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EDITOR
Andrea Hamilton
Partner
Brussels
+32 2 282 35 15
ahamilton@mwe.com

IN THIS ISSUE

A key challenge for global businesses is the management of an international workforce. The internet may have rendered borders largely theoretical, but national laws have a profound effect on hiring, maintaining and reducing a workforce. The "name and shame" approach taken by many legislators to enforce laws relating to, e.g., gender pay inequality or forced labour, is turning localised mistakes into global censure.

In this issue, we also dive into the UK National Health Service's first high-energy proton beam therapy to treat cancer. By turning innovative solutions into actionable plans for one of the most complex medical equipment projects, our lawyers helped propel the clients' success in this case. We frequently handle the legal challenges that new technology creates. Competition laws, for example, are having to evolve to reconcile the positive and negative effects that the use of artificial intelligence is having on markets, even though there is still uncertainty over whether it harms or benefits competition.

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

PUBLICATION EDITORS
Aileen Devlin
Kate Hinze

CREATIVE SERVICES
Jane Hanlon

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RESPONSES TO GENDER PAY INEQUITY: A QUICK WORLD TOUR

Rachel B. Cowen and Marjorie Soto

Most major jurisdictions have pay equity laws, but their approach is far from uniform. Global companies need to evaluate compliance with these laws on a country-by-country basis whilst simultaneously addressing their compensation policies globally.

A sample of the rules across several countries helps to identify trends that can drive effective global policies.

AUSTRALIA

The Australian Workplace Gender Equality Act of 2012 mandates equal pay for equivalent or comparable work. There are annual reporting requirements for employers with 100 or more employees. Those reports must include the following indicators: gender composition of the workforce, gender composition of governing bodies, and equal compensation between men and women.

Employers are penalised by being publicly named if they fail to lodge a public report on time, or inform employees or other stakeholders that a public report was lodged, or give the requested compliance data under the Act.

CANADA

The law varies across Canada; several Canadian provinces have pay equity laws in place, such as Ontario's Pay Equity Act of 1987. There is also pending federal legislation that would require public and private employers with at least 10 employees to

- Identify job classes predominated by men or women
- Evaluate the value of work performed by job classes that are male or female predominant
- Compare compensation associated with job classes that are male or female predominant and are of similar value
- Identify female-predominant job classes requiring an increase in pay as compared with male predominant job classes performing work of similar value
- Identify when pay increases are due.

These pay analyses will need to be included in a Pay Equity Plan. Employers need to post notices regarding Pay Equity Plan obligations and progress, provide employees with the opportunity to comment on the Plan, and file annual statements with the Pay Equity Commissioner.

CHINA

There are no direct rules or measures in China to address pay equity. China does have in place general principles for eliminating pay gaps, but those do not specifically focus on gender pay disparities, and there is no duty for employers to assess and report on gender wage differentials.

FRANCE

President Macron's administration has declared equality between men and women to be a "great national cause." France enacted new legislation in September 2018 that requires employers with at least 50 employees to publish information each year on gender pay gaps and the actions they have taken to address them.

Employers also receive an "equal pay rating" based on the following factors:

- The pay gap between men and women, which is based on average full time compensation within equivalent job functions
- The difference between men and women who have received raises, other than as a result of promotion
- The difference in compensation between men and women who have received promotions
- Whether or not the employer has complied with the existing legal obligation to give a pay rise to employees when they return from maternity leave, if pay rises were granted during their maternity leave
- The proportion of men and women in the list of the 10 most highly paid employees within the company.

If the employer's equal pay rating falls below a certain level, the employer must adopt corrective measures. If the problem persists for three consecutive years, a financial penalty may apply.

GERMANY

The German Wage Transparency Act, which came into effect in January 2018, gives employees at companies that have over 200 employees the right to find out what their co-workers of the same level and opposite gender are earning. Although employees cannot obtain earnings information for a specific employee, a company must provide average earnings for employees of the opposite gender, with the *caveat* that there must be at least six comparable employees at that level.

Additionally, companies with over 500 employees are required to publish reports regarding any pay disparities they may have, along with their efforts to lessen those disparities.

UNITED KINGDOM

UK employers with at least 250 employees must publish the following information:

- Mean and median gender pay gaps
- Mean and median bonus gender pay gaps
- Proportions of men and women receiving a bonus payment
- Proportion of men and women in each quartile pay band.

Non-compliance with these requirements could result in potentially unlimited fines.

UNITED STATES

The US Equal Pay Act of 1963 (EPA) prohibits employers from paying employees differently based on their sex for performing equal work in the same establishment under the same or similar working conditions. Title VII of the Civil Rights Act of 1964 also bans sex discrimination in compensation in any form.

The United States did not historically have pay data reporting requirements but, in April 2019, a federal judge ordered the Equal Employment Opportunity (EEO) Commission to implement without further delay its proposal to collect pay data in the EEO-1 report required by Title VII and filed annually by employers with 100 or more employees.

Where laws elsewhere rely on disclosure, US law has historically relied on litigation. Litigation is predominantly driven by individuals, rather than government agencies, but now often includes either collective actions under the EPA, or class actions under Title VII, both of which raise the stakes significantly in terms of dollar exposure for employers. One of the best-known is *Kassman v KPMG LLP*, an ongoing class action brought by approximately 10,000 female employees alleging they faced disparate pay and promotions.

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Beyond US national laws, over 40 states and territories have enacted their own pay equity laws. Amongst the most stringent are California, Delaware, Massachusetts, Oregon, New York, and Puerto Rico. Additionally, at least 11 states have enacted salary history bans preventing employers from requesting salary history information from job applicants. As with national laws, enforcement is largely by private lawsuits.

The global trend towards closing the pay gap is an opportunity for businesses.

GLOBAL COMPLIANCE

There are clearly trends that are apparent from this quick global tour, which may help improve overall compliance.

One trend is the increase in countries making public disclosure (not just to employees or the government but to everyone, including shareholders) of gender pay disparity the core principle of their attack on gender-based pay inequality. This "name and shame" policy forces businesses to actively manage pay equity to limit brand damage. This approach is paralleled in the United States by shareholder resolutions that demand such disclosures.

Although there is a focus on avoiding litigation risk (US law), "shame" (UK and Australian law), and administrative burdens (Canada's proposed federal law), businesses need to think carefully before acting.

The most obvious solution to pay inequality is to do a pay study and fix any disparity. It is, however, counterproductive if the company conducting the pay study does not have a detailed and evidence-based process in place for addressing any problematic findings from the study, and if it has not carefully considered what, if anything, should be privileged. There is a legal and employee relations minefield for ill-conceived studies and corrective actions that could create claims of reverse discrimination, which is illegal in the United States. *Rudebusch v Hughes*, for example, permitted Title VII claims of white, male professors challenging pay equity adjustments for female and minority professors, resulting in a jury verdict for the plaintiffs. Quick studies and quick fixes only exacerbate the problem.

Instead of knee jerk reactions, businesses need to follow the lawmakers' lead to identify and rectify the structural impediments to equality in order to have real, lasting effect.

The component of French law that addresses wage increases during maternity leave is illustrative, since absences from the workforce owing to family responsibilities is part of the persistent wage disparity between men and women. The German law requiring salary disclosures empowers underpaid women to take steps to ask for a raise. Similarly, those US states that prevent questions about previous salaries are designed to avoid the "market defence" or "market replication" of sex discrimination in pay.

The global trend towards closing the pay gap is an opportunity for businesses to develop and implement proactive policies that recognise the source of the problem and tackle it head on.

Some examples include the following:

- Address the gap in experience that invariably arises due to women, far more often than men, taking time off to handle family responsibilities.
- Standardise starting compensation for the position, rather than the person; *i.e.*, new hires or promotions each receive the same compensation package. From that point, each could earn more based on performance.
- Follow the US' example and ban asking for prior salary when hiring or promoting. A further embellishment may be to ban salary negotiations, which studies show disadvantage women.
- Make pay transparent, which requires managers to rationalise and explain pay, while permitting employees to ask how to equalise the pay of similarly situated colleagues.

RACHEL B. COWEN
Partner
Chicago
rcowen@mwe.com

MARJORIE SOTO
Associate
Los Angeles
msoto@mwe.com

GLOBAL EMPLOYMENT CONTRACTS: THE MODERN TOWER OF BABEL

Yesenia M. Gallegos and Ludovic Bergès

Although multi-jurisdictional compliance is a challenge in relation to every aspect of employment law, the structure of employment contracts and the enforcement of global policies require particularly careful consideration.

The need to coordinate individual country compliance across numerous countries whilst still maintaining a common company culture requires extensive knowledge of national laws and considerable flexibility.

CONTRACTS

US-based businesses will be used to working with at-will offer letters, but these are mostly unheard of elsewhere. In most jurisdictions, detailed employment contracts are not only customary, but are required by law.

As you would expect, companies must ensure the legal compliance of their contractual documentation for each country in which they do business. This includes engagement letters, employment offers, employment contracts, bonus schemes, stock option plans, *etc*.

With employment contracts, the most common approach is to prepare a contract compliant with local law in accordance with best practices in the jurisdiction where the individual is to be employed. Contracts should incorporate crucial terms, such as probationary periods, termination grounds, working time provisions, and post-termination non-compete and/or non-solicitation provisions.

- Countries have varying rules on the maximum duration of a probationary period. For example, France permits an eight-month probationary period, one renewal included, for executives under an indefinite-term contract (*contrat à durée indéterminée*); whereas a 90-day probationary period is standard in the United States.
- Subject to applicable statutory restrictions in each country, termination provisions provide a good starting point to enforce the departure of an employee, for example in case of a violation of company policies, such as a code of conduct.
- In France, where the legal working time is 35 hours per week, there is the option of entering into flat-rate pay agreements for autonomous executives whose roles and responsibilities do not permit alignment with the collective working time/office schedule.

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In the United Kingdom, there exist more flexible, zero-hours contracts, under which the employer is not obliged to provide any minimum working hours but, equally, the employee has no obligation to accept the work offered.

- The rules on post-termination provisions, such as confidentiality, non-compete and non-solicitation restrictions, vary significantly. Some jurisdictions follow a reasonableness approach (Australia, the United Arab Emirates, and the United Kingdom); others have outright prohibitions (India, Mexico, and Russia); and others mandate compensation for non-compete clauses (China, France, and Germany).

Forum-selection provisions tend to be unenforceable outside the United States.

With so many nuances country-by-country, contract drafters often consider choice of law and jurisdiction clauses. Public policy considerations may, however, override such clauses. For an Italian citizen hired in Italy to work in Italy, it will be difficult to apply Australian law merely because the employer is an Australian corporation. The general rule is that the laws of an employee's physical worksite will likely apply, regardless of such clauses.

The relevant law for all European Union countries is the Rome I Regulation. Under Rome I, foreign employees in Europe benefit from the mandatory laws of the country with which they have the closest connection, which will usually be the country where they normally work. Accordingly, a German employee working in France should receive a French law-governed employment contract, even if the employee works for a UK employing entity.

For highly mobile employees, however, the place of work is often debatable. For instance, English employment courts have decided that an employee working remotely in Australia has the right to bring an unfair dismissal claim in the United Kingdom if the work is done for a UK employer, regardless of the employee's physical worksite.

Forum-selection provisions that call for a forum other than the place of employment tend to be unenforceable outside the United States. In London, US expatriates working under contracts with such clauses who sue before an English Employment Tribunal are unlikely to see their claim dismissed when their employer invokes the forum-selection clause.

In choice-of-forum situations, Europeans invoke the provisions of the "Recast Brussels Regulation." These codify the general rule that employees rarely have to litigate employment disputes outside their host country place of employment, even if a choice-of-foreign-forum clause purports to require otherwise.

COMMUNICATING GLOBAL POLICIES

Every organisation has bespoke policies, employee handbooks, and a code of conduct. In addition, every organisation has its own HR practices, such as evaluation processes and training programmes, all dictated by the corporate culture and even corporate vocabulary. It can be challenging to extend those across borders and the legal systems of different countries.

In France, policies related to safety, disciplinary procedures, harassment, whistleblowing, *etc.*, particularly if the policy provides sanctions, must be incorporated within internal rules (*règlement intérieur*), which must be filed with the employment court and inspectorate. If a company fails to file its policies correctly, it may not be able to discipline employees for violating the rules.

Country by country, companies must consider the interrelationship between the contract and the applicable policies. In some jurisdictions, it is advisable to incorporate relevant handbook policies into the contract. In the United Kingdom, for example, it is compulsory to mention disciplinary and grievances procedures in the contract.

LANGUAGE BARRIERS

Where the policies are written is, however, merely the beginning. *How* they are written is much more complicated. Communicating clearly in multiple languages is now a core HR function for global entities. Many jurisdictions, such as Belgium, France, and Poland, require contracts to be in the local language, even for an employee fluent in the primary language used by the employer. If the contract is not in the local language, its provisions, the policies, and other elements, will be unenforceable, at least for the employer.

A typical example is a global bonus plan, where a failure by the employer to translate the target objectives can allow the employee to claim a bonus without needing to comply with the terms of the plan, *i.e.*, without achieving the stated goals or objectives. This has been confirmed by French case law.

In some countries, such as Turkey, the local language will always prevail, regardless of what is provided for in the contract. In those cases, ensuring translation accuracy can avoid inadvertently granting employees more generous terms under a local translation than the company intended.

Local language translations are also required for other purposes. For instance, in Spain the employment contract needs to be filed with the government, in Spanish. In other countries, such as China, works councils and unions will need to be consulted on the implementation of policies, and submissions for those consultations will need to be in the local language.

As a result, businesses now often consider whether to create employment documents in the local language only, or in two languages. If a document is used that has two columns showing the corporate language and the local language, it is crucial to state which language prevails.

YESENIA M. GALLEGOS
Partner
Los Angeles
ygallegos@mwe.com

LUDOVIC BERGÈS
Associate
Paris
lberges@mwe.com

UK TAX CHANGES SHIFT WORKER CLASSIFICATION BURDEN TO CLIENTS

Katie Clark, Paul McGrath and James Ross

The UK Government has confirmed that it will extend to the private sector tax rules designed to target tax avoidance by contractors who operate through an intermediary personal service company (PSC).

The UK Government has announced that new "off-payroll working" tax rules (commonly known as IR35) will apply to the private sector from April 2020.

The move will shift responsibility for determining the tax status of individuals who personally provide services through an intermediary personal service company from that PSC to the end user client.

The IR35 rules apply if

- An individual personally performs services for a client, or is obliged to do so
- Those services are provided under arrangements involving an "intermediary", *i.e.*, the arrangement for the provision of the services is made between the client (or an agent on its behalf) and the PSC, rather than between the client and the individual; and
- The individual would be regarded as an employee or office-holder, *e.g.*, director, of the client for tax purposes, if the arrangements had been made directly between the individual and the client.

CURRENT SITUATION

As the sole director and shareholder of a PSC, the contractor can pay himself the bulk of the fees received by the PSC by way of dividend, rather than as remuneration. The rate of tax paid on a dividend is much less than income tax and does not attract National Insurance contributions (NICs).

Currently, it is the PSC's obligation to decide whether or not the contractual relationship in question falls inside or outside IR35. If it falls inside IR35, the PSC must account for income tax and NICs. If the PSC gets that analysis wrong, it is also responsible for any associated penalties and interest.

WHAT WILL CHANGE?

From 6 April 2020, the client will become responsible for determining whether or not IR35 applies. Where it does apply, the "fee-payer" (*i.e.* the client or, where there is an intermediary agency, the agency) will be responsible for deducting income tax and employee NICs, and accounting for those together with employer NICs, at a rate of up to 13.8 per cent. If the client gets the analysis wrong, it will be liable for the underpaid tax and associated penalties and interest.

Only "small" businesses will be excluded from the new rules. To be considered small, a business will need to satisfy two or more of the following criteria: i) have an annual turnover that is not more than £10.2 million, ii) have a balance sheet total of not more than £5.1 million, or iii) have no more than 50 employees.

The UK Treasury expects this new measure to net over £1.1 billion per year.

Clients will need to assess the true employment status of the individual.

DETERMINING WHETHER OR NOT IR35 APPLIES

Clients will need to assess the true employment status of the individual.

There are two types of status for tax purposes: employee and self-employed; as opposed to the three types of status for employment rights purposes: employee, worker, and self-employed. Similar tests are used to decide status for tax and employment purposes, and the results are frequently the same.

Whilst one does not necessarily follow the other, it can at least be anticipated that a contractor who is an employee for tax purposes is more likely to claim to be an employee or worker for employment status purposes. As a minimum, this entitles them to the key worker rights of holiday pay, automatic enrolment into a pension scheme, and national minimum wage; and possibly the more extensive employee rights, such as unfair dismissal protection.

STATUS TEST

The starting point will remain the written contract between the parties, but it is often alleged that the contract does not reflect the true relationship. In this case, Her Majesty's Revenue and Customs (HMRC) and/or a court or tribunal will consider evidence on the day-to-day conduct of the parties and determine status based on the reality of the situation.

The test is multi-factoral and considers all the circumstances. However, whether or not an individual is an employee is generally judged against four key pillars.

1. What **mutual obligations** exist? In an employment relationship there must be an obligation on the individual to provide his or her work or skill, and an obligation on the employer to pay for that service.
2. To what extent is the individual required to **provide services personally**? If a PSC has a meaningful and genuine (rather than token) right to provide someone other than the individual whose status is being assessed, particularly if the PSC is responsible for paying that other person, this would be a strong indicator of self-employment.
3. What degree of **control** does the client have over the individual? An employee is generally subject to a reasonable degree of control by his or her employer. This may manifest as the way in which the services are to be performed, what tasks have to be performed, and when and where they must be performed. A genuinely independent contractor is likely to have the freedom to work when, where, and how they want, as long as they provide the services in question.
4. How is **financial risk** attributed amongst the parties? Individuals who risk their own money, *e.g.*, by rectifying unsatisfactory work without additional payment, are less likely to be employees. A self-employed contractor would also generally provide whatever equipment is needed to do the job.

Other factors that might indicate an employment relationship will also be considered, including the length of the engagement, the degree of the individual's integration into the client organisation, and how they are treated relative to employees.

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NEXT STEPS

Given the potentially significant costs and risks involved, it would be prudent for affected organisations to start planning for these changes now.

Decide Who Will Be Responsible For Assessing Compliance

In practice, a multidisciplinary approach is likely to be required, potentially including procurement, finance, human resource, and legal functions. Organisations may need to provide training for anyone dealing with the issue.

Audit Contracting Arrangements

Organisations should review the arrangements under which they engage independent contractors, and identify how reliant they are on services provided *via* PSCs, as opposed to individuals who contract directly; the risks in relation to these individuals remain unchanged.

The UK Treasury expects this new measure to net over £1.1 billion per year.

Determine Status

Ultimately, each PSC relationship will need to be assessed, using "reasonable care", and a Status Determination Statement (SDS) issued to both the individual and the contracting party, *i.e.*, the PSC or intermediary agency, if there is one. Notably, the SDS must specify the reasons for the organisation's determination.

The UK Government has created an online tool to assist with this process, which can be pointed to if HMRC subsequently questions a status determination. The tool has, however, been subject to widespread criticism. Pending an updated version and guidance expected later this year, organisations may be best served by working with legal advisors to implement their own, more robust, review system.

If an individual disagrees with a status determination, draft legislation anticipates a mandatory organisation-led dispute resolution process that must be complied with.

Plan For Change

Organisations should consider what action they will take if an independent contractor is determined to be within IR35 and have employee or worker status. The organisation will need to decide, in dialogue with the contractor, whether to

- Amend existing contracting arrangements so that the contractor becomes genuinely engaged on a self-employed basis, and carry out these changes in practice; or
- Engage the contractor in question as an employee or worker. The parties will need to decide which of them will bear the additional costs of the engagement, including holiday pay, pension contributions, sick pay, and employer's NICs.

KATIE CLARK
Partner
London
klclark@mwe.com

PAUL McGRATH
Partner
London
pmcgrath@mwe.com

JAMES ROSS
Partner
London
jross@mwe.com

THE GLOBAL REPERCUSSIONS OF LOCAL EMPLOYMENT RISKS

Michael Sheehan and Emma Chen

The global village is small, but social media is large; what a business does in country X will have repercussions in country Y.

While campaigning for President in 1932, Franklin Roosevelt promised a crowd in Pittsburgh that he'd balance the federal budget while cutting "government operations" by 25 per cent. When he returned to Pittsburgh during his 1936 campaign, Roosevelt asked his staff how to answer questions about that unfulfilled promise and was told "deny you were ever in Pittsburgh."

So much has changed since then: what is said and done is now instantly visible. This lesson came earlier to politicians, it is now unavoidable for business entities. There is no option to deny that you were there.

Let's look at some consequences of this global visibility:

- El Super, a small California-based grocery chain with approximately 600 unionised workers, failed to resolve a routine labour dispute at one store with the union representing those employees. As a result of this dispute involving just one store, El Super's Mexican parent company, Chedraui Commercial Group, found itself subject to double barrel complaints filed by US and Mexican labour unions under the North American Free Trade Agreement labour agreement and Organization for Economic Cooperation and Development guidelines.
- Vedanta found itself subject to a lawsuit by individuals living more than 5,000 miles away when an appellate court in the United Kingdom held that farmers from a Zambian village could bring a claim against Vedanta and its Zambian subsidiary (*Lungowe and Ors. v Vedanta Resources PLC and Konkola Copper Mines PLC* [November 2017] EWCA Civ 1528). The court's decision expanded the potential "duty of care" that parent companies have under UK law to employees of their subsidiaries, to include even non-employees who might be affected by its subsidiaries' operations.

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FOCUS ON ▸ EMPLOMENT

This trend is particularly apparent with respect to issues of forced labour. Eight of the G20 countries (Australia, Brazil, China, France, Germany, Italy, Britain, and the United States) have passed, or taken steps to pass, anti-slavery laws intended to minimise the impact of forced labour. The UK Modern Slavery Act is a prime example.

These "nudge laws" require companies to disclose what actions they have taken to ensure there is no forced labour in their businesses or within their supply chains. The idea is that large companies that have not taken actions to prevent forced labour become subject to public scorn or shaming.

The risk, however, goes far beyond adverse publicity, as the following challenges demonstrate.

- *Barber v Nestlé USA* alleged violations by Nestlé USA of California's Transparency in Supply Chains Act, asserting a failure to disclose that some of the fish used by Nestlé in its cat food products may have been caught by fishing boats in Thailand that use forced labour and sold their catch to Nestlé's partner, Thai Union Frozen Products, PCL. Nestlé ultimately won in both the trial and appellate courts.
- *Tomasella v. Mars, Inc.*, raised similar claims, alleging violations by Hershey Co., Nestlé USA Inc., and Mars, Inc., of the Massachusetts' Consumer Protection Act by failing to disclose on the packaging their "participation in supply chains making use of the worst forms of child labour" despite having "knowledge of the child and slave labour in its supply chain." The federal court judge dismissed the claims against Hershey, Nestlé, and Mars.

The risk... goes far beyond adverse publicity.

- Samsung Global and its French subsidiary, Samsung Electronics France, have been challenged by nongovernment organisations (NGOs) in France for alleged misleading advertising. For example, the NGOs claim that Samsung's website publishes ethical commitments guaranteeing workers' rights, while its factories in China, South Korea, and Vietnam allegedly violate human rights, including engaging in child exploitation. After a Paris prosecutor closed the investigation, the NGOs filed a civil complaint against Samsung's French subsidiary, which has led the Paris investigating magistrate to file preliminary charges against Samsung Electronics France.
- *Doe v. Nestlé* is a suit under the US Alien Tort Claims Act in which Nestlé and Cargill have been accused of aiding and abetting child slave labour in the Ivory Coast. Most recently, the US Ninth Circuit Court of Appeals reversed the dismissal of these claims and allowed the plaintiffs to amend their complaint to "specify which potentially liable party is responsible for what culpable conduct."

"Nudge laws" require companies to disclose what actions they have taken.

Historically, businesses, like Franklin Roosevelt in 1932, focused narrowly on geography. Back then, what was said or done in Pittsburgh was only heard or witnessed in Pittsburgh. Today, what is done in Pittsburgh may matter in Paris, Prague, and Phnom Penh, and *vice versa*. As a result, companies must pay attention to employment practices along their entire global supply chain.

MICHAEL SHEEHAN
Partner
Chicago
msheehan@mwe.com

EMMA CHEN
Emma Chen directs the legal work at Youth Advocate Programs Inc. She was an associate at McDermott at the time of writing this article.

PLYING THE SCIENCE: COLLABORATING TO FIGHT CANCER WITH PROTON BEAM THERAPY

Hamid Yunis and David Gibson

For the first time ever, a patient has been treated with high energy proton beam therapy (PBT) by the United Kingdom's National Health Service (NHS). Lawyers now working together at McDermott advised the counterparty providers and equipment supplier in what is the highest value, and most complex, medical equipment project ever undertaken in the United Kingdom.

Manchester, England, the cradle of the industrial revolution, and the home of multiple physics and engineering firsts, including Sir Ernest Rutherford's breakthrough in understanding the structure of the atom, can now add another: the first high energy PBT centre for the NHS.

The new centre at The Christie NHS Foundation Trust, Europe's largest tertiary cancer hospital, recently started treating patients. The centre forms part of a wider project bringing high energy PBT equipment to the UK for NHS patients. A sister centre jointly procured with University College Hospitals London NHS Foundation Trust will open its doors in London in 2020.

PBT is a form of particle radiotherapy that uses protons (think the hadron collider at CERN, but on a much smaller scale) rather than conventional "photons" to treat certain cancer indications. A key motivation is that it will help to reduce the effect of radiation upon tissue that surrounds tumours under treatment; in the longer term, this will help reduce the risk of secondary cancers. The two centres will predominantly treat children with brain, neck, and spinal cancers and, once on-stream, will allow the NHS to phase out its overseas PBT programme, which was highly publicised by the British press in the Aysha King case.

Although the United Kingdom had the world's first hospital-based PBT centre—a low energy centre for ocular tumours that opened in 1989 at the NHS Clatterbridge Cancer Centre (Liverpool)—these new centres are the first high energy PBT units procured by NHS bodies. This move reflects the increasing use of and confidence in particle radiotherapy worldwide, which has seen rapid growth over the last decade. Private providers are now entering the market to support the demand for PBT across the United Kingdom.

COMPLEX AND HIGH PROFILE PROJECT: INTEGRATED PROJECT DELIVERY

In 2012, the Department of Health and NHS England chose the two Trusts to deliver PBT services from a number of leading NHS hospital applicants. The Trusts, working closely together through their clinicians, medical physics teams, and legal advisors, undertook meticulous analysis and engaged with the market to identify highly detailed equipment and building requirements for each site.

This complex project was notable for a number of reasons, including

- Adoption of state-of-the-art high energy PBT technology, which was a pathfinder project for the United Kingdom
- Stringent building requirements and highly constrained inner city sites, which impacted on the design of equipment and building
- The Trusts' arms' length procurements across equipment and building work streams on commercial terms, requiring effective negotiation and risk control
- The high level of understanding and analysis of project risk required, which took into account available mitigations and reporting to the respective project sponsors
- The co-ordination between the equipment and build teams for design and installation
- The structuring and agreement of underlying capital funding arrangements, and the agreement of future clinical commitments with NHS commissioners.

The key to the success of the project was integrated project delivery. There was considerable co-ordination and synchronisation across the two Trusts, which were procuring separate equipment and building contracts, and substantial joint planning on the interfaces between the equipment suppliers and the building contractors.

The Trusts designed and conducted arms' length parallel competitive dialogue procurements across equipment and building workstreams, allowing extensive and collaborative engagement between the Trusts and the bidders (international suppliers for equipment and build) to establish a detailed level of understanding of the technical side of the equipment and the buildings. Once these were well understood, the early dialogue enabled the creation, development, and refinement of bespoke and achievable contracts for the design, supply, installation, testing, operation, and maintenance of the equipment, and for the design and construction of the centres.

This move reflects the increasing use of and confidence in particle radiotherapy worldwide.

The contracts were developed with particular emphasis on co-operation and information exchange, adequate testing and verification regimes, and clear equipment specifications. Bespoke operation and maintenance contracts require the supplier to make the equipment available for clinical use and anticipate future variations to equipment and services. Particular focus was applied to project management and risk control, including controls on time, cost, and quality objectives, which were vital for such a demanding project.

Throughout the complex competitive dialogue public procurements, all parties worked closely and collaboratively with the professionals in the multi-disciplinary teams, including the respective legal, medical physics, clinical, finance, equipment supplier, design and construction teams; and with radiation shielding experts, procurement specialists, and insurance advisors.

In July 2015, following three stages and 12 months of procurement (which, thanks to exceptional

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forward planning, didn't involve any procurement challenges), Varian was appointed the preferred equipment supplier for the two sites. Building contractor appointments were made shortly thereafter.

A GLIMPSE OF THE FUTURE

In June 2019, to celebrate the recent opening of The Christie's PBT centre and, with perfect symmetry, the centenary of Rutherford's atom discoveries, Manchester hosted the annual conference of the Proton Therapy Co-operation Group (PTCOG). PTCOG is a non-profit worldwide organisation of scientists and professionals with a mission to promote science, technology, and the clinical application of particle radiotherapy to improve treatment of cancer worldwide.

The conference, held in the United Kingdom for the first time, took as its theme "how the worldwide growth of particle therapy will develop in years to come." It focussed on sharing experiences and ideas for the use of particle therapy for a wider pool of cancer indications, and on developing treatment techniques, including "flash" irradiation and targeting moving tumours.

The conference also highlighted the efforts by organisations such as The European Particle Therapy Network and Project Inspire to promote international co-operation and to co-ordinate cross-border research and clinical trials in support of the use of PBT and other particle therapies. The expectation is that, in the next 10 years we will see

- The evolution of equipment and associated technologies, and a reduction in their costs
- Increasing involvement and integration of biological sciences and personalised cancer treatments, notably immunotherapy
- Artificial intelligence in diagnostics
- Cross-border clinical networks giving increasing structure to clinical trials.

WORLDWIDE GROWTH

The scientists, clinicians, equipment suppliers, and multi-disciplinary professionals attending the conference came from around the globe, and there is clearly great enthusiasm for the expansion of particle therapy treatments worldwide. This is reflected in the growth of the number of PBT units globally. Historically, the United States has led the way, but by 2021 there will be as many PBT units in Europe as in the United States, many with research facilities. Other PBT programmes are developing in countries such as China, India, and Singapore, and across the Middle East.

However great the potential and possibilities of PBT and other forms of particle therapy to help in the fight against cancer, it remains the most expensive medical equipment available. Bodies developing new centres must give themselves and their advisors time to design procurements and contract structures that maximise co-operation and collaboration between providers, equipment suppliers, and builders alike, whilst financial structures, capital costs and, critically, reimbursement regimes, must be thoroughly assessed, affordable, and optimised.

In this respect, new centres can learn from the United Kingdom's experience and follow the approach adopted for its successful PBT procurement. After all, it will not be the first time that the world has followed Manchester's lead.

HOW COMPLEX WAS THIS PROJECT?

The cyclotron, which is the part of the equipment that produces the beam, weighs 100 tons but is no bigger than a family car.

Given the speed at which protons whizz around the cyclotron, if let out, they would go around the world four times in one second.

The London site required digging the deepest hole ever dug in London for a building.

The concrete poured for the construction of the proton facility is equivalent to 1½ times the weight of the HMS Ark Royal aircraft carrier.

McDERMOTT DIFFERENCE

We are uniquely positioned with this case, as the authors, now working together in our London Healthcare team, represented the counterparty providers and equipment supplier in what is the highest value, and most complex, medical equipment project ever undertaken in the United Kingdom. Hamid Yunis acted for Varian Medical Systems Inc. and David Gibson acted for the two Trusts throughout the project.

HAMID YUNIS
Partner
London
hyunis@mwe.com

DAVID GIBSON
Associate
London
dgibson@mwe.com

EU COMPETITION LAW AND ARTIFICIAL INTELLIGENCE

Wilko van Weert

Artificial Intelligence (AI) and big data are playing an increasingly important role in the economy. Competition law will have to evolve if it is to reconcile the positive and negative effects that the use of these new instruments may have on markets.

Modern life is being progressively influenced by the "fourth industrial revolution", whereby new and disruptive technologies and trends, such as the Internet of Things, robotics, virtual reality, AI, and big data are combined in ways that until recently were inconceivable. Although all these factors will influence the way we work and live, AI and big data are already playing a critical role in how companies make business decisions and interact with customers, suppliers, and one another. AI may even lead to the development of entirely new economic models.

Because of the relative novelty and rapid development of AI-based platforms and applications, antitrust agencies and commentators are struggling to establish how the existing competition law framework can be applied to the issues that arise out of the effects that AI and its use of data have on the functioning of markets.

ARTIFICIAL INTELLIGENCE

AI is based on a tailor-made set of algorithms. An algorithm is itself a set of decision-making rules that is able to generate a precise output from certain data inputs. Traditional algorithms are relatively static (if *this* then *that*) and do not adapt their output based on feedback. AI introduces a self-learning element that allows the algorithm to adapt itself and get better and more efficient at its task as it processes more data. AI is therefore a dynamic algorithm with an increasingly precise output.

AI only works, however, if the underlying algorithms are fed sufficient data that allows the algorithm to learn and improve. For example, when a consumer searches online for a product, a supplier's AI platform will collect data from the customer's previous searches, and combine this with a detailed profile of the individual and statistics from the market, in order to propose a new product at the right time, personalised and priced appropriately to entice the consumer to make the purchase.

If the consumer buys a different product through the platform, that choice will become part of the updated dataset that determines what product may be proposed to this or similar consumers in the future. The chances that the proposed offer appeals to this consumer therefore increases over time.

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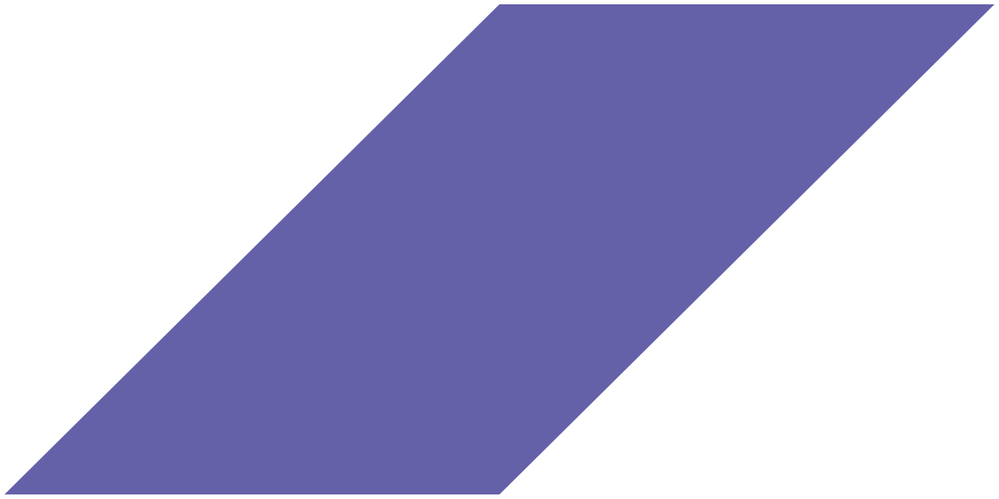

AI, algorithms, and access to data clearly influence the functioning of markets and may therefore have direct or indirect implications under competition law.

COLLUSION

Collusion in oligopoly markets is one of the main concerns of competition agencies when assessing the effects of algorithms, even though enforcers and academic commentators differ on whether the use of algorithms will ultimately harm or benefit competition.

The use of AI in pricing algorithms is often feared to lead to tacit collusion *i.e.*, the alignment of competitive behaviour without explicit agreement. Because algorithms are created with a specific purpose in mind, their propensity to result in tacit collusion depends on how the algorithm is programmed and used. Much depends on the number of competitors in the market and the willingness by some to compete aggressively.

Equally, it has often been argued that pricing algorithms create more opportunities for consumers to compare products and prices and ultimately get a better deal. In a market with sufficient suppliers, this is likely to hold true. In a market with few suppliers, this transparency may have the opposite effect and induce these few suppliers to align their prices.

Algorithms can create the "perfect price discrimination."

RESALE PRICE MAINTENANCE

The first fine imposed by the European Commission in this field related to the use of algorithms in e-commerce and concerned a vertical issue. The Commission sanctioned four consumer electronics manufacturers that had engaged in resale price maintenance (RPM) practices with regard to their online retailers.

When those retailers did not follow the prices requested by the suppliers and instead offered their products at prices below the recommended resale price, they faced threats or sanctions from the manufacturers, such as blocking of supplies. The use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network, and to intervene swiftly when it noted deviations from the recommended resale price. The price interventions limited effective price competition between retailers and led to higher prices for consumers.

An interesting element here is that the retailers themselves used pricing algorithms, which automatically adapted retail prices to those of competitors. In the Commission's view this would have led to lower prices if it were not for the intervention by the manufacturers.

In addition to these collusive aspects, it is clear that algorithm-based business models could also give rise to potential abuse of market dominance by large operators.

EUROPEAN UNION ▸ ARTIFICIAL INTELLIGENCE

ABUSE OF DOMINANCE

By using algorithms and other new technologies, dominant market players may find new ways of leveraging their dominance and foreclosing other companies from the market. This was the case with a large search engine provider that was found to have abused its dominant position by altering, for its own benefit, the criteria of its generic search algorithm with the objective of demoting competing comparison shopping services in the search results list.

A main area of discussion regarding dominant companies is whether or not they should make their data sets available to companies that, without this data, will never make it in a given market. Access to data is therefore likely to be a hot topic for the new Commission.

Algorithms might entirely change the way suppliers interact with their customers in a market. By monitoring prices, customer profiles and behaviour, and other factors, algorithms can create the "perfect price discrimination", which is the ability to charge customers exactly what they are willing to pay at any given time and circumstance. This individualised pricing is still relatively new from a competition law perspective, and raises the question of whether or not offers and transactions can be compared, and how they should be assessed from a competition law perspective.

On the other hand, consumers will also increasingly have access to platforms that use pricing algorithms to make markets more transparent and navigable, and help consumers make better choices. The same platforms may allow producers to react more quickly to consumer demand and market evolution, which could be viewed as efficiency enhancing.

Algorithms might entirely change the way suppliers interact with their customers in a market.

THE WAY FORWARD

While the fourth industrial revolution is already upon us, and algorithms and AI are omnipresent, competition law enforcers are still struggling to determine how to deal with this new reality. Disruptive technologies may have to adapt to competition law, but competition law will have to take into account new market realities, and enforcers will have to capture whether and where infringements are committed. Enforcement agencies may need to have recourse to AI themselves in detecting anticompetitive practices in future.

It is likely that AI and its applications will figure highly on the agenda of the new Commission when it takes office in November. All market players using AI will be watching what the policy agenda will bring, but the big data aggregators will likely have the most to fear.

Pedro García de Pesquera Villagrán also contributed to this article.

WILKO VAN WEERT
Partner
Brussels
wvanweert@mwe.com

FRANCE ▸ FOREIGN INVESTMENT

FOREIGN INVESTMENT CONTROL IN FRANCE: STRATEGIC SECTORS EXPANSION AND SANCTIONS REINFORCEMENT

Nicolas Lafont and Stephan de Groër

The legislator extended the list of sensitive sectors in order to capture the “sectors of the future”

Like other EU Member States and the European Union itself, France has recently strengthened its national foreign direct investments control regime.

Foreign investments in France are generally unrestricted. However, in order to ensure the protection of French national interests, certain foreign investments require the prior authorisation of the French Ministry of Economy.

Ministry of Economy approval is required for those investments that satisfy the two following conditions:

1. The investment either

- Participates in the exercise of public authority
- Relates to activities likely to affect public order, public security or national defence; or
- Relates to the research, production or commercialisation of weapons, ammunitions, and explosive substances.

2. The foreign investor acquires either

- More than 33.33 per cent of the share capital or voting rights of a French company (or, if the foreign investor is based in the European Union, a majority of the voting rights); or
- All or part of a French company’s branch of activity.

Like other EU Member States and the European Union itself, France has recently strengthened its national foreign direct investments (FDI) control regime.

The Ministry of Economy may also impose daily penalties.

STRATEGIC SECTORS EXPANSION

In order to improve visibility on the applicability of the foreign investment regulation, Article R153-2 of the French Monetary and Financial Code provides a list of “sensitive sectors” that fall within the scope of the prior-approval regime.

In 2018, in Decree No. 2018-1057, the legislator extended this list of sensitive sectors in order to capture the “sectors of the future”. The scope of the authorisation regime therefore now includes research and development activities relating to cybersecurity, artificial intelligence, robotics, additive manufacturing, semiconductors, and dual-use goods.

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The list also includes activities relating to equipment for capturing computer data; space operations; and storage of data that, if disclosed, is likely to harm strategic national interests.

This is the first time this list has been updated since 2014, when the Montebourg Decree was enacted in the context of the sale of Alstom's energy business to General Electric. The Decree added to the list sensitive sectors, such as the safety and continuity of the supply of water, electricity, gas, hydrocarbons and any other source of energy; the operation of transport services and telecommunications; and activities related to "the protection of public health".

The Ministry is now entitled to impose a financial penalty.

SANCTION REINFORCEMENT AND INCREASED MINISTRY OF ECONOMY POWERS

Until recently, the sanctions in cases of violations of the foreign investment regulations mainly consisted of the transaction being rendered null and void. Criminal sanctions allowed for (largely theoretical) imprisonment for up to five years, or a fine of up to twice the amount of the investment.

Owing to the review procedure and its outcome being confidential, there is no publicly-known precedent, but the risk of nullity under the prior approval regime was so high that many investors sought comfort from the Ministry of Economy by requesting an advance ruling to confirm that their contemplated foreign investment did not fall within its scope.

On 24 May 2019, the PACTE Law (*loi relative à la croissance et la transformation des entreprises*, or the law on growth and transformation of enterprises), which provides for additional sanctions, entered into force. The goals of the law were, in particular, to strengthen the powers of the Ministry of Economy and to allow it to adopt more diversified and tailored sanctions.

Injunctions

When an investment is carried out without prior authorisation, the PACTE Law enables the Ministry of Economy to order the foreign investor to either

- Submit a request for authorisation
- Restore the original pre-investment situation at its own expense
- Modify the investment.

The Ministry of Economy may also impose daily penalties until an order is complied with by the investor, and can appoint a temporary manager in the relevant legal entity in order to ensure the protection of national interests.

Furthermore, if the protection of national interests is compromised, the Ministry of Economy may also

- Suspend the voting rights attached to the investor's shares in the relevant French company
- Prohibit the distribution of dividends attached to these shares
- Suspend the free disposal of all or part of the assets related to the activities subject to authorisation.

Financial Penalties

The Ministry of Economy now has the power to impose administrative penalties as opposed to the criminal and civil sanctions above, which could only be ordered by a judge and, in practice, have rarely been imposed. The Ministry is now entitled to impose a financial penalty when

- An investment is carried out without prior authorisation
- The authorisation has been obtained fraudulently
- The investor has failed to comply with the conditions imposed by the Ministry as a condition to its authorisation.

The amount of the penalty cannot exceed the higher of the following: either twice the value of the irregular investment, 10 per cent of the annual pre-tax turnover of the target company, €1 million for natural persons, or €5 million for legal entities.

This is the first time this list has been updated since 2014.

Non-Compliance With Clearance Conditions

If a foreign investor fails to comply with the conditions imposed by the Ministry of Economy as a condition of its authorisation, the Ministry can

- Withdraw its authorisation
- Order the investor to comply with the conditions
- Order the investor to comply with new conditions, including measures to restore the previous pre-investment situation or the divestiture of all or part of the sensitive activities at stake.

Annual Statistics

The Ministry of Economy will publish an annual report stating the main statistics regarding the control of foreign investments in France. This report will be prepared on an anonymous basis.

NICOLAS LAFONT
Partner
Paris
nlafont@mwe.com

STEPHAN DE GROËR
Associate
Paris
sdegroer@mwe.com

THREE MAJOR CONSIDERATIONS FOR US SWEEPSTAKES AND CONTESTS

Jorge Arciniega and Eleanor (Ellie) Atkins

In the United States, prize-driven promotions have proven to be powerful marketing tools, attracting consumer interest, enhancing brand loyalty, and generating sales, but they should be handled with caution.

Promotional sweepstakes and contests are ubiquitous in the American commercial landscape; "Enter Here!" can be found everywhere from bottle caps to social media posts. The laws that govern such promotions can, however, lead to unpleasant surprises for the uninformed. Private lawsuits and state enforcement are not uncommon in this field.

AVOIDING AN ILLEGAL LOTTERY

Under US law, only entities licensed by states can offer a lottery, *i.e.*, a promotion that contains all three of the following elements:

- Consideration is required to enter
- A winner is selected by chance
- A prize is awarded to the winner.

Entities that are not licensed by a state to offer a lottery must therefore omit one of these elements to be able to offer a legal promotion. If they remove the element of consideration, the promotion becomes a "sweepstakes"; if they remove the element of chance, the promotion becomes a contest.

Consideration

What constitutes "consideration" varies from state to state. In some states, only requiring a monetary fee to enter the promotion constitutes consideration. In others, obtaining something of value from the entrant, such as the completion of a survey, constitutes consideration.

Offering a free alternative method of entry (AMOE)—often *via* simple mail or online submission—is a common method of avoiding the element of consideration. Importantly, all AMOE entries must be treated the same as other entries; all entries must receive the same, equal chance to win.

Chance

To effectively omit chance, the contest must be skill-based and the rules must clearly state the objective judging criteria. The submission of user-generated, creative works, *e.g.*, videos, photos, songs, *etc.*, can present intellectual property rights clearance problems.

A small number of states require that sponsors register and bond the promotion.

The rules for the promotion should therefore clearly state what is not permitted and who owns the rights once entries are submitted.

REGISTRATION AND BONDING

A small number of states require that sponsors register and bond the promotion well in advance of the target date for offering the promotion. For example, New York and Florida require that a sweepstakes with a total prize value exceeding US$5,000 be bonded and registered before it can be announced in those states. Rhode Island requires the registration of any promotion that is offered at a retail location and has a cumulative total prize value of over US$500.

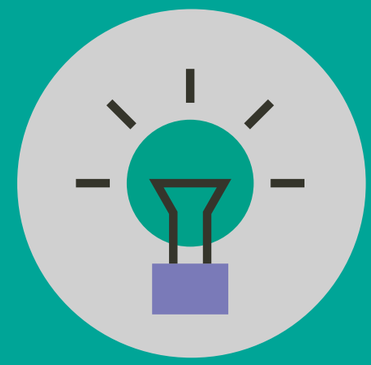
OFFICIAL RULES AND ADVERTISING

Sponsors must publish clear rules for how the promotion will be run. Not only is this a legal requirement in most states, it will help shield the sponsor from lawsuits brought by unhappy participants. The rules should contain all material terms, including, for example, the start and end date, how to enter, a description of the prizes, any eligibility restrictions (*e.g.*, "only open to legal, US residents"), and the name and address of the sponsor.

When advertising space is limited, the sponsor can publish abbreviated rules that state the most important terms, such as "no purchase necessary," but entrants must nonetheless have the opportunity to read and accept the full rules. This is usually done by including a hyperlink to the official rules or, in the case of print media, directing the entrant to the promotion's website.

JORGE ARCINIEGA
Partner
Los Angeles
jarciniega@mwe.com

ELLIE ATKINS
Associate
Washington DC
eatkins@mwe.com



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McDermott
Will & Emery