix prices to lower the pay rates of certain employees.

> Labour market investigations have become a core aspect of DOJ's investigative priorities

Despite the lack of precedent supporting the prosecution of certain labour market practices as *per se* criminal violations, DOJ in both instances asserted that the mere existence of any naked wage fixing or no-poach agreement would constitute a crime. The jury disagreed in both instances, finding that no criminal Sherman Act violations existed. There are significant legal points to consider in these cases of first impression.

In *DaVita/Thiry*, the court did not agree with DOJ that a typical *per se* approach was appropriate. First, the judge held that not every non-solicitation, or even every no-hire, agreement would allocate the market and be subject to *per se* treatment. Further, the court agreed with many of the defence arguments and required DOJ to prove that the defendants acted with the specific intent to constrain the labour markets. Given the draconian nature of the *per se* standard, the court held that DOJ would "not merely need to show that the defendants entered the non-solicitation agreement and what the terms of the agreement were. It will have to prove beyond a reasonable doubt that the defendants entered into an agreement with the purpose of "allocating the market" and that the defendants "intended to allocate the market as charged in the indictment." This key holding is one that other defence counsel should consider utilising in future labour market prosecutions.

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THE EUROPEAN PERSPECTIVE

In Europe, no-poach agreements are not new to antitrust authorities; such agreements have been examined for decades as ancillary restraints in the context of mergers. In this respect, the European Commission Notice on restrictions directly related and necessary to concentrations states that non-solicitation clauses imposed on the seller have an effect comparable to non-compete clauses and therefore must be evaluated in a similar way. Since 2005, the European Commission has issued a number of merger decisions covering such clauses, in which it notably examines whether or not the duration and scope of the clause was reasonable to ensure the transfer of the full value of the acquired business.

No-poach agreements have also been considered as possible merger control remedies. The Notice provides that, when it is necessary to ensure the viability and competitiveness of the divested business, a non-solicitation commitment can be offered as a remedy, under which the parties agree not to solicit identified key personnel for a determined period (usually two years) after closing.

But Europe, like the United States, is increasingly examining naked no-poach agreements. More than 15 investigations have been opened across the European Union in the last two years compared to a total of 24 cases between 2010 and 2019. At the Commission level, Margrethe Vestager has made it clear that no-poach agreements can create a cartel and will be the subject of a new focus for the Commission. At the same time, national authorities have also recently been very active in pursuing no-poach agreements, either as part of wider cartel practices, including price fixing or illicit exchange of information (*e.g.*, the flooring cartel case in France, football case in Portugal, and HR consulting agencies case in Hungary), or as a standalone violation of antitrust law (*e.g.*, the automotive case in Romania, basketball cases in Lithuania and Poland, and the private school cases in Spain).

> **More than 15 investigations have been opened across the European Union in the last two years**

There are many substantial points to note in these national cases. First, the authorities are not focusing on one specific sector and there don't appear to be limits on which sectors are being scrutinised as they range from Health to Private Equity. Second, there is a common and co-operative effort being made by the authorities to detect the violation of antitrust law by no-poach agreements. Whistleblowing, leniency applications, and dawn raids are all being employed.

KEY TAKEAWAYS

- Despite its trial losses, the US DOJ continues to prioritise investigations and prosecutions criminalising certain labor market practices.
- DOJ has taken an aggressive stance on what it means to be a horizontal competitor. Even if not all companies are competitors in the line of business, DOJ takes a broad view that the companies may compete for labour, even if not for services.
- In Europe, the European Commission has clearly stated that it will investigate the labour markets.
- At a European national level, the antitrust authorities will undoubtedly continue to investigate wage fixing and no-poach violations.
- Executives involved in hiring and compensation-related decisions should receive antitrust training that addresses issues relating to labour market practices.

JUSTIN P. MURPHY
Partner
Washington, DC
jmurphy@mwe.com

FRÉDÉRIC PRADELLES
Partner
Paris
fpradelles@mwe.com

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