



ANTITRUST MATTERS

MARCH 2016

EDITORIAL

Hubs, spokes and middlemen ...

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But for now, please enjoy our new Antitrust Matters!



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HUBS, SPOKES, MIDDLEMEN AND SIGNALLING



I. INTRODUCTION



Despite European competition law's dynamic and ever-evolving nature, for a very long period of time undertakings could rely on two quasi-certainties: first, that vertical information gathering – gathering or exchanging information with an undertaking at a different level of the production or distribution chain – was not anti-competitive and thus unlikely to raise any competition law concerns; and second, that as long as they did not occupy a dominant position within the market, their unilateral behaviour could not fall afoul of competition law. However, these certainties have been blurred, in recent years, due to the emergence of the hub and spoke and price signalling doctrines, created by the competition authorities in their everlasting efforts to stretch the cartel concept.

Generally, a hub and spoke cartel involves competitors and one (or more) of their common suppliers and/or customers. The involved competitors exchange sensitive information through a third party that facilitates the cartelistic behaviour of the competitors involved. Price signalling, on the other hand, can be described as a company's public or semi-public unilateral announcement of potentially strategic information, e.g. future prices or future volumes.

Companies face a relatively high degree of legal uncertainty at the European Union level because the body of uniform EU case law on hub and spoke cartels and price signalling is scant. However, a number of national competition authorities have dealt with these issues.

On the other side of the Atlantic, American courts have analysed potential violations of antitrust laws using the hub and spoke concept since the late 1930's. Yet, the constant evolution of general antitrust theories affect the analysis of hubs and spokes, as any other type of potential restraint on competition. The Supreme Court recently denied a petition to hear a hub and spoke case and has left untouched a decision in which the lower court found that vertical agreements between the hub and each spoke were considered per se unlawful because they facilitated a horizontal conspiracy amongst the spokes.

“Middlemen” have been sued for their roles in alleged anticompetitive conduct. Enforcement authorities and private plaintiffs have notably focused on trade associations, acting on their own or at the behest of their members, and private companies active in one market and owned by competitors in another related market.

Price signalling has been a feature of American antitrust law for over ninety years. Similarly to the hub and spokes concept, price signalling has evolved somewhat in tandem with the general thinking of each era of antitrust law.



2. HUB AND SPOKE CASES





2.1. THE UK

During the mid-2000s, a number of retail investigations in the United Kingdom brought hub and spoke collusion to the surface. Due to the lack of EU case law on hub and spoke cartels, many national competition authorities came to look at the UK precedents for guidance.

In the *Replica Kit* decision (2003) – the first on this topic – the Office of Fair Trading (OFT) found that a number of sportswear retailers and suppliers had entered into price-fixing agreements with regard to replica football kits through a common contractual partner. The OFT fined all involved parties. JJB Sports, one of the fined undertakings, appealed the OFT’s decision before the UK Competition Appeal Tribunal (CAT). The CAT dismissed JJB Sports’ appeal and held that an anti-competitive concerted practice exists “if one retailer ‘A’ privately discloses to a supplier ‘B’ its future pricing intentions in circumstances where it is reasonably foreseeable that B might make use of that information to influence market conditions, and B then passes that pricing information on to a competing retailer ‘C’”.¹

This test, as put forward by the CAT, requires the competitor providing the information to have reasonably foreseen that the information provided would be passed on to a competitor. This test could have grave

consequences: it puts every undertaking that exchanges information with its suppliers or customers in jeopardy, because they should have foreseen that their information could have been passed on by their vertical contact. The CAT also extended this reasoning to complaints. An anti-competitive concerted practice can be said to exist, the CAT stated, when a competitor complains to a supplier about the market activities of another competitor, and the supplier acts on the complaining competitor’s complaint in a way that limits the competitive activity of the other competitor.

JJB Sports also appealed the decision of the CAT. Before the UK Court of Appeal, JJB Sports argued that the *reasonable foreseeability* test as formulated by the CAT was too general and too extensive.² After all, the more informed and intelligent we are, the higher the risk gets that the passing on of information might be deemed “reasonably foreseeable”.

The UK Court of Appeal opined that the test should indeed be narrowed down to a test in which a requirement of intent is essential. Therefore, the UK Court of Appeal formulated a more nuanced test to determine the existence of hub and spoke collusion. It stated that hub and spoke collusion exists if:

- “(I) retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one),
- (II) B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B and
- (III) C does, in fact, use the information in determining its own future pricing intentions then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition.”³

In the “Toys” case (Hasbro/Argos/Littlewoods – 2003), the OFT decided that Hasbro, Argos and Littlewoods entered into an overall agreement and/or concerted practice to fix the price of certain Hasbro toys and games. This overall agreement included two bilateral price-fixing agreements and/or concerted practices which in themselves constitute infringements: one between Hasbro and Argos and the other between Hasbro and Littlewoods.

¹ Case 1022/1/1/03 *JJB Sports plc v Office of Fair Trading* [2004] CAT 17, para 659.

² Case 2005/1071, 1074 and 1623 *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318, paras 32 – 34 and 91.

³ Case 2005/1071, 1074 and 1623 *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318, para 141.



Although Argos and Littlewoods appealed the OFT's decision⁴, the CAT dismissed the appeals on liability in their entirety, finding that there had actually been bilateral agreements or concerted practices between, on the one hand, Hasbro and Argos and, on the other, Hasbro and Littlewoods, and a trilateral (hub-and spoke) concerted practice between all three undertakings.

The CAT's judgment was challenged before the Court of Appeal on the grounds that there was no evidence of there being a horizontal agreement or consensus between the retailers which was necessary for a finding of an agreement or concerted practice. However, the Court of Appeal held that "*concerted practices can take many forms, and courts have always been careful not to define or limit what may amount to a concerted practice*".⁵

In the *Private Schools* case (2006), the OFT reached a settlement decision with 50 fee-paying independent schools which had "*engaged in the exchange of specific information regarding future pricing intentions on a regular and systematic basis*." The information exchanged was organised by the bursar of Sevenoaks School, to whom the participant schools submitted details of their existing fee levels, proposed fee increases (expressed as a

percentage) and the resulting intended fee levels. In the *Private Schools* case (2006), the OFT reached a settlement decision with 50 fee-paying independent schools which had "*engaged in the exchange of specific information regarding future pricing intentions on a regular and systematic basis*." The information exchanged was organised by the bursar of Sevenoaks School, to whom the participant schools submitted details of their existing fee levels, proposed fee increases (expressed as a percentage) and the resulting intended fee levels. The information was subsequently circulated amongst the participant schools in tabular form. The OFT held that the "*(P)articipant schools exchanged on a regular and systematic basis highly confidential information regarding each other's pricing intentions for the coming academic year that was not made available to parents of pupils at Participant schools or published more generally*." The OFT concluded that the arrangement constitutes an obvious restriction of competition whereby the Participant schools knowingly substituted practical co-operation for the risks of competition amounting to an agreement and/or concerted practice having as its object the prevention, restriction or distortion of competition.

In the *Tobacco* case (2010), the OFT imposed record total fines of £225 million on two tobacco manufacturers and 10 retailers in the UK for having entered into a series of bilateral arrangements whereby the retailers agreed to set the shelf prices for the relevant manufacturer's products in accordance with a set parity and differential requirements.⁶ The OFT considered that the agreements had as their object the prevention, restriction or distortion of competition because the retailers' ability to determine selling price was restricted. The OFT reached early resolution agreements with a number of parties. However, appeals were lodged with the CAT by a number of parties, including one of the settling parties. During the CAT case, the foundation of the OFT's case was called into question and the OFT subsequently attempted to refine its case during the proceedings. However, the CAT concluded that it was unable to hear the modified case that OFT wished to make since it was not the basis of the original OFT decision and that it did not have jurisdiction to continue to hear the appeal (or, even if it did have jurisdiction, it would decline to exercise such jurisdiction). The CAT therefore quashed its decision insofar as it related to the appellants.⁷

⁴ Hasbro escaped a penalty on the basis that it was the first to provide information to the OFT on the infringement and it cooperated with the OFT's investigation.

⁵ Case 2005/1071, 1074 and 1623 *Argos Limited and Littlewoods Limited v Office of Fair Trading and JJB Sports Plc v Office of Fair Trading* [2006] EWCA Civ 1318, para 21.

⁶ This meant that if any price increase occurred for the named brand, a price increase for the other brands would automatically be implemented by the retailers.

⁷ The non-appealing parties which settled the case with the OFT subsequently decided to challenge the OFT on procedural grounds (unfairness that assurances mistakenly given to one party were not also given to the other non-appealing parties). However, those cases proved unsuccessful.



In the *Dairy Retail Price Initiatives* decision (2011), the OFT decided that the UK's big supermarkets had exchanged information about their retail pricing intentions for milk and cheese. The OFT decided that on 8 occasions in 2002 and on 5 occasions in 2003 there had been anticompetitive exchanges of information pursuant to a plan to coordinate the retail process for cheese. All retailers and suppliers (except for Tesco) admitted the infringements and settled the cases (by means of Early Resolution Agreements). Tesco, on the other hand challenged the OFT's decision before the CAT which held that there was insufficient evidence of a secret plan to coordinate retail prices of cheese in 2003 or for 5 of the 8 occasions in 2002. However, the CAT held that on the remaining 3 occasions in 2002 the Tesco cheese buyers had participated in unlawful exchanges of information with Sainsbury's. Tesco and the OFT subsequently settled the case with Tesco agreeing to pay £6.5 million.⁸

Preliminary observations on the UK cases

These cases highlight the importance of the intentional element in hub and spoke collusion investigation because vertical information exchange is not per se prohibited: it even plays an important role in the day-to-day business of most companies. Therefore there cannot be a

presumption on A or C's state of mind, and they shouldn't be held liable for the actions of B, over whom they have no or little control.

While the *state of mind* test remains rather ambiguous, it leaves more room for lawful information exchanges than its predecessor, the *reasonable foreseeability* test. However, caution is advisable: the thin line between necessary and legitimate information exchanges and a punishable cartel is still easily crossed due to the ambiguity of this *state of mind* test. If there is any doubt about where the information might end up or why information has been received, parties would be well advised to take steps to mitigate such doubts at the earliest possible stage.

2.2. BELGIUM

On 22 June 2015, the Belgian Competition Authority adopted a settlement decision and fined 18 parties, both retailers and suppliers for their involvement in hub and spoke collusion in the drugstore, perfumery and hygiene sector between 2002 and 2007. Most of Belgium's major retail chains were involved, and the authority opened an investigation following a leniency application by one of the hubs.

Price coordination had been orchestrated through indirect contacts between the retailers. The retailers exchanged information through their suppliers, which acted as intermediaries for their own products. The BCA found that the parties' behavior met the state of mind test because the retailers had conveyed certain information to their common supplier, and the competing retailer that was on the receiving end was aware of the context and purpose of the information exchange.

2.3. ITALY

There are no decisions by the Italian Competition Authority (ICA) properly regarding hub and spoke collusion. Nonetheless, in some cases the ICA has deemed that an indirect information exchange between competitors, by means of a third party, could fall afoul of competition law.

*RC Log*⁹ and *IAMA Consulting*¹⁰ are strong examples of behaviour that the ICA has considered as a collusion. The parties used a database, managed by a third party to share and exchange sensitive commercial information (in both cases, the undertakings involved in the practice entrusted an external advisory with the task of creating and managing the database, collecting and developing the information).

⁸ The OFT had originally imposed fines of £9.55 million as a result of the 2002 infringements.

⁹ Decision n. 8546 dated 28 July 2000, Case I377 – *RC Auto*.

¹⁰ Decision n. I3622 dated 30 September 2004, Case I575 – *RAS-General/IAMA Consulting*.



2.4. THE NETHERLANDS

The JJB Sports test, as it was extended to complaints, was recently used by the Dutch Supreme Court (Hoge Raad) in the Batavus case.¹¹ In this case, Dutch bicycle retailers complained and practically forced bicycle producer Batavus to end its distribution agreement with an Internet retailer. This Internet retailer was offering the same bikes at a much lower consumer price than the other retailers were willing to offer. The Dutch Hoge Raad held that the termination of the distribution agreement could be incompatible with the Dutch Competition Act, if the termination could be found to restrict competition appreciably. The Dutch Hoge Raad referred the case back to the Arnhem Court, which held that the termination of the distribution agreement indeed appreciably restricted competition and that the termination therefore was null and void.¹²

2.5. POLAND

In December 2015, in a case involving establishing minimum retail prices on watches, the Office of Competition and Consumer Protection, Polish Competition Authority, fined five companies more than PLN 2 million and ordered them to abandon the illegal practices. Proceedings in the case took two years and the Office's decision is not yet final as it may be appealed.

According to the Office, Swatch Group Polska and its several retailers entered into price-setting agreement on a few watch brands. Their agreement concerned both traditional retail shops and online sales and included various unlawful actions. While it was an illegal vertical agreement between Swatch Group and its retailers, it had also hub-and-spoke elements. In addition, three of the involved retailers exchanged information on prices between themselves directly. The hub and spoke aspect of this behaviour was done through Swatch Group. The individual retailers had no any direct contact with each other, but still obtained information on competing entities' pricing policies. Swatch Group's hub character was revealed in the electronic correspondence exchanged between all of the companies.

2.6. ROMANIA

In 2013, the Romanian Competition Council (RCC) fined four undertakings active in either the production or the supply of ammunition for their participation in an anti-competitive concerted practice. The participants were considered to have been rigging various tenders through a common undertaking which represented the three undertakings during those tenders organised by the Romanian Ministry of Defence in 2005–2007. It was

the first time in a bid rigging case where the RCC fined undertakings for exchanging sensitive information through a common representative.

Three of the tendering undertakings all mandated the same undertaking – Transcarpat – to represent them during the tender process. However, Transcarpat surpassed the provisions of its mandate by drafting, submitting and signing the bids on behalf of the three undertakings. Based on the sensitive information Transcarpat obtained in its capacity as a representative, Transcarpat divided the product portfolios of the undertakings, so that the undertaking's chances of winning were maximized. Transcarpat, as an undertaking active in the market for the supply of ammunition, also submitted qualification documents for the 2005 tender in various forms (individual participation and association with various companies).

Transcarpat drafted the proposals for each of the undertakings in order to prevent potential overlaps in the undertakings' product portfolio. Therefore the RCC took the view that the investigated undertakings did not participate independently in the tenders, and thus unlawfully shared the markets. The RCC concluded that commercially sensitive information does not necessarily have to be exchanged through a circular scheme, but that it also may be exchanged by way of a radial flow towards and from Transcarpat and the three companies.

¹¹ Arrest van de Hoge Raad van 16 September 2011, LJN BQ2213, point 3.7.

¹² Arrest van het Gerechtshof Arnhem-Leeuwarden van 22 Maart 2013, LJN BZ5188, point 3.3.



This decision is the first bid rigging case appraised by the RCC in relation to information exchange facilitated by a third party, however the RCC decision contains no reference to hub and spoke in particular. The RCC mainly relied on circumstantial evidence and on the documents submitted by Transcarpat to prove the undertakings' alleged anti-competitive behaviour. The RCC specifically stated that appointing a representative in a tender process does not constitute an infringement. However, the competitive element of the tender process gets eliminated when multiple undertakings appoint the same representative to draft their proposals.

The decision of the RCC was appealed by the undertakings. At least one of the appeals was dismissed in its entirety.

2.7. THE UNITED STATES

The hub and spoke structure – if not the term – has been subject to antitrust scrutiny pursuant to Section 1 of the Sherman Act since at least 1939.¹³ An oft-cited 2000 Seventh Circuit opinion held that a toy retailer, Toys “R” Us, was the “hub,” and the main toy manufacturers the spokes, thereby infringing upon competition by

other retailers, in this case warehouse clubs, such as Costco.¹⁴ The vertical element of the hub and spoke conspiracy was a policy issued by Toys “R” Us, which the main toy manufacturers adopted. The court held that the horizontal element of the hub and spoke conspiracy existed because the record showed that the toy manufacturers wanted to sell their wares to the warehouse clubs in an effort to diversify their retailer base and reach more potential consumers. Yet, they agreed to limit their sales to those warehouse clubs only after assurances from Toys “R” Us that every other toy manufacturer would abide by the same policy, which the court found was “direct evidence of communications.”¹⁵ The court thus ruled that the evidence excluded independent action of the toy manufacturers.¹⁶

The Supreme Court recently refused to hear a factually similar e-Books case to the one discussed in the E.U. portion of this article.¹⁷ The ruling of the U.S. Court of Appeals for the Second Circuit ruling is now final.¹⁸ It affirms the district court’s finding that Apple had participated in “a conspiracy among the [publishers] to raise prices of [e-Books].”¹⁹ The court held that vertical

agreements between Apple and the publishers were illegal *per se*, as they facilitated a horizontal price-fixing conspiracy among the publishers.²⁰

2.8. AUSTRALIA

The potential for competitors to form an anti-competitive contract, arrangement or understanding (agreement) that is facilitated by a third party is not a new concept in Australia. However, over the last couple of years it has attracted increased attention due to recent cases and a competition policy review which recommended the introduction of a concerted practices prohibition.

In Australia, it is unlawful to make an agreement between two or more actual or potential competitors that contains a cartel provision, such as a provision fixing prices. It is also unlawful to form an agreement between two or more parties that has the purpose, effect or likely effect of substantially lessening competition. The mere sharing of information between competitors (including through a third party) does not necessarily result in an agreement. Nor does it necessarily have the purpose or effect of substantially lessening competition. Whether such conduct has the purpose or effect of substantially

¹³ *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 220 (1939).

¹⁴ *Toys “R” Us, Inc. v. F.T.C.*, 221 F.3d 928 (7th Cir. 2000).

¹⁵ 221 F.3d at 935.

¹⁶ *Id.*, at 936.

¹⁷ *United States v. Apple*, 791 F.3d 290 (2nd Cir. 2015), *cert. denied*, 84 U.S.LW. 3258 (U.S. March 7, 2016) (No. 15-565).

¹⁸ *United States v. Apple, Inc.*, 791 F.3d 290 (2nd Cir. 2015).

¹⁹ *United States v. Apple, Inc.*, 791 F.3d 290, 297 (2nd Cir. 2015).

²⁰ *Id.*, at 325.



lessening competition is likely to be dependent upon the facts of each particular case. However, as outlined below, Australia's law may soon change to prohibit concerted practices that have the purpose or effect of substantially lessening competition.

The potential for competitors to form an anti-competitive agreement through a third party was recognised by the Court in 1996 in *News Ltd v Australian Rugby League Ltd* (No 2). *News Ltd* alleged that rugby league clubs had each entered agreements with the league organiser that contained exclusionary provisions. For an exclusionary provision to have been made it must have been part of an agreement between at least two persons that were competitive with each other. The Court found that there was powerful support for a hub and spoke agreement – that is the proposition that there was an arrangement amongst the clubs, to which the NSWRL and the Australian Rugby League were also parties.²¹

In *ACCC v Air New Zealand* (2014) the Federal Court considered allegations that Air New Zealand had breached the anti-competitive agreements prohibition by exchanging future surcharge pricing intentions with other airlines through surveys and meetings conducted by an industry association.²² The Court observed that the exchange of future pricing intentions would not necessarily result in a substantial lessening of competition.²³ Although the matter was heavily fact

specific, the Court ultimately concluded that the ACCC had not established its case. In respect of the allegations of price fixing on air cargo services ex Singapore, the Court concluded that the exchange of future surcharge intentions would not have resulted in a substantial lessening of competition for reasons including that surcharges formed only part of the overall price of air cargo services.²⁴

Recent proceedings brought by the ACCC relating to information sharing in the petrol industry reignited the focus on alleged anti-competitive hub and spoke agreements in Australia. In *ACCC v Informed Sources* (2014), the ACCC commenced proceedings against Informed Sources (a company that collected information about retail petrol prices and disseminated that information to subscribers to its service) and petrol retailers who subscribed to the service. The ACCC alleged that the information sharing between Informed Sources and the retailers had the effect or likely effect of substantially lessening competition in markets for the sale of petrol. In contrast to previous cases brought by the ACCC in the petrol industry alleging understandings between retailers to fix the price of petrol, the ACCC alleged in the Informed Sources case that the information sharing arrangements between Informed Sources and the retailers (rather than between the retailers directly) were likely to increase retail petrol

price coordination and cooperation and were likely to decrease competitive rivalry, such that they had the likely effect of substantially lessening competition.

The case was settled in December 2015, so the question of whether this type of conduct falls within the prohibition on agreements that substantially lessen competition was not ultimately determined. Most of the retailers involved settled on a basis that allowed them to continue using Informed Sources in the same way, provided the information received through the service is made available to consumers and third party organisations at the same time. However, two of the retailers settled earlier with the ACCC and agreed that they would not subscribe to the Informed Sources service or similar services for five years.

To address concerns about anti-competitive information sharing and perceived difficulties with fitting such conduct within the concept of an agreement, the recent competition policy review in Australia recommended introducing a new prohibition on concerted practices that substantially lessen competition. In November 2015, the Australian Government announced that it supported that recommendation. It is expected that draft legislation incorporating the proposed new provision will be released for consultation this year.

²¹ *News Ltd v Australian Rugby League Ltd* (No 2) (1996) 64 FCR 410 at [573].

²² *ACCC v Air New Zealand* (2014) FCA 1157.

²³ *ACCC v Air New Zealand* (2014) FCA 1157 at [1107].

²⁴ *Ibid.*



In *ACCC v Australian Egg Corporation Limited* (2016) the ACCC brought proceedings against the Australian Egg Corporation Limited (AECL), which was an egg industry representative, two egg producers, and some of their representatives, alleging that they attempted to induce a cartel arrangement between egg producers that were members of the AECL to cull hens or otherwise dispose of eggs, for the purpose of reducing the amount of eggs available for supply in Australia. The case is the most recent proceeding involving an alleged attempt to form a hub and spoke cartel agreement in Australia.

In February 2016, the Court found that the AECL and the relevant egg producers had not attempted to induce a cartel amongst egg producers.²⁵ The Court found that the AECL was accustomed to engaging in actions such as providing advice to egg producers in relation to reducing egg supply.²⁶ However, the Court noted the distinction between industry participants being brought to an appreciation of what is in their interests, independently of what others are doing, to act a certain way (which did not breach the cartel provisions), and industry participants being invited to agree to act in a certain way in the expectation of reciprocal conduct by others.²⁷ The Court found there was insufficient evidence to conclude that the options to reduce the oversupply of eggs were proposed as a form of collective action involving reciprocal obligations or understandings by the egg producers.



²⁵ *Australian Competition and Consumer Commission v Australian Egg Corporation Limited* [2016] FCA 69.

²⁶ *Ibid*, at [259].

²⁷ *Ibid*, at [381].

3. MIDDLEMEN LIABILITY IN CARTEL CASES





3.1. THE EU

At EU level, there is a lack of case law on (genuine retail) hub and spoke cartels, and even though on a European level a milestone judgment or decision has yet to be issued, there have been some cases that may shed indirect light on how the European institutions may approach hub and spoke cases. These cases are the *AC Treuhand I* and *AC Treuhand II* cases. Neither of these cases is a genuine hub and spoke case; each featured a the “hub/facilitator” that was not active on the cartelised market or on any related market. However, these cases will likely play a crucial role in the analysis of hub and spoke cases under EU competition law.

AC Treuhand is a Swiss consultancy firm that was found to have contributed to the implementation of a cartel and was fined for complicity in two separate cases. In both cases, AC Treuhand was entrusted with storing certain secret documents relating to the cartel on its premises, collecting and treating information concerning the commercial activity of the parties to the cartel, communicating to them the data thus treated, and completing logistical and clerical-administrative tasks associated with the meetings among those producers, such as reserving hotel rooms and reimbursing their representatives’ travel costs.²⁸

The *AC Treuhand I* case kicked off after a leniency application of one of the cartel parties. During its investigation, the European Commission found that AC Treuhand had played an essential role in the cartel by organising the meetings and covering up evidence of

the infringement. For those reasons, the Commission concluded that AC Treuhand had also infringed the competition rules and imposed a fine of €1,000.²⁹ The fine was rather modest due to the novelty of the policy followed in that area, but by levying the fine the European Commission sent a clear message: those who organise or facilitate a cartel must be aware that they are infringing competition law, and that heavy sanctions can be imposed on them.³⁰

On appeal, the Court of First Instance held that the fact that the consultancy firm was not active on the market on which the restriction of competition occurred does not exclude liability for the infringement as a whole.³¹ Indeed, the Court found that the mere fact that an undertaking has participated in a cartel only in a subsidiary, accessory or passive way is not sufficient for it to escape liability for the entire infringement.³² However, notwithstanding that the Court confirmed AC Treuhand’s fine in 2008, AC Treuhand was fined again in 2009 for very similar behaviour in the Commission’s decision in *AC Treuhand II*. As in the first case, AC Treuhand was not a party to the cartel agreement as such, but it played an essential facilitating role in the cartel that covered price fixing, market sharing, customer allocation and exchanges of commercially sensitive information. For those reasons, the European Commission imposed a total fine of €348,000 on AC Treuhand.³³ The General Court confirmed the fine in 2014, and AC Treuhand then appealed the case once more. Recently, the Court of Justice issued its decision in that case.³⁴

On 22 October 2015, the EU’s highest court dismissed AC Treuhand’s appeal and confirmed the General Court’s judgement. The Court of Justice stated that it cannot be inferred from its case law that Article 101(I) TFEU concerns only either (i) the undertakings operating on the market affected by the restrictions of competition or indeed the markets upstream of that market or neighbouring market or (ii) undertakings which restrict their freedom of action on a particular market under an agreement or as a result of a concerted practice.³⁵ The Court’s well established case law refers generally to all agreements and concerted practices which, in either a horizontal or vertical relationship, distort competition in the internal market, irrespective of the market in which the parties operate, and that only the commercial conduct of one of the parties needs to be affected by the terms of the arrangements in question.³⁶

The Court of Justice confirmed that, by playing an essential role in the infringements at issue, the conduct adopted by AC Treuhand was directly linked to the

²⁸ Case T-99/04, *AC Treuhand v Commission* [2008] ECR II-1501, para 2.

²⁹ COMP/E-2/37.857 – Organic Peroxides.

³⁰ Case T-99/04, *AC Treuhand v Commission* [2008] ECR II-1501, para 7.

³¹ Case T-99/04, *AC Treuhand v Commission* [2008] ECR II-1501, para 127.

³² Case T-99/04, *AC Treuhand v Commission* [2008] ECR II-1501, para 131.

³³ COMP/38.589 – Heat Stabilisers.

³⁴ Case C-194/14P, *AC Treuhand v Commission*, not yet published.

³⁵ Case C-194/14P, *AC Treuhand v Commission*, not yet published, para. 34.

³⁶ Case C-194/14P, *AC Treuhand v Commission*, not yet published, para. 35, and the case law cited.



parties' efforts in the cartel, regarding both the negotiation of the parties' cartel obligations and the monitoring of the cartel's implementation. As a result, the Court concluded that the actions undertaken by AC Treuhand did not constitute mere peripheral services that were not connected to the parties' obligations to the cartel in order to ensure competition restrictions.³⁷ Furthermore, the Court was also of the opinion that AC Treuhand could have reasonably foreseen that its conduct was incompatible with the EU competition rules.³⁸ As a result, the Court dismissed AC Treuhand's appeal in its entirety and confirmed the General Court's judgment and the fine that had been imposed on AC Treuhand, thus confirming cartel middleman liability.

3.2. THE UNITED STATES

Although not entirely apposite to the *AC Treuhand* fact pattern above, American courts have reviewed, for anticompetitive conduct, agreements limiting competition in one market through a company owned by competitors in another related market. In *American Needle, Inc. v. National Football League*, the United States Supreme Court ruled that the decisions "by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions that deprive the marketplace of independent centres of decision making... and therefore of actual or potential competition."³⁹ The implication of trade associations in

their members' economic activities may also be subject to antitrust scrutiny. Mere membership and participation in a trade association⁴⁰ and conduct consistent with the independent economic interest of trade associations⁴¹ generally do not offend the antitrust laws. When trade associations have a purpose or effect of unreasonably restraining trade, however, courts have found that trade associations may run afoul of Section I of the Sherman Act.⁴²

³⁷ Case C-194/14P, *AC Treuhand v Commission*, not yet published, para. 39.

³⁸ Case C-194/14P, *AC Treuhand v Commission*, not yet published, paras. 42-46.

³⁹ *American Needle, Inc. v. National Football League*, 560 U.S. 183, 197 (2010) (internal citations and quotations omitted).

⁴⁰ See generally *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 567 n.12 (2007).

⁴¹ See *American Council of Certified Podiatric Physicians & Surgeons v. American Board of Podiatric Surgery*, 185 F.3d 606, 620 (6th Cir. 1999).

⁴² See e.g., *Realcomp II, Ltd. v. FTC*, 635 F.3d 815, 824-25 (6th Cir. 2011) (Owned by several associations of competing real-estate brokers, Realcomp maintained several real-estate related policies. The Court found that one of the policies challenged "constitute[d] an agreement governing the Realcomp [multiple listing service] among the Realcomp members. Realcomp is, therefore, a contract, combination, or conspiracy.").

4. PRICE SIGNALLING



4.1. THE EU

In a hub and spoke scenario, information exchanges could amount to a punishable cartel. A comparable problem arises with regard to unilateral public announcements of future prices or of conceivable sensitive information. Communicating such factors as prices or volumes to customers also forms an essential part of competition and is day-to-day practice for many companies. However, since competition authorities are stretching the boundaries of competition law, these unilateral price communications could potentially amount to a concerted practice, since the communicated information may also be noted by competitors, who take it into account when determining their own commercial conduct.

Nonetheless, the EU's 2011 Horizontal Guidelines show that in a case of price signalling, finding a competition law infringement is highly dependent on the facts.⁴³ The guidelines state: "Where a company makes a unilateral announcement that is also genuinely public, for example through a newspaper, this generally does not constitute a concerted practice within the meaning of Article 101(1). However, depending on the facts underlying the case at hand, the possibility of finding a concerted practice cannot be excluded, for example in a situation where such an announcement was followed by public

announcements by other competitors, not least because strategic responses of competitors to each other's public announcements."

Unfortunately, due to the scarcity of case law on price signalling, the conditions under which price signalling becomes a punishable anti-competitive practice are still unclear. This scarcity can be explained, since most companies, subject to a price signalling investigation, have opted for behavioural commitment decisions, rather than taking any risk for an often significant fine.

A recent example is the container liner shipping investigation by the European Commission. The 15 container liner shipping companies under investigation offered commitments in order to address the European Commission's concerns relating to concerted practices through price signalling. The European Commission has concerns that the container liner shipping companies' practice of publishing their future intentions to increase their prices may harm competition. Although the container liner shipping companies have not admitted to any anti-competitive behaviour, they agreed to offer binding commitments to settle the European Commission's investigation.

These announcements, known as General Rate Increases or GRI announcements only indicated the increase in U.S. Dollars per transported container unit (as an


amount or percentage of the change), the affected trade route and the planned date of implementation. The GRI announcements were generally made 3 to 5 weeks before their implementation, and during that period other container liner shipping companies would announce similar increases.

The European Commission's concern was that the GRI announcements may not provide full information on the new prices to customers, but merely allowed them to explore each other's pricing intentions and subsequently coordinate their behaviour.

To address the European Commission's concerns, the container liner shipping companies offered to stop publishing the GRI announcements in their current form. In order for customers to be able to understand the and rely on their price announcements, the announcements will have to be more transparent and include at least the five main elements of the total price (i.e. the base rate, bunker charges, security charges, terminal handling charges and peak season charges, if applicable). Furthermore any future announcement shall be binding on the carriers as a maximum price and will not be made more than 31 days before their entry into force.

The commitments will be made legally binding by the European Commission and would apply for three years. However, there are two exceptions. The commitments

⁴³ Communication from the Commission, Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements, point 63.



would not apply to communications with purchasers who on that date have an existing rate agreement in force on the route to which the communication refers, and to communications made during bilateral negotiations or communications tailored to the needs of a specifically identified purchaser.

If a company would break one of the agreed commitments, the European Commission can impose a fine of up to 10% of the company's worldwide turnover, without having to find a competition law infringement.

4.2. THE NETHERLANDS

In January 2014, the Netherlands Authority for Consumers and Markets (the ACM) ended an investigation into mobile telephony operators KPN, Vodafone and T-mobile with a commitment decision.⁴⁴ During its investigation, the ACM had identified anti-competitive risks of public statements made by the operators about possible future changes to their commercial terms. These statements included media reports, speeches, presentations and contributions to panel discussions at conferences, as well as interviews through both traditional and digital media.

By way of example, the AMC mentioned a statement made by a representative of one of the mobile operators at a conference that is considered the most important telecom event in the Netherlands. This representative

publicly announced that his company was considering the reintroduction of separate connection fees (payable by customers who conclude a new contract). The ACM found internal documents of other mobile operators, showing that they had taken note of the announcement. The ACM considers it a risk to competition if companies take note of (and may follow) public statements of their competitors about intended future changes to their commercial policies, as this can lead to a collusive market outcome which is harmful to consumers.

The three mobile operators therefore made the commitment to the ACM to refrain from public statements about any intention to change commercial policies that might be unbeneficial to consumers when the company's internal decision to adopt the change is not yet final. They also promised to incorporate this commitment into their compliance programs and to give the matter special attention in employee training workshops.

The ACM declared the commitments binding on the mobile operators, which risk being fined if they do not act in accordance with such commitments. Due to the nature of a commitment decision under Dutch competition law, the ACM did not have the opportunity to formally decide that the public announcements at issue actually did violate the cartel prohibition. However, the statement of reasons for the decision

leaves little doubt on the ACM's conviction that public announcements in circumstance such as those in the case at hand may well be within that prohibition's scope.

4.3. THE UK

In January 2014, following a two year investigation, the UK's Competition Commission ("CC", now forming part of the CMA) concluded that certain features of the British aggregates, cement and ready-mix concrete market had an adverse effect on competition. The CC required Lafarge Tarmac to sell one of its cement plants and Hanson to sell one of its ground granulated blast furnace slag (GGBS) plants to enhance competition in the cement and GGBS markets.

The CC found that certain large UK cement producers were using generic price announcement letters to their customers in order to facilitate the eon of their behaviour, potentially even accommodating the price increases of their competitors. On 22 January 2016, the CMA published the Price Announcement Order 2016, which prohibits UK cement suppliers from sending generic price announcement letters to their customers and instead, any price announcement letter has to be specific and relevant to the customer receiving it, including setting out the last unit price paid, the new unit price, and specific details of other charges that apply to the customers. The CMA recognises that while

⁴⁴ ACM decision of 7 January 2014, case number 13.0612.53. See also the press release at <https://www.acm.nl/en/publications/publication/14326/Commitment-decision-regarding-mobile-operators/>.



information can still leak back via customers, because price increases will be specific to each customer, this should mitigate the possibility for the announcements to continue the previous practice.

4.4. THE UNITED STATES

US courts have dealt with several iterations of price signalling over the years.⁴⁵ Yet “the dissemination of price information is not itself a per se violation of the Sherman Act.”⁴⁶ Indeed, the enjoinder of open advertisement of price fluctuation “comes dangerously close to precluding lawful pricing activity as part of vigorous price competition.”⁴⁷

Courts have held that signalling future prices is lawful as long as it serves a legitimate, procompetitive purpose, such as customer necessity.⁴⁸ However, courts may find evidence of unlawful behaviour in regard to the

publication of tentative prices.⁴⁹ Such publication of tentative prices has led the US Department of Justice to sue several airlines and an airline tariff publishing company. In that case, the airline companies used the airline tariff publishing company to communicate with each other about their prices: “they [i.e., the airlines] conducted negotiations, offered explanations, traded concessions with one another, took actions against their independent self-interests, punished recalcitrant airlines that discounted fares, and exchanged commitments and assurances – all with the goal of reaching agreements to increase fares, eliminate discounts, and set fare restrictions.”⁵⁰

In the healthcare sector, the DOJ and the Federal Trade Commission issued a joint statement creating safety zones for price or personnel-related cost surveys, according to which those agencies would not challenge

the exchange of price and cost information absent extraordinary circumstances. To fall within the ambit of the safety zones, the following requirements must be met: (i) “the survey is managed by a third-party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association)”;

(ii) “the information provided by survey participants is based on data more than 3 months old”; and

(iii) “there are at least five providers reporting data upon which each disseminated statistic is based, no individual provider’s data represents more than 25% on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.”⁵¹

Similar safety zones have been applied in other industries as well.⁵²

⁴⁵ See for instance *Maple Flooring Manufacturers Ass’n v. United States*, 268 U.S. 563, 584-85 (1925) (upholding an open exchange dealing with statistical information regarding past prices and other data that nonetheless maintained customer anonymity).

⁴⁶ *United States v. Citizens & S. Nat’l Bank*, 422 U.S. 86, 113 (1975).

⁴⁷ *United States v. Gen. Motors Corp.*, 1974 U.S. Dist. LEXIS 6569, at *58 (E.D. Mich. 1974).

⁴⁸ See e.g., *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.*, 971 F.2d 37, 54 (7th Cir. 1992) (the announcements “served important purpose in the industry” because customers “bid on building contracts well in advance of starting construction and, therefore, required sixty days’ or more advance notice on price increases”).

⁴⁹ See e.g., *In re Petroleum Prods. Antitrust Litig.*, 906 F.2d 432, 445-48 (3rd Cir. 2004).

⁵⁰ *United States v. Airline Tariff Publishing Co.*, 59 Fed. Reg. 15,225, 15,230 (Mar. 31, 1994).

⁵¹ DOJ and FTC, *Statement on Provider Participation in Exchanges of Price and Cost Information (Statement 6)* (Aug. 1996).

⁵² For ground transportation, see DOJ Bus. Review Letter to Am. Trucking Ass’n, 2002 DOJBRL LEXIS 11 (Nov. 15, 2002) (allowing for a national trucking association to circulate a model contract to its members to be used on a voluntary basis, either in whole or in part, and lacking any reference to price, rates or charges). For consumer telecommunications, see DOJ Bus. Review Letter to National Consumer Telecommunications Data Exchange, 2002 DOJBRL LEXIS 1 (Mar. 12, 2002) (allowing for an expansion of credit information exchange to other utility industries).



4.5. AUSTRALIA

Since 2012, the Australian *Competition and Consumer Act 2010* has had a specific division regulating the anti-competitive disclosure (both public and private) of pricing and other information.⁵³ However, the provisions currently only apply to the banking sector and there have not been any cases applying the provisions. In 2015, a competition policy review recommended that the provisions be repealed on the basis that they are not fit for purpose (including because the prohibition on public disclosure of prices may over-capture pro-competitive or benign conduct).

In other sectors, the exchange of information about matters such as price is currently considered under the cartel prohibitions and the general prohibition on agreements that substantially lessen competition in a market. However, as outlined in section 2 above, the competition policy review has recommended the introduction of a new prohibition on concerted practices that have the purpose, effect or likely effect of substantially lessening competition. The competition policy review's final report states that a concerted practice "would include the regular disclosure or exchange of price information between two firms,

whether or not it is possible to show that the firms had reached an understanding about the disclosure or exchange". The Australian Government is expected to introduce draft legislation this year incorporating the proposed new prohibition and the repeal of the price signalling provisions.

⁵³ Division IA of Part IV.

5. CONCLUSION





Both price signalling and vertical information exchanges could amount to an Article 101 infringement without the infringing company being well aware of it. This was particularly the case when applying the first “reasonable foreseeability” test which was very ambiguous and easily satisfied. This reasonable foreseeability test rightfully concerned a lot of undertakings, especially since the exchange of sensitive information between undertakings operating at a different level of the production/distribution chain is a necessity in commercial relations.

It is precisely because of the necessity of the exchange of certain sensitive information in vertical commercial relations that UK Court of Appeal adopted a more nuanced and appropriate approach, a state of mind test. The UK Court of Appeal found it legitimate “for a manufacturer to ask its distributors, as a matter of routine, to inform it of the prices at which and the terms on which they sell its products, which it may wish or

need to be aware of for its own commercial purposes and in the context of the on-going relationship with each distributor separately.”⁵⁴ This approach seems to be followed by most competition authorities in the EU.

While this test remains rather ambiguous, it is less easily satisfied than its predecessor. In fact, since competition authorities started with applying the state of mind test, this test was only considered to be met in cases where there was indeed collusion.

A similar conclusion can be drawn in relation to price signalling. While the conditions which the price signalling has to satisfy in order to constitute a concerted practice are not entirely clear, most companies should not be too reluctant to communicate their prices to their customers. The horizontal guidelines are clear on the point that as long as the announcements of future prices are sincere and unequivocal, they do not amount to illegal price signalling. However, as is the case in

vertical information exchanges, caution is advisable. Notwithstanding that competition authorities have only opened investigations where there was evidence of collusion, companies should not communicate more information than what is necessary, and only make announcements when their commercial decisions are final.

In the United States, the e-Books decision that the Supreme Court refused to review will allow litigants to claim that other alleged hub and spoke arrangements should be analysed under the per se rule, not under the rule of reason. This may encourage litigants to bring more claims under the hub and spoke theory.

“Middlemen” and price signalling are not currently under such a spotlight but remain issues that are part of the landscape in the American antitrust system.

⁵⁴ Cases 2005/1071, 1074 and 1623, *Argos Limited and Littlewoods Limited v Office of Fair Trading and JBB Sports plc v Office of Fair Trading* [2006] EWCA Civ 1318, para 99.



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GLOBAL UPDATES





AUSTRALIA

It's OK to agree: the High Court of Australia endorses agreed civil penalties

I. AT A GLANCE

Regulators and businesses can once again make joint submissions to the court proposing agreed penalties in civil penalty proceedings, after the High Court of Australia unanimously reversed a Full Federal Court decision that had held it was impermissible for parties to do so.

For regulators and the businesses they regulate, the decision provides a welcome return to the approach which had prevailed before the Full Federal Court's decision. It means that parties can negotiate settlements of civil investigations commenced by Australian regulators with greater confidence in the predictability of outcomes, and in avoiding the time and cost of contested litigation.

2. BACKGROUND

The Fair Work Building Industry Inspectorate had sought civil penalties against two unions for alleged breaches of the Building and Construction Industry Improvement Act 2005 (Cth). The unions agreed to pay penalties in agreed amounts for the alleged breaches, and the Director of the Inspectorate commenced

proceedings in the Federal Court, requesting the Court to award penalties in those amounts, subject to the Court's discretion.

However, the Federal Court and then the Full Federal Court, applying the High Court's decision in *Barbaro v R* (2014) 253 CLR 58, held that the submissions about penalties were inadmissible. In *Barbaro*, the High Court had held that it was impermissible for criminal prosecutors to make submissions about the sentence that should apply. The Full Federal Court in *Director, Fair Work Building Industry Inspectorate v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 59 (CFMEU) applied the same principle to civil penalty proceedings, finding that the penalty process in criminal and civil proceedings were similar in nature.

3. THE HIGH COURT'S DECISION

The High Court found that the Full Federal Court in *CFMEU* mistakenly conflated the task of criminal sentencing and the task of fixing civil pecuniary penalties. Civil proceedings are an adversarial contest in which the scope of relief is largely framed within the choice

of the parties, allowing for settlements and court-approved compromises. This is not true of criminal proceedings, which are accusatorial in nature. There are also significant differences in the burden of proof as well as the role of criminal prosecutors and the court in criminal proceedings as distinct from regulators and the court in civil proceedings.

The High Court also emphasised the important public policy involved in promoting predictability of outcomes in civil penalty proceedings. The previous long-standing practice of receiving and, if appropriate, accepting submissions about civil penalties was consistent with that policy, because it increased the predictability of outcome for both regulators and the regulated. It also encouraged early acknowledgement of wrongdoing and the opportunity to avoid expenditure of resources on lengthy and complex litigation.

Nor was that approach inconsistent with the court's independent discretion to fix a penalty (as the Full Federal Court had held): in every case, the court needs to be satisfied that the penalty submitted is appropriate in the circumstances.



4. IN PRACTICE

While the High Court's decision offers greater certainty of outcome, and the opportunity to avoid the costs of contested litigation, it is important to remember that a court is able to reject a penalty submission it considers inappropriate in all the circumstances. It is up to the parties to persuade the court that any jointly proposed penalty should be adopted by the court.

This means it is important that when approaching negotiations with regulators to settle civil penalty proceedings, businesses bear in mind the need to justify

any penalty figure reached against the particular facts of the case. Joint submissions about penalties, and agreed statements of facts to support those submissions, need to be carefully formulated and supported by the evidence (as well as consistent with case law about penalties in equivalent circumstances). Failure to do so runs the risk that a court will not accept the submitted penalty as appropriate, and that the parties will not have achieved the certainty they sought.



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Australian Government supports simplifying and expanding the scope of certain competition laws but does not support extending the law's extra-territorial application

On 24 November 2015, the Australian government released its response to the recommendations of the Competition Policy Review (the Harper Review). The government supported the majority of the Harper Review's recommendations in full or in part. The reforms are likely to simplify cartel and merger clearance laws and expand anti-competitive arrangement laws to prohibit certain concerted practices.

I. THE EXTRATERRITORIAL APPLICATION OF AUSTRALIA'S COMPETITION LAW

The Harper Review recommended that Australia's competition law apply to overseas conduct insofar as the conduct relates to trade or commerce within Australia or between Australia and places outside Australia. However, the government did not, at this stage, support the removal of the requirement that the contravening firm has a connection with Australia in the nature of residence, incorporation or business presence. Therefore, at least for now, the application of Australia's competition laws to businesses engaging in conduct outside of Australia will continue to be limited by this requirement.

2. KEY COMPETITION LAW REFORMS

Businesses that are subject to the Competition and Consumer Act 2010 should be aware of the following key reforms that the government has supported:

- 1 simplifying the cartel conduct provisions and broadening the joint venture exemption to not limit legitimate commercial transactions
- 2 extending the anti-competitive arrangements provision to prohibit persons from engaging in a concerted practice that has the purpose, effect or likely effect of substantially lessening competition
- 3 simplifying the exclusive dealing provisions including making third line forcing subject to a competition test rather than a per se prohibition
- 4 retaining the per se prohibition on resale price maintenance conduct but enabling businesses to notify the ACCC of the conduct to seek immunity from contravening the law
- 5 creating a more streamlined statutory formal merger review process and encouraging a more timely and transparent informal merger review process

THE FUTURE OF AUSTRALIA'S MISUSE OF MARKET POWER PROHIBITION

The key outstanding issue, which the government is seeking views on, is the future of the misuse of market power prohibition under the Act. Australia's misuse of market power prohibition differs significantly to overseas laws that are aimed at prohibiting similar conduct. Key issues with Australia's current provision include:

- the requirement to prove the corporation took advantage of its market power in engaging in the conduct and
- the prohibition being based on the corporation's subsection purpose, which is a difficult element to prove

One option being explored is the inclusion of an "effects" test to capture conduct by a corporation with market power that has the purpose, effect or likely effect of substantially lessening competition in a market. This will significantly broaden the provision's application. The government is expected to announce its final position in relation to the misuse of market power provision in March 2016.



WHERE TO FROM HERE?

Although the government has supported a number of Harper's recommendations in principle, its response did not contain a lot of detail regarding their implementation. The government will now prepare exposure draft legislation for consultation, which will demonstrate the full extent of the proposed changes to the law.



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ROMANIA

Amendments to the Romanian Competition Law in force as of 1 January 2016

The amendments to the Romanian Competition Law no. 21/1996 (Competition Law) entered into force on 1 January 2016. According to the President of the Romanian Competition Council (RCC), the recent amendment of the Competition Law constitutes the final step in aligning the domestic competition rules with the EU competition rules.

The most important amendments are the following:

- The scope of the documents covered by legal privilege has been narrowed down. Thus, the interdiction for the RCC inspectors to seize during dawn-raids preparatory documents created by the investigated undertaking for the exclusive purpose of exercising its right of defence has been excluded. This exclusion is in contrast with the provisions of the Commission's Best Practices in proceedings concerning Articles 101 and 102 TFEU, as well as with the established European case-law, according to which the legal professional privilege also covers (i) the preparatory documents drawn up by the investigated undertaking for the exclusive purpose of seeking legal advice from a lawyer in exercise of the rights of the defence, even

if not exchanged with a lawyer or not created for the purpose of being sent physically to a lawyer and (ii) internal notes circulated within an undertaking which are confined to reporting the text or the content of communications with independent lawyers containing legal advice. As such, the benefit of the legal privilege is only maintained for those communications carried out between an undertaking and its lawyer, exclusively made within and for the purpose of exercising the undertaking's defence right, following the opening of the procedure or previously, subject to the condition that such communications are related to the subject-matter of the procedure.

- Competition inspectors are vested with additional prerogatives that allow them to interview any individual or legal entity that consents to it. However, the provision of inexact or misleading information during the interview might trigger the application of a fine to the undertaking involved for such provision, without prejudice to the quality of the interviewee i.e. an individual or the legal representative of the undertaking.

- The express acknowledgment of a breach of competition rules, still available for all types of competition law breaches, must occur before the hearings. Additionally, if undertakings submit a proposal for acknowledgement prior to the communication of the investigation report (which is similar to the Statement of Objections issued by the European Commission) they can benefit from a simplified procedure whereby the RCC will issue a simplified investigation report. The amended acknowledgment procedure is very similar to the settlement procedure existing at the EU level. The acknowledgement triggers a decrease in the fine level of up to 30%, subject to a limitation consisting in a minimum fine of 0.2% of the turnover obtained in the previous fiscal year to be applied.
- The request for the annulment of the RCC's decision in court in relation to the issues comprised by the acknowledgment results in the loss of the reduction benefit, hence the fine shall be imposed by the court following the RCC's request in this respect. This appears to be a departure from the settlement procedure available at EU level.



- A new concept has been introduced, namely competition whistle-blowers, referring to those individuals that voluntarily provide the RCC with information regarding possible infringements of Competition Law. The provision of information by the whistle-blower will not be deemed as a breach of the employee's confidentiality obligation.

- The maximum threshold of the authorisation fee for economic concentrations is increased. As such, the previous figures ranging from EUR 10,000 to EUR 25,000 are currently applicable only in cases where the RCC issues a clearance decision without initiating an investigation in relation to the proposed economic concentration. Should the RCC have strong doubts in relation to the compatibility of the economic concentration with the competitive environment, it may initiate an

investigation. If the RCC decision is issued pursuant to such an investigation, the beneficiaries will pay an authorisation fee ranging between EUR 25,001 and EUR 50,000, irrespective of whether it is a clearance or a conditional decision subject to commitments.

Undertakings should consider the recent amendments to the Competition Law, since these could impact them directly, especially in cases where such undertakings are subject to a RCC investigation or involved in a concentration.



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RUSSIA

Amendments to the Russian Competition Law – Further route to improvement

Long-awaited amendments to the Russian Competition Law have come into force. These amendments are the result of the persistent work of the Russian antimonopoly authority (FAS) together with the legal and business community, and they affect a number of areas: merger control, unfair competition, abuse of a dominant position, anticompetitive agreements, appeal procedures, and others.

Our aim here is to provide corporate counsel with an overview of major aspects of the amendments:

I. JOINT ACTIVITY AGREEMENTS SUBJECT TO FAS PRIOR MERGER CONTROL CLEARANCE

The Competition Law now requires that the conclusion of a joint activity agreement between competing businesses (JAA) in Russia be subject to prior merger control clearance if certain financial thresholds are exceeded.

Since the concept of JAAs has not been defined by Competition Law, there is uncertainty as to which deals should be approved. FAS previously clarified that JAAs are formed where the parties combine their resources and/or undertake mutual investments to achieve the purposes of and jointly bear the risks associated with

the joint activity project, which is a broad concept. In principal terms, a JAA should be the equivalent of a joint venture agreement; however, other contracts (such as SHA, joint manufacturing, or joint marketing) between competing businesses could similarly trigger the filing obligation.

An important feature of the JAA being subject to FAS clearance is that the contracting parties should be “competitors” or “potential competitors”. These concepts and their application for merger control purposes have already raised questions. In particular, since the law has not narrowed the rule to the market on which the joint activity will be performed, company groups with diversified and to a certain extent overlapping businesses could formally be deemed competing and their deals could fall under the new requirement even if they are not competitors with regard to the subject matter of the joint activity. This issue has surfaced in the context of the assessment of investments made by strategic investors.

Finally, although the law specifically refers to joint activity in the Russian Federation, it is possible that FAS may apply the clearance requirement to certain cross-border or foreign JAAs which have an impact on the Russian market. This aspect needs to be clarified.

I.1 Financial thresholds

Prior clearance for the conclusion of a JAA is required if:

- 1 the aggregate worldwide group asset value of the parties concluding the agreement exceeds RUB7 billion (approximately US\$93 million) based on the latest balance sheet or
- 2 the aggregate worldwide group revenue of the parties for the previous calendar year exceeds RUB10 billion (approximately US\$133 million).

I.2 Restrictive Covenants

The new rule also includes the review and approval by FAS of the restrictive covenants (non-compete and equivalent provisions) which are normally included in JAAs. The detailed criteria and benchmarks for the analysis of such restrictions developed earlier for other context will now be applied during the merger control review of JAAs.

Therefore, it is possible during the merger control assessment to consider whether the restrictive covenant may be permissible and will be approved by FAS. When considering the petition, FAS will evaluate such provisions as part of the decision to approve the JAA.



While this new scrutiny is not itself good news for business, there is a silver lining. If FAS approves the conclusion of a JAA containing restrictive provisions, FAS shall not be able to claim later on that the restrictive covenants breach the law. This should protect the parties and mitigate the competition law risks. However, this is new and requires implementation and testing by practice.

1.3 Sanctions

The potential sanction for not filing for the FAS consent itself is an administrative fine for each party of up to RUB500,000 (around US\$6,500) and for their responsible officers of up to RUB20,000 (around US\$250).

The crucial risk arises if the JAA has not been approved and later on FAS finds that the restrictive covenants contained in the JAA amount to a cartel. This would lead to a risk of much more serious turnover fines as well as administrative and even criminal liability for the responsible officers.

1.4 Our Recommendation

Until the new merger control requirement is tested and clarified by practice, it is important to tread carefully and seek local competition law advice on almost any proposed cooperation or dealings possibly involving joint activity in Russia by parties which may be competing and/or have overlapping businesses within their groups.

2. WARNINGS FOR POTENTIAL VIOLATORS OF THE COMPETITION LAW

The amended Competition Law broadens the application of the warning procedure. A warning is a written document FAS issues with regard to a suspected breach of the Competition Law and in which FAS specifies the deadline for ceasing the conduct and the curative measures to be taken. If the warning is heeded and the terms set forth are complied with, FAS will not initiate a case. FAS shall not initiate a case and issue penalties in the relevant contexts without first issuing a warning.

Previously, FAS issued warnings in a limited number of cases regarding the abuse of a dominant position:

- 1 imposition of unfavourable conditions not related to the subject matter of the contract and
- 2 unjustified refusal to supply.

The procedure has been effective and its application has been expanded.

The list of the types of cases subject to the warning procedure have been expanded to include:

- 1 an abuse of a dominant position in price and other trade discrimination
- 2 unfair competition in discrediting; misleading consumers; making incorrect comparisons abusing commercial secrets and other types of unfair competition and
- 3 an anticompetitive action of a state body or organisation.

3. NON-DISCRIMINATORY ACCESS

The application of rules of non-discriminatory access is now expanded beyond natural monopolies. Such rules may now be established by the Russian government for an undertaking with a market share exceeding 70%. This could apply if FAS determines that the undertaking has abused its dominant position.

If adopted, the rules shall contain a list of products to which the non-discriminatory access shall be provided, a list of information subject to mandatory disclosure, the procedure for selecting counterparties and the substantive contractual terms. The undertaking concerned will be bound to these requirements.

It is not certain which industries could be regulated first and the extent to which this mechanism will be applied. In light of the unsettled situation, it is wise for businesses having a market share close to the 70% benchmark to review their business practices and to monitor these developments of non-discriminatory access regulations.

4. CLARIFYING UNFAIR COMPETITION RULES

The new amendments clarify the concept of unfair competition based on law enforcement practice over the past years. Although no revolutionary changes, in our view, are introduced, the amendments shed light on key features for determining when the behaviour of companies may be deemed illegal and establish an expanded list of prohibited conduct.



The changes will hopefully lead to a more consistent approach in classifying certain business behaviour and boost law enforcement.

In view of such changes it is advisable to obtain a consultation of counsel before implementation of advertising and marketing campaigns.

5. APPEALING DECISIONS OF TERRITORIAL BODIES OF FAS

It is now possible to appeal a decision of a FAS territorial body at the federal FAS level if such a decision contradicts FAS's common interpretation of law. A specially formed collegial body in FAS will review appeals within three months.

This is an important improvement since territorial FAS bodies have not consistently interpreted and applied the law in a uniform manner and courts are not always familiar with the concepts of the Competition Law. Allowing administrative level appeals of decisions of FAS territorial bodies at FAS Russia is aimed at bringing clarity and uniformity in the interpretation and application of the competition Law.

We note that the procedures for implementing this appellate process are still to be developed by FAS.



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Merger Control Reform

In late January, the Verkhovna Rada of Ukraine introduced changes to the Law of Ukraine “On Protection of Economic Competition”. These changes aim to simplify concentration control regime in Ukraine by reducing the financial thresholds and implementing a simplified procedure of concentration clearance.

According to the Law, the Antimonopoly Committee has to be notified of a concentration if one of the following criteria is met:

- 1 if worldwide value of assets or aggregate turnover of parties to the concentration in the last financial year exceeds €30 million, and the value of assets or turnover in Ukraine of at least two parties to the concentration in the last financial year exceeds €4 million each or
- 2 if the value of assets or turnover in Ukraine of the target undertaking, or of at least one founder of the new enterprise to be incorporated (taking into account control relations) in the last financial year exceeds €8 million, and the worldwide value of assets or aggregate turnover of at least one other party to the concentration in the last financial year exceeds EUR 150 million.

Also the introduced changes excluded the requirement to obtain a permit to concentration in cases where the market share of any party to a concentration (or aggregate share of parties in Ukraine) in the Ukrainian product market exceeds 35%.

The Law introduces the new simplified procedure of reviewing the merger notification, which lasts 25 days from the date of submitting the notification (instead of 45 days under general procedure). The parties to concentration may take advantage of the simplified procedure provided that:

- only one party to concentration is active in Ukraine or
- the aggregate market share of parties to concentration on the same market does not exceed 15% or
- the share of any party or aggregate shares of parties to a concentration on the key markets does not exceed 20%.

Additionally, the amended Law introduces possibility to hold preliminary consultations with the Antimonopoly Committee before filing the merger notification in order to clarify scope of information and documents to be submitted. Previously, such consultations could be held only after filing the notification to the committee.

Also, the fee for submission of the applications for concentration and concerted actions will be increased four times (up to €700 and €350, respectively).⁵⁵

The Law will become effective following signing by the President two months after its publication. We expect that this will occur this April.



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⁵⁵ UAH 20,400 and UAH 10,200, respectively.

DLA PIPER RAPID RESPONSE APP

The DLA Piper Global Rapid Response App provides our clients with legal crisis assistance at the touch of a button and complements the 24/7 global hotline to assist them in a legal crisis.

Crisis management lawyers and communications professionals are on call to answer any questions and help clients deal with any legal crisis they may face. Whether it is a dawn raid, an unannounced regulatory visit or interviews under caution, the app provides a useful first port of call.

This app is particularly relevant in the competition law context, providing a direct, immediate line to our antitrust team when timing is crucial. For instance, very recently, investigators carrying search warrants unexpectedly staged a dawn raid at a client's headquarters in Germany. Our Antitrust team was contacted using the Rapid Response hotline and was able to assist from the outset, advising on the scope of the search warrant and which documents could be legally seized or not seized, and suggesting solutions to mitigate the impact of the search on the client's business interests.

The App is available for free to download from the Apple Store, BlackBerry World and Google Play.



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KEY CONTACTS

DLA Piper is a global law firm 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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