Hogan Lovells

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Contents

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Individuals as whistleblowers

Cartels are by their nature hard to uncover and regulators rely – to a large part – on appealing to companies' wallets. Immunity and leniency policies, by which regulators offer to whistleblowing companies full immunity or discounts from fines, have been around for a long time. An increasing number of regulators have now added another instrument to their cartel enforcement toolkit: the offering of financial incentives to lure individual employees to come forward and whistleblow against their employers or former employers.

By way of example, the Hungarian Competition Council provides a reward calculated as a percentage of the cartel fine imposed, with a maximum limit of HUF 50,000,000 (approximately EUR 155,000 or USD 175,000). Similarly, the Taiwan Fair Trade Commission also offers a financial reward of potentially up to 20% of the amount of fines that it recovers. The Korean Fair Trade Commission is reported to generously offer up to KRW 3 billion (approximately EUR 2.2 million or USD 2.5 million).

Financial rewards, however, can only go so far in encouraging individuals to come forward and some regulators have recognised the importance of countering the strong disincentives of whistleblowing on the individual, including distress and loss of career prospects, by offering other means of support, such as the promise of anonymity.

The UK Model

The UK Competition and Markets Authority (CMA) offers a reward of up to GBP 100,000 (approximately EUR 115,000 or USD 130,000) to individual whistleblowers. In addition to financial rewards, the CMA states that it makes available specially trained officers to deal with individuals coming forward so as to protect the individual's identity from disclosure.

The financial reward offered by the CMA is arguably modest – a fact recognised by the CMA itself. Recently, there have been calls for the reward to be increased; in February of this year, Lord Tyrie (Chair of the CMA), wrote to the Secretary of State for Business, Energy, and Industrial Strategy, to advocate for offering even greater financial compensation, arguing that the current limits are unlikely to even cover the loss that a typical whistleblower would suffer as a result of losing their job.

There are also calls for stronger confidentiality safeguards. Currently anonymity in the UK is only protected by the CMA up to the moment the whistleblower becomes a witness, at which point their confidentiality is at the discretion of the UK Courts. This is an issue which may not be so easily fixed; the rights of the defence of the business under investigation may mean that the whistleblower's identity must be revealed. However, the CMA has called for an explicit duty for the Courts to give due weight to the importance of anonymous whistleblowing for the enforcement of competition law. Whilst this would not guarantee anonymity in 100% of cases, the increased likelihood of protection combined with even greater financial compensation may well help individuals make the tough decision to blow the whistle.

The European Commission's approach

The European Commission ("Commission") offers the opportunity for individuals to come forward to report on cartels by email, telephone or by anonymous message. Crucially, however, the Commission does not offer a financial reward to individuals reporting on cartels.

There are no proposals to introduce financial rewards, but the Commission has proposed a Directive in April 2018 to strengthen the protection afforded to persons (both legal and natural) who report breaches of EU law. This includes breaches of EU competition law. The proposed Directive envisages minimum standards across the EU for confidentiality, protection from retaliation and sufficient reporting mechanisms, in an effort to entice individuals to come forward. The proposed Directive is still working its way through the EU legislative process and is currently being discussed in the Council of the EU.

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The French Competition Authority issues its recommendations to lower prices of pharmaceutical products

Almost one and a half years after the launch of the sector inquiry (see here), the French Competition Authority (FCA) has released its conclusions on the functioning of competition in the pharmaceutical sector.

The FCA's recommendations mainly focus on increasing competition for over-the-counter pharmaceuticals at the retail level and the revision of the remuneration scheme of wholesalers.

Decreasing prices of over-the-counter pharmaceuticals

While supporting the preservation of pharmacists' monopoly in selling prescription medicines, the FCA formulated a number of recommendations aimed at (i) enhancing competition between pharmacists and (ii) decreasing the prices of over-the-counter pharmaceuticals.

- Facilitating the online sales of over-the-counter pharmaceuticals and personal care/beauty products, by authorizing pharmacists to:
  - Use paid internet referencing and comparator tools;
  - Pool their sale services under a single website;
  - Store the products intended for online sales in premises separate from their physical points of sale;
- Authorizing pharmacists to advertise personal care/beauty products and propose promotional actions as well as loyalty rebates for such products;
- Authorizing the delivery of certain health products (in particular, over-the-counter pharmaceuticals and in vitro diagnostic medical devices such as blood glucose meters) by retailers other than pharmacists; it being specified that the retailers should comply with the following conditions:
  - The health products must be displayed in a dedicated selling space;
  - A qualified pharmacist must be present during all opening hours; and
  - The pharmacist should not be incentivized by sales targets.

The FCA further recommends that pharmacists be empowered to provide certain medical acts and services (including vaccinations, detection of certain diseases, basic medical advices, and delivery of prescription drugs in case of benign diseases).

Disconnecting the wholesale margin from the price of pharmaceuticals

The remuneration level of wholesalers has been repeatedly called into question, as it is would not compensate for the public service obligations imposed upon wholesalers. The wholesale margin, which exclusively relies on the pharmaceuticals' prices, does not take into account the significant logistical costs borne by wholesalers as a result of their public service obligations.

The FCA therefore proposes to modify the calculation of the wholesale margin, so as to determine it on the basis of either:

- The volumes of products sold by wholesalers; or
- A lump sum, which would be adjusted according to the marketing specificities of the pharmaceutical concerned (e.g., for drugs subject to cold chain and for narcotic drugs).

Considering the significant financial impact it might have on the French public health insurance system, the FCA recommends that a thorough analysis be carried out before introducing such a modification of the wholesale margin calculation.

The FCA also issued some recommendations regarding biomedical laboratories, including encouraging the creation of large groups of biomedical laboratories, authorizing them to extend their geographical footprint, and authorizing price discounts offered to other biomedical laboratories and public hospitals.

While the government is likely to take over some of the FCA recommendations, such as the extension of the pharmacists' scope of activities, it might prove more reluctant as regards the opening up to competition of over-the-counter pharmaceuticals.

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Global enforcement trends and priorities: An update from the 2019 ABA Spring Meeting

Representatives from antitrust enforcement agencies around the world converged in Washington, D.C. last week to attend the American Bar Association's 67th Spring Meeting of the Section of Antitrust Law. Over 3,000 delegates attended the conference, including government officials from a number of international antitrust agencies. Represented agencies used this opportunity to communicate their enforcement priorities, as well as weigh in on key issues in merger review, antitrust litigation, and cartel enforcement. We provide key highlights below.

Merger enforcement

Close scrutiny of vertical mergers will continue

Vertical mergers remained a hot topic at this year's Spring Meeting. In the wake of the D.C. Circuit's recent affirmance of the district court's decision not to block the AT&T/Time Warner merger and the Federal Trade Commission's (FTC) votes to allow the Staples/Essendant and Fresenius/NxStage deals to go forward, officials from both agencies stated they will continue to closely scrutinize deals that present potential vertical issues. Department of Justice (DOJ) officials emphasized that the D.C. Circuit in AT&T/Time Warner acknowledged that the fundamental theory of vertical harm presented by DOJ was valid, that vertical mergers can harm competition, and that harm can also be shown by demonstrating nonprice effects (e.g., decreased product quality and reduced innovation). FTC Chairman Joe Simons likewise emphasized the willingness of the FTC to challenge deals on the basis of vertical theories where the documents, testimony, and economics work support such a challenge.

FTC and DOJ officials also discussed that they are considering efforts to revise the vertical merger guidelines, which were last revised in 1984 and are widely acknowledged to be of limited relevance today.

Officials from antitrust agencies outside the United States echoed much of what was said by DOJ and FTC officials. In particular, panelists acknowledged that while vertical theories of harm are similar in both the European Union and the United States, other jurisdictions such as China may scrutinize these issues even more closely.

Merger review timing remains a mixed bag

Another issue that was addressed was the timing of merger reviews in the United States. DOJ officials reported on the agency's progress in implementing new policies first announced by Assistant Attorney General Makan Delrahim in September 2018 to streamline merger reviews.

According to Antitrust Division Deputy Assistant Attorney General Barry Nigro, since the policy change was announced, the agency has opened 30 investigations, all of which are already closed or are on track to close within six months.

The FTC also clarified its perspective with respect to timing agreements. While noting that timing agreements are not required and that negotiations are not conditioned on the execution of a timing agreement, Bureau of Competition Director Bruce Hoffman made clear that if a party does not enter into a timing agreement, the FTC will treat the matter as though both sides are preparing for litigation.

The FTC's Technology Task Force will closely examine acquisitions of nascent competitors

FTC Chairman Joe Simons also discussed the new Technology Task Force within the FTC's Competition Bureau, initially announced in February, to target digital platforms and technology issues, including in particular the acquisition of nascent competitors. He noted that the Technology Task Force, which currently has 17 dedicated staff attorneys, will examine both consummated and unconsummated mergers.

Antitrust litigation

Technology companies are receiving increasing scrutiny

Tech issues were one of the major themes of this year's Spring Meeting.

From discussions of the indirect purchaser rule in the *Apple, Inc. v. Pepper* case before the Supreme Court to broader discussions of whether and to what extent regulators and courts should intervene in the operations of global technology companies, tech was a major focus of the panels. As many speakers noted, the outcome of *Apple v. Pepper* will affect not only technology companies but also any company that offers a platform for selling goods or services.

If the Supreme Court decides in favor of plaintiffs, platform-based businesses could face suits from multiple interrelated groups of users. Antitrust Division Principal Deputy Assistant Attorney General Andrew Finch indicated that DOJ has begun thinking about whether standards like the indirect purchaser rule should be applied mechanically, or if it makes sense to step back and look at the purpose of the rule. As many authorities conduct investigations into a wide range of tech companies' practices, from Google's shopping service to Facebook's data-gathering arrangements, the effects of changing legal standards will have far-reaching implications for everyday consumers, the economy, and other companies. Staying on top of these changes is imperative for all companies.

Companies facing a surge in state antitrust enforcement should consider early advocacy to address the policy concerns underlying investigations

Several panelists noted an increase in state antitrust litigation. States are also coordinating their enforcement efforts more than ever, with an uptick in large multistate cases. According to the state enforcers who attended the Spring Meeting, state enforcement priorities have been (1) investigations where the federal agency investigation has stalled; (2) cases that are instrumental to state policy (like the generics cases); and (3) cases of particular importance to state constituents such as data security and health care investigations. The National Association of Attorneys General (NAAG) continues to be active, starting a new task force within NAAG to review technology and antitrust related issues. State enforcers indicated a willingness to work with defense counsel who wanted to address the policy concerns underlying investigations. Defendants faced with state enforcement action should consult experienced antitrust counsel who can assist in assessing how to defend against investigations, particularly multistate coordinated efforts.

Companies should stay abreast of FTC guidance and state consumer protection laws

Consumer protection lawyers have been busy recently with both state and private enforcement on the rise. The FTC prioritized four key enforcement efforts: (1) privacy and data security; (2) actions against brands, influencers, and associated third parties that are not complying with the FTC's social media guidance; (3) deceptive pricing cases, such as where a retailer lists a higher price of an item along with a lower sales price, or where consumers allege that surcharges are hidden; (4) investigation of companies falsely offering student debt relief. It is important for companies to remain up-to-date with FTC guidance and state consumer protection laws, particularly if they collect consumer data, engage in social media advertising, or have a pricing structure that is not fully transparent to consumers.

Cartel enforcement

Throughout the Spring Meeting, antitrust and competition agencies around the world emphasized their commitment to investigating and prosecuting cartels. Several countries announced new or enhanced cartel enforcement regimes generally, while other agencies described specific improvements to their leniency regimes.

Given the globalization of cartel enforcement, companies need to ensure antitrust compliance globally

Several agencies either announced their first cartel enforcement action or said they were actively looking to bring their first case. Malaysia Competition Commission (MyCC) CEO Iskandar Ismail announced the resolution of the MyCC's first bid-rigging case and Australian Competition and Consumer Commission (ACCC) Chair Rod Sims explained that after years of ramping up, the ACCC is ready to bring cartel enforcement actions. Other jurisdictions, like Myanmar, Brunei, and Thailand, have recently passed new or updated competition laws that expand their cartel enforcement ability. Companies should review their compliance programs globally to ensure that they are in compliance with every region in which they operate or their goods are used.

Leniency remains a key component of cartel enforcement programs

Agencies around the world emphasized the continued importance of leniency programs as an enforcement tool. Multiple agencies described changes designed to enhance the effectiveness of their leniency programs or announced new or updated leniency programs altogether. For example, Japanese Fair Trade Commissioner Reiko Aoki explained that instead of providing a reduction in fines for the first five companies to come in for leniency, the Japanese Fair Trade Commission would now provide a fine reduction for all companies that self-reported cartel conduct. The Philippine Competition Commission described its newly instituted leniency program.

DOJ, however, recognized that as the number of jurisdictions with leniency programs grows, so does the cost for companies to apply for leniency. DOJ is developing a "best practices" guide for working with leniency applicants in cross-border investigation to increase the efficiency of cross-border investigation as well as to avoid duplicative fines and penalties.

The European Commission has new digital cartel-detection tools and DOJ is focused on government procurement cases

European Commissioner for Competition Margrethe Vestager announced that the European Commission is investing in digital tools to help detect cartels and has created a new whistleblower tool for agencies to alert the commission to cartel conduct. The DOJ provided two key updates. First, DOJ Deputy Assistant Attorney General for Criminal Enforcement Richard Powers emphasized that companies must timely cooperate with investigators to receive credit at sentencing. Timely cooperation is considered cooperation that begins at the start of the investigation. To timely cooperate, companies do not have to admit guilt but rather must work with investigators to uncover key facts. Second, DOJ is prioritizing the prosecution of companies whose anticompetitive conduct harms the government.

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A new target: The Antitrust Division focuses on criminal antitrust violations in public procurement

The Antitrust Division (Division) has recently prioritized the investigation and prosecution of criminal antitrust violations involving public procurement. Last week, the Division announced that two companies have agreed to plead guilty as part of an ongoing investigation into bid rigging and fraud on Department of Defense (DoD) fuel supply contracts for U.S. military bases in South Korea. The Division simultaneously unsealed an indictment charging seven individuals with violating criminal antitrust laws as well as committing fraud against the federal government. To date, five companies have pleaded guilty as part of the Division's probe into these DoD fuel supply contracts.

At a press conference announcing the plea agreements and indictment, Makan Delrahim – the Assistant Attorney General of the Division – explained that "[o]ne of the Antitrust Division's top priorities is to protect the US government and tax payers." Delrahim also said that the fuel supply investigation may spur investigations into other types of military supply around the world and that the DoD has "brought other matters to" the attention of the Department of Justice (DOJ). The top criminal antitrust official at the Division, Deputy Assistant Attorney General for Criminal Enforcement Richard Powers, echoed Delrahim's statements at the American Bar Association (ABA) white collar conference where he identified public procurement cases as a priority for the Division's criminal program.

Penalties for violating criminal antitrust laws in the United States are steep. Companies face maximum fines of US$100 million. In addition to criminal fines, the DOJ can pile on treble damages under both Section 4a of the Clayton Act and the False Claims Act (FCA) when the government is the victim of criminal antitrust conduct. For example, one of the companies that pleaded guilty in the fuel supply investigation – GS Caltex – has agreed to pay a total of US$104.17 million to the government in order to resolve the matter: US$46.67 million in criminal fines, US$14.88 million to settle the civil antitrust claims, and US$42.62 million to settle the FCA claims.

For individuals, the penalties are also severe. In addition to fines of up to US$1 million, individuals face imprisonment of up to 10 years. Foreign individuals are not protected from the consequences of indictment. The Division has previously extradited indicted non-U.S. citizens from countries such as Canada and Germany. The current administration also appears willing to consider extraditing individuals. In the recent fuel supply case, while Delrahim did not go into detail about the extradition process, he did say that the DOJ is exploring "every option for bringing these [indicted] individuals to the US" and has been in communication with the Korean Ministry of Justice "about access" to the individuals. According to Delrahim, the DOJ anticipates "full cooperation" with the South Korean authorities.

Given the Division's recent focus on public procurement and the high penalties at stake, companies that supply goods and services to the government need to enhance their compliance efforts. Companies should take a fresh look at their compliance programs to determine whether additional measures – such as compliance training for their employees – are necessary given the Division's heightened scrutiny. Companies may want to consider retaining outside counsel to evaluate the sufficiency of their compliance programs. If a company suspects that it has violated criminal U.S. antitrust laws, it should consult with experienced antitrust counsel to assess its best course of action.

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District Court denies FRAND breach of contract and Sherman Act summary judgment motions by ASUS and InterDigital

In a decision published in redacted form, Judge Beth Labson Freeman of the Northern District of California denied ASUSTek Computer Inc.'s and ASUS Computer International's (collectively, ASUS's) motion for summary judgment that InterDigital, Inc.'s (InterDigital's) standard essential patent (SEP) licensing practices breached its FRAND obligations. The court also granted-in-part and denied-in-part InterDigital's motion for summary judgment, rejecting a request to dismiss ASUS's Sherman Antitrust Act claim but granting summary judgment as to issues relating to judicial and promissory estoppel and as to a California competition law claim. ASUS Computer Int'l v. InterDigital, Inc., Case No. 5:15-cv-01716-BLF, ECF No. 367 (N.D. Cal. Jan. 29, 2018).

In 2008, ASUS and InterDigital entered into a patent license agreement (PLA). Under the PLA, InterDigital licensed certain SEPs to ASUS, including SEPs directed to the 2G and 3G cellular standards. Subsequently, around 2012, the parties began negotiations to extend the PLA to cover SEPs directed to the 4G cellular standard. These negotiations continued for several years, but no agreement was reached.

ASUS filed the present suit in April 2015, alleging violations of the Sherman Act, breach of contract related to InterDigital's SEP licensing practices, and various violations of state competition law. However, the case was stayed in August 2015, while some of ASUS's claims were sent to arbitration. The arbitration tribunal issued its decision in June 2016, finding many of the claims not arbitrable and returning the case to the district court for resolution.

In the district court case, InterDigital sought summary judgment on six issues, and was granted with respect to four:

- ASUS was judicially estopped from arguing that the PLA was not FRAND-compliant when first executed;
- ASUS could not invalidate the parties' PLA on a theory that the agreement, even if FRAND when signed, became non-FRAND based on subsequent, more favorable licenses granted by InterDigital;
- ASUS's claim for promissory estoppel did not apply to the French law-governed ETSI FRAND commitments; and
- ASUS's claim under California's unfair competition law was barred based on extraterritoriality.

Judge Freeman denied InterDigital's motion on the two remaining issues—namely, as to ASUS's Sherman Act claim and as to InterDigital's argument that ASUS was issue precluded from raising a claim under the Delaware Consumer Fraud Act.

ASUS moved for summary judgment on only a single issue: that InterDigital breached its commitment to license its SEPs on FRAND terms. In rejecting this motion, the court found disputed issues of material fact, and commented that the Central District of California's March 2018 *TCL v. Ericsson* decision (which ASUS relied on heavily in its motion) was not settled law and would not compel ASUS's conclusion that InterDigital breached its FRAND commitment.

The court's summary judgment ruling comes as the case is progressing toward a jury trial, presently scheduled for May 2019. Several of the issues addressed by the court's ruling are fact-specific to the case, but the rulings relating to breach of contract, most favorable licensees, and the Sherman Act are of particular interest for SEP licensing and illustrate how the legal landscape continues to evolve.

ASUS' "Most Favorable Licensee" Theory Rejected

The court held that ASUS was barred from arguing that the 2008 PLA was non-FRAND based on arguments ASUS had made during arbitration. This portion of the decision was substantially redacted, so the precise reasoning and facts are unclear. But the ruling highlights how arguments made during arbitration can have a substantial impact on related district court litigation.

Notably, ASUS had also argued that even if the PLA was FRAND when executed in 2008, it became non-FRAND when InterDigital subsequently licensed its SEPs to others at more favorable rates. ASUS contended that in doing so, InterDigital had discriminated among licensees. This argument seems to center on a theory that the FRAND obligation contains an inherent "most favorable licensee" (MFN) obligation, requiring reevaluation throughout the term of an agreement. InterDigital argued in response that the ETSI FRAND commitment does not contain an ongoing obligation to reevaluate and renegotiate a contract if it becomes non-FRAND. ASUS responded that InterDigital's negotiations with ASUS demonstrated an acknowledgement of such an obligation.

Judge Freeman rejected ASUS's arguments, concluding that the ETSI policy applicable to the PLA's SEPs, as well as the text of the PLA itself, lacked an MFN obligation. The court observed, in particular, that earlier versions of the ETSI policy expressly included an MFN provision, but that such an obligation was absent from the operative 1994 version. Judge Freeman further noted that the parties' experts, as well as the court in TCL v. Ericsson, reached the same conclusion. And as for InterDigital's negotiations with ASUS, the court explained that these communications were simply a recognition that FRAND obligations apply to the 4G renegotiation of the PLA, rather than acquiescence to an ongoing obligation to reevaluate the original PLA.

InterDigital's Motion for Summary Judgment on Sherman Act Claim Denied

The court held that genuine issues of material fact precluded summary judgment of ASUS's claim that InterDigital engaged in unlawful monopolization in violation of Section 2 of the Sherman Act. InterDigital put forward three arguments in moving for summary judgment: (1) that ASUS failed to identify a relevant market, because ASUS only made general reference to lists of patents InterDigital disclosed to ETSI, without actually identifying specific patents to which monopoly power could be attributed; (2) even assuming that InterDigital possessed monopoly power in a relevant market, that ASUS put forward no evidence that InterDigital engaged in any conduct that harmed the competitive process or was anticompetitive in nature; and (3) InterDigital disputed ASUS's claims of an "antitrust injury" (i.e., an "injury to competition in the market as a whole"), rather than injury to a competitor standing alone. The court rejected each of these arguments in turn.

On market definition, Judge Freeman explained that it was not necessary to define a relevant market by listing individual patents. Citing a Northern District of California opinion, Judge Freeman noted that, in the context of a standard setting organization (SSO), courts have allowed a relevant market to be defined in reference to the technologies that previously competed to perform functions covered by the purported essential patents, and that "technology markets" associated with the technology standard for which a defendant's patents are declared "essential" may serve as "relevant markets." Therefore, it was sufficient for ASUS to refer to the effect of InterDigital's actions on "Cellular Technology Markets," which ASUS's expert defined to include "technologies covered by patents incorporated into the 2G, 3G, and 4G cellular standards by SSOs, together with all other technologies that SSOs could have used in alternative cellular standards to perform the same or reasonably interchangeable functionalities."

In evaluating the anticompetitive conduct at issue, Judge Freeman agreed with ASUS's argument that InterDigital's purported misrepresentation of its intent to abide by FRAND commitments presented a triable issue of fact as to whether InterDigital engaged in anticompetitive conduct. Citing the Third Circuit's 2007 decision in *Broadcom v. Qualcomm*, the court explained that, in the context of a standard setting environment, "a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms," coupled with a "[SSO's] reliance on that promise" and "subsequent breach of that promise" by the patent holder, is "actionable" under the Sherman Act. While acknowledging it was a "close call," Judge Freeman found that the evidence ASUS presented regarding InterDigital's declarations to ETSI could lead a trier of fact to conclude that InterDigital never intended to abide by its FRAND obligations.

Finally, the court held that a reasonable trier of fact could find that InterDigital's conduct caused injury-in-fact to ASUS and created antitrust injury. Because a factual dispute existed as to whether InterDigital's offer was FRAND, the court explained that InterDigital's conduct could have caused harm to ASUS by forcing it to choose between licensing InterDigital's 4G SEPs on non-FRAND terms or effectively being cut off from the technology. The court noted that "similar logic" applied with respect to antitrust injury, since the market as a whole could have been precluded from practicing alternative technologies due to the anticompetitive conduct being alleged (i.e., misrepresentation by InterDigital of its intent to abide by FRAND obligations).

ASUS's Motion for Summary Judgment on FRAND Breach of Contract Claim Denied

As mentioned, ASUS had moved for summary judgment on the issue of whether InterDigital breached its FRAND obligation. One of ASUS's central contentions in its motion was that InterDigital's ongoing negotiations to expand the PLA to cover its 4G SEPs violated its ETSI FRAND obligations by engaging in discrimination among licensees. This portion of the decision contains many redactions, apparently regarding licensing terms and allegedly similarly situated licensees, but ASUS generally appears to argue that it is not being offered licensing terms similar to those offered to similarly situated companies. InterDigital emphasized in response that the ETSI FRAND inquiry is highly factual and subject to disputes as to similarly situated licensees and license comparison methodology, among other issues.

Judge Freeman denied ASUS's motion based on the existence of several genuine issues of material fact, and explained her view that ASUS read too broadly the non-binding and unsettled reasoning of *TCL v. Ericsson*. As one example of disputed facts, she identified that many factors contribute to the similarly situated licensee inquiry, and that the parties have presented conflicting evidence as to the particular companies that are similarly situated to ASUS. She further cited testimony by InterDigital President and CEO, as well as assertions by ASUS, as factually disputed by the parties, the precise details of which were redacted.

As for *TCL*, Judge Freeman explained that ASUS's reading of the decision overlooks its guidance that "[s]ales volume alone does not justify giving lower rates to otherwise similar firms." *TCL*, 2017 WL 6611635, at *33 (emphasis added by Judge Freeman). She stressed that *TCL* does not hold that volume discounts are *necessarily* discriminatory—only that this alone is not a legitimate basis for such discounts. She declined to hold that partial reliance on sales volume for discounts were discriminatory, and she commented that TCL's reasoning is, in any event, yet "non-binding" and "unsettled," based on its pending appeal to the Federal Circuit.

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Hong Kong Competition Commission expands leniency program

On 29 April 2019, the Hong Kong Competition Commission (**HKCC**) published the Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct (**Cooperation Policy**). In essence, the Cooperation Policy expands HKCC's Leniency Policy, published in November 2015, just before the full implementation of the Competition Ordinance.

The expansion occurs in two main directions. First, the benefits of the existing leniency program can only accrue to a single company involved in a cartel (*i.e.*, the first one to submit significant evidence on the cartel), while the Cooperation Policy is available to subsequent applicants. Second, the Cooperation Policy puts forward a new concept – "Leniency Plus" – which allows a company participating in a cartel to submit evidence of a new, separate cartel to HKCC and get credit for its cooperation in relation to both the "old" and "new" cartels.

More detail and more certainty

Under the Leniency Policy, if successful in an application for leniency, HKCC will not seek proceedings against the applicant in the Competition Tribunal (in Hong Kong, HKCC is not empowered to impose monetary penalties directly). However, one of the main drawbacks of the Leniency Policy was that it only applies to the first successful applicant who reports the cartel conduct to HKCC, and subsequent applicants could be left empty-handed.

To be fair, HKCC had indicated its willingness to reduce enforcement actions against subsequent cartel members which assist HKCC in the investigation. However, this willingness was expressed in relatively vague terms (*e.g.*, "rely on its enforcement discretion") and no specific benefits were mentioned (for example, the amount of a potential reduction of the fine) in the Leniency Policy. Generally, vague guidelines deter self-reporting on unlawful conduct. Unless a company is certain it can benefit from immunity or a reduction of fines, it will not have an incentive to self-report.

In that sense, the Cooperation Policy provides further clarifications. Under the new policy, HKCC stipulates the further incentives it is willing to extend to other companies which disclose cartel misconduct: a discount of up to 50% off the pecuniary penalty, which HKCC would otherwise recommend to the Competition Tribunal, is available.

More specifically, prior to the commencement of any Competition Tribunal proceedings, the first applicant under the Cooperation Policy (after the leniency applicant) will be given a recommended discount of up to 50%. Applicants coming forward thereafter will be given a recommended discount between 20% and 40%, depending on the timing, nature and value of the cooperation provided.

If a company cooperates with HKCC only after the commencement of enforcement proceedings against it, it may be given a recommended discount of up to 20%.

In addition, HKCC may agree not to bring any proceedings against current and former officers, employees, partners and agents of the applicant company, as long as they provide complete, truthful and continuous cooperation with HKCC's investigation.

As with its position on the Leniency Policy, we do not expect the Communications Authority – which enjoys parallel enforcement powers with HKCC in the telecoms sector – to adopt a similar program to the Cooperation Policy.

"Leniency Plus"

The Cooperation Policy also proposes a novelty in Hong Kong competition law, the "Leniency Plus" system.

Under that system, a company cooperating with HKCC in relation to one cartel may also be involved in a second, unrelated cartel. If the company applies for leniency for the second cartel, it may not only be granted immunity for the second cartel, but HKCC may apply an additional 10% discount on the fine HKCC recommends to be imposed for the company's involvement in the first cartel.

This idea of extending cooperation from a first to a second cartel comes from the "Amnesty Plus" program used in the United States by the Department of Justice (DOJ). HKCC's Chief Executive Officer previously prosecuted cases at the DOJ, and the DOJ's program has been very successful. Hence it is not surprising to see the proposal of the "Leniency Plus" program being launched in Hong Kong.

Procedure under the Cooperation Policy

The procedure for applying and benefiting from the Cooperation Policy is similar to that laid out under the Leniency Policy, involving a number of steps:

- **Stage 1:** HKCC or the company under investigation may approach each other to propose cooperation under the Cooperation Policy.
- **Stage 2:** The company will need to provide documents and detailed information regarding the cartel. The company's employees, officers, partners and agents may also be asked to be interviewed by HKCC.
- **Stage 3:** The company will enter into a Cooperation Agreement with HKCC, which includes an agreed summary of facts. HKCC will indicate the maximum penalty it will recommend to the Competition Tribunal, which will incorporate the discount applied for the cooperation provided. The company will ordinarily be required to confirm, amongst other things, that it is willing to make submissions to the Competition Tribunal that it has contravened the Competition Ordinance, pay a pecuniary penalty in a sum assessed by the Competition Tribunal, and pay HKCC's costs of the proceedings against it.
- **Stage 4:** The company is expected to continue cooperation with HKCC throughout the investigation and proceedings and comply with the terms of the Cooperation Agreement. At an appropriate time, HKCC issues a final letter to the company to confirm that all conditions of the Cooperation Agreement have been complied with.

Drawbacks

As with a company benefiting from immunity under the Leniency Policy, an applicant under the Cooperation Policy not only needs to agree with HKCC on a summary of facts but will usually be required to admit involvement in the cartel. Such an "admission" will need to be filed jointly with HKCC to the Competition Tribunal.

This procedural step represents a risk for companies willing to come forward and self-report. Even if HKCC and the Competition Tribunal take measures to safeguard the confidentiality of that filing, the risk of a leakage could act as a deterrent for companies. A leakage of a document admitting a cartel infringement could be used in court litigation not only in Hong Kong but potentially also in other jurisdictions. In the case of a cross-border cartel, the risks of civil damages claims elsewhere could become a factor for companies deciding whether or not to apply for a reduction of fines under the Cooperation Policy in Hong Kong.

Another potential deterrent for a company to apply under the Cooperation Policy is that, in the event that the application for cooperation is rejected, HKCC may use the documents and detailed information obtained indirectly: the authority can use its acquired knowledge to "develop facts through further investigation," which likely means it will request the documents and information from the company afresh. This is notwithstanding the fact that these documents and information were obtained on a without prejudice basis. In addition, if HKCC terminates the Cooperation Agreement with the company (for example, because the company provided false information), the documents and information provided can be used directly against the company.

Conclusion

By publishing the Cooperation Policy, HKCC is expanding its investigatory tools by defining a framework in which other cartelists which do not qualify for leniency under the Leniency Policy may be encouraged to disclose their misconduct. The aim is to resolve liability without having to incur the time and cost of litigation. As the maximum fine for a contravention of the Competition Ordinance is 10% of a company's turnover for each year in which the breach occurred (up to a maximum of three years), providing clearer incentives to cooperate with HKCC will further destabilize the operation of cartels as it introduces distrust among cartel members.

The Cooperation Policy also brings Hong Kong's leniency and cooperation arrangements more in line with overseas jurisdictions such as the European Union. Other regulatory departments in Hong Kong, such as the Securities Futures Commission and the Hong Kong Monetary Authority, have also adopted similar cooperation arrangements to encourage the disclosure of regulatory breaches and misconduct in order to save significant time, costs and resources to both the regulator and the company or individual concerned.

However, it must be noted that while HKCC may make recommendations to the Competition Tribunal as to the pecuniary penalty that should be imposed on a cartel member, the final decision on the penalty amount rests with the Competition Tribunal.

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Sunset on ACPERA draws the antitrust bar to DOJ's roundtable

The Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA) incentivizes companies to self-report criminal antitrust conduct under the Antitrust Division's (the Division) leniency program by reducing civil liability for successful leniency applicants that also cooperate with plaintiffs in related civil litigation. ACPERA, however, will expire in 2020 unless Congress reauthorizes it. As part of the reauthorization process, the Division is considering proposing revisions to Congress. Last month, the Division hosted a roundtable to gather comments and insight into whether – and if so, how best – to revise ACPERA. The Division invites additional comment on its forthcoming revisions to Congress before 31 May.

What is ACPERA?

Cartelists face both criminal and civil liability. The Division's leniency program exempts successful leniency applicants from all criminal penalties; however, a cartelist's liability does not end with the criminal case. The cartelist may still have to pay restitution as well as damages from "follow-on" civil lawsuits. Civil damages can be substantial due to the potential for treble damages and joint and several liability. These civil damages can even exceed the related criminal fines. ACPERA was designed to enhance incentives for self-reporting cartel conduct by limiting damages for the leniency applicant to single damages and eliminating joint and several liability in return for "timely" and "satisfactory cooperation" with civil plaintiffs. ACPERA, however, may not be working as planned.

Leniency's applications appear to be down

Leniency applications are a critical source of antitrust investigations and prosecutions. The recent drop in antitrust enforcement suggests that leniency applications must be down. From 2011 to 2015, the Division secured an average of US$1 billion in total corporate criminal fines each year, while last year, the total in criminal fines was only US$172 million. The number of criminal cases filed also fell from 90 in 2011 to 18 in 2018, the lowest since 1972. Likewise, 27 corporations were charged in 2011 compared to five in 2018. Although there may be several explanations for this drop in enforcement, many antitrust practitioners believe that a drop in leniency applications is a core cause.

ACPERA may not be living up to its promise

ACPERA's purpose is to incentivize and therefore increase leniency applications. The antitrust defense bar, however, has expressed growing concern that ACPERA is not fulfilling that purpose. There are two main criticisms of ACPERA: first, that key provisions of ACPERA are unclear; and second, that ACPERA does not sufficiently reduce civil damages.

ACPERA: What is satisfactory and timely cooperation?

The standard for "satisfactory" and "timely" cooperation is undefined and unpredictable. ACPERA gives no guidance on what constitutes "satisfactory cooperation" or when such cooperation should be considered "timely." In addition, the statute does not instruct courts when, in the course of the follow-on civil litigation, to assess an applicant's cooperation and grant ACPERA's protections.

ACPERA's "satisfactory cooperation" provision requires that the applicant provide a complete and truthful account of all relevant facts, furnish all potentially relevant documents, and agree to be available for interviews, depositions, or testimony. In practice, this standard gives companies little-to-no guidance regarding how much cooperation is enough, with plaintiffs and the leniency applicant often at odds as to how much cooperation ACPERA requires.

ACPERA also does not define "timeliness," or when a leniency applicant must cooperate with plaintiffs. Plaintiffs ask leniency applicants to cooperate immediately and provide documents on an expedited and nearly instantaneous basis. Leniency applicants must either acquiesce to plaintiffs' demands or risk a judicial determination that cooperation is untimely, thereby disqualifying the leniency applicant from ACPERA's benefits.

Finally, there is also uncertainty as to when the leniency applicant will realize the benefits of cooperation. ACPERA contains no guidance as to when the judge must decide the leniency applicant has fulfilled the requirements of the statute. So, a leniency applicant has no certainty

that it has qualified for ACPERA benefits and faces constant risk that it will be found not to have qualified for ACPERA benefits.

Is the single damages limit a sufficient incentive?

The defense bar views ACPERA's single damages limit as ineffective when paired with the statute's uncertainty over the amount of cooperation required. A cooperative leniency applicant may evade treble damages, yet still significantly raise the cost of single damages by helping the plaintiffs uncover evidence they would not have had access to otherwise. Indeed, an overzealous applicant may inadvertently increase single damages beyond the initial treble damages exposure faced in the civil litigation. This outcome renders the single damage incentive obsolete.

Possible improvements to ACPERA

There were several suggestions at the roundtable for improving ACPERA, including:

- **Clarify ACPERA's "timeliness" language:** At the roundtable, plaintiffs' lawyers argued that cooperation should start very early in the litigation, perhaps even before an amended complaint is due, while defense lawyers suggested that cooperation should occur later in the litigation. Regardless, both sides agreed that a time-certain, whatever it may be, would be beneficial to leniency applicants.
- **Clarify ACPERA's "satisfactory cooperation" language:** At the roundtable, the defense bar argued that ACPERA's "satisfactory cooperation" requirement should be deemed satisfied if the leniency applicant provides plaintiffs with the same information as provided to the Division. Conversely, panelists from the plaintiffs' bar argued for a broader definition of "satisfactory cooperation," expecting complete cooperation with every request, even though plaintiffs' claims may be significantly broader than the Division's investigation. One defense practitioner proposed a compromise: a rebuttable presumption of satisfactory cooperation if the company provides to civil plaintiffs' counsel all documents and

information that the company provided to the Division, which could be rebutted if the company failed to meet any of the other statutory obligations, including providing a full account of all known facts relevant to the civil action, furnishing all documents or other items potentially relevant to the civil action, and using best efforts to secure and facilitate interviews, depositions, and trial testimony of individuals covered under the leniency agreement.

- **Earlier determination for granting ACPERA protections:** Panelists agreed that the determination of whether a company or individual has fulfilled ACPERA's requirements should be made in the early stages of litigation, and certainly before trial.
- **Reduced damages under ACPERA:** There was no consensus regarding the single damage calculation, but suggested approaches included:
  - Incentivizing the leniency applicant further by offering zero liability in exchange for full cooperation.
  - Limiting the applicants' damages based on a predetermined number, which would be paid into a restitution fund for the plaintiffs.
  - Calculating damages proven by coextensive cooperation with the Division as single damages, while removing ACPERA's detrebling benefit for damages that the plaintiffs' counsel could prove through its own investigation.

The Division is accepting comments on ACPERA until 31 May. If your organization is interested in submitting comments to the Antitrust Division please contact counsel at Hogan Lovells.

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EQUAL JUSTICE UNDER

Hospitals and insurers turn to new partnerships in an effort to better manage the cost of care

Vertical relationships and changing antitrust enforcement

Vertical relationships may be a viable solution for lowering the burden of health care costs, but large-scale mergers of health care providers, hospitals, and physicians bring a host of new questions around anti-competitive behavior.

With increasing pressure from government payers like Medicare and Medicaid to drive down the overall cost of care, vertical integration arrangements – where health insurance providers, hospitals, and doctors merge into more cohesive entities – are becoming more commonplace. But these large-scale partnerships present new business challenges and have the potential to alter current standards around antitrust enforcement. Leigh Oliver and Bob Leibenluft, partners in Hogan Lovells' Antitrust Practice group, discuss some of the major trends driving vertical relationships, and how an increase in these types of mergers may fundamentally shift attitudes around competition.

Q: At a high level, how are vertical relationships addressing the cost of care?

Oliver: "The biggest benefit of vertical relationships is in aligning incentives. Many companies are making efforts to integrate and coordinate delivery of care for better efficiency, and one of the best ways to do that is through more in-depth, closer relationships with those in the vertical supply chain."

Leibenluft: "Many hospitals are becoming health plans or acquiring health plans, partly because they've been asked by the government to take on more risk and more responsibility for the full range of services, and therefore (must) share more of the overall cost burden.

Q: What sort of business challenges might these partnerships create?

Oliver: "With upward vertical integration, a hospital may become more like a health plan. As a health care provider, its incentivized to provide as many services as possible (in order) to create revenue. But as a health plan, each service (the hospital) provides becomes a cost center, which means it is operating within a completely new incentive structure."

Leibenluft: "We also see a lot of hospital systems integrating downstream by acquiring physician practice groups because they recognize the importance of having a close relationship with them. But getting physicians to do what you want them to do once you employ them isn't simple, and hospitals often don't have much experience doing it."

Q: Where are you seeing antitrust issues arise as a result of these relationships?

Leibenluft: "Take the example of a hospital acquiring a large physician group. [The hospital] needs to consider how this could prevent other area hospitals from having access to that large physician group and its patient referrals. The problem isn't that the hospital is going to become a stronger competitor, which in the eyes of antitrust agencies is a good thing, but that it's preventing other hospitals from having enough physicians altogether.

Oliver: "Examples of mergers like this one may ultimately put more weight on the complaints of competitors than we're accustomed to seeing. Under current antitrust law, just hurting a competitor may not be unlawful. But if a competitor feels a vertical partnership will mean they're going to have a tougher time competing, they may bring an antitrust suit. As more of these types of deals arise, the State Attorneys General, and the Federal Trade Commission are having to start thinking a little bit differently about the way that healthcare competition works in this country."

Q: What insight about vertical relationships would you share with a client considering this type of merger?

Oliver: "There's no one size fits all when it comes to the antitrust analysis of a particular vertical relationship. So much of antitrust in healthcare is really fact driven. It comes down to who is in the market, what the market landscape looks like, and what part of the country you're in."

Leibenluft: "Dealing with the antitrust enforcers is an ongoing, evolving issue. There aren't any blanket rules that apply to vertical relationships when you're considering potential antitrust litigation – so understanding a deal's unique context becomes very important."

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AT&T wins (again): Insights from the appeal

On 26 February 2019 AT&T won its appeal at the U.S. Court of Appeals for the District of Columbia Circuit when the district court's decision denying the government's attempt to block AT&T from acquiring Time Warner Inc. was upheld.

This ends a lengthy antitrust saga that began with AT&T and Time Warner's merger announcement over two years ago in October 2016. Following an in-depth investigation, the U.S. Department of Justice (DOJ) Antitrust Division filed a complaint to block AT&T's acquisition of Time Warner in November 2017. Shortly after the district court decision in favor of AT&T in June 2018, the government confirmed that it would not seek to stay the merger pending an appeal, and it would allow AT&T to close its transaction on the condition that AT&T would continue to hold separate Turner networks (including Time Warner's HBO, CNN, TBS, and TNT assets) through 28 February 2019. The government filed a notice of appeal in July 2018.

On appeal, the government focused on the district court's rejection of its "increased leverage" theory, which was only one of the three antitrust theories DOJ relied upon at trial. Since DOJ's challenge was based on the district court's factual conclusions rather than a pure question of law, the relevant standard of review was whether the decision was "clearly erroneous" in its application of facts – a very challenging criteria to meet.

Writing for a unanimous panel, Judge Judith Rogers rejected nearly all of the government's objections to the district court's factual findings and described DOJ's arguments as "unpersuasive." Following the decision, DOJ released a statement confirming that it would not seek further appeal. Below are some key takeaways from the opinion.

Conduct remedies – even if implemented unilaterally by the merging parties – cannot be ignored for vertical transactions

The government's leveraging theory hinged on the prediction that Time Warner, under the ownership of AT&T, could more credibly threaten to withhold content (i.e., blackouts) during negotiations with distributors, thereby increasing the combined firm's leverage over rival distributors. One week after the government filed the initial suit in November 2017, Turner Broadcasting, a Time Warner business unit, sent an irrevocable offer to approximately 1,000 distributors agreeing to engage in "baseball style" arbitration for seven years if the parties could not reach a renewal agreement, eliminating the possibility of blackouts. The government argued against considering this unilateral remedy because it would "undermine enforcement" by creating an incentive for firms to "take similar actions" in order to "evade antitrust review."

This argument failed at the district court, and the panel decision concurred, as Judge Rogers was highly critical of the government's argument that it need not account for the merging parties' unilateral arbitration offers. In particular, the panel highlighted that DOJ had previously agreed to a similar remedy when entering into a consent decree that would allow the Comcast-NBC Universal merger to move forward and had asserted in those proceedings that "conduct remedies... can be a very useful tool to address competitive problems while preserving competition and allowing efficiencies." This is a pointed rebuke of DOJ leadership's recent pronouncements that behavioral remedies are generally inadequate to address anticompetitive harms in vertical cases. The assistant attorney general leading the Antitrust Division, Makan Delrahim, stated in a speech following his appointment in 2017 that "behavioral remedies often fail" to "let the competitive process play out," and "instead of protecting the competition that might be lost in an unlawful merger, a behavioral remedy supplants competition with regulation." Delrahim also recently announced the withdrawal of DOJ's "2011 Policy Guide to Merger Remedies" on the ground that it takes too solicitous an approach to behavioral relief. In contrast, the AT&T court concluded that the "government's challenges to the district court's treatment of its economic theories becomes largely irrelevant" while the arbitration agreements remained in force, thereby signaling that the parties' unilaterally imposed behavioral remedy was sufficient to mitigate any potential anticompetitive effect.

"Real-world" evidence carries more weight than theoretical modeling

Throughout the opinion, the court emphasized the value of "real-world" evidence over theoretical modeling, siding repeatedly with the district court's decisions in weighing the evidence. In addition to the government's failure to account for econometric studies on past media mergers, the court particularly called out DOJ's failure to factor into its models the existence of long-term contracts, the post-litigation remedy of arbitration offers, and the dynamic nature of the industry. AT&T, meanwhile, was applauded for incorporating econometric studies on past media mergers such as Comcast-NBC Universal, which the court also noted as positive precedent for this type of transaction.

The "fact-specific" arguments required for vertical transactions are particularly difficult to challenge on appeal

When challenging a transaction between head-to-head competitors, DOJ benefits from a presumption of anticompetitive effect when the transaction leads to an increase in concentration above a certain level under the Supreme Court's decision in *Philadelphia Natl. Bank*. Since a vertical transaction like AT&T-Time Warner does not involve an increase in concentration in any market, the presumption does not apply. Therefore, vertical transactions require a "fact-specific" showing that the proposed merger is "likely to be anticompetitive." Appeals of fact-specific findings in a lower court are evaluated under the challenging, and highly deferential, "clearly erroneous" standard. In this case, even though the panel opinion acknowledged that some aspects of the district court decision were "troubling" and that some statements "in isolation... could be viewed as addressing the wrong question," the panel stressed the fact-specific nature of the district court's factual findings and tended to review the district court's underlying analysis favorably in light of the record as a whole.

As a practical matter, *AT&T* demonstrates that the government may find it challenging to carry its evidentiary burden in future vertical cases. At a minimum, DOJ will need to marshal significant real-world evidence such as ordinary course business documents and testimony from the merging parties and third-party market participants to support any theoretical economic models to demonstrate likely harm to competition in future vertical cases.

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EU Competition in the digital age – European Commission publishes Report of special advisers

On 4 April 2019, the European Commission published the much anticipated Report Competition Policy for the digital era (hereinafter referred to as the "Report"). Authored by a panel of special advisers (all academics) appointed by Competition Commissioner, Margrethe Vestager, the Report explores **how competition policy should evolve so as to promote pro-consumer innovation in the digital age** – in particular, arguing that EU competition enforcement needs to be "adapted and refined" to account for the challenges posed by digitisation. According to the Report, such adjustments might include (amongst other things) developing new theories of harm for evaluating conglomerate mergers, interoperability or data-sharing requirements for dominant companies and the provision of guidance on the definition of dominance in digital markets (and/or on the duties of conduct for dominant platforms).

The Report represents the latest development in the Commission's ongoing review as to how EU competition policy might better harness the benefits of digitisation whilst, at the same time, looking to address competition concerns (some of which appear peculiar to digital markets). It also follows the publication in March in the UK of an independent report on the state of competition in digital markets (Professor Jason Furman's Unlocking digital competition: Report of the Digital Competition Expert Panel).

Arguably not as far-reaching as the findings set out by Furman, the Report does put forward some proposals that are likely to be controversial and potentially influential in the Commission's thinking going forward.

Outline of the report

In terms of its structure, the Report focuses on the following issues:

- digitisation and its impact on competition law analysis;
- the goals of EU competition law in a digital context;
- the role of data and platforms in digital markets and how competition law should be applied given their prominence; and
- whether current EU merger control rules (and substantive theories of harm) need to be updated to enable scrutiny of acquisitions of innovative start-ups by dominant platforms.

Digitisation and competition

The Report notes that there are three key features characterising the digital economy:

- *Extreme returns to scale* – the cost of production for digital services is proportionally much less than the number of customers served – a feature considered to be much more pronounced in digital markets and which the authors consider significantly to reinforce the position of incumbent players;
- *Network externalities* – regardless of whether new entrants can produce better quality and/or offer lower prices, the convenience of using existing technology or services due to significant user numbers is considered to constitute an additional barrier to new market entrants (the Report noting this "incumbency advantage" depends on a number of factors including the possibility of data portability, data interoperability and multi-homing); and
- *Importance of data* – companies now have the ability collect and use large amounts of data which is a crucial input for many online services processes and logistics. In this respect, the use of data to develop and innovate is a competitive parameter whose relevance will continue to increase.

Taken together these factors are believed to create strong 'economies of scope' – favouring the development of ecosystems in which incumbent platforms derive significant competitive advantage, secure positions that appear increasingly unassailable and in which they may develop strong incentives for engaging in anti-competitive conduct.

According to the Report, dealing with these issues not only requires vigorous competition enforcement but also justifies making adjustments to the way in which competition law is applied.

Goals and methodologies of EU competition law

Despite the challenges presented by greater digitisation, the Report suggests there is no need to rethink the fundamental goals of EU competition law, confirming that the basic competition framework (as governed by Articles 101 and 102 TFEU) continues to serve as a "sound and sufficiently flexible basis" for protecting competition.

The Report argues, however, that the specific characteristics and workings of digital markets do create concerns about under-enforcement and, in this respect, the efficacy of certain established doctrines, concepts and methodologies which underpin current competition analysis. In particular, the Report argues that it may be necessary to revisit orthodox views on, amongst other things, the 'consumer welfare' standard, approaches to 'market definition' and the measurement of 'market power'. Taking these points in turn, the Report argues as follows:

- *Consumer welfare* – given the unprecedented pace of change, the difficulty in establishing the "expected" impact on consumers and the stickiness of market power in digital markets identified by the authors, the Report suggests that both the relevant time-frame and the standard of proof may need to be revisited. It argues that even in circumstances where the extent of consumer harm cannot be established, strategies employed by dominant platforms aimed at reducing competition should be prohibited in the absence of clearly documented consumer welfare enhancement.
- *Market definition* – less emphasis should be put on market definition as boundaries in digital markets are often vague and may change quickly. Instead the Report advocates placing greater emphasis on the identification of workable theories of harm and anti-competitive strategies pursued by dominant incumbents.
- *Measuring market power* – the assessment of market power should consider whether a platform, even in a fragmented market, has 'intermediation power' (and is therefore an 'unavoidable trading partner'). Such an assessment should also gauge, on a case by case basis, a platform's access to data (which is not available to market entrants) and the sustainability of any such differential access to data insofar as such access provides a strong competitive advantage potentially leading to market dominance.

The Report also argues, controversially, that the specific features of digital markets has changed the balance of error and implementation costs such that it might be necessary to make changes to established tests (including allocation of the burden of proof and definition of the standard of proof). The authors argue that, given highly concentrated markets characterised by strong network effects and high barriers to entry, it may be prudent to err on the side of prohibiting certain conduct and, as part of this, imposing on incumbent players the burden of proof for demonstrating the pro-competitiveness of their conduct.

The role of platforms and data in digital markets

Platforms

The Report notes that in markets where returns to scale and network externalities are strong (and particularly where there is a lack of multi-homing, protocol and interoperability), the number of platforms active will often be very limited. In such circumstances, it will be necessary to ensure competition both "for the market" (such that the market remains contestable and accessible to new entrants) and "in the market" (ie on the platform in question).

To protect competition *"for the market",* conduct by dominant platforms that hinders potential rival platforms and/or suppliers or raises their costs by means that cannot be considered as "competing on the merits" should be treated with suspicion. To this end, the Report cites the use of most favoured national (MFN) clauses and restrictions focused on limiting multi-homing and switching as examples of means that could raise questions as to their compatibility with free and undistorted competition.

In terms of MFNs, whilst it is accepted that such provisions can have both pro- and anti-competitive effects, the Report suggests it would be prudent to prohibit dominant platforms from imposing clauses preventing sellers on their platforms from price differentiating between platforms (ie restricting price competition between platforms).

Similarly, ensuring multi-homing and switching means authorities should view sceptically any measure by which a dominant player impedes multi-homing and switching unless it can raise a credible efficiency defence. Finally, the Report notes that data regulation in relation to 'interoperability' (ie facilitating the seamless exchange of data between companies) and 'data portability' (facilitating the transfer of data between platforms) also play an important role in facilitating multi-homing and the offering of complementary services.

As for ensuring *"competition in the market"* (ie on the (dominant) platform), the Report notes that dominant platforms act as regulators of their own markets and suggests that they have, as such, a responsibility to ensure that their rule-setting power does not determine the outcome of the competition. In short, they must not impede free and undistorted competition (without objective justification) on account of their privileged positions.

According to the Report, particular attention should be paid to dominant platforms that engage in leveraging market power (ie using its dominant position in one market to extend it into a neighbouring market) and/or self-preferencing (ie giving preferential treatment to its own products or services where they are in competition with products and services provided by other entities active on the platform). The Report underscores that not all instances of self-preferencing by dominant companies will be abusive; regard should be given to the restrictive effects of such self-preferencing in order for it to be considered abusive. Nevertheless, the Report controversially argues that self-preferencing by a vertically integrated dominant platform should be presumed abusive, even outside an 'essential facility' context, where it is likely to result in the leveraging of market power and is not otherwise supported by a pro-competitive rationale.

Data

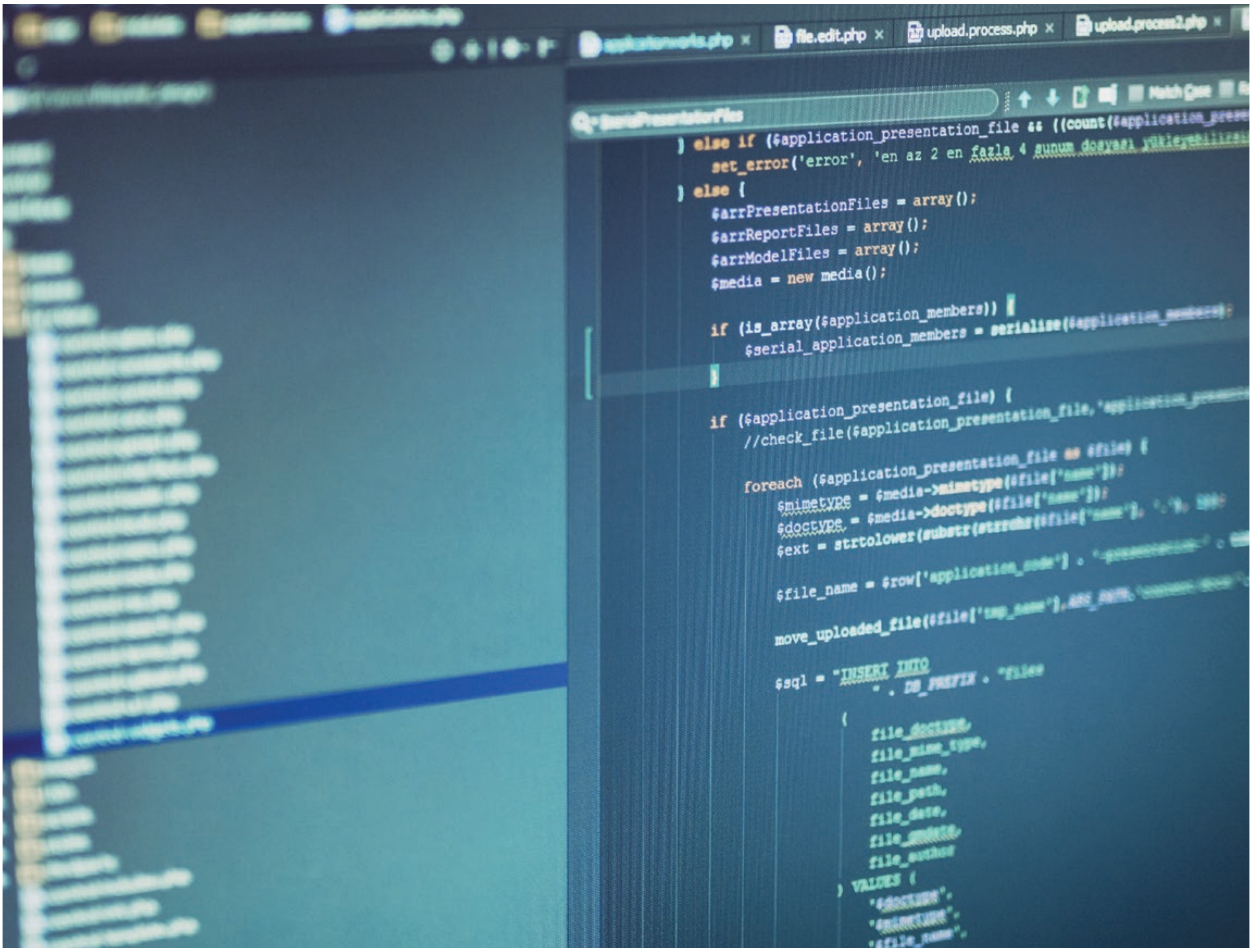
Noting that data is often an important input for (amongst other things) online services and production processes, the Report submits that a company's competitiveness may increasingly depend on its timely access to relevant data. On this basis, a broad (or broader) dissemination of data could be desirable for promoting/protecting competition in digital markets. This might, however, prove difficult in light of the rights of data subjects with respect to their personal data (and, in particular, the requirements of the General Data Protection Regulation (GDPR)), business secrets and the risks it might create in terms of collusive data sharing.

It is also not clear that an obligation to share data would be warranted where access is not indispensable for a competing in the market. To this end, the Report notes that the importance of data and data access for competition will *"always depend on an analysis of the specificities of a given market, the type of data and data usage in a given case"*.

However, where data access is actually shown to be indispensable for competing in a given market, the Report suggests that access to data should be considered. The Report discusses, among others, the following topics in this context:

- *Access to personal data* – a key issue in this regard relates to the portability of personal data – something which the Report acknowledges is now in part regulated by the GDPR. The Report suggests, however, that in line with the GDPR a more stringent data portability regime could be imposed on dominant undertakings in an effort to overcome so-called 'lock-in' effects.

- *Data sharing* – the Report underscores that data-sharing (and data-pooling) arrangements are often pro-competitive. Nevertheless, the Report provides some examples of where such activities may become anti-competitive: (i) when certain competitors are denied access to data and others not; (ii) where data-sharing amounts to anti-competitive information exchange between competitors; and (iii) where data-sharing acts as a barrier to innovation. The Report notes that issues regarding data sharing are relatively new and, as such, suggests that a "scoping exercise" of the different types of data pooling may be necessary in order to generate more insights and, in turn, provide guidance (for example, by way of "guidance letters", incorporated into the next review of the Guidelines on Horizontal Cooperation and/or, in due course, as part of a possible block exemption regulation focused on data sharing and pooling).
- Refusing access as potential abusive behaviour (Article 102 TFEU) – whether refusing access to data is abusive will, in many respects depend on the 'indispensable' nature of said data. This in turn is a function of the nature of data involved and the purpose for which access is sought. The Report questions whether Article 102 TFEU is always the best tool to remedy such refusals to access, in particular where such access is sought in the so-called 'data aftermarket'. The Report suggests there may be more efficiency to be gained from regulatory intervention for dealing with these issues.



Mergers and acquisitions in the digital field

The Report addresses the much discussed issue of ‘killer acquisitions’ – the term used to describe the process by which large digital incumbents purchase potential competitors at an early stage, allegedly to kill off their potentially disruptive (future) offerings (ie in order to avoid a replacement effect for their own existing products/services). By doing so, it is said, the incumbent pre-empts competition from firms that potentially threaten their own market position.

Given this concern, the Report proposes a detailed discussion as to whether the current EU merger control regime needs amending or updating to address better the issue of the early elimination of potential competition. The Report breaks its analysis of this issue into the jurisdictional and substantive assessment considerations.

Jurisdictional thresholds

There has been concern that some acquisitions by platforms in the digital sector “escape” the Commission’s scrutiny as they occur before start-up targets have generated significant revenues. Despite the argument that these transactions can be of potential competitive significance, the level of turnover generated means they can fall below the jurisdictional thresholds set out in the EU Merger Regulation (EUMR).

Some Member States (notably, Austria and Germany) have introduced “transaction value” thresholds to address, in part, this issue. Nevertheless, the Report concludes that it is too early to change the EUMR’s jurisdictional thresholds. Instead, it recommends that the Commission monitor developments at the Member State level to assess how the new transaction value thresholds play out in practice as well to determine whether the existing referral system ensures that transactions of EU-wide relevance are ultimately analysed by the Commission. Only where enforcement gaps persist should the Commission consider making necessary amendments to the EU merger control regime.

Substantive assessment

The Report proposes that substantive theories of harm be revisited where a dominant platform, with strong network effects and (proprietary) data access (the latter acting as a significant barrier to entry), acquires a target which, despite low turnover, has a fast-growing user base and evident future market potential. In such circumstances, competition law should be particularly concerned, the Report argues, with protecting such entities so that they might otherwise enter and contest the incumbents’ markets.

The Report sets out that the competitive risk from such acquisitions is not limited to the foreclosure of rivals’ access to inputs but also to the perpetuation/preservation of the incumbent’s dominance by:

- intensifying the loyalty of users that consider the new services as complements to existing services; and
- retaining other users for which the new services might constitute partial substitutes for the ones already available.

On this basis, it is argued that the best way to assess such acquisitions is to inject some ‘horizontal’ merger elements into ‘conglomerate’ theories of harm by posing the following questions:

- Does the acquirer benefit from barriers to entry linked to network effects or use of data?
- Is the target a potential or actual competitive constraint within the technological/users space or ecosystem?
- Does its elimination increase market power within this space, notably through increased barriers to entry?
- If so, is the proposed acquisition justified by efficiencies?

The approach advocated here would provide the Commission with a "heightened degree of control" over acquisitions of innovative start-ups by dominant platforms. In particular, where the scrutinised acquisition is plausibly part of a strategy employed by the dominant platform to deter users from migrating from its ecosystem, the acquiring party should, the Report argues, bear the burden of showing that adverse effects on competition are offset by merger-specific efficiencies. This would not, however, amount to a presumption about the illegality of such acquisitions. Rather, the authors suggest, it merely involves taking specific account of such acquisition strategies in recognition of the competitive risks they may give rise to in a digital market context.

What's next?

The January 2019 conference and the Report are meant to provide input to the Commission's ongoing reflection process about how competition policy can best serve European consumers in the fast-changing digital world. Commissioner Vestager has welcomed the report and indicated it is now time to take a step back and process the contents of the Report.

The Report underscores that "[it] is not intended to be the final word on how competition policy should adapt to the digital era". We therefore do not expect any imminent changes to the main European competition rules in the short term. In fact, it will be for the next European Commission and Competition Commissioner to consider whether any change in competition policy or law will be required. In doing so, the Commission will not only take into account the recommendations and findings set out in this Report, but also how other competition agencies plan to deal with these markets as more and more reports and studies into digital competition policy are published. Looking forward, it will be interesting to see what changes are actually made in practice.

If you would like to discuss any of the above, please reach out to your usual antitrust contact or any of the ones listed on this page.

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You can't spell FinTech without FTC

The Consumer Financial Protection Bureau (CFPB) is not the only consumer watchdog keeping a close eye on the financial sector and certainly not the only agency focused on FinTech. This is also a key area for the Federal Trade Commission (FTC).

FinTech provides an exciting array of financial products and services that benefit consumers. From online lending to payment apps, these technologies offer consumers fast and convenient access to financial services. But companies providing new and innovative digital products cannot take shortcuts when it comes to complying with traditional consumer protection principles without risking catching the attention of the FTC.

In this post, we describe several recent FTC actions highlighting key enforcement issues facing FinTech companies. Importantly, companies should keep in mind that basic consumer protection principles continue to apply in the new economy.

The FTC's authority

The FTC has a dual mission to protect consumers and promote competition. The primary consumer protection law enforced by the FTC is Section 5 of the FTC Act, 15 U.S.C. § 45(a), which prohibits unfair and deceptive acts or practices. The FTC also enforces a number of other consumer protection statutes governing financial-related activity, including (among others) the Gramm-Leach-Bliley Act, Truth in Lending Act, Fair Debt Collection Practices Act, and Fair Credit Reporting Act.

In the financial arena, the FTC and the CFPB share oversight over businesses that offer consumer financial products and services, except that the FTC's jurisdiction does not extend to banks, thrifts, federal credit unions, and others that are exempt under the FTC Act. In light of their concurrent jurisdiction, the two agencies cooperate and work to avoid duplication of effort, as documented in a memorandum of understanding.

The FTC has focused its efforts on, among other areas: debt collection, mortgage, credit card, student, and other debt relief services; short term lending; auto sales; financing and leasing; and FinTech.

Recent FTC enforcement actions in FinTech

In recent years, with the increasing role of technology, the FTC has paid particular attention to FinTech. These are some of the matters in which the FTC has taken action.

Avant LLC

On 15 April 2019, the FTC announced a US$3.85 million settlement with online lender Avant LLC, resolving charges that the company had engaged in deceptive and unfair loan servicing practices in violation of Section 5 of the FTC Act, the Electronic Fund Transfer Act, and the Telemarketing Sales Rule.

In its complaint, the FTC alleged that Avant required consumers to authorize recurring electronic fund transfers as part of their loan applications, stating that consumers could later change the method of payment. However, according to the FTC, Avant refused to accept debit or credit card payments from consumers who later attempted to switch payment methods. The FTC also charged, among other conduct, that the company withdrew money from consumers' accounts or charged their credit cards without authorization.

In addition to obtaining monetary relief for consumers, the FTC issued an order prohibiting Avant from taking unauthorized payments from consumers' accounts, collecting payments using remotely created checks, and misrepresenting material facts regarding, among other things, the accepted methods of payment, fees, and charges.

Lending Club

The FTC sued Lending Club in November 2018 alleging that it had misled borrowers by deceptively promising loans with no hidden fees. Lending Club's mail and online advertisements stated, "No hidden fees" and "No prepayment penalties." But the FTC alleged that the fine print, often behind obscure hyperlinks, stated otherwise and that the company charged, on average, a five percent fee and deducted the fee before disbursing its loans. The FTC asserted that this also resulted in consumers having to pay interest on the total requested loan amount even though the actual amount disbursed was less the fee charged by the company.

The lawsuit is pending in the Northern District of California.

Bitcoin Funding Team

In March 2018, the FTC brought an action in the Southern District of Florida to stop an allegedly fraudulent cryptocurrency scheme. In its complaint, the FTC charged four individuals operating under the name Bitcoin Funding Team with deceptively claiming that a small payment of bitcoin or litecoin, equivalent to about US$100, could be turned into US$80,000 in monthly income. On making the initial investments, participants were also eligible to recruit new members to make payments. The FTC alleged that in fact, the majority of participants would lose their initial investments.

The court granted the FTC's request for a temporary restraining order and asset freeze pending trial. Trial is set for 16 September 2019 in the Southern District of Florida.

Key takeaways

Companies must be mindful that traditional consumer protection principles continue to apply even if the products and services being offered are new and innovative. The following are some key lessons from the FTC's enforcement actions:

- **Representations to consumers must be truthful.** Statements regarding products and services should be truthful and accurate.
- **Promises to consumers should be kept.** Companies that make promises to consumers should follow through.
- **Avoid hidden fees.** Key terms of an offering should not be hidden in fine print or in hard-to-see hyperlinks. Consumers should be given clear and prominent information about all relevant terms.The failure to abide by these key lessons could lead to a knock on the door by the FTC. If you have questions about any of these issues or receive an inquiry from the FTC, we are here to help.

About our team

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The concept of an undertaking in cartel damages – the Court of Justice establishes liability of economic successors

The Court of Justice of the European Union (CJEU) issued a landmark judgment on 14 March 2019 concerning the application of the concept of an 'undertaking' and 'economic continuity' in cartel damages claims. In *Skanska Industrial Solutions and others* (Case C-724/17), the CJEU ruled that the broad concept of an undertaking under Article 101 TFEU also applies to the party liable to provide compensation in follow-on damage claims. Thus, under certain circumstances, the liability in follow-on damage claims also exists for the legal successor as to damages resulting from cartel violations of an acquired and subsequently liquidated company.

The judgment of the CJEU is accessible here.

The judgment at a glance:

- The CJEU ruled that the concept of an undertaking of Article 101 TFEU applies in a national cartel damages claims. The legal entity liable for damages derives directly from EU law.
- With this ruling, the CJEU transfers its previous interpretation of a broad concept of an undertaking – which it had developed in administrative proceedings – to cartel damages claims. The unique concept of an undertaking under EU law comprises its entire economic unit, even if this unit legally consists of several natural or legal persons.
- As a result, the CJEU establishes the economic continuity test also in cartel damages law; meaning that the legal successor of a company which committed the infringement of EU competition law is liable for damages where this company ceases to exist, but the legal successor continues its economic activity. This also applies if the legal successor acquires the company subsequent to the infringement by way of a share deal.
- According to the CJEU, follow-on damage claims are an integral part of the system for enforcing EU competition law. In order to ensure effective enforcement, the broad concept of an undertaking must also be applied in cartel damages law. Only in this way will infringements of competition law be effectively penalised and companies deterred from such behaviour.
- The CJEU has not limited the scope of the judgment in time. Thus, it also claims temporal validity for cases that occurred before the judgment.

The underlying facts of the case:

The underlying facts of the case concerned a cartel on the Finnish asphalt market between 1994 and 2002. Three companies (Skanska Industrial Solutions Oy, NCC Industry Oy and Asfaltmix Oy) each acquired one of the cartel members by way of a share deal. The companies involved in the cartel were then liquidated and the purchasers continued their business activities. After the Finnish Competition Authority initiated proceedings and the Finnish Administrative Court imposed fines on various companies in 2009, a follow-on damage claim was brought before a Finnish civil court. The plaintiff (the City of Vantaa) also brought a claim against the purchasers. While the court of first instance affirmed the liability of the purchasers with reference to the principle of economic continuity, the court of appeal denied this for lack of a corresponding principle in Finnish cartel damages law. Finally, the Finnish Supreme Court turned to the CJEU.

This judgment may have important consequences for your business:

- The judgment has advantages for plaintiffs when choosing their possible defendant. Under certain circumstances, plaintiffs can now bring damage actions against the legal successor of a company which was a member of a cartel.
- At the same time, the judgment increases the risk of being held liable for cartel damages as a result of a company acquisition. This risk should be taken into account during due diligence.

The judgment could, however, reduce the risk of "forum shopping", as a uniform application of the law throughout Europe should now be guaranteed.

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