

2017 Annual Report

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23 major  
trends in  
Antitrust  
Law

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**Shearman & Sterling  
is a destination competition  
practice for clients  
who require solutions  
to particularly complex  
problems.**

*— Global Competition Review*

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## Foreword



This fifth edition of Shearman & Sterling's Antitrust Annual Report is issued at a time of great turbulence and uncertainty. Brexit. Elections in France, Germany, and the Netherlands. Existential threats to the euro and perhaps the European Union itself. President Trump. Populism. Protectionism. Isolationism. Anti-globalism. It is a trite but necessary observation that one would like to see the antitrust agencies immune from these political pressures, resisting any and all political interference and following the facts wherever they may lead and reaching conclusions based only on the facts, law, and economics. However, I cannot. More than at any other time in my memory is the threat of political interference across the globe a material risk for antitrust proceedings, whether in the EU, the US, China, or elsewhere. Businesses must therefore not only view agency investigations through the narrow lens of antitrust, but also must have an acute appreciation of geopolitical developments, be ready to engage far more with the antitrust agencies and, where necessary, with the broader government, expect transactional clearances to take longer, and overall be prepared for unpredictable outcomes.

This year's report documents the key trends in antitrust, including the EU private damages directive which is set to go live in 2017, big data, the EU's e-commerce inquiry, online distribution, proposed changes to the EU merger

thresholds, the Staples-Office Depot merger and the importance of internal documents, the effects of Brexit, Advocate General Wahl's Opinion on *Intel*, multinational companies' tax arrangements and state aid law, and the US Court of Appeals' ruling in *American Express* and lessons for antitrust litigation in two-sided markets.

*Pro bono* remains important to us and we invite you to discover the projects our team has contributed to in the course of 2016.

My Antitrust Co-Head, Beau Buffier, became the new Chief of the Attorney General's Antitrust Bureau in New York in September 2016. Beau is a talented antitrust lawyer with a broad set of skills. I have no doubt that he will be a transformative resource to the New York Antitrust Bureau.

As ever, we thank our clients for their continued trust in us to handle their most important and demanding cases and we wish you every success in 2017.

A handwritten signature in black ink, appearing to read 'Stephen C. Mavroghenis'.

**Stephen C. Mavroghenis**  
Practice Group Head

# 01

# Merger Control

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## FTC's concerns impede *Staples-Office Depot* merger

On May 10, 2016, Staples and Office Depot announced that they would be terminating their US\$6.3 billion merger in the wake of a US federal judge's decision to issue a preliminary injunction blocking the deal. *Continued overleaf*

# 01

### Background

On February 4, 2015, Staples and Office Depot announced their proposed merger. On December 7, 2015, the Federal Trade Commission (FTC) filed a complaint in federal court seeking injunctive relief against the proposed transaction, alleging that it would have created a dominant firm in the provision of consumable office supplies to large business to business (B2B) customers in the United States.

### Market Definition

The government's case in chief lasted more than two weeks and included testimony from an economist and a number of third-party witnesses.

The FTC maintained that 'consumable office supplies' included items like pens and paper, but excluded ink and toner for printers and copiers because ink and toner manufacturers serve many large B2B customers directly through 'managed print services,' and thus these products warranted separate consideration. The defendants argued that the agency's deliberate exclusion of products from the market definition artificially inflated the parties' market shares.

The FTC's market was also limited to certain large customers. It contended that Staples and Office Depot were *"the best options for most large [B2B] customers — and the only meaningful options for some large [B2B] customers — particularly those with facilities in multiple regions of the country."* Staples and Office Depot challenged the FTC's use of the Fortune 100 as a proxy for large office supply customers, accusing the regulator of 'gerrymandering' by excluding hundreds of large B2B customers from its calculations of the market.

Based on its market definition, the FTC alleged that the merged entity would control as much as 80% of the market post-transaction.

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### FTC's concerns impede Staples-Office Depot merger

### New and Existing Competition

The FTC's complaint expressly excluded from the market other office supply vendors, which it alleged would not be viable competitors to a combined Staples Office Depot for large B2B customers. To this end, the government relied, in part, on the merging parties' own documents, some of which suggested that they were each other's only or closest competitors.

The defendants asserted that they compete vigorously against a number of players, including Amazon and W.B. Mason. A W.B. Mason executive testified that the company did not have the ability to compete with Staples and Office Depot for national B2B accounts and that it recently abandoned a plan to expand nationally. Large B2B customers testified that regional players, including W.B. Mason, do not typically bid for or win large B2B contracts.

Staples and Office Depot argued that a part of the rationale behind their proposed transaction was to be able to better compete against Amazon Business (the online retailer's office supply division, which entered the market in 2015), which they presented as a rapidly expanding competitor that would constrain any anti-competitive price increase post-merger. The key question was whether Amazon Business would restore lost competition in a timely and sufficient manner, and the FTC's expert witness raised doubts about Amazon Business' likely ability to compete for large B2B customers in two to three years.

### The Best Defense May Be No Defense?

Following the government's case, in a surprising and unprecedented move, the defendants declined to call any witnesses in their defense. They had spent the entire hearing challenging every aspect of the FTC's case, and undercutting its witness and expert testimony, and in their bold move denied the government the reciprocal ability to cross-examine Staples and Office Depot executives. Had they subjected their own witnesses to cross-examination, the parties likely would have been faced with their 'bad'



documents and risked giving the government the opportunity to resuscitate some of its case. Failing to call their own economist to refute the FTC's expert testimony and to develop their defense, however, was a precarious move.

### The Decision

The district judge ultimately ruled in the FTC's favor, stating that the agency had met the burden of showing that there is a reasonable probability that the *Staples-Office Depot* merger would substantially impair competition in the sale and distribution of consumable office supplies to large B2B consumers.

The judge found that the evidence supported the FTC's market definition because, among other things, large B2B customers have distinct needs (requiring specialized vendors with sophisticated capabilities) and ink and toner are subject to distinct competitive conditions. He also broadly accepted the FTC's expert testimony relating to market shares.

Based on its market definition, the FTC alleged that the merged entity would control as much as 80% of the market post-transaction.

Relying in large part on testimony from B2B customers, and Amazon and W.B. Mason executives, the judge determined that Amazon Business would not be in a position to replace the competition lost as a result of the proposed merger within three years, and that regional players do not have the ability to compete on a national scale.

Significantly, throughout his decision, the judge repeatedly cited the merging parties' 'bad' documents and that although they could have, they elected not to offer any evidence in their defense.

### Conclusion

The court's decision in *FTC v. Staples* highlights a number of important considerations that parties contemplating a transaction should keep in mind, including the following:

- Parties should be aware of the importance of their internal documents, which can affect the length and outcome of any regulatory review and litigation proceeding. 'Bad' documents that include unhelpful statements about how the merging parties view each other continue to attract the attention of antitrust agencies and courts.
- The District Court endorsed once more a national product market, underlining that markets and competitive effects analyses can be based on a particular customer or particular group of customers — and even the largest customers can be harmed by a loss of competition.

# 02

# Merger Control

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## Mega mergers in the agribusiness

Three large transactions in the agribusiness industry were announced from late 2015 through September 2016: (i) Dow and DuPont's merger of equals, with a combined market capitalization of approximately US\$130 billion, was announced in December 2015, and will result in three different companies which will be spun off within two years of closing, one of which will focus on agriculture; (ii) ChemChina's purchase of Syngenta for US\$43 billion was announced in February 2016; and (iii) Bayer's US\$66 billion unsolicited takeover bid for Monsanto, which was announced in May 2016 and accepted by Monsanto in September 2016 (after being increased from US\$62 billion). *Continued overleaf*

# 02

The transactions highlight:

1. the typical theories of harm that antitrust authorities investigate;
2. the thicket of various national merger control filings that companies involved in large, multinational transactions must navigate; and
3. the complex divestitures that might be necessary to convince the antitrust authorities to approve the transaction.

### 1. Theories of Harm

The three mergers demonstrate three common theories of harm that antitrust authorities examine: (i) horizontal concerns, (ii) vertical concerns, and (iii) innovation concerns:

- (i) Horizontal concerns — The overlaps in Dow-DuPont demonstrate the types of overlaps that might concern regulators. Dow and DuPont overlap in both seeds and crop-protection products (herbicides and pesticides). Any overlaps in non-agricultural product areas are not the focus of this article. Public sources indicate that the combined firm will become the largest player in the US market for corn and soybean seeds at about 41% and 38% of the respective markets. Together with Monsanto, the new top two players would have 76% and 66% of the markets, respectively. Watchdog groups such as the American Antitrust Institute (AAI) and the National Farmers Union argue that this level of concentration would hurt the companies' US customers — farmers.
- (ii) Vertical concerns — Those same watchdog groups argue that the three megadeals have vertical concerns as well, namely that the companies' integrated traits, seeds, and chemicals platform would harm smaller competitors because the vertical integration would increase the risk that they are foreclosed from

interoperating with necessary technology from the two firms. AAI also argues that prices are lower when companies must cross-license their technologies compared to when one company has the technologies all under their own tent.

- (iii) Innovation concerns — A third way that the agribusiness megadeals might affect the market, watchdog groups argue, is by reducing innovation competition. Currently, the merging firms compete head to head not only in their current product portfolios, but also in the research and development space to create new products.

The companies' main procompetitive defense for their transactions, which became apparent at a Senate Judiciary Committee hearing in September 2016, is that the combined firms would be better able to develop new and improved crop varieties that have higher yields. Such radical innovation is necessary to be able to feed the world's soaring population, and may not be possible without combining the expertise of different companies.

### 2. Multi-jurisdictional Merger Control Filings

The merger of Dow and DuPont will require approvals from at least the US, EU, China, and Brazil. There likely are several other approvals needed, but which are not listed in the prospectus filed with the Securities and Exchange Commission (SEC). ChemChina-Syngenta will require approvals in 22 jurisdictions. Bayer-Monsanto will similarly also require multiple merger control approvals. Navigating the thicket of merger control approvals is difficult not only because each filing takes more time and resources away from integration planning and other potentially value-enhancing activities, but also because all merger filings are not created equal. That is, companies filing in multiple jurisdictions must deal not only with different facts in different jurisdictions, but also with different processes. For example, the merger control process in the US tends to be fairly 'back-loaded,' with the amount of information needed to make the Hart-Scott-Rodino (HSR) filing (the

initial filing in the US) fairly limited in comparison to other jurisdictions' initial filings, but with a second request process that can take months of compliance effort and that seeks an unwieldy amount of data and documents from custodians that might be fairly viewed as having only a tenuous relationship to the transaction and overlap products. The European Union (EU) process, in contrast, is a more front-loaded process that might potentially seek an unwieldy amount of information from merging parties even in cases where any theories of harm issues are tenuous at best. The differing procedures make the already complicated decision of when and how to offer remedies even more complicated. With the current political trend toward decentralizing political mechanisms (as seen in the anti-free trade rhetoric — especially anti-multilateral trade agreements — from both Democrats and Republicans in the US presidential campaign and Brexit in the UK), the merger control filing process is unlikely to be standardized in the near future.

be able to step into the shoes of the seller and replace the competition that was lost in the transaction, yet (ii) the divestiture buyer must not create its own competition issues. So, for example, Monsanto (absent its own transaction) would be a credible buyer of the Dow-DuPont divestitures assets, but would not remedy the concerns of regulators. It is possible that, if the antitrust authorities believe that there are no buyers who will fit both of these categories, they could seek to block the transaction or transactions outright rather than let them proceed with divestitures.

Navigating the thicket of merger control approvals is difficult not only because each filing takes more time and resources away from integration planning and other potentially value-enhancing activities, but also because all merger filings are not created equal.

### **3. Potential Divestitures**

In each of the three megadeals, it is clear or at least highly likely that the parties contemplated the possibility of considerable divestitures. For example, according to the Bayer-Monsanto merger agreement, Bayer must divest assets that generated as much as US\$1.6 billion in net sales. The parties in all three transactions are likely to face two related and somewhat contrary challenges in convincing the authorities that any potential divestiture packages are sufficient: (i) the divestiture buyer must

# 03

# Merger Control

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## Big data in the spotlight of competition enforcement

### What is Big Data and Why is it Important?

The term ‘big data’ is used to refer to the collection and processing of large quantities of data through sophisticated methods (e.g., advanced processing through algorithms), primarily by online businesses including search engines like Google, Yahoo and Bing, social media platforms like Twitter, Facebook, and LinkedIn, and financial information providers like Thomson Reuters, but also retailers (e.g. Starbucks). Data is the lifeblood of these businesses, such that an online platform’s ability to collect and use data to create a more accurate and complete online experience for users is what makes it thrive or fail. *Continued overleaf*

Big data may comprise personal information about end users, their profile information, search queries and ad clicks, but also other types of data such as publicly available information (e.g., geological information), or highly specialized data (e.g., financial, technical, pharmaceutical, genetic information). However, there is no consensus on the precise nature and definition of big data. According to some, big data is “*the new oil of the internet and the new currency of the digital world*”<sup>1</sup> or just “*the new currency*.”<sup>2</sup> According to others, data is like “sunshine,” something that is available and free for anyone who wants to enjoy it.<sup>3</sup> Data has also been referred to as a “*non-rivalrous*” product, meaning that a firm using a database comprising accessible (i.e. non-proprietary) user or other type of data cannot prevent others from accessing and using the same data.<sup>4</sup>

‘Big data’ is currently at the forefront of competition agencies’ enforcement priorities. The most recent developments regarding big data are discussed below.

### Merger Control

On October 7, 2016, the European Commission (EC) launched a public consultation<sup>5</sup> seeking stakeholders’ views, *inter alia*, on whether to revise the purely turnover-based jurisdictional thresholds<sup>6</sup> so as to capture all transactions which can potentially have an impact in the internal market.<sup>7</sup>

The purpose is to assess whether firms that gain access to valuable data via small M&A deals should seek approval even though such acquisitions would not meet the European Union Merger Regulation (EUMR) thresholds. According to EU Competition Commissioner Margrethe Vestager, the risk is that “[h]aving the right set of data could make it almost impossible for anyone else to keep up.”<sup>8</sup> Therefore, the key question is whether the data acquired is ‘unique’ enough to create insurmountable barriers to entry. For instance, the EC applied this test in *Microsoft/LinkedIn*,<sup>9</sup> finding, *inter alia*, that LinkedIn’s customer relationship

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### Big data in the spotlight of competition enforcement

management solution is not ‘must have’ and access to its database is not essential for rivals to compete.<sup>10</sup>

A possible amendment of the EUMR would affect firms’ decisions to acquire non-rival, small firms active in niche segments that collect and process ‘unique’ data, patents and key know-how, and increase the administrative burden not only on digital firms but also firms active in other sectors, e.g., pharmaceuticals. Depending on the outcome of the consultation, the challenge for the EC would be to find an appropriate and measured solution in assessing data-rich mergers without unnecessarily restricting commercial freedom.

### Abuse of Dominance

Competition watchdogs appear keen to investigate possible abuse of dominance in the data-rich digital industry, the most recent example being the Bundeskartellamt’s probe into Facebook’s allegedly abusive imposition on its users of unfair privacy terms.<sup>11</sup> However, it is questionable whether competition law is the right tool to intervene in that specific instance. Arguably, such matters are more adequately and swiftly addressed by privacy or consumer protection laws. For instance, following the *Facebook/WhatsApp*<sup>12</sup> deal, the EC stated that “[a]ny privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the transaction do not fall within the scope of EU competition law.”<sup>13</sup> Also, on September 27, 2016, the German data protection agency ordered Facebook to stop collecting user data from its WhatsApp messenger app and delete any data it had already received.<sup>14</sup> Such intervention shows that data protection rules can and do work.

Another conceivable type of abuse would be the refusal by a dominant firm to grant access to information that is essential for rivals to compete downstream. According to well-established EU case law,<sup>15</sup> dominant firms may be forced to grant rivals’ access to a proprietary input only in ‘*exceptional circumstances*,’ namely when that input is essential for rivals to compete, and refusal to grant access is



1. Meglena Kuneva, former Consumer Protection Commissioner (Speech at the Roundtable of Online Data Collection, Targeting and Profiling, March 31, 2009) <[http://europa.eu/rapid/press-release\\_SPEECH-09-156\\_en.htm](http://europa.eu/rapid/press-release_SPEECH-09-156_en.htm)>
2. Deloitte, 'Data as the new currency' Deloitte Revue, Issue 13 (2013), <[http://mobile.deloitte.wsj.com/riskandcompliance/files/2013/11/DataCurrency\\_report.pdf](http://mobile.deloitte.wsj.com/riskandcompliance/files/2013/11/DataCurrency_report.pdf)>
3. Julia Holz, Director, Competition at Google (Speech at the 33<sup>rd</sup> Competition Policy Conference of the American Chambers, Brussels, October 26, 2016)
4. Nils-Peter Schepp and Achim Wambach, 'On Big Data and its Relevance for Market Power Assessment' (2016) Journal of European Competition Law & Practice, Vol. 7, No. 2, p. 121. See also Autorité de la concurrence and Bundeskartellamt, 'Competition Law and Data' (May 10, 2016) 36
5. Evaluation of procedural and jurisdictional aspects of EU Merger Control, October 7, 2016, available at: [http://ec.europa.eu/competition/consultations/2016\\_merger\\_control/consultation\\_document\\_en.pdf](http://ec.europa.eu/competition/consultations/2016_merger_control/consultation_document_en.pdf).
6. Council Regulation (EC) No 139/2004 of January 20, 2004 on the control of concentrations between undertakings (EUMR).
7. The consultation expired on January 13, 2017.
8. MLex, "Microsoft, LinkedIn should heed Vestager's warning about 'unique' data," Dafydd Nelson, September 9, 2016.
9. Case COMP/M.8124 – *Microsoft/LinkedIn*, conditionally cleared on December 6, 2016. Commission Press Release IP16/4284 "Commission approves acquisition of LinkedIn by Microsoft, subject to conditions," December 6, 2016.
10. The Commission identified issues in professional social network services. The commitments consisted of ensuring: (i) that the parties' products/services would not be bundled; (ii) the interoperability of rival products with Microsoft's Office suite; and (iii) access to Microsoft Graph, a gateway for software developers.
11. Press Release "Bundeskartellamt initiates proceeding against Facebook on suspicion of having abused its market power by infringing data protection rules," March 2, 2016.
12. Commission Decision of October 3, 2014 in Case COMP/M.7217 – *Facebook/WhatsApp*.
13. Commission Press Release IP/14/1088 "Mergers: Commission approves acquisition of WhatsApp by Facebook," October 3, 2014.
14. The Guardian, "Germany orders Facebook to stop collecting WhatsApp user data," available at: <https://www.theguardian.com/technology/2016/sep/27/germany-orders-facebook-stop-collecting-whatsapp-phone-numbers-user-data>.
15. Cases C-7/97, *Oscar Bronner GmbH* (EU:C:1998:569); C-418/01, *IMS Health GmbH* (EU:C:2004:257), and T-201/04, *Microsoft Corp. v. Commission* (EU:T:2007:289).
16. Nils-Peter Schepp and Achim Wambach, On Big Data and its Relevance for Market Power Assessment, Journal of European Competition Law & Practice, 2016, Vol. 7, No. 2, p. 121. See also the study co-authored by the French Autorité de la concurrence and the German Bundeskartellamt on "Competition Law and Data," p. 36.
17. MLex "Data abuses could be targeted by antitrust regulators as Vestager weighs new law," Lewis Crofts and Matthew Newman, September 29, 2016.
18. "Competition Law and Data," May 10, 2016, available at: <http://www.autoritedelaconcurrence.fr/doc/reportcompetitionlawanddatafinal.pdf>.
19. *Ibid.*, pages 14–15.

unjustified and excludes competition on an actual, potential or hypothetical downstream market. The standard of proof is very high, and the challenge to establish such an abuse even higher in cases concerning non-proprietary data that is accessible to all.<sup>16</sup> Also, typically, users multi-home, *i.e.*, use multiple platforms for the same service.

### Collusion

One of the possible concerns with the collection of large amounts of data is that rivals may illegally share this information.<sup>17</sup> The issue of possible (tacit or explicit) collusion through increased market transparency through data collection and data-crunching algorithms has been raised by Commissioner Vestager and discussed in a recent report by the Autorité de la concurrence and the

Bundeskartellamt.<sup>18</sup> However, that report rightly concluded that "[a]ll in all, prosecuting such conducts could prove difficult: first, market transparency is generally said to benefit consumers when they have — at least in theory — the same information as the companies and second, no coordination may be necessary to achieve such supra competitive results."<sup>19</sup>

### Conclusion

With significant innovations in the digital world particularly through the development of the Internet of Things, big data will undoubtedly remain one of the key enforcement priorities of the EC and national competition authorities.

One of the possible concerns with the collection of large amounts of data is that rivals may illegally share this information.

# 04

# Merger Control

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## Privacy concerns surrounding big data

We have seen explosive growth in big data in recent years and the impact is wide-ranging. From analyzing consumer behavior on e-commerce websites to gathering patient data to help develop new medical treatments, the massive amounts of data that have been collected combined with powerful algorithms allow for exciting innovations in how consumers are targeted and services are delivered. But inherent in the value that big data brings is also the potential for data abuse or misuse, and one of the challenges that big data must address is the concern for privacy violations. *Continued overleaf*

# 04

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### Privacy concerns surrounding big data

Privacy concerns can range from the need to protect personally identifiable information (*e.g.*, a person's name, social security number, or credit card number) to the more complex task of identifying data elements that are not so easily identifiable but may cause embarrassment or harm if leaked or abused, such as the tracking of our online shopping history or vehicle driving patterns.

Big data is here to stay. So what can businesses do to harness the power of big data analytics while addressing the privacy risks?

#### Regulatory Oversight and Compliance Requirements

In the US, there are federal and state requirements for how personally identifiable information must be treated and protected. In addition, there are compliance requirements for data protection in Europe (where the General Data Protection Regulation (GDPR) will take effect in May 2018) as well as in other regions around the globe. Because data protection laws are constantly evolving, the use of big data requires careful consideration of the patchwork of laws and regulations and close coordination between the technical and legal teams within the organization.

A cyber-attack can be motivated not only by money and information theft, but also espionage or sabotage.

#### Preserving Anonymity

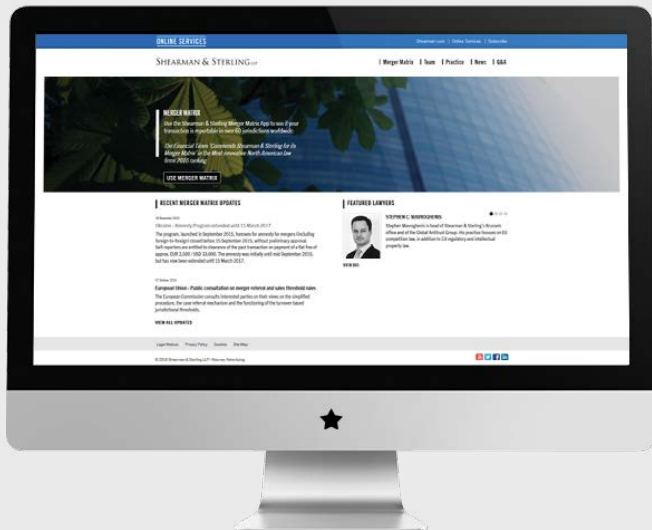
With so much data and powerful analytics linking individuals to data, it is more important than ever to establish rules on how data will be anonymized if identification of individuals is not necessary for the business goal. Particularly for organizations that sell consumer data, rules must be in place to remove or mask personally identifiable information so that it is not revealed through big data analytics.

#### Hacking Risk

Data warehouses are high-value targets for hackers. A hacker will try to exploit system vulnerabilities that, even if they exist only for a short time, can give access to massive amounts of data and result in privacy violations. A cyber-attack can be motivated not only by money and information theft, but also espionage or sabotage. Knowing the value of the data that is collected — and how it is stored and used — will help begin the conversation about the level of protection necessary to respond to potential cyber-attacks.

To help navigate the opportunities and pitfalls of big data, organizations are advised to:

- hire skilled data privacy and technology professionals to identify privacy risks and manage them, be they in-house experts or consultants;
- develop strong compliance and information security policies to secure personal data; and
- create an organizational culture that thinks not only about the value, but also anticipates and addresses the potential harm in collecting, storing and using big data.



## Merger Matrix – helping clients determine quickly where to file transactions

Shearman & Sterling's antitrust practice has developed an online tool to help clients quickly identify likely merger filing obligations for contemplated transactions. Merger Matrix currently covers 62 jurisdictions, with a further 10 to be added in 2017.

### What It Does

Merger Matrix uses transaction-specific data in conjunction with antitrust practice know-how and experience to produce a red flag analysis report. Users also have the option — e.g., when no public information on a target company is available — to generate country fact sheets with a high-level overview of merger filing obligations for the jurisdictions covered by a transaction.

### How It Works

Testing a transaction is quick and easy. Merger Matrix' interface is intuitive to use. Users only need to have

transaction data to carry out a merger control analysis. The process is automated — without interaction with an external advisor, unless further information is required. This means checking transactions take minutes compared with hours when done manually by a lawyer; moreover, Merger Matrix reduces the risk of human error. It is continuously updated to reflect changes to the regulatory frameworks.

### Secure and Confidential

To ensure security and confidentiality, Merger Matrix sessions are encrypted and no information is stored or retained. Access is password protected.

### Free to Shearman & Sterling clients

Merger Matrix is an added value tool for firm clients. It is offered at no cost.

## Recognitions

Shortlisted for the 2016 British Legal Awards in 'Best use of technology'

Commended by the *Financial Times* in its 'Most innovative North American law firms 2016' ranking

### Sample Results

Merger Matrix		
FILING ANALYSIS RESULTS		
<p>DOWNLOADS</p> <ul style="list-style-type: none"> <li>Filing Analysis Results.pdf</li> <li>Country by Country Fact Sheets.pdf</li> </ul>		
AMERICAS		
Country	Information	Results
United States	<p><b>US Revenue</b> Target: USD 3,328,500,000</p> <p><b>Other Information</b> Target US assets meet threshold: Unknown</p>	<p>Further information is required on the target's assets in the United States to determine if filing is required. Filing may not be required if the value of the target's assets in the United States is less than USD 78,200,000.</p>
ASIA		
Country	Information	Results
China	<p><b>China Revenue</b> Target: RMB 13,946,600,000 Acquirer: RMB 6,973,300,000 Combined: RMB 20,919,900,000</p> <p><b>Worldwide Revenue</b> Combined: RMB 153,412,600,000</p>	Filing likely required*

# 05

# Merger Control

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## Proposed amendments to the German Competition Act: Towards a competition law for the Digital Age

In 2017, several amendments to the German Competition Act will come into force. Apart from provisions implementing the European Union (EU) Directive on antitrust damages actions, the proposed amendments concern in particular merger control and market dominance in the digital economy as well as antitrust liability of parent companies. *Continued overleaf*

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### Proposed amendments to the German Competition Act: Towards a competition law for the Digital Age

The proposed provisions on antitrust liability will bring the German rules generally in line with the rules at the European level. Previously, parent companies could in case of infringements by subsidiaries only be fined if senior management at the parent level was involved. Under the new regime, which will close loopholes lamented by the Bundeskartellamt (BKartA), a parent will be jointly and severally liable for payment of a fine imposed on a subsidiary, irrespective of involvement or knowledge of the parent's management, if the parent and the subsidiary formed part of the same 'undertaking' during the infringement because the parent directly or indirectly exercised decisive influence on the subsidiary. Although German administrative offence law does not allow for a rebuttable presumption in cases of (almost) wholly owned subsidiaries — as applied by the European Commission (EC) — but instead requires proof to the free conviction of the judge, it appears likely that in practice there will hardly be much difference with results at the European level. The explanations to the amendments note that *"in cases where a clear majority of shares is held a high probability militates for the assumption that the business policy of the relevant entity is actually determined by the majority shareholder."*

Important amendments relating to the digital economy will be a provision that *"the fact that a service is rendered without payment does not rule out the assumption of a market,"* as well as the introduction of specific legal criteria for assessment of market dominance in case of multilateral markets and networks, such as direct and indirect network effects or access to competitively relevant data.

The key new provision relating to the digital economy reflects an idea which is currently also contemplated by the EC with respect to the EU Merger Regulation. It concerns the proposed introduction of a new, alternative set of reporting thresholds aimed at acquisitions by large, established companies of young innovative companies with yet little or no revenues but significant competitive potential. Such transactions have so far not been

subject to German merger control if the target did not generate revenues in Germany of more than €5 million in the last financial year. The exclusively turnover-based reporting thresholds, which would continue to apply, are, cumulatively (each in the last financial year, respectively): (i) combined worldwide turnover exceeding €500 million; (ii) turnover in Germany of one party exceeding €25 million; and (iii) turnover of the other party in Germany exceeding €5 million.

Under the proposed alternative set of reporting thresholds, which would apply in addition to the above-mentioned set of purely turnover-based thresholds, transactions where the target does not meet the second domestic turnover threshold of €5 million would be reportable if, cumulatively, (i) the combined worldwide turnover of the parties in the last financial year exceeded €500 million; (ii) the acquirer had a German turnover of more than €25 million in the last financial year; (iii) the 'value of the consideration for the concentration' (as defined by the amendments) exceeds €400 million; and (iv) the target is active in Germany 'at a significant scale.'

The proposed transaction value threshold of €400 million was determined based on an analysis of publicly available data on transaction values of previous acquisitions of start-ups in Germany. The aim was to strike a balance between extension of German merger control to acquisitions of overall macroeconomic relevance on the one hand and avoidance of disproportionate bureaucratic burdens on the other hand.

The explanations to the proposed amendments appear to suggest that the requirement for the target needing to be active in Germany 'at a significant scale' is equivalent to it having had turnover of more than €5 million in Germany in the last financial year. That is provided the target's competitive potential and market position are reliably reflected by turnover, because the target is active in an industry which has been characterized for many years by



delivery of goods or services against payment of cash and by high turnover volumes. On that basis, the proposed new, alternative set of thresholds would generally have no practical relevance for acquisitions of targets active in the 'old economy' as the threshold of activity of the target in Germany 'at a significant scale' would in such cases essentially correspond to the second domestic turnover threshold in the purely turnover-based set of thresholds.

In case of acquisitions of targets whose competitive potential and market position are not reliably reflected by turnover, the scale of activities of the target in Germany according to the explanations would need to be assessed according to different criteria than turnover. The explanations to the proposed amendments mention as examples research & development (R&D) activities in Germany and the number of domestic monthly active users of an app or the number of domestic unique visitors of a website. Only activities that are current and market related — which does not exclude services that are free of charge — would have to be taken into account.

**A parent is jointly and severally liable for payment of a fine imposed on a subsidiary, irrespective of involvement or knowledge of the parent's management.**

It remains to be seen, if it enters into force as proposed, how the somewhat problematic proposed new set of thresholds would be applied in practice by the BKartA. Additional guidance by the BKartA in particular on the interpretation of the proposed *local nexus* threshold relating to activities of the target in Germany 'at a significant scale' would appear necessary to provide more legal certainty for undertakings, for example with respect to the question under which circumstances the threshold would be met in case of start-ups in the pharmaceutical or technological sector that conduct R&D activities in Germany.

## Merger Control

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2016 representative matters

**Albemarle Corporation**

Advised Albemarle Corporation on the divestment of its Chemetall Surface Treatment business to BASF for approximately US\$3.2 billion.

**American Axle & Manufacturing Holdings**

Advising American Axle & Manufacturing Holdings on its pending acquisition of Metaldyne Performance Group, a leading provider of highly engineered lightweight components for use in powertrain and suspension applications, for approximately US\$1.6 billion in cash and stock, plus the assumption of US\$1.7 billion in net debt.

**B/E Aerospace**

Representing B/E Aerospace in the pending sale of the company to Rockwell Collins, a leading manufacturer of communications and aviation systems, for US\$8.3 billion in cash and stock.

**Major chemical company**

Advising on the acquisition of a People's Republic of China based chemical company.

**Citigroup**

Advised Citigroup on the disposal of its Alternative Investor Services business, a leading provider of hedge fund and private equity fund administration services, to SS&C Technologies for approximately US\$321 million.

**CMC Biologics**

Advising the founders and other private equity investors of CMC Biologics on the sale of the company's operating subsidiaries CMC Biologics and CMC ICOS Biologics to Asahi Glass Co.

**Coopervision**

Advised Coopervision on the acquisition of Adaro Direct.

**Corning**

Advised Corning on its US\$236 million acquisition of Alliance Fiber Optic Products (AFOP).

**EFG Hermes**

Advised EFG Hermes on the equity financing of an €550 million acquisition by Vortex II, a renewable energy portfolio company it manages, of a 49% stake in an operational 664 MW portfolio of European wind assets from a subsidiary of EDP Renováveis, one of the largest players in the global renewable energy sector. The portfolio comprises 23 wind farms in Spain (348 MW), Portugal (191 MW), Belgium (71 MW) and France (54 MW).

**Fairfax Financial Holdings Limited**

Advising Fairfax Financial Holdings Limited on its proposed US\$4.9 billion acquisition of Allied World Assurance Company Holdings.

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### 2016 representative matters (continued)

#### **Francisco Partners and Elliott Management**

Advised Francisco Partners and Elliott Management on the antitrust aspects of their acquisition of Dell's Software Group.

#### **HeartWare International**

Advised HeartWare International in connection with its acquisition by Medtronic for approximately US\$1.1 billion.

#### **HOYA Corporation**

Advising Hoya Corporation, a global leader in the eyeglass lens business with a presence in over 50 countries, on its acquisition of Performance Optics, a global eyeglass lens manufacturing company employing over 2,000 people around the world.

#### **Intercontinental Exchange (ICE)**

Advising long-standing client ICE on its US\$650 million acquisition of London-based Trayport, a provider of software to operate trading networks for over-the-counter energy markets, the Competition and Markets Authority's phase II investigation of the transaction and subsequent appeal to the Competition Appeal Tribunal.

Advised ICE on the (EU and US) competition law aspects of its contemplated bid, competing with Deutsche Börse's bid, for London Stock Exchange.

#### **Investcorp**

Advised Investcorp on its sale of Icopal, the Denmark-headquartered manufacturer of flat and pitched roofing and waterproofing products, to GAF Corporation, North America's largest roofing manufacturer, for approximately US\$1.08 billion.

Advised Investcorp on the £278 million sale of Tyrrells Crisps to Amplify Snack Brands.

#### **Liberty Global**

Advised Liberty Global subsidiary Virgin Media on the acquisition of Arqiva WiFi, a wholly owned subsidiary of Arqiva Group.

#### **Major industrial player**

Representing a major industrial player involved in a joint venture with French and German competitors.

#### **Diversified mining company**

Representing a major mining company on the divestiture of certain coal assets.

#### **Nokia**

Advised Nokia, a global leader in the technologies that connect people and things, in connection with the acquisition of Withings, a pioneer and leader in the connected health revolution.

**Qualcomm**

Advising Qualcomm on the European competition law aspects of its US\$47 billion acquisition of the leading Dutch chipmaker NXP Semiconductors.

**Salesforce.com**

Advised Salesforce.com, the leading US provider of CRM software solutions and enterprise cloud computing, on its US\$2.8 billion all-cash tender offer for leading e-commerce platform provider Demandware.

**Sompo Holdings**

Advising Japanese insurer Sompo Holdings on its US\$6.3 billion acquisition of the Bahamas-based Endurance Specialty, a global provider of property and casualty insurance and reinsurance.

**S&P Global (formerly known as McGraw-Hill Financial)**

Advised S&P Global in its US\$1.1 billion sale of J.D. Power to buyout group XIO Group.

Advised S&P Global Platts, the leading independent provider of information and benchmark prices for the commodities and energy markets and a division of S&P Global, on its acquisition of Petroleum Industry Research Associates (PIRA Energy Group).

**Sun Pharmaceuticals**

Advised long-time client Sun Pharmaceuticals on the antitrust aspects of its pending acquisition of a product from Novartis and on its acquisition of Ocular Technologies.

**Thomson Reuters**

Advised Thomson Reuters on its acquisition of REDI Holdings, a high speed trading platform, and its subsidiaries from Goldman Sachs and its affiliates.

**Viacom**

Advised Viacom on its US\$345 million acquisition of Televisión Federal (Telefe) from Telefónica.

**Wausau Paper**

Advised Wausau Paper on its US\$513 million acquisition by SCA, a leading global hygiene and forest products company.



# 06

# Cartels

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## Lessons from the recent EU/US cartel investigation on Japanese defendants

Many Japanese corporations and individuals have been charged for cartel activities by various authorities, and Japanese parties continued to be exposed to aggressive investigations in 2016. *Continued overleaf*

## Lessons from the recent EU/US cartel investigation on Japanese defendants

The biggest recent investigations involving Japanese companies are the Capacitors cartel and Auto Parts cartel.<sup>1</sup> At the end of 2015, the European Commission (EC) sent a Statement of Objections to 10 Asian companies (including Japanese companies) in the electrolytic capacitors investigation. 2016 started with two Japanese companies pleading guilty in the US to participating in the conspiracy regarding electrolytic capacitors. In April, August and November, Japanese companies and individuals pleaded guilty in the US to fixing prices of electrolytic capacitors. The capacitors cartel investigation also involves enforcement authorities of Brazil, China, Korea and Japan. It is believed that the capacitors case could be as extensive as the investigation and enforcement of the worldwide Auto Parts cartel investigation.

The Auto Parts cartel investigation, in which defendants are mostly Japanese companies, is still ongoing, too. In January 2016, the EC fined two automotive companies more than €137 million in total. So far, the EC has fined 15 corporations in connection with its Auto Parts investigation for a total of approximately €1.3 billion. In the US, the Department of Justice (DOJ) has charged nine Auto Parts manufacturers (as of November 30, 2016). Since the DOJ shook the Japanese industry with a US\$200 million fine levied on Furukawa in 2011, 47 companies and seven Japanese individuals were charged for their parts in the Auto Parts cartel and two also for obstruction of justice. And that's only for 2016.

Japanese companies have gone through international investigations by the DOJ and the EC for decades, including the Lysine cartel investigation involving Ajinomoto and Kyowa Hakko Kogyo and the Vitamins cartel investigation which involved Daiichi Pharmaceuticals and Takeda Chemical Industries in the 1990s. More recently, the EC fined Asahi Glass €13.5 million in 2008 for its involvement in a Car Glass cartel. Several years have passed since the worldwide Auto Parts investigation started.

Despite such accumulated experience among Japanese companies, as a whole, Japanese business has not integrated those lessons, as is apparent in the recent investigations by the EC and DOJ. The biggest surprise for investigated companies usually comes from the harsh consequences — *i.e.*, magnitude of the fines and, for individuals, the prospect of a custodial sentence. Japanese companies are, however, facing the aggressiveness of the EC or DOJ at different phases of the proceedings as well. This translates into surprise at these authorities' lower evidentiary hurdles for the prosecution of cartel cases, and the broad range of targets in their investigation.

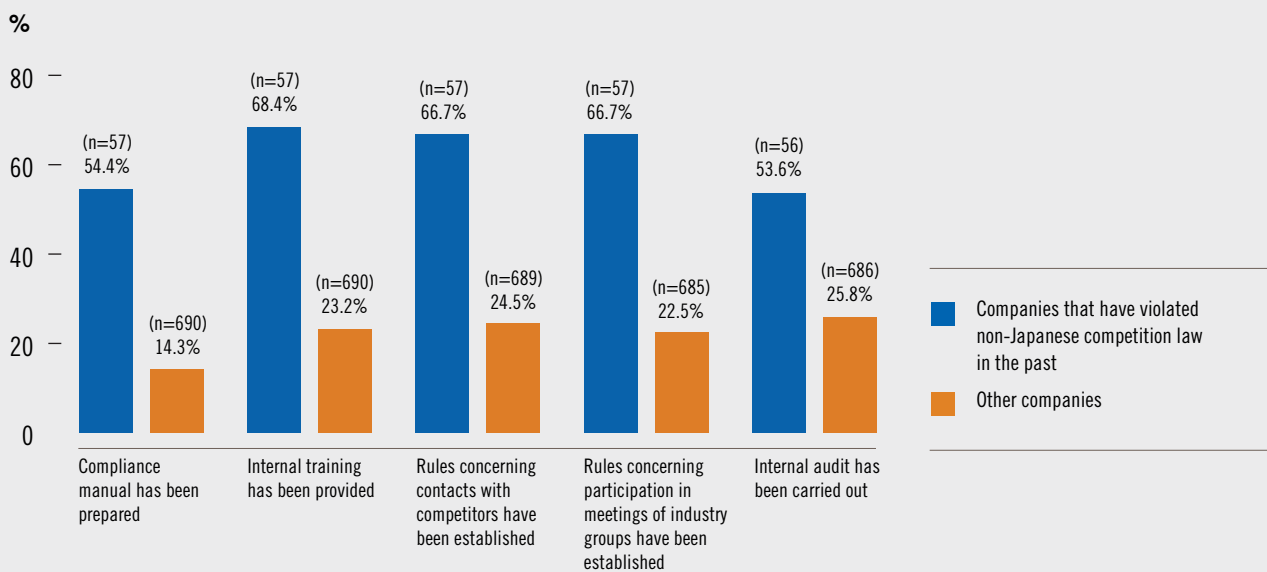
When questioned, employees of investigated Japanese companies explain that while they did communicate with competitors, this was only information exchange and that they never formally agreed on any prices. However, such an explanation would not protect Japanese employees in EC or DOJ investigations. In EC investigations, as confirmed in the European Court of Justice ruling in the *Banana* case<sup>2</sup> in 2015, a mere exchanging of information could be sufficient evidence for the EC to establish cartel activities and levy significant fines. The DOJ's evidentiary hurdle is quite low, as well.

Also, apparently it was a common understanding among Japanese companies that many of them would be exempted from international cartel investigations because they were not big enough to be targeted by non-Japanese authorities. This understanding is wrong, which was never clearer than in 2016. In the DOJ's Auto Parts investigation, Furukawa, which was the first company that pleaded guilty in 2011, had approximately US\$8 billion in gross sales in their fiscal year 2015, and Denso and Yazaki, which both pleaded guilty in 2012, had approximately US\$20 billion in gross sales. On the other hand, when looking at the Japan-based companies charged by the DOJ in the Auto Parts cartel conspiracy in 2016, save one exception (Hitachi Automotive, with approximately US\$9 billion in gross sales), each company's gross sales in fiscal year 2015 were



1. Referred to as the *Car Parts* cartel by the EC.
2. Case C-286/13 P, *Dole v. Commission* (EU:C:2015:184).

### Comparison of approach to compliance programs reflecting foreign competition laws between companies that have been charged for violation of non-Japanese competition law in the past and other companies



Source: JFTC website: [http://www.jftc.go.jp/houdou/pressrelease/h27/mar/150327\\_1.files/150327gaiyou.pdf](http://www.jftc.go.jp/houdou/pressrelease/h27/mar/150327_1.files/150327gaiyou.pdf)

less than US\$1.5 billion. Employees of those Japanese companies often express that when they heard the news of Furukawa, Denso and Yazaki several years ago, they thought it was not their problem. Not because they had never committed cartel activities, but because they thought they were too small to attract non-Japanese authorities' attention.

While such investigations might be intimidating, they should not deter from engaging in sound marketing activities. So it is important for companies, regardless of their size, to be serious and active in training their employees and establishing good compliance programs globally. Antitrust compliance is not something people can achieve with common sense only, but instead, companies have to devote resources and strategically develop and maintain efficient compliance programs to protect their employees and their business.

In 2015, the Japanese Fair Trade Commission (JFTC) conducted a survey regarding antitrust compliance among Japanese corporations listed on the Tokyo Stock Exchange.

According to the survey, 82.6% of the responding companies confessed that they did not have antitrust compliance manuals covering antitrust/competition laws outside Japan. Only 9.5% of those companies who have business in the US had a compliance manual covering US antitrust laws, and 10.2% of those who have business in Europe had a compliance manual covering EU competition laws. As indicated by the chart above, Japanese companies with a history of breaking non-Japanese competition laws are making more effort to develop their compliance program for non-Japanese antitrust/compliance laws. However, those findings also suggest that a substantial number of companies with an experience of non-Japanese antitrust investigations still have not developed sufficient compliance programs. The JFTC concluded their report on this survey with a promise to continue supporting and informing Japanese companies on how to protect their business and their employees from charges by various authorities outside Japan.

# 07

# Cartels

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## Latest on European investigations into the financial services sector

### **Euribor**

On December 7, 2016,<sup>1</sup> the European Commission (EC) fined Crédit Agricole, HSBC and JPMorgan Chase a total of €485 million for participating in a cartel in euro interest rate derivatives. Crédit Agricole, HSBC and JPMorgan Chase chose not to settle this cartel case with the EC, unlike Barclays, Deutsche Bank, RBS and Société Générale, with whom the EC reached a settlement concerning the same cartel on December 4, 2013. *Continued overleaf*

## 07

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**Latest on European investigations into the financial services sector**

The fines imposed for the three banks were as follows:

Participants	Duration of participation	Fine (€)
Crédit Agricole	5 months	114,654,000
HSBC	1 month	33,606,000
JPMorgan Chase	5 months	337,196,000

By contrast, the fines imposed on the settling banks in 2013 were as follows:

Participants	Duration of participation	Reduction under the Leniency Notice (%)	Fine (€)
Barclays	32 months	100%	0
Deutsche Bank	32 months	30%	465,861,000
Société Générale	26 months	5%	227,718,000 (see further information below)
RBS	8 months	50%	131,004,000

The EC's investigation found that there was a cartel in place between September 2005 and May 2008, involving seven banks (Barclays, Deutsche Bank, Société Générale, RBS, Crédit Agricole, HSBC and JPMorgan Chase) over varying time periods. The EC found that participating traders of the banks communicated regularly using corporate chatrooms

or instant messaging services, exchanging sensitive information on their trading positions or on their trading or pricing strategies. In doing so, the traders distorted the normal course of pricing for euro interest rate derivatives and therefore were colluding, rather than competing with one another.

1. Commission Press Release IP/16/4304 “Antitrust: Commission fines Crédit Agricole, HSBC and JPMorgan Chase €485 million for euro interest rate derivatives cartel,” December 7, 2016.
2. Commission Press Release IP/13/1208 “AMENDED1 - Antitrust: Commission fines banks €1.49 billion for participating in cartels in the interest rate derivatives industry,” December 4, 2013.
3. Commission Press Release IP/16/2586 “Antitrust: Commission accepts commitments by ISDA and Markit on credit default swaps,” July 20, 2016.

The EC’s latest decision marked the end of the cartel investigation which was the first of several in the financial services sector. However, future appeals of the decision by the three non-settling banks could stretch the process out for a number of years.

At first glance, the fines handed down on the non-settling banks appear high, especially considering the comparatively shorter duration of participation in the cartel. Although this may in part depend on the value of sales that was taken into account for each bank and the exact basis which the EC used to determine the sales value, it would appear that the EC is sending a message that parties choosing not to settle could be at risk of higher fines than if they chose to settle.

Furthermore, by its decision of April 6, 2016,<sup>2</sup> the EC amended its fine for Société Générale, reducing it by more than €218 million. The amended fine was based on the amended value of sales data provided by Société Générale in February 2016 on the basis that the value of sales previously submitted by Société Générale was calculated in a different manner than the other banks.

This decision highlighted a weakness in the EC’s settlement process, whereby settling participants only find out the basis of their fine on the day the settlement is announced, meaning there is no real opportunity to challenge this basis before it is announced. It does, however, confirm the principle of equal treatment within EU law — that all the settling participants to a single infringement were treated equally on the basis of the fine handed down.

### Credit Default Swaps

On July 20, 2016,<sup>3</sup> the EC adopted a decision that accepted commitments by the International Swaps and Derivatives Association, Inc. (ISDA) and the information service provider Markit on Credit Default Swaps (CDS). The commitments put in place legally

binding commitments to license inputs for CDS, offered separately by ISDA and Markit.

The EC was concerned that ISDA and Markit were seeking to prevent the CDS market from moving away from the investment banks and onto regulated exchanges. Certain information or services are required by exchange trading platforms that want to offer CDS trading that can only be provided by ISDA and Markit. These relate to the ‘final price’ which is used to value a CDS if there is a default, and the licensing of specific CDS indices (such as iTraxx and CDX).

The commitments are intended to make it easier to trade CDS on exchanges, while improving transparency. This decision is also in line with the general support from regulators (both competition and financial) to move more trading of financial products to regulated exchanges. From a competition point of view, this is particularly seen to benefit consumers, as exchange traded CDS are cheaper and less risky.

Two years into Margrethe Vestager’s tenure and there does not appear to be any less interest from the EC in investigating anti-competitive behavior in the financial services sector. With such complex intangible products that have the potential to have significant repercussions on end consumers, along with increased scrutiny across multiple jurisdictions, there are no signs that this trend will change. Financial service providers should remain vigilant and seek prompt legal advice should they uncover any behavior which could be deemed anti-competitive.

08

# Cartels

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## What you don't know could still hurt you: Awareness and liability in cartels and the consequences for civil damages actions

The cost of civil damages pay-outs for companies found liable for a cartel can be significant and more punitive even than the fine imposed by the European Commission (EC). For example, in July 2016, the EC found five truck manufacturers liable for a cartel lasting 14 years and imposed a fine of €2.93 billion.<sup>1</sup> In November 2016, a litigation vehicle announced funding for a potential damages claim of €100 billion.<sup>2</sup> Defining the precise extent of liability, therefore, has never been more important. *Continued overleaf*

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## What you don't know could still hurt you: Awareness and liability in cartels and the consequences for civil damages actions

In the vast majority of cartel infringement decisions, the EC characterizes the conduct as a single and continuous infringement: the infringement of Article 101 of the Treaty on the Functioning of the European Union (TFEU) results not from an isolated act but from a series of acts or continuous conduct that forms part of an overall illegal plan. The consequence in civil actions of being found liable for a single and continuous infringement by the EC is joint and several liability for the whole cartel.<sup>3</sup> But what if a company (an undertaking) participates in some but not all of the conduct that the EC determines comprises the single and continuous infringement? Is it still responsible for all such conduct? This article looks at the key cases that answer these questions.

In *Anic*,<sup>4</sup> the 1990's case in which the Court of Justice of the European Union (CJEU) approved the single and continuous construct that had been developed by the EC, the CJEU held that a company that was found to have participated in a single and continuous infringement “through **conduct of its own** which formed an agreement or concerted practice having an **anti-competitive object** for the purposes of [Article 101(1) TFEU] and which was **intended to help bring about the infringement as a whole** was **also responsible**, throughout the entire period of its participation in that infringement, **for conduct put into effect by other undertakings** in the context of the same infringement. That is the case **where it is established that the undertaking in question was aware of the offending conduct of the other participants or that it could reasonably have foreseen it and that it was prepared to take the risk.**”<sup>5</sup> Thus, an undertaking that either takes part in all conduct or, although it only takes part in some conduct, is aware of the conduct of other undertakings or could reasonably have foreseen it is liable for all conduct. Lack of participation on its own is not enough to absolve a company of liability. But what if an undertaking is not aware of the conduct of other undertakings and could not have reasonably have foreseen it?

The CJEU considered such a situation in its 2012 judgment in *Coppens*.<sup>6</sup> Coppens was an addressee of the EC decision in the international removals cartel. The EC found the cartel was comprised of three elements: pricing agreements, market sharing agreements by means of a system of cover quotes and financial compensation, or commissions. During the time of Coppens' participation in the infringement, the single and continuous conduct comprised agreements on cover quotes and commissions. Coppens challenged its participation in the single and continuous infringement on the basis that there was no evidence that it had been involved in or aware of the commissions element of the cartel. Coppens argued that its reduced role negated that it could have participated in the overall infringement. The General Court agreed and annulled the decision against Coppens. On appeal, the EC argued that Coppens should be held liable for the parts of the single and continuous infringement in which it had participated. The CJEU found in favor of the EC: the fact that Coppens was not aware of the overall cartel did not mean that it could not be held liable for the part of the infringement in which it had participated.

In 2015, in *Del Monte*,<sup>7</sup> the CJEU followed the approach in *Coppens*. Del Monte argued that its Northern European distributor, Weichert's, lack of awareness of the contacts between the two other banana importers (Dole and Chiquita) meant that it could not be held liable for a single and continuous infringement and even that such lack of awareness of the overall scheme negated the very existence of a single and continuous infringement because Weichert cannot have intended to contribute to an overall plan if it was not aware of the conduct of the other undertakings. The CJEU found that Weichert's lack of awareness only restricted the extent to which Weichert could be attributed liability for the whole cartel, it did not stop the EC from finding that the conduct comprised a single and continuous infringement and Weichert was responsible for a part of that infringement.



1. Case AT.39824 *Trucks*. Commission Press Release IP/16/2582 “Commission fines truck producers € 2.93 billion for participating in a cartel,” July 19, 2016.
2. See [http://www.benthamerurope.com/files/Trucks\\_Bentham%20English%20Media%20.pdf](http://www.benthamerurope.com/files/Trucks_Bentham%20English%20Media%20.pdf).
3. This is reiterated in Article 11 of the Damages Directive which Member States were required to implement in national law by December 27, 2016: “Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement of competition law; with the effect that each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.” There are certain limitations for small and medium sized businesses and immunity applicants.
4. Case C-49/92 P, *Commission v. Anic Partecipazioni* (EU:C:1999:356).
5. *Ibid.*, para. 83.
6. Case C-441/11P, *Commission v. Verhuizingen Coppens NV* (EU:C:2012:778).
7. Case C-293/13 P, *Fresh Del Monte Produce v. Commission* (EU:C:2015:416).
8. Case C-287/11 P, *Commission v. Aalberts Industries and Others* (EU:C:2013:445).
9. Case T-68/09, *Soliver v. Commission* (EU:C:2014:867).

The CJEU found Coppens only partially liable for the single and continuous infringement and approved the EC’s finding in *Del Monte* that Weichert was partially liable for the single and continuous infringement because the EC had shown in each case that (i) the conduct in which the undertaking had not participated and of which it was not aware could be severed from the overall infringement while still comprising a part of it; and (ii) procedurally, Coppens and Weichert had had the opportunity to defend themselves not only against the single and continuous infringement overall but against their participation in each of the elements comprising the single and continuous infringement. Where the EC has not demonstrated these two criteria, the Courts have annulled EC decisions in full. In *Aalberts*<sup>8</sup> and *Soliver*,<sup>9</sup> the EC had not shown that the conduct comprising the single and continuous infringement could be considered as separate parts of the same infringement or suggested that any of the conduct comprising the single and continuous infringement amounted to an infringement on its own. Consequently,

are not aware of the full extent of it. This question was not addressed in *Coppens* or *Del Monte*, although the point was raised by *Del Monte*. Companies accused of participating in a cartel should seek to force the EC to answer this question.

As a consequence of the cases discussed in this article, companies can expect the EC to hedge its bets in presenting its objections. While it may ultimately characterize conduct as comprising a single and continuous infringement, it will also now likely identify the constituent elements as separate parts, even infringements in themselves, in order to be sure that if the Court finds an undertaking cannot be liable for the whole infringement it can still be liable for part of it, or even the part it participated in as a separate infringement. A company seeking to defend itself must show both that its conduct did not amount to a single and continuous infringement and that each of those parts is not an infringement in its own right. At the very least, a company must try to limit its participation only to certain parts of the infringement.

## The consequence in civil actions of being found liable for a single and continuous infringement by the EC is joint and several liability for the whole cartel.

when the applicants were able to establish that they were not aware of the conduct of other participants, the CJEU’s and General Court’s only option was to annul the decision. The Courts could not divide up the conduct on behalf of the EC, nor find a separate infringement where the EC had not envisaged that one could exist.

The current case law finds that it is possible to be liable for part of a single and continuous infringement. However, one key question remains: how can undertakings be said to contribute to an overall plan or common scheme when they

Where the EC finds a single and continuous infringement composed of various parts and holds certain undertakings liable for only part of that infringement, companies can expect a reduction in the fine to reflect the limited scope of participation. A company’s liability in civil actions would also be limited, in theory, although it is yet to be seen how national courts would deal logistically with liability where the cartelists were jointly and severally liable for only part of the infringement.

09

# Cartels

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## Territoriality and ‘captive sales’ in ‘international’ cartels

The treatment of ‘captive sales’ by antitrust authorities remained at the center of attention in 2016. In last year’s report, the focus was on the implications of EU Court decisions such as *InnoLux*<sup>1</sup> on the determination of the appropriate value of sales when calculating fines for antitrust infringements (and, in particular, for cartels). This year, the related — yet distinct — issue of territoriality and jurisdiction has taken the limelight. *Continued overleaf*

### Jurisdiction and Captive Sales — Why It Matters

Captive sales pose challenging jurisdictional issues. They relate to the broader question of the limits in which a cartel conduct outside the European Economic Area (EEA) can give rise to an actionable infringement in the European Union (EU) and thus fall within the territorial scope of Article 101 Treaty on the Functioning of the European Union (TFEU). The European Commission (EC) has jurisdiction to apply Articles 101 and 102 to agreements and practices that are *capable* of having an appreciable *influence* on the pattern of trade between Member States even if one or more of the parties are located outside the Community.<sup>2</sup> One issue that arises is due to the fact that *captive* sales are *internal* sales — *i.e.*, products sold by one entity to another within the same corporate group for incorporation into another (downstream) product. Within internal sales, a further distinction can be made between sales that cannot be made available in the *merchant market* for sale as a traded good and the internal production of an entity that is made available to the market.

#### LCD, CRT and InnoLux

When assessing jurisdiction, the EC may consider either the place of implementation of the conduct ('implementation doctrine') or its effects ('qualified effects doctrine').

In the *LCD – Liquid Crystal Displays* decision,<sup>3</sup> the EC assessed jurisdiction over sales made by LCD suppliers established in third countries. Although the agreement was formed outside the EEA, suppliers made direct sales to customers in the EEA. The EC asserted jurisdiction on the grounds that the "*implementation took place through the direct sales of LCD panels and of transformed products in the EEA (...), even if the negotiation of the price took place outside the EEA.*"<sup>4</sup> To retain jurisdiction over the conduct, the EC considered it sufficient that the cartelized products were sold in the EU. The General Court upheld this approach and observed that "*although the undertaking to which the applicant belongs took part in a cartel conceived outside*

### Territoriality and 'captive sales' in 'international' cartels

*the EEA, the Commission must be able to take proceedings in respect of the repercussions which that undertaking's conduct has had on competition within the internal market.*"<sup>5</sup> According to the Court of Justice, "*when a vertically-integrated undertaking incorporates the goods in respect of which the infringement was committed into the finished products in its production units situated outside the EEA, the sale by that undertaking of those finished products in the EEA to independent third parties is liable to affect competition on the market for those products and, therefore, such an infringement may be considered to have had repercussions in the EEA, even if the market for the finished products in question constitutes a separate market from that concerned by the infringement.*"<sup>6</sup>

Jurisdiction over 'sales through transformed products' (*i.e.*, products incorporating captive supplies) was addressed in the *CRT* case.<sup>7</sup> The EC concluded that "*through their sales into the EEA or measures impacting their sales to the EEA*"<sup>8</sup> it retained jurisdiction, arguing that (i) the alleged collusive behavior included European production and customers, (ii) there was an interconnection and equilibrium between Asian and European prices and (iii) European focused contacts emerged as an extension of those initially aimed at other geographic areas. On appeal, the General Court sided with the EC and asserted that the "*sale of finished products in the EEA to independent third parties is liable to affect competition (...) even if the market for the finished products in question constitutes a separate market from that concerned by the infringement.*"<sup>9</sup>

#### The *Iiyama* and the *Intel* cases

In *Iiyama*,<sup>10</sup> the English High Court considered a situation where there were only indirect sales through transformed products. This was a follow-on action brought by a group of claimants seeking damages of €1 billion for the defendants' participation in the *CRT* case and/or the *CRT Glass*<sup>11</sup> cartel. More specifically, the alleged cartelized goods were neither sold directly or indirectly in the EEA by the defendants (only the end-products that incorporated the alleged cartelized goods). To establish the scope of the

1. Case C-231/14 P, *InnoLux Corp. v. Commission* (EU:C:2015:451).
2. *Guidelines on the effect on trade concept contained in Articles [101 and 102 TFEU]*, OJ C 101/81 of 27 April 2004, para. 100. See also Case C-306/96, *Javico v. Yves St Laurent* (EU:C:1998:173).
3. Case COMP/39.309 – LCD – *Liquid Crystal Displays*.
4. *Ibid.*, para. 237.
5. Case T-91/11, *InnoLux Corp. v. European Commission* (EU:T:2014:92), para. 70.
6. Case C-231/14 P, *InnoLux Corp. v. Commission* (EU:C:2015:451), para. 57.
7. Case COMP/39.437 – *TV and computer monitor tubes*.
8. *Ibid.*, para. 593.
9. Case T-92/13, *Philips v. Commission* (EU:T:2015:605).
10. Case HC-2014-001979, *iiyama Benelux BV & Ors v. Schott AG & Ors* [2016] EWHC 1207 (Ch).
11. Case COMP/39.605 – *CRT Glass*.
12. In a separate case concerning iiyama's claim for damages following the LCD case, Mr. Justice Morgan held that iiyama needed to "show that they suffered harm by reason of the implementation of the cartel in the EU"; noting that "it is not enough for the Claimants to say that they are indirect purchasers downstream from the implementation of the cartel in Asia." See *iiyama (UK) Ltd & Ors v. Samsung Electronics Co Ltd & Ors* [2016] EWHC 1980 (Ch) (the "iiyama LCD" case).
13. Case HC-2014-001979, *iiyama Benelux BV & Ors v. Schott AG & Ors* [2016] EWHC 1207 (Ch), para. 118.
14. Case T-286/09, *Intel v. Commission* (EU:T:2014:547).
15. Opinion of Advocate General Wahl in Case C-413/14, *Intel v. Commission* (EU:C:2016:788).

defendants' liability, the claimants asserted that the EC would be territorially competent where neither *direct sales* nor *direct sales through transformed products* were made (i.e., where there was no implementation). Mr. Justice Mann disagreed. In the High Court's view, both *Woodpulp* and *InnoLux* posited that jurisdiction is assessed by determining the place of *implementation* of a conduct, foreign cartels requiring a direct link to the EEA to be considered 'implemented' therein.<sup>12</sup> In Mr. Justice Mann's view, even by applying the 'qualified effects' doctrine "there is no suggestion that the infringement can be found where the effects of the cartel are somehow felt in a more indirect way."<sup>13</sup>

internal market ('implementation doctrine') or produce effects therein ('qualified effects doctrine'). Under an *effects-based* approach to jurisdiction, it would be incumbent on the EC to prove that the conduct appreciably affected Community trade.

This is perhaps too ambitious in terms of analysis, too complex in evidentiary burden and too restrictive to the EC's powers of intervention as an enforcer, to become the established requisite standard for determining jurisdiction. This is the reason why the Court of Justice does not consider jurisdiction on a pure effects doctrine.

## To retain jurisdiction over the conduct, the EC considered it sufficient that the cartelized products were sold in the EU.

The question of where implementation occurred was also assessed in *Intel*.<sup>14</sup> The General Court noted that direct sales are *not* the only means of implementation and that the impugned conduct — e.g., the grant of financial incentives to postpone launching a certain notebook worldwide — sought to be implemented in the EEA. Advocate General Wahl's Opinion sided with the General Court's position, but suggested that the Court should endorse an *effects-based* jurisdictional criterion.<sup>15</sup> In his view, "conduct is caught by [Articles 101 and 102] only to the extent that a direct (or immediate), substantial and foreseeable anti-competitive effect within the internal market can be detected. That criterion of 'qualified' effects (...) is not satisfied where, for example, the effect in the European Union is merely hypothetical or, in any event, of minor significance." Whether those effects are *appreciable* and whether the conduct seeks to produce such effects require a case-by-case assessment.

The European Courts are likely to maintain the EC's wider discretion — including a light touch approach on captive sales — to pursue international cartels, without placing too many hurdles already at the jurisdictional stage. The seeds, however, have been planted.

### Captive Sales Going Forward

The *CRT* case suggests that captive sales would only confer jurisdiction to the EC if and when the investigated conduct specifically sought to be implemented in the

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# Cartels

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## Recent developments in cartel settlements

Since its introduction in July 2008, the settlement procedure has been used by the European Commission (EC) to resolve the majority of its cartel investigations, with 22 settlement decisions having been announced to date. Generally, the settlement procedure is presented as a way of expediting cartel cases; in addition to procedural efficiencies, settlements offer the EC the prospect of fewer appeals to the European courts because parties must admit their involvement in the cartel, and for companies, the incentives are a 10% reduction in the fine imposed by the EC and fewer details of the alleged infringement being disclosed in the decision (which is the basis on which claims by third parties succeed in national courts). *Continued overleaf*

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## Recent developments in cartel settlements

However, companies can choose not to settle at any point in the process if, for example, they disagree with the scope of infringement, and the EC can also decide to revert back to the ordinary infringement procedure for all companies involved in the cartel. Where some participants in the cartel agree to settle and others do not, this results in so-called ‘hybrid cases’ in which the two procedural tracks of settlement and ordinary procedure run in parallel. Such cases are undesirable from an EC standpoint as they undermine procedural efficiencies — the *raison d’être* of the settlement procedure.

In particular, parties have voiced concerns that given the EC’s preference towards settlement, there is a risk of bias by the EC against non-settling parties in hybrid cases. While the EC is still required to observe the fundamental principle of equal treatment and cannot discriminate against cartel members that withdraw from the settlement procedure, the EC is not required to adopt the same level of fines for settling and non-settling parties (ignoring the 10% discount for settling). This issue, amongst others faced by companies in hybrid cases, was brought to light in the case of *Timab v. Commission*<sup>1</sup> (May 20, 2015), where Timab withdrew from the settlement procedure and the EC imposed a higher fine on it under the standard procedure. The General Court rejected Timab’s appeal against the new fine, confirming that the EC was entitled to go ‘back to the drawing board’ when calculating the fine for a non-settling party and take into account new arguments and evidence, even if this may lead to a less favorable result. The European Court of Justice<sup>2</sup> has recently confirmed the General Court’s judgment and the EC’s incontrovertible ability to depart from ranges of fines proposed during settlement discussions, and instead calculate fines on the basis of all relevant information available at the time of the final decision.

Furthermore, the condition of admission of liability as part of the settlement process means that appeals by settling parties can only be based on the fining level.

This was the case in recent appeals by Société Générale and Tompla. Société Générale was fined €445 million in December 2013 for its participation in the *Euribor* cartel,<sup>3</sup> and challenged the way in which the EC had established the value of sales relevant to the infringement (*i.e.*, the basis of the fine) on appeal. This appeal was desisted, however, as the EC announced in April 2016 that Société Générale’s fine had been reduced to €227 million. Similarly, in the *Envelopes*<sup>4</sup> cartel, Tompla also appealed the level of the fine imposed by the EC in December 2014. The Court has recently sided with Tompla and found that the EC had infringed the duty to state reasons and the principle of equal treatment in calculating the level of the fine.<sup>5</sup>

In both instances, the settling parties did not challenge their liability for the infringements and any appeal on such basis remains unlikely, given their previous admissions to such infringements during the settlement proceedings. This, together with the clear incentives for parties to settle, means there is a worrying possibility that settlements are used to elicit admissions of an infringement from parties in situations where the EC would otherwise be unable to build a sufficiently strong case and meet the standard of proof necessary to find an infringement of competition law capable of standing up to Court scrutiny. The key concern is therefore whether appropriate judicial checks and balances are available to ensure that the EC makes its settlement case on a sound legal and evidentiary basis.

Furthermore, the limitations of the settlement process itself mean that parties do not have the ability to review the full body of evidence obtained by the EC to ensure its allegations have merit. Without having a full picture of the evidence against them, it is more difficult for companies to assess the strength of the EC’s case and to decide whether to challenge the case in Court. Nevertheless, companies should not settle cases in which it appears early on in the proceedings that the EC is overreaching on the facts, stretching legal theories or adducing weak evidence.



1. Case T-456/10, *Timab Industries and CFPR v. Commission* (EU:C:2015:296).
2. Case C-411/15 P, *Timab Industries and CFPR v. Commission* (EU:C:2017:11).
3. Case COMP/AT.39914 – *Euro Interest Rate Derivatives*.
4. Case COMP/AT.39780 – *Envelopes*.
5. Case T-95/15, *Printeos SA and Others v. Commission* (EU:T:2016:722), paras 55 and 57.

Recent successful challenges by settling parties have only addressed the level of the fine imposed by the EC since, by entering into a settlement and thus already admitting liability, companies forgo the possibility of challenging the EC's decision on substantive grounds. Given that settlement and (substantive) judicial review are mutually exclusive, companies should enlist the help of their legal counsel to identify the above-mentioned signals of a weak case and decide to settle only where the features of a case demonstrate settlement, and not legal action, to be the most appropriate course of action.

There is a worrying possibility that settlements are used to elicit admissions of an infringement from parties in situations where the EC would otherwise be unable to build a sufficiently strong case.

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# Cartels

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## The *Container Shipping* case: Price signaling and commitment decisions

In July 2016, the European Commission (EC) published its commitments decision in the *Container Shipping* case.<sup>1</sup> The commitments addressed the EC's preliminary investigation concern related to price signaling among fourteen container shipping competitors. *Continued overleaf*

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### The *Container Shipping* Case: Price signaling and commitment decisions

The concern was that public announcements of a series of general rate increases (GRIs) by the shipping companies, beginning in 2009, were anti-competitive. These announcements were made several times a year and contained the date of implementation and the amount of the individual price increases, which were similar for all companies. The announcements were made by the companies successively in the weeks leading up to the announced implementation date.

The EC found that the public announcements, which are typically innocuous under competition rules, allowed the companies to signal future pricing intentions to each other, harming competition and customers by increasing prices for container liner shipping services. The EC alleged that the making of regular public announcements of future price increases amounted to a concerted practice because the information communicated was useful to competitors, but not to customers. The EC took this view because the announcements: (i) did not contain the full price of the service after the increase (only the amount of the increase itself); (ii) were not binding upon the carriers and could therefore not be relied upon; and (iii) were made too far in advance of the implementation date of the increase to be of use to customers.

Crucially, the EC found no evidence of price collusion and therefore did not present the case as a cartel. However, the EC found that the conduct of the shipping companies was by its very nature harmful to competition and constituted a ‘by object’ infringement of European Union (EU) competition law. As a result, the EC needed merely to prove that the infringing conduct occurred, and not that the conduct resulted in anti-competitive effects in the market.

Importantly, the decision was adopted under Article 9 of Regulation 1/2003<sup>2</sup>, so the EC was not required to conclude on the existence of an infringement of competition law, nor provide a full explanation of the legal and factual basis for the imposition of the commitments.

Under an Article 9 procedure, the parties have strong incentives to accept the commitments: they offer the certainty of a resolution that involves no financial exposure from the administrative procedure and avoid a finding of an infringement, which could expose the parties to third party claims in the national courts. While the avoidance of a fine makes Article 9 procedures attractive to the parties involved, it also means that the EC’s case avoids the scrutiny of the European courts.

This absence of judicial review gives the EC freedom to bring allegations of an infringement and control the behavior of parties in the market, without necessarily meeting the evidentiary and explanatory thresholds required for an infringement decision under Article 7 of Regulation 1/2003. In *Container Shipping*, the ordinarily narrow category of by object infringements has arguably been expanded to include public pricing announcements, where these can be used by competitors to signal their price intentions to each other. Given the novelty of the theory, the *Container Shipping* decision may not have stood up to legal scrutiny were it assessed under Article 7 and followed by an eventual appeal by the parties. The courts may not have viewed the conduct as constituting a by object infringement and may have requested the EC to prove anti-competitive effects, requiring a higher burden of proof. If this were the case, the EC would have had to demonstrate that the exchange of future pricing intentions led to a concrete effect on prices in the market, which would be difficult to achieve.

In order to avoid the EC taking similar action against them in the future, companies should refrain from making public pricing announcements which: (i) are non-committal; (ii) do not state the full price after the increase but just the increase; and (iii) are made too far in advance of the implementation date. The only safe harbor revealed by the *Container Shipping* decision is for companies to avoid making announcements which have one or more of these features or otherwise have reduced value to customers.

1. Case COMP/AT.39850 – *Container Shipping*.
2. Council Regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

However, while a cautious approach with regard to the making of public pricing announcements is advisable, companies should not hesitate to challenge the EC on Article 9 investigations if they fear that the EC is bringing innocuous practices within the scope of EU competition rules. By working closely with their legal counsel, companies should assess any such allegations brought by the EC thoroughly, and carefully consider whether these do in fact constitute legitimate grounds for them to change their commercial behavior.

The EC alleged that the making of regular public announcements of future price increases amounted to a concerted practice because the information communicated was useful to competitors, but not to customers.

## Cartels

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2016 representative matters

### **Cargolux Airlines**

Representing Cargolux Airlines in both the successful application for annulment of the European Commission's decision in the Air Cargo Investigation before the General Court and the damages litigation in the United Kingdom before the High Court.

The Air Cargo Investigation received *Global Competition Review's* 2016 "Matter of the Year" award and at *The American Lawyer* Global Legal Awards 2016 it was the "Global Dispute of the Year: International Litigation."

### **Hanjin Shipping**

Represented Hanjin Shipping in the European Commission investigation into container shipping transport services concerning alleged anti-competitive price signaling behavior.

### **JTEKT**

Representing JTEKT in the Auto Parts multidistrict follow-on antitrust class action.

### **Major Asian manufacturing company**

Representing a major Asian manufacturing company in an investigation into alleged anti-competitive behavior in the capacitors sector in the European Union/European Economic Area.

### **Major financial institution**

Advising a major financial institution on a number of European Commission investigations into potential cartel conduct in various financial benchmarks and trading markets including related to foreign exchange and precious metals sectors.

### **Major financial institution**

Representing a major financial institution in antitrust class actions relating to foreign exchange (FX) trading.

### **Major financial institution**

Representing a major financial institution in antitrust class actions related to supranational, sub-sovereign and agency (SSA) bonds.

### **Major financial institution**

Representing a major financial institution in antitrust class actions relating to interest rate swaps.

### **Major financial institution**

Representing a major financial institution in antitrust class actions related to the silver market.

### **Major financial institution**

Representing a major financial institution in litigation regarding the challenge to network and card-issuers' conduct with respect to setting and applying interchange fees and various payment-card network rules.

### **Major financial institution**

Representing a major financial institution in antitrust class actions relating to alleged manipulation of yen LIBOR and euroyen TIBOR rates.

### **Major financial institution**

Representing a major financial institution in the Australian dollar benchmark antitrust class action.

### **Major financial institutions**

Representing numerous major financial institutions in investigations related to LIBOR.

### **Major solar panel manufacturer**

Representing a solar company in a predatory pricing matter where the Sixth Circuit affirmed a district court's dismissal with prejudice of an action claiming more than US\$1 billion in damages arising out of alleged collusion between Chinese solar panel manufacturers.

### **Two major financial institutions**

Representing two major financial institutions in antitrust class actions relating to US Treasury securities.

### **Two major financial institutions**

Representing two major financial institutions in antitrust class actions relating to ISDAfix.

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## Brexit consequences for antitrust

On October 2, 2016, the Prime Minister confirmed that the UK government envisages triggering Article 50 by the end of March 2017, thereby kicking-off the process for leaving the European Union (EU). On this timetable, Brexit will be complete by March 2019. *Continued overleaf*

This announcement prompted considerable political debate as to what sort of arrangement the UK should agree with the EU post-Brexit. Three months of political uncertainty ensued before the Prime Minister finally outlined the UK government's key principles and goals to secure during the negotiation process during a speech on January 17, 2017. As well as sticking to the original timetable, the Prime Minister confirmed that the UK would definitely be leaving the single market and ruled out adopting any of the existing relationship models currently adopted by any other countries. This 'hard' Brexit strategy will have significant consequences for the interrelationship between EU and UK competition law.

The extent of the consequences of Brexit for competition law will ultimately be determined by the Article 50 withdrawal agreement and any additional agreement reached governing the future relationship between the EU27/European Economic Area (EEA) and the UK. In the event no agreement that is satisfactory to the UK can be reached, the UK government confirmed its intention to exit the EU without any agreement in place at all. It is important to note that in any scenario all UK-based companies trading in or with Europe will continue to be subject to the EU competition rules.

There is much that can be said (and has been said) on this topic. This note aims to pick out a few key issues that are expected to arise once the UK leaves the EU/EEA altogether.

#### **Mergers — the End of the 'One-Stop Shop'**

The EU merger control regime is designed as a 'one-stop shop.' Merging parties do not have to file separate notifications in each EU Member State if the jurisdictional turnover thresholds are met at EU-level. Following Brexit, the UK's Competition and Markets Authority (CMA) will have jurisdiction over a considerable number of mergers that would previously have come within the sole competence of the European Commission (EC). In a large

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#### **Brexit consequences for antitrust**

number of these mergers, any UK investigation would occur in parallel with the EU investigation. Multiple filings will inevitably increase the cost and regulatory burden for the merging parties, and may also cause delays in obtaining clearance, as the UK merger control regime has a longer timeline than its European counterpart.

An increased case load also has significant resource implications for the CMA. In addition to an increased volume of cases, the end of the one-stop shop could result in the CMA facing larger and more complex merger cases. The CMA will likely need to respond with increased resources and capacity in its merger division. Further, notification of mergers in the UK is currently voluntary, and the CMA has the power to instigate merger reviews of its own volition. It is not clear how the CMA will shape its enforcement priorities post-Brexit. Will the CMA retain its policy of investigating small (as well as larger) mergers? Or will the UK go a step further and amend its current jurisdictional thresholds to address its growing case load?

#### **Vertical Agreements — a More Liberal UK Regime?**

As with mergers, following Brexit there is the possibility of dual investigation of anti-competitive agreements and abuses of dominance, meaning that the same behavior could be assessed and potentially fined by both the EU and UK authorities. This will mean a greater risk of inconsistent outcomes due to different interpretations of the rules. One area where we could see a divergence in approach is in the assessment of vertical agreements.

The creation of the single market is one of the main objectives of the EU competition policy, and the EU has historically taken the view that vertical arrangements can be used to partition the market and exclude new entrants, resulting in detailed rules on vertical restraints not often seen in other jurisdictions. Contrast this to the United States, where vertical agreements are largely seen as pro-competitive and generally withstand antitrust scrutiny. Post-Brexit, the UK has the potential to drift away

from the EU norm. The CMA is currently anchored to Brussels in its approach due to the ‘duty of sincere co-operation’ between the UK and EU competition authorities. With these ties removed, the UK could be prone to moving closer to the US position on vertical agreements.

With the launch of the digital single market initiative we have seen a renewed vigor of enforcement by the EC in this area. In the e-commerce sector, the EC is drawing on case law dating back to the 1960’s and 1970’s to attack vertical agreements between electronic platforms and suppliers to try and open up the platforms and break down barriers to cross-border online trade. The EC is predominantly concerned about geo-blocking and different technical methods which allow businesses to redirect consumers to their home country’s website or restrict payment or delivery to specific territories. The concern is that companies are using this technology to partition markets, which results in differential pricing across markets. These are not concerns rooted in consumer welfare economics but are in reality single market initiatives.

Take, for example, the current investigation into ‘geo-filtering’ clauses in pay-TV licenses of Hollywood movie studios. The US antitrust authorities would not raise competition concerns with such exclusive licenses and it is not evident what economic theories of harm would cause issues here. Even though the licenses grant exclusivity, there is no shortage of content available. It is clear that this EU investigation is not driven by consumer welfare principles but by trade barriers to the single market.

The EC uses vertical agreements as a single market tool, but when this distortion is removed from competition enforcement, will the UK end up closer to the US position based on more economic theory-based thinking? The UK could well end up with a more liberal regime on vertical agreements in the long term following Brexit.

### **State aid — will State aid Rules Continue to Apply to the UK?**

State aid is entirely a matter of EU law without any national rules or institutional structure of enforcement. Enforcement of State aid is heavily dependent on the cooperation of Member States but, despite this, there is no indication that the UK will not comply with its existing treaty obligations or retroactively change its approach to past decisions. The UK has always been a very strong supporter of the State aid rules and of the EC in enforcing upon them.

When the UK does eventually leave the EU, there is a wide variety of possible outcomes for the State aid regime in the UK ranging from: (i) retaining the existing regime (seemingly ruled out once the UK leaves the single market); (ii) adopting a comparable regime with its own enforcement mechanisms; or (iii) not having a State aid regime at all. The EU is likely to resist against (iii) out of fear that the UK could afford levels of subsidization (especially through the tax system) that would attract investment from the EU. Indeed, the UK government explicitly threatened to do this in January 2017. Some sort of State aid control in a future EU/UK trade agreement together with a dispute settlement mechanism is likely to be an important EU objective.

Initially, the EC indicated privately that it would strongly de-prioritize UK-related cases and would focus resources elsewhere. In fact, the EC has continued to launch UK State aid investigations and issue decisions since the June referendum. It remains to be seen whether UK cases will be de-prioritized or actually prosecuted more aggressively once formal steps are taken for the UK to leave the EU. This will put greater pressure on the parties themselves and their advisers to consider State aid risks and its treatment by the authorities.

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# Compliance

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## E-commerce sector inquiry

The European Commission (EC) launched the e-commerce sector inquiry on May 6, 2015 as part of its Digital Single Market Strategy. The inquiry's purpose is to obtain an overview of the main market trends, collect evidence of possible barriers to competition and analyze certain potentially restrictive business practices. During the course of its inquiry, the EC has gathered information from nearly 1,800 respondents from across the European Union (EU) — including from manufacturers and distributors of a wide range of products, from e-commerce platforms, from digital service providers and from digital content rights holders. *Continued overleaf*

On September 15, 2016,<sup>1</sup> the EC published its Preliminary Report which focuses on the online sale of consumer goods and on digital content and has found that consumers may be prevented from receiving the best online deals due to certain restrictive practices.

#### Online Sale of Consumer Goods

*Restrictions of online sales in selective distribution agreements*  
The Preliminary Report<sup>2</sup> indicates that certain clauses restricting online sales in selective distribution agreements may go beyond what is necessary to protect the goals of selective distribution, and indicates that the EC “*may investigate possible anti-competitive clauses restricting online sales in selective distribution agreements.*” Following on from the Preliminary Report, when drafting selective distribution agreements manufacturers will need to be able to robustly demonstrate that any such restrictions are needed — for example in order to ensure high quality distribution and a coherent brand image.

#### *Restrictions on cross-border sales*

The Preliminary Report also found a number of limitations on cross-border sales, and indicated that they may not be compliant with EU competition law. Given that the EC has reviewed over 8,000 agreements in the course of its inquiry, it is possible that the EC will open individual investigations into such cases following the e-commerce sector inquiry.

#### *Recommended sales prices*

The EC notes that over 40% of retailers questioned reported certain price recommendations or price restrictions from manufacturers. While EU competition law does not prohibit sales price recommendations, such recommendations may infringe EU competition law if they contain a binding element.

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## E-commerce sector inquiry

#### *Restrictions on price comparison websites*

The Preliminary Report also takes note of certain contractual restrictions on submitting offers on price comparison websites. While the EC acknowledges that such general bans may be a cost-effective means by which to prohibit the use of channels deemed unfit for a relevant product, such bans may also prevent retailers from generating traffic on their websites and providing increased price transparency to consumers.

#### *Online marketplaces*

The EC notes that 20% of retailers are restricted from selling on online marketplaces. While the Preliminary Report does not state that such bans are hardcore restrictions, as they do not restrict where and to whom distributors can sell, the Preliminary Report states that this does not mean that absolute marketplace bans are generally compatible with EU competition law.

#### Digital Content

The EC views the availability of copyright licenses for content as essential for digital content providers and key to competition. The Preliminary Report states that copyright licensing agreements are often exclusive and limit the territories, technologies and release windows digital content providers are allowed to use, and may in certain cases breach EU competition law.

#### *Geo-blocking*

The EC is seeking to stop retailers and others from blocking consumers from buying content and products across EU Member States, so-called ‘geo-blocking.’ The EC wants to ensure that online retailers do not segment markets across national lines or restrict cross-border access to content. While suppliers are generally entitled to decide where to sell their products, the Preliminary Report states that if geo-blocking results from agreements between suppliers and distributors, then it may restrict

1. Commission Press Release IP/16/3017 “Antitrust: Commission publishes initial findings of e-commerce sector inquiry,” September 15, 2016.
2. Commission Staff Working Document SWD (2016) 312 “Preliminary Report on the E-commerce Sector Inquiry,” September 15, 2016.

competition and breach EU competition law. The EC states that enforcement measures against geo-blocking would need to be based on a case-by-case assessment including an analysis of potential justifications.

The EC published its initial findings on geo-blocking in March 2016, which noted that the practice was widespread in e-commerce across the EU, and in particular for digital content — where over 60% of responding digital content providers had agreed with rights holders to geo-block. The EC already has pending investigations into Hollywood movie studios and video game makers in relation to alleged anti-competitive geo-blocking. The EC also intends to limit geo-blocking through legislation, including the proposed Geo-blocking Regulation, the proposed Portability Regulation and proposed amendments to the Satellite and Cable Directive.

### Next Steps

The public consultation on the Preliminary Report closed on November 18, 2016. The EC expects to publish its Final Report in the first quarter of 2017. With the EC focusing intently on online markets, companies active in online sales or in digital content would do well to review their current arrangements in light of the Preliminary Report. Past inquiries in the energy and pharmaceutical industries resulted in investigations of undertakings and so too for the e-commerce sector inquiry. On February 2, 2017, the EC announced the opening of three separate investigations into online sales practices, in the consumer-electronics, video games and hotel-accommodation sectors. Given the EC’s focus on e-commerce, it should be assumed that further sectors will be targeted.

## Certain clauses restricting online sales in selective distribution agreements may go beyond what is necessary to protect the goals of selective distribution.

### *Other licensing terms*

The EC is concerned that excessive duration, automatic renewal clauses, rights of first refusal and matching offer rights contained in certain licensing agreements could raise barriers to entry and expansion. The Preliminary Report also notes that the common use of minimum, flat or fixed fees, often together with advance payment terms, may also make new entry more difficult.

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# Compliance

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## The enlargement of the Court of Justice: Upcoming changes

At the end of 2015, the Regulation 2015/2422 of the European Parliament and of the Council of December 16, 2015 amending Protocol No. 3 on the Statute of the Court of Justice of the European Union (CJEU) (the Regulation) was issued with the purpose of amending the structure of the General Court. *Continued overleaf*

The main purpose of the Regulation was to deal with the increasing workload at the General Court and shorten the duration of the proceedings by doubling the number of judges. The restructuring process has already started; however, there is no certainty so far about the actual impact the enlargement will have on either ongoing or upcoming competition cases.

#### Background

The General Court is the court of first instance that rules on those actions for annulment brought by individuals, companies and the European Union (EU) institutions. The General Court deals with decisions taken by the European Commission (EC) mainly related to competition law, trade, intellectual property, State aid and agriculture.

Before the Regulation came into force, the General Court was composed of 28 judges. With its entry into force, the number of judges has gone up to 44. Twelve additional judges should be appointed before September 1, 2019 in order to reach the number set out by the Regulation.

#### The new judicial structure: expected impact on the judicial review

The Regulation observes that as a consequence of the progressive expansion of the CJEU since its creation, the number of cases before the General Court has increased. The increase in the number of potential cases falling within the General Court's jurisdiction, combined with, until recently, relatively few judges to deal with those cases, resulted in a significant backlog of pending cases. This has resulted in lengthy proceedings in particular in competition, State aid and intellectual property cases.

The backlog issue has been previously raised before the Court of Justice in the context of three judgments delivered by the General Court in the industrial bags cartel (*Gascoigne Sack Deutschland*,<sup>1</sup> *Groupe Gascoigne*<sup>2</sup> and *Kendrion*<sup>3</sup> judgments). The cartel proceedings

#### The enlargement of the Court of Justice: Upcoming changes

before the General Court lasted five years and nine months including a period of inactivity that amounted to more than three years. The Court of Justice ruled that if proceedings related to a competition case brought under the General Court are not completed within a 'reasonable time,' the parties may claim damages before the latter.

Despite the General Court having not specified any time-threshold, it stated that the "*reasonableness of the period for delivering judgment is to be appraised in the light of the circumstances specific to each case, such as the complexity of the case and the conduct of the parties.*"<sup>4</sup> As a result of the judgment, damages actions are now pending before the General Court.

Regarding the impact of the Regulation on the judicial review, the reduction in volume of pending cases and shortening of proceedings are among the expected results. The number of competition cases filed in the General Court has already declined in the last two years.<sup>5</sup> Nevertheless, it must be noted that the Regulation also provides for the integration of the European Union Civil Service Tribunal (CST) with the General Court. As a consequence, the CST's jurisdiction at first instance in (EU) civil service disputes was transferred to the General Court on August 31, 2016.<sup>6</sup> This integration could be perceived as an obstacle in order to decrease the length of proceedings since the General Court will have to also rule on new matters that were not under its jurisdiction until now.

It is also assumed that the General Court will be able to hear more cases in larger formations. According to Judge K. Lenaerts, current President of the Court of Justice, the reform will allow the General Court to sit in chambers of five judges which will ensure that important cases would be heard by more than three judges (former composition). However, it remains uncertain whether the increase in the number of judges will translate into

1. Case C-40/12 P, *Gascogne Sack Deutschland GmbH v. Commission* (EU:C:2013:768).
2. Case C-58/12 P, *Groupe Gascogne SA v. Commission* (EU:C:2013:770).
3. Case C-50/12 P, *Kendrion NV v. Commission* (EU:C:2013:771).
4. Case C-50/12 P, *Kendrion NV v. Commission* (EU:C:2013:771), para. 96; Case 385/07, *Duales System Deutschland v. Commission* (EU:C:2009:456), para. 182; Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, *Limburgse Vinyl Maatschappij and Others v. Commission* (EU:C:2002:582), para. 188; and Case 194/99 P, *Thyssen Stahl v. Commission*, (EU:C:2003:527), para. 156.
5. The number of cases filed in the General Court in 2013 was 790, in 2014 was 912 and in 2015 was 831, available at <http://curia.europa.eu>.
6. Regulation 2016/1192 of the European Parliament and of the Council of July 6, 2016 on the transfer to the General Court of jurisdiction at first instance in disputes between the European Union and its servants.
7. Council Press Release 497/15 “Q&A on the reform of the General Court,” June 23, 2015.
8. Article 3 of the Regulation.

enhanced legal rulings. Moreover, submitting a case to five judges is set to further increase the risk of delays, which goes against the initial objective of the Regulation.

Furthermore, it should be stressed that the newly appointed judges are expected to be less acquainted with the daily work at the court. Consequently, while an increased number of judges would be positive in the long term, it may hinder the smooth running of the system during the first stage of the implementation of the Regulation. In this sense, it must be borne in mind that competition cases require a high-level analysis given their complexity.

establishment of specialized chambers.<sup>8</sup> In this sense, even though creation of specialized courts is currently not a viable alternative, it could potentially be revised after the 2020 report.

In light of the above, while the issuance of the Regulation was a positive prerogative, it will take some time to determine with certainty how the enlargement of the General Court will impact on ongoing and upcoming competition cases.

The increase in the number of potential cases falling within the General Court’s jurisdiction, combined with, until recently, relatively few judges to deal with those cases, resulted in a significant backlog of pending cases.

Finally, another broadly debated topic is the creation of specialized courts (*i.e.*, competition matters) to enable a more in-depth analysis in major cases. The Council of the European Union stated before the adoption of the Regulation that the creation of specialized courts would not constitute a viable alternative since it would add complexity to the proceedings and would be unnecessarily costly (*i.e.*, it would require a President, its Cabinet, registry, among other fixed costs).<sup>7</sup>

In contrast, the Regulation provides that by December 2020 the CJEU shall prepare a report on the efficiency of the General Court and the necessity for an increase to 56 judges and other structural changes, such as the

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## Online distribution of luxury goods: C-230/16 *Coty Germany v. Parfümerie Akzente* is on everyone's watchlist

Online shopping has grown rapidly over the past 10 years. The European Commission (EC) estimates that e-commerce has grown between 10% and 20% every year in some Member States and that the EU is now the largest e-commerce market in the world with 53% of individuals aged 16 to 74 having shopped online.<sup>1</sup> With everything from designer handbags to luxury beauty products now available at the click of a button, luxury brand owners must consider how to protect a high-end brand image and how to preserve the offline shopping experience online. *Continued overleaf*

### Online distribution of luxury goods: C-230/16 *Coty Germany v. Parfümerie Akzente* is on everyone's watchlist

One question that has arisen is whether luxury brand owners can restrict the sale of their products on online marketplaces such as Amazon or eBay. This question has most recently been discussed by the EC in the context of the e-commerce sector inquiry. Previously, it had been the subject of a number of cases investigated at Member State level and in particular by the Bundeskartellamt (BKartA). Now, a reference is pending before the Court of Justice of the European Union (CJEU) in Luxembourg that will finally determine the issue.

The EC launched the e-commerce sector inquiry in which it is examining in detail the online distribution of goods on May 6, 2015 as part of its Digital Single Market strategy. The preliminary report on the e-commerce sector inquiry was published on September 15, 2016.

In the preliminary report, the EC observes that “[m]arketplaces have become an important sales channel for many online retailers as well as manufacturers as they can provide access to a large number of customers which are looking for products on the respective marketplace. Marketplaces may allow starting an online sales business with lower initial investments. They may also facilitate cross-border sales. On the other hand, some manufacturers are critical of marketplaces mainly because of brand image considerations.”<sup>2</sup>

The sector inquiry revealed that retailers may be prohibited from selling on marketplaces either as a result of an outright ban or through the imposition of certain qualitative criteria which may have the same effect. For example, the requirement to sell the goods via a website that uses the retailer’s name as its domain name, the prohibition to sell on a marketplace which displays the logo and branding of the marketplace or the prohibition from selling the goods in an auction. Alternatively, manufacturers may require that the retailer obtains consent before placing the products for sale on a marketplace. The EC stated that it considers such

approval requirements may be the same as an outright ban to sell on marketplaces.

In the preliminary report, the EC reiterates the position in the Vertical Guidelines, which expressly permits marketplace bans: “where the distributor’s website is hosted by a third party platform, the supplier may require that customers do not visit the distributor’s website through a site carrying the name or logo of the third party platform.”<sup>3</sup> It considers marketplace bans “concern the question of how the distributor can sell the products over the internet and do not have the object to restrict where or to whom distributors can sell the products.”<sup>4</sup>

Thus the EC does not consider marketplace bans to amount to a ‘hardcore’ restriction of competition. This means that provided the other criteria are met, a restriction on marketplace sales will not in general prevent companies from benefitting from the Vertical Block Exemption.

The EC’s position contrasts with the approach taken to date by the BKartA. In the *Sennheiser* case,<sup>5</sup> the BKartA required Sennheiser to remove the ban on the marketing on marketplaces which it found to be a ‘major hindrance’ to online distribution. In its investigations into adidas and ASICS the BKartA also found that general prohibitions on sales via marketplaces restricted intra-brand competition, and harmed small and medium-sized distributors.<sup>6</sup>

This question of marketplace bans is now the subject of the *Coty* case in Germany. The case concerns a dispute in Germany between Coty, a perfume and cosmetics manufacturer, and Parfümerie Akzente, one of its retail distributors. Coty sought to prevent Parfümerie Akzente from selling products on Amazon. The Court of Appeal in Frankfurt has asked the CJEU for clarification to the legality of online marketplace bans. The case will decide how much control luxury brand owners have

1. Preliminary Report on the E-commerce Sector Inquiry, para. 6.
2. *Ibid*, para. 409.
3. Vertical Guidelines, para. 54.
4. Preliminary Report on the E-commerce Sector Inquiry, para. 472.
5. Case Report “Sennheiser lifts ban on sales via Amazon Marketplace for distributors in its selective distribution system,” October 24, 2013.
6. Press Release “adidas abandons ban on sales via online market places,” July 2, 2014 and Press Release “Bundeskartellamt takes a critical view of restriction of online distribution by ASICS,” April 28, 2014.

over distribution of their products on online platforms such as Amazon or eBay. Amazon has sought leave to intervene in the case.

The CJEU has been asked to consider (i) whether goods with a luxury image are the type of goods that can be protected by use of a selective distribution system compatible with Article 101 of the Treaty on the Functioning of the European Union (TFEU); (ii) whether a general ban on the use of online marketplaces is permissible to protect the luxury image of luxury goods, even if the online marketplace meets the criteria of the selective distribution system; (iii) does prohibiting the use of online platforms constitute a restriction by object

## The EC does not consider marketplace bans to amount to a ‘hardcore’ restriction of competition.

under Article 101(1) TFEU as it restricts customer groups retailers can sell to; and (iv) does prohibiting the use of online platforms constitute a restriction by object under Article 101(1) TFEU as it restricts their ability to make passive sales?

The ruling in *Coty* will provide clarity on the permissible restrictions in vertical agreements and should address the diverging approaches of the EC and the BKartA. As (e-)commerce increasingly transcends national borders, businesses need to be able to negotiate their supply and distribution agreements to match. For brand owners, online retailers and marketplaces, *Coty* should be one for the watch list.

## Compliance

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### 2016 representative matters



**Chemical company**

Advising a chemical company on complex joint venture issues.

**Fortune 500 company**

Engaged by a Fortune 500 company to handle an antitrust investigation in the US related to pricing practices.

**Major corporation**

Conducted a global internal compliance investigation.

**Major corporation**

Conducting a global internal compliance investigation.

**Medical devices company**

Advised a medical devices company on the restructuring of its Europe-wide online/offline distribution network.

**Viacom**

Representing Viacom in the EU e-commerce sector inquiry. The preliminary report was published on September 15. The Final Report that will summarize the main findings of the sector inquiry, incorporating the comments submitted by stakeholders in the public consultation, is due in the first half of 2017.

# 16

# Unilateral Conduct

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## Exclusive arrangements in the shadow of *Intel*

In 2014, following the General Court judgment in *Intel*,<sup>1</sup> ‘exclusivity’ became European Union (EU) competition law’s new dirty word. While highly questionable from an economic perspective,<sup>2</sup> the General Court offered clarity and legal certainty for businesses and their advisors, right? Incorrect. *Continued overleaf*

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**Exclusive arrangements in the shadow of *Intel***

**First**, Intel appealed the ruling to the Court of Justice and, although the judgment is pending at the time of writing, in October 2016 Advocate General Wahl handed down a scathing Opinion that rebuked the General Court ruling, recommending that it be quashed on numerous grounds.<sup>3</sup> Advocate General opinions are influential but non-binding and the Court of Justice is expected to rule on the case during the first half of 2017. **Second**, the *Intel* ruling *only* applies to firms that are dominant in a properly defined relevant market. Indeed, the General Court in *Intel* even held that “*exclusivity conditions may, in principle, have beneficial effects for competition*” when entered into by non-dominant firms, requiring an individual assessment of their effects.<sup>4</sup> **Third**, whether dominant or not, it is open to firms to justify exclusive arrangements, whether under Article 101(3) of the Treaty on the Functioning of the European Union (TFEU), or pursuant to the Article 102 TFEU case law. **Fourth**, in 2009, the European Commission (EC) published its Guidance Paper on Article 102 TFEU.<sup>5</sup> In this document, the EC has acknowledged that exclusive arrangements entered into by dominant firms may well be pro- rather than anti-competitive. At the time of its publication, the EC stated that it would ‘fully apply’ the approach of the Guidance Paper to future cases.<sup>6</sup> In any event, the facts of the *Intel* case pre-date the adoption of the Guidance Paper so this case is not a test case for the Guidance Paper.

Regardless of the outcome of Intel’s appeal, firms considering entering into arrangements that are exclusive in nature, or may be perceived as such, can undertake a meaningful assessment, and take certain steps to mitigate risk. In this respect, market definition and market shares matter: the larger the market share, the greater the risk.

Firms with market shares of less than 30% are covered by the EC’s Vertical Restraints Block Exemption Regulation.<sup>7</sup> This regulation block exempts ‘non-compete obligations’ with a duration of five years or less. A ‘non-compete obligation’ is an “*obligation causing the buyer not to manufacture, purchase, sell or resell goods or services which compete with the contract goods or services, or any direct or*

*indirect obligation on the buyer to purchase from the supplier or from another undertaking designated by the supplier more than 80% of the buyer’s total purchases of the contract goods or services and their substitutes on the relevant market.*” This does not mean, *a contrario*, that a term exceeding five years would be anti-competitive, merely that it must be individually assessed.

Non-dominant firms with market shares above 30% are in a “grey zone” outside the scope of the block exemption but not within the stricter regime of Article 102. For those firms, self-assessment is the order of the day, the primary tool for which is the EC’s Guidelines on Vertical Restraints.<sup>8</sup> Among other factors, these guidelines state that “[exclusivity arrangements] *shorter than one year entered into by non-dominant companies are generally not considered to give rise to appreciable anti-competitive effects or net negative effects. [Exclusivity arrangements] between one and five years entered into by non-dominant companies usually require a proper balancing of pro- and anti-competitive effects, while [exclusivity arrangements] exceeding five years are for most types of investments not considered necessary to achieve the claimed efficiencies or the efficiencies are not sufficient to outweigh their foreclosure effect.*”<sup>9</sup> Though crude, this statement nevertheless provides a useful starting point for assessment.

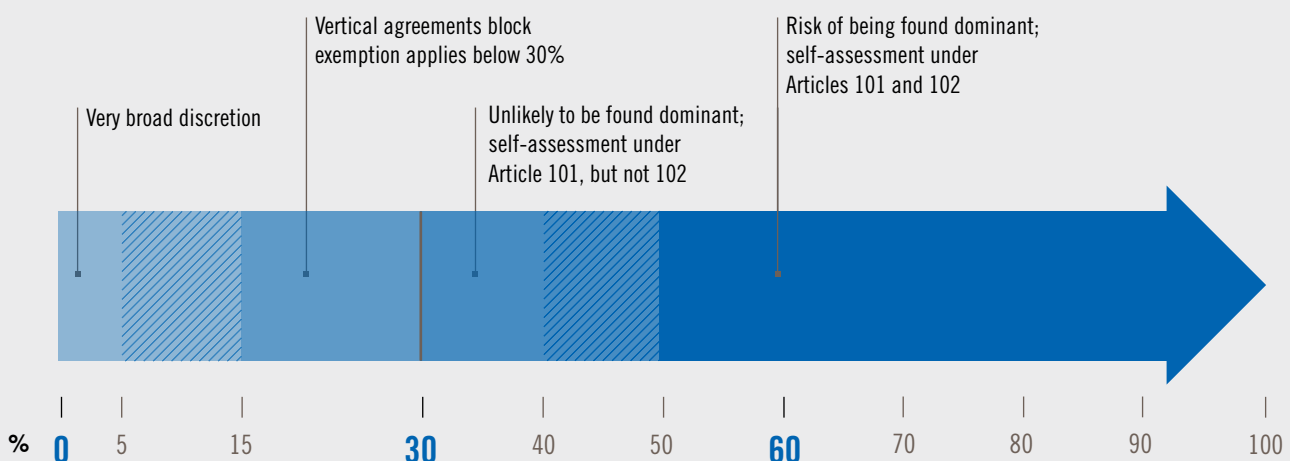
When does a non-dominant firm become dominant? This key question has no one clear-cut answer.<sup>10</sup> What is clear, however, is that market shares are relevant to any dominance assessment. In practice, firms with market shares below 40% are very unlikely to be found to be dominant absent exceptional circumstances. By contrast, EC decisional practice and EU case law suggest that firms with market shares above 50% run a material risk of being found to be dominant. The higher the market share, the bigger the risk. Of course, these are just more ‘rules of thumb’ and (durable) market **power** is what really matters: elements such as stability of market shares over time, buyer power and barriers to entry and expansion must also be given due weight.

1. Case T-286/09, *Intel v. Commission* (EU:T:2014:547).
2. One should not forget that competition law is meant to be the law of microeconomics.
3. Case C-413/14 P, *Intel v. Commission* (EU:C:2016:788).
4. Case T-286/09, *Intel v. Commission* (EU:T:2014:547), para. 89.
5. To give it its full name, Guidance on its enforcement priorities in applying Article [102 TFEU] to abusive exclusionary conduct by dominant undertakings.
6. Commission Press Release IP/08/1877 "Antitrust: consumer welfare at heart of Commission fight against abuse by dominant undertakings," December 3, 2008.
7. Commission Regulation 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices. For the regulation to apply, the buyer must also have a share of 30% or less on the buying market.
8. Commission notice - Guidelines on Vertical Restraints.
9. *Ibid.*, para. 133.
10. This alone undermines the 'legal certainty' justification that has often been offered for the General Court's *Intel* ruling and its binary approach to exclusivity arrangements.
11. Case C-23/14, *Post Danmark II* (EU:C:2015:651), para. 52.

For firms found to be dominant, the Guidance Paper provides a useful framework for the assessment of exclusivity arrangements — unless and until it is either withdrawn by the EC or ruled by the EU Courts to be inapplicable, which is considered unlikely as the Court of Justice in *Post Danmark II* noted that the Guidance Paper sets out “the administrative practice followed by the Commission.”<sup>11</sup> Regardless of the legal standard applied for the *prima facie* assessment, it is clear that efficiency arguments will be important. It would therefore be prudent for firms at risk of being found to be dominant to prepare *ex ante* at least a preliminary assessment of the pro-competitive rationale for entering into exclusivity arrangements. At the outset, a firm should be prepared to explain to an authority why it entered into a given arrangement.

In conclusion, firms and their advisors should not fall into a simplistic ‘exclusivity is bad’ mentality. Of course, the higher the market share — and market power — of a firm, the higher the risk and the more thorough the assessment that is warranted. Factors such as duration of the arrangements, market coverage, customer requirements, capacity constraints or other factors that may hinder competitors from making similar offers, and efficiencies are all important in such an assessment. This will be true irrespective of the outcome of the *Intel* appeal.

### Vertical Agreements Market Share and Different Regimes



# 17

# Unilateral Conduct

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## Developments on the ‘object’ vs ‘effect’ analysis under articles 101 and 102 TFEU

The recent judgment of the General Court (of the European Union) in *Lundbeck*<sup>1</sup> and Advocate General Wahl’s Opinion in *Intel*<sup>2</sup> are the latest interpretations of the ‘object’ vs ‘effect’ concepts under Article 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 102 TFEU, respectively. *Continued overleaf*

### I. Article 101 TFEU – The *Lundbeck* judgment

The General Court recently upheld a 2013 decision of the European Commission (EC) imposing fines of approximately €150 million on the innovator pharmaceutical company Lundbeck and a number of generic manufacturers with whom Lundbeck had entered into agreements to settle patent disputes relating to the citalopram active ingredient patent (AIP).

In its appeal, Lundbeck claimed, *inter alia*, that the EC erred in finding that the impugned patent settlement agreements amounted to restrictions of competition ‘by object,’ akin to market-sharing agreements similar to those at issue in *BIDS*,<sup>3</sup> and that such a finding was contrary to the judgment of the Court of Justice in *Cartes Bancaires*.<sup>4</sup>

The General Court rejected those claims by observing that in *Cartes Bancaires*, the Court of Justice did not challenge the concept of a restriction of competition ‘by object’; rather, it considered that this concept should be interpreted narrowly and apply only to agreements between undertakings which reveal a sufficient degree of harm to competition such that it is unnecessary to examine their actual effects.<sup>5</sup> Accordingly, in order to establish whether there is a sufficient degree of harm it is necessary to consider the relevant restrictions in their economic and legal context.<sup>6</sup>

The General Court also noted that the fact that the EC has not, in the past, considered that a certain type of agreement was restrictive of competition ‘by object’ does not prevent it from doing so in the future following an individual and detailed examination of the measures in question having regard to their content, purpose and context.<sup>7</sup>

The General Court also found that the EC adequately applied the case law in *Lundbeck*: the mere existence of reverse payments and their disproportionate nature were relevant factors in establishing that the impugned

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### Developments on the ‘object’ vs ‘effect’ analysis under articles 101 and 102 TFEU

agreements constituted restrictions of competition ‘by object’ by providing an incentive to the generics to discontinue their independent efforts to enter the market.<sup>8</sup> Moreover, the EC did consider Lundbeck’s process patents and the uncertainty regarding their validity at the time the agreements at issue were concluded and was right in finding that, even if those patents were presumed to be valid, they did not justify the exclusion of all competition in relation to the citalopram AIP.

Furthermore, the General Court noted that the way in which intellectual property rights are exercised may fall within Article 101(1) TFEU, and that Lundbeck had not demonstrated that the restrictions contained in the impugned agreements were objectively necessary to protect those rights.<sup>9</sup> Similarly, while the EC is not competent to determine the scope of a patent, it may take it into account where relevant in determining whether there has been an infringement of Article 101 (or 102) TFEU. Therefore, even if the restrictions in the agreements potentially fell within the scope of Lundbeck’s patents, the agreements went beyond the specific subject matter of its intellectual property rights (which included the right to oppose patent infringement) in paying (actual or potential) competitors not to enter the market.

Arguably, the General Court’s judgment in *Lundbeck* (currently under appeal at the Court of Justice) is ‘novel’ given that under *Cartes Bancaires* agreements should only be classified as infringements ‘by object’ where there is ‘existing experience’ of them being harmful to consumers and society — which is not the case for patent settlement agreements.

### II. 102 TFEU – Advocate General Wahl’s Opinion in *Intel*

On October 20, 2016, Advocate General Wahl rendered his Opinion on Intel’s appeal before the Court of Justice against the 2014 judgment of the General Court.<sup>10</sup> In that judgment, the General Court upheld the 2009 EC decision finding that Intel infringed Article 102 TFEU by



1. Case T-472/13, *Lundbeck v. Commission* (EU:T:2016:449).
2. Case C-412/14 P, *Intel v. Commission* (EU:C:2016:788).
3. Case C-209/07, *Beef Industry Development Society and Barry Brothers* (EU:C:2008:643).
4. Case C-67/13P, *Groupement des cartes bancaires v. Commission* (EU:C:2014:2204).
5. Case T-472/13, *Lundbeck v. Commission* (EU:T:2016:449), para. 434.
6. Case C-67/13 P, *Groupement des cartes bancaires v. Commission* (EU:C:2014:2204), para. 51.
7. *Ibid.*, para. 438; see also para. 51.
8. Case T-472/13, *Lundbeck v. Commission* (EU:T:2016:449), para. 355.
9. *Ibid.*, para. 477 et seq.
10. Case T-286/09, *Intel v. Commission* (EU:T:2014:547).
11. Case COMP/C-3/37.990 – *Intel*. The Commission decision ordered Intel to cease the alleged unlawful practices, and imposed a €1.06 billion fine.
12. Case C-412/14 P, *Intel v. Commission* (EU:C:2016:788), para. 114.
13. *Ibid.*, para. 106 et seq.
14. Case C-23/14, *Post Danmark II* (EU:C:2015:651), para. 66.
15. Case C-209/10, *Post Danmark I* (EU:C:2012:172), para. 44.
16. *Ibid.*, para. 117.
17. *Ibid.*, paras 118-119.
18. *Ibid.*, para. 120.
19. Similar to *Cartes Bancaires*, where there are doubts as to the anti-competitive nature and operation of a given practice, an analysis of its effects is necessary.

implementing a strategy aimed at foreclosing a rival, AMD, from the market for x86 Central Processing Units (CPUs) microprocessors (the EC decision).<sup>11</sup>

The Opinion examines the General Court’s alternative assessment of whether Intel’s practices were capable to result in anti-competitive effects.<sup>12</sup>

The Opinion confirms that, while the EC is not obliged to show actual foreclosure effects, nevertheless, the “*capability* [of the scrutinized conduct to restrict competition] **cannot be merely hypothetical or theoretically possible**” (emphasis added).<sup>13</sup> Relying on *Post Danmark II*<sup>14</sup> and *Post Danmark*

*restrictive effects necessary for the performance of something which is pro-competitive, but that its presumed restrictive effects are in fact confirmed. Absent such a confirmation, a fully-fledged analysis has to be performed*” (emphasis added).<sup>18</sup>

This finding accepts that a certain practice may *prima facie* appear to be unlawful under Article 102 TFEU. However, the analysis should not stop there; rather, the EC must assess whether such practice is, in fact, capable of restricting competition, examining all circumstances of the case (first step). If, following such analysis, the presumed restrictive effects are not confirmed, a fully-fledged analysis is necessary (second step).

While the EC is not competent to determine the scope of a patent, it may take that scope into account where this is relevant to determining whether there has been an infringement.

I,<sup>15</sup> the Opinion states that “[t]he aim of the assessment of *capability* is to ascertain whether, **in all likelihood**, the impugned conduct has an anti-competitive foreclosure effect. For that reason, **foreclosure must be considerably more than a mere possibility that certain behaviour may restrict competition**” (emphasis added).<sup>16</sup> Therefore, a low level of likelihood cannot be accepted; if that were the case, “one would have to accept that EU competition law sanctions form, not anti-competitive effects,” and that would lead to over-enforcement.<sup>17</sup> Therefore, mere ‘capability’ of an allegedly dominant firm’s conduct to restrict competition is not the relevant standard.

Furthermore, the Opinion states that “the assessment of *capability* as concerns **presumptively unlawful behaviour** must be understood as seeking to ascertain that, having regard to all circumstances, the behaviour in question **does not just have ambivalent effects on the market or only produce ancillary**

Questions arise as to how and to what extent the first step in the Advocate General’s proposed analysis, namely the review of ‘all circumstances,’ differs from a ‘fully-fledged’ analysis. For instance, must the EC conduct an ‘as-efficient competitor’ test (AEC) already at the initial step of the analysis? Arguably, this is not what Advocate General Wahl proposes. Rather, he advocates towards an ‘informed,’ well-grounded finding of *prima facie* unlawfulness, as opposed to a pure form-based presumption that disregards the circumstances of the case and any redeeming features of the practice in question.<sup>19</sup> Put differently, where it is not entirely clear, based on the facts of the case, that the sole economic rationale and impact of the practice under investigation is the anti-competitive foreclosure of rivals, it is necessary to conduct a thorough analysis of its likely effects on the market.

## Unilateral Conduct

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2016 representative matters

**Nokia**

Advising Nokia in connection with the current European Commission investigation concerning Android.

**Qualcomm**

After our prior success defending Qualcomm, the world's leading developer of wireless communication technology, in the European Commission's investigation of complaints lodged by Nokia, Ericsson, NEC, Panasonic, Texas Instruments and Broadcom, the team is currently representing Qualcomm on two European Commission investigations regarding alleged predatory pricing and exclusivity payments.

# 18

# Antitrust Litigation

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## ***United States v. American Express Co.: The two-sided market comes of age***

In one of the most important antitrust decisions of 2016, the United States Court of Appeals for the Second Circuit reversed a district court judgment in favor of the United States Department of Justice's Antitrust Division (DOJ) against American Express Company's so-called Non-Discrimination Provisions (NDPs), the contractual provisions in American Express' acceptance contracts with merchants that require accepting merchants not to attempt to steer consumers to other credit or charge cards.<sup>1</sup> *Continued overleaf*

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**United States v. American Express Co.:  
The two-sided market comes of age**

The ruling was a sweeping vindication for American Express' position, and for its 'spend-centric' business model, and has important implications for antitrust analysis, not only for American Express and the credit card industry, but for other industries that operate in two-sided markets or where competition creates strong consumer demand for particular brands without necessarily creating market power.

#### Industry and Procedural Background

American Express contracts with merchants to accept charges on American Express cards as payment for goods and services in return for American Express' agreement to reimburse merchants for those charges, minus a designated merchant discount fee that American Express retains as compensation for its services. American Express' acceptance contracts with merchants typically contain some form of non-discrimination provisions in which the merchant agrees not to discriminate against American Express by, *inter alia*, indicating a preference for another credit card or attempting to dissuade cardholders from using the American Express card (collectively, 'steering').<sup>2</sup> The DOJ, along with 17 state Attorneys General, challenged these agreements under Section One of the Sherman Act, alleging that American Express' NDPs unreasonably restrained competition in the alleged 'network services market' because, by inhibiting merchants from steering consumers to use cards with a lower cost to the merchant, they reduced the incentive of credit card networks to reduce merchant fees because reducing merchant fees would not necessarily result in greater volume.<sup>3</sup> After a lengthy bench trial, the District Court agreed with the DOJ, finding that the NDPs were unreasonable restraints on competition in violation of the Sherman Act.<sup>4</sup> Based on this finding, the court entered a sweeping injunction requested by the plaintiffs that not only prohibited American Express from enforcing the contractual NDPs, but prohibited American Express from unilaterally treating merchants differently based on whether they steered or not (*i.e.*, the injunction prohibited not only the challenged contractual restraints,

but any unilateral action by American Express based on a merchant steering or not steering American Express cardholders).<sup>5</sup> On appeal, the Court of Appeals reversed the District Court's order and directed the District Court to enter judgment for American Express. The Court began its analysis with an explanation of the payment card industry and the two-sided nature of the business. On one side, a payment card network<sup>6</sup> needs merchants to accept its cards, and on the other side, it needs consumers to obtain and, because consumers often hold multiple cards, use its cards. To succeed, the network must offer a sufficient value to both sides to use the card to consummate a transaction. The industry is also characterized by network effects: as the number of merchants that accept a particular card increases, the more valuable the card is for consumers and as the number of consumers that use the card increases, the more valuable acceptance of the card is for merchants.

Different networks and issuers in the credit card industry pursue different business models. For example, according to the Second Circuit, Visa and MasterCard run 'lend-centric' models that derive more than half their revenues from interest charged on unpaid balances.<sup>7</sup> American Express, on the other hand, runs a 'spend-centric' model whose revenues are primarily dependent on merchant-discount fees. The Second Circuit recognized that this spend-centric model is critical both to (1) American Express' merchant value proposition because American Express cardholders tend to spend more both on an annual and a per-transaction basis than users of other payment methods; and (2) American Express' cardholder value proposition, which features robust rewards and other benefits.<sup>8</sup> In recent years, credit card networks and issuers have competed intensely for cardholder usage through rewards programs and other benefits to consumers.<sup>9</sup>

Another way American Express competes for card usage is by offering its cardholders "*welcome acceptance*," that is, "*a frictionless and consistent point-of-sale experience when using their American Express Cards.*"<sup>10</sup> Like other networks,

1. *United States v. American Express Co.*, 838 F.3d 179 (2d Cir. 2016).
2. 838 F.3d at 191 (describing American Express' standard form NDPs).
3. *Ibid.*, at 192. The DOJ also sued Visa and MasterCard based on their non-discrimination arrangements with merchants but these parties agreed to a consent decree with DOJ and did not litigate.
4. *United States v. American Express Co.*, 88 F. Supp. 3d (E.D.N.Y. 2015).
5. *United States v. American Express Co.*, 2015 WL 1966362 (E.D.N.Y. Apr. 30, 2015).
6. This article uses the term 'network' broadly to encompass not only the four companies that operate major credit card networks in the United States — American Express, Discover, MasterCard, and Visa — but also their networks of issuing and acquiring banks that use their respective networks. Visa and MasterCard do not themselves issue credit cards to consumers; they each rely on a network of thousands of issuing banks. American Express and Discover issue their own cards, although they also have arrangements with a small number of third-party financial institutions to issue cards under their respective brands. This article also uses the term 'credit card' to encompass both general purpose

- credit and general purpose charge cards. The District Court found that the relevant market did not include debit cards, a finding the defendants did not challenge on appeal. 88 F. Supp. 3d at 175-85.
7. 838 F.3d at 189.
8. *Ibid.*, at 189.
9. *Ibid.*, at 206-07.
10. *Ibid.*, at 191 (quoting 88 F. Supp. 3d at 225).
11. *Ibid.*, at 191-92.
12. *Ibid.*, at 204.
13. 344 F.3d 229 (2d Cir. 2003).
14. 88 F. Supp. at 171.
15. *Ibid.*, at 171-72.
16. 838 F.3d at 197-98.
17. *Ibid.*, at 198-200.
18. 838 F.3d at 200.
19. 88 F. Supp. 3d at 188.
20. 838 F.3d at 190.

American Express uses its NDPs “to increase cardholders’ certainty as to whether its cards will be accepted and on what terms.”<sup>11</sup> American Express believes that the NDPs help protect its cardholder experience at the point-of-sale, for example, by preventing merchants from attempting to persuade its cardholders to use another card instead of American Express, as well as reducing free riding on its brand investments.<sup>12</sup>

### Market Definition

The parties, the District Court, and Second Circuit all agreed that the NDPs are vertical restraints subject to analysis under the rule of reason. Thus, the Second Circuit began its analysis with market definition. The District Court, relying largely on *United States v. Visa USA, Inc.*,<sup>13</sup> had found that the relevant market was for the provision of ‘network services,’ meaning the “core enabling functions provided by networks, which allow merchants to capture, authorize, and settle transactions for customers who elect to pay with their credit or charge card.”<sup>14</sup> In doing so, the District Court had expressly rejected the idea that the market should be evaluated as a ‘single platform-wide market for transactions’ that encompassed both merchant and consumer interactions, finding that this analysis would have taken “the concept of two-sidedness too far.”<sup>15</sup> This, the Second Circuit found, was error.

The Court of Appeals began by explaining why the ‘network services’ market definition in *United States v. Visa* was not an appropriate model for market definition in this case, including because the ‘exclusionary rules’ at issue in the *Visa* case were horizontal, rather than vertical restraints, and were directed at a different level of competition in the industry — the competition among networks to secure issuing banks — not the competition for credit card transactions.<sup>16</sup> Turning to the District Court’s application of the ‘hypothetical monopolist test,’ the Court of Appeals found that the lower court erred in limiting its consideration of the effect of a hypothetical increase in merchant fees to potential merchant attrition,

without considering the effect of any merchant attrition on consumer demand, “because the price charged to merchants necessarily affects cardholder demand, which in turn has a feedback effect on merchant demand (and thus influences the price charged to merchants).”<sup>17</sup> In other words, the District Court should have considered the degree to which a reduction in merchant acceptance resulting from an increase in merchant fees would reduce consumer demand to use the card and the feedback effects from that. To illustrate with a practical example, if a card network raised merchant fees to a level that caused a major airline or hotel chain to decline to accept the card, this is likely to have a negative effect on at least some cardholders’ interest in using the card, not only at that merchant, but others as well, which would in turn decrease other merchants’ demand for the card. In short, because the District Court did not consider the total effect of a hypothetical price increase, its application of the hypothetical monopolist test did not support its market definition conclusion.

As a practical matter, the Second Circuit’s rejection of the District Court’s ‘network services’ market definition in favor of a two-sided platform market did not affect either the identity or the market shares of the four meaningful participants in the market — Visa, MasterCard, American Express and Discover — but, as will be seen below, it had a profound effect on the District Court’s conclusions with regard to market power and competitive effects.

### Market Power

At the time of trial, American Express accounted for approximately 26.4% of the general purpose credit card charge volume in the United States.<sup>18</sup> According to the District Court, American Express’ merchant acceptance network was able to satisfy approximately 94% of its card members credit card spending needs.<sup>19</sup> Yet, of the approximately nine million credit-card-accepting merchant locations in the United States, about three million did not accept American Express.<sup>20</sup> It was not disputed that, although there have been a number of innovative new

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entrants in the payments space in recent years, there remain high barriers to entry in establishing a payment card network.

The District Court found that although American Express' "26.4% share of a highly concentrated market with high barriers to entry" likely would not suffice to prove market power alone,<sup>21</sup> American Express was able to exercise market power over merchants due to "the amplifying effect of cardholder insistence."<sup>21</sup> 'Cardholder insistence' refers to the concept that, although most consumers have multiple credit cards, some consumers may 'insist' on using a preferred card and either not patronize or spend less at a merchant who does not accept it.<sup>22</sup> Because consumer insistence can result in lost sales to the merchant if the merchant does not accept American Express, the District Court found that cardholder insistence "effectively prevents merchants from dropping American Express."<sup>23</sup> As an example, the District Court pointed to American Express' 'Value Recapture' program in which American Express had raised merchant discount rates in several merchant categories in the years preceding the trial with "little or no meaningful attrition."<sup>24</sup>

The Second Circuit, however, rejected the District Court's reliance on American Express' 'Value Recapture' program because this reliance failed "to recognize that increased demand on the cardholder side of the platform expands value on the merchant side," i.e., that "increases in merchant fees are a concomitant of a successful investment in creating value and output."<sup>25</sup> In practical terms, the Court found (i) that an increase in cardholder rewards is in effect a price cut to cardholders — a fact that the government's expert admitted; (ii) that rewards and other cardholder benefits associated with a credit card transaction must be considered in evaluating the total price American Express charged; and (iii) that the District Court improperly failed to do so. More broadly, the Court of Appeals rejected the District Court's reliance on customer insistence because "[c]ardholder insistence results not from market power, but

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### **United States v. American Express Co.:** The two-sided market comes of age (continued)

instead from competitive benefits on the cardholder side of the platform," which in turn benefits merchants.<sup>26</sup> The Court of Appeals pointed out that the District Court had correctly recognized that, if American Express stopped investing in rewards and other benefits to attract cardholders, its cardholder insistence and market share would dissipate, but failed to draw the correct conclusion from that fact. "Continuing investment in cardholder benefits," the Second Circuit found, "indicates, if anything, a lack of market power."<sup>27</sup> Or, to put it simply, and perhaps to state the obvious, competing on price to cardholders does not demonstrate the power to increase prices to supracompetitive levels.<sup>28</sup>

Buttressing the Court of Appeals' finding as to market power was the fact that roughly one-third of the credit-card accepting merchants in the United States do not accept American Express, a clear demonstration that viable alternatives to American Express acceptance exist. Each merchant makes an assessment of whether accepting is more profitable than not accepting, based in part on the degree of cardholder insistence, which can vary with the nature of the merchant and the nature and size of the transaction, and is a function of competition for the cardholder.<sup>29</sup> Thus, the Court explained, if a merchant finds the cost of acceptance outweighs the benefits, it can choose not to accept, and millions of merchants make exactly that choice.<sup>30</sup>

#### **Anti-Competitive Effects**

Not surprisingly in light of its previous analysis, when it turned to competitive effects, the Second Circuit found, as it had with market definition and market power, that the District Court erred in limiting its inquiry to the effect on merchants and not examining the effects of the NDPs on the market as a whole, including the effects on cardholders.<sup>31</sup> Further, the Court found that plaintiffs had not met their burden of showing an anti-competitive effect in the overall market through reduced output, decreased quality or supracompetitive pricing.<sup>32</sup>



21. 838 F.3d at 202 (quoting 88 F. Supp. 3d at 190-91).
22. 838 F.3d at 202-03.
23. 88 F. Supp. 3d at 191-92.
24. 88 F. Supp. 3d at 196.
25. 838 F.3d at 192.
26. *Ibid.*, at 203-04.
27. *Ibid.*, at 203.
28. *Ibid.*
29. *Ibid.*, at 203-04.
30. *Ibid.*, at 206.

31. 838 F.3d at 205.
32. *Ibid.*
33. 838 F.3d at 205-06 (emphasis in original).
34. *Ibid.*, at 207.
35. Order, *United States v. Am. Express Co.*, No. 15-1672 (2d Cir. Jan. 5, 2017), ECF No. 462.
36. 838 F.3d at 198.
37. 88 F. Supp. 3d at 172-73.
38. F.3d at 186-87 & nn.3-10.

Rather, the Second Circuit found that the evidence showed a substantial increase in output and a significant improvement in quality, all of which was “*consistent with evidence that American Express’ differentiated closed-loop model, supported by its NDPs, has increased rather than decreased competition overall within the credit card industry.*”<sup>33</sup> Because the plaintiffs failed to carry their burden of proof, the Court reversed and remanded with instructions to enter judgment for American Express.<sup>34</sup>

On January 5, 2017, the plaintiffs’ petition for rehearing was denied.<sup>35</sup>

#### **Lessons From the American Express NDPs case**

The *American Express NDPs* case contains several lessons for antitrust analysis and for antitrust litigation, and these are not limited to two-sided markets. While, with the exception of the two-sided market analysis, these lessons are not particularly novel, they bear repeating because they found an unusual application in this case and because they are occasionally forgotten, including by enforcers.

consumers was intense, manifesting itself in any number of ways, not the least of which was consumer rewards. Indeed, one of the reasons that the Court of Appeals cited for analyzing both sides of the market together is that separating the two interrelated markets “*allows legitimate competitive activities in the market for general purposes to be penalized no matter how output-expanding such activities might be.*”<sup>36</sup> Enforcers should think long and hard before bringing a case in which it is impossible to credibly demonstrate that output has been, or is at least likely to be, restricted or that quality has been reduced.

***Antitrust analysis must consider the total market affected by a practice, including two-sided platform markets where appropriate.*** In their case-in-chief, the *American Express* plaintiffs and their economic expert acknowledged that the credit card market was two-sided but then made minimal efforts to incorporate that fact in their analysis. The District Court followed the plaintiffs down this path, not wishing to take “*the concept of two-sidedness too far.*”<sup>37</sup> As is clear from the foregoing, however, the Court of Appeals devoted substantial discussion to the proper

Plaintiffs had not met their burden of showing an anti-competitive effect in the overall market through reduced output, decreased quality or supracompetitive pricing. Rather, the Second Circuit found that the evidence showed a substantial increase in output and a significant improvement in quality.

**Output is key.** Even with what they view as good price evidence, antitrust litigants ignore evidence relating to output at their peril. The government did not and could not attempt to prove that American Express’ NDPs reduced output. In fact, the evidence showed that competition for

approach to two-sided analysis, including an examination of the academic literature on the subject.<sup>38</sup> In light of this analysis, it will be very difficult for a future litigant to ignore or merely pay lip service to two-sided issues when they are properly presented. This is important because

the payments industry is not the only industry in which two-sided markets are present. Examples of industries in which two-sided or multi-sided market analysis may be important include media, internet, software and other technology products, auction houses, and even health insurance. In all two-sided markets, the firm must balance the value offered on one side of its platform with the value offered on the other side. Often, the firm sets the price on one side of the platform as free or even negative in order to generate demand on the other side of the platform and thereby maximize its total revenue. For example, newspapers, television programmers, and many web sites typically balance their offerings to readers/audiences with the offerings to advertisers, with a variety of different pricing structures, some of which incorporate subscription or other fee-based revenue from the readership/audience while others rely entirely on advertising. Proper analysis of competition in these and other platform industries must consider actual and potential effects of the challenged conduct on both sides of the platform, including the kind of feedback and network effects the Second Circuit considered in the *NDP* case.

***Strong consumer demand for a product does not equate to market power where continuing investment and price competition are necessary to maintain that demand.***

As explained above, the Second Circuit found that the District Court erred in relying on consumer insistence in finding market power because that insistence was the result of continuing investment and competition for cardholder usage. Boiled down to its core, the government's evidence — that their merchant witnesses felt that, because of consumer demand, they had no choice but to accept American Express — amounted to little more than the truism that merchants accepted American Express because they concluded that it was more profitable to do so than not to do so. But, of course, this truism can apply to most, if not all, products a retailer decides to carry. If a vertical restraint does not enable a firm to relax its competitive efforts, the restraint simply

***United States v. American Express Co.:  
The two-sided market comes of age*** (continued)

does not increase or maintain market power. Further, it is important to remember that this principle can apply even where a firm's market share is larger than American Express' 26.4% share if that share is contestable and requires continuous investment and competition to maintain.

***Vertical restraints that protect differentiated product competition are important and valuable.*** The government's theory and affirmative case of anti-competitive effects was both remarkably simple and remarkably narrow — merchant fees were higher than they would be absent the NDPs — completely ignoring the admitted innovation, competition and consumer benefits that characterized the industry in recent years. Further, the government never explained why it had an interest in challenging a business model that relies less on consumer interest charges and fees and more on revenue from merchants than some of its competitors' models. Indeed, the Second Circuit specifically noted the irony of the government bringing a case that, if successful, could reduce product differentiation and lessen American Express' impact on competition.<sup>39</sup>

As the Supreme Court has recognized repeatedly, many firms in many industries use vertical restraints in order to promote and protect their differentiated product business models. See, e.g., *Leegin Creative Leather Prods, Inc. v. PSKS Inc.*, 551 U.S. 877 (2007); *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988); and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). While enforcers have an understandable desire for lower prices as a general matter, they need to carefully consider the benefits of such differentiated product competition before challenging a restraint designed to promote such competition in hopes that the challenge will result in lower prices.

***Price increases, without consideration of either the nature or cost of the product or market conditions, do not by themselves demonstrate market power.*** As discussed above, the Second Circuit rejected the District Court's reliance on American Express' increased merchant rates as proof of either market

39. 838 F.3d at 204 & n.51.
40. 838 F.3d at 206.
41. 838 F.3d at 206-07.
42. 838 F.3d at 206.
43. *Ibid.*
44. *Ibid.*, at 197-98.

power or anti-competitive effects because this analysis did not consider prices on the other side of the platform.<sup>40</sup> Nor did the government attempt to establish by any other means that American Express' pricing or margins on transaction were supracompetitive.<sup>41</sup> In a competitive market, litigants cannot rely on price increases without more to prove their case.

***Antitrust analysis cannot lose sight of consumer welfare.***

Perhaps the most fundamental error in the District Court's analysis was to focus "*entirely on the interests of the merchants while discounting the interests of cardholders.*"<sup>42</sup> While "*merchants may desire lower fees,*" the Court recognized that "*those fees are necessary to maintaining cardholder satisfaction*" and that consumers are best served by allowing American Express to balance the costs and benefits on each side of the platform to maximize competitiveness and output.<sup>43</sup> Indeed, in discussing why it upheld the 'network services' market in *United States v. Visa*, the Court made clear that the 'exclusionary rules' at issue there not only eliminated competition from the American Express and Discover networks in marketing network services to issuing banks, they also led to downstream anti-competitive effects in the "*market for cardholders obtaining the general purpose cards,*" and that striking down those rules was "*therefore, consistent with antitrust principles.*"<sup>44</sup> Enforcers in particular must always keep this principle in mind.

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# Antitrust Litigation

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## Frontloading the FTAIA: Improving efficiency in litigating global cartel litigation

The Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) limits and defines the extraterritorial reach of the Sherman Act. Specifically, the FTAIA excludes from the ambit of the Sherman Act “*conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless —* (1) *such conduct has a direct, substantial, and reasonably foreseeable effect —* (A) *on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or* (B) *on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and* (2) *such effect gives rise to a claim under the provisions of [15 U.S.C. §§ 1-7].”* Continued overleaf

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One of the purposes of the FTAIA was to limit the burden on the courts and the parties of litigating claims in US courts that do not have a compelling nexus to the United States. Unfortunately, appropriately limiting discovery and litigation to transactions that fall within the proper ambit of the FTAIA has proven to be difficult in civil cases alleging a global cartel, especially class actions. Because these cases typically involve gigabytes of data and other electronic evidence, numerous depositions — often with translation challenges — and extensive expert work and motion practice, they are often “*a time and money sinkhole for the litigants.*”<sup>1</sup>

The *Capacitors* case is typical of recent civil litigation alleging a global cartel. Soon after the existence of a US DOJ investigation became known, a slew of antitrust lawsuits was filed against over 20 defendants on behalf of putative classes of direct and indirect purchasers, as well as an opt-out plaintiff, alleging a global conspiracy to fix the price of capacitors. Various plaintiffs claimed injury based on purchases of raw capacitors or purchases of finished products containing capacitors or both. These transactions fell into a number of different categories: (i) sales to US entities; (ii) sales to foreign entities but shipped to the US; (iii) sales billed and shipped to a foreign entity; (iv) products incorporated into other products and shipped into the US; and (v) sales based on state law indirect purchaser claims.

In a laudable effort to more efficiently manage this kind of global cartel litigation, the United States District Court for the Northern District of California (J. Donato) adopted a two-phase process to address the FTAIA issues early in the litigation in hopes of achieving “*downstream efficiencies and economies in discovery, class certification and other motions.*”<sup>2</sup> In Phase I, the court set out its findings on the legal standards to be applied to the various categories of transactions for which the plaintiffs seek damages. In Phase II, the court will apply those standards via summary judgment motions. If all goes well, the parties will then be able to proceed to class certification motions and the rest of

## Frontloading the FTAIA: Improving efficiency in litigating global cartel litigation

the case with a clear understanding of the scope and nature of the transactions for which liability is at issue. This note outlines how the court addressed these categories.

### 1. Products Billed to Entities in the US

The parties did not dispute that products invoiced directly to an entity located in the United States were subject to the Sherman Act and not excluded by the FTAIA.

### 2. Products Billed to Foreign Entities but Shipped to the US

The district court readily found that products imported into the United States by the defendants fell squarely within the ‘import commerce’ exception to the FTAIA, notwithstanding the fact that the products were billed to a foreign entity. In so holding, the court followed the Third Circuit’s reasoning in *Animal Science Products, Inc. v. China Minmetals Corp.*,<sup>3</sup> noting that there was no need to “*determine the outer bounds of import trade*” because the defendants themselves imported the capacitors into the United States.

### 3. Products Billed and Shipped to a Foreign Entity

Turning to the more difficult questions presented, the court addressed sales that were billed and shipped to foreign entities and which therefore do not constitute import commerce. For these transactions to remain in the case, the “*nonimport trade or commerce must have had a ‘direct, substantial and reasonably foreseeable’ effect on U.S. domestic commerce, and this domestic effect must have ‘given rise to’ the Sherman Act claim.*”<sup>4</sup> This requirement does not automatically exclude persons who were injured abroad from recovery under the Sherman Act but does require them to demonstrate that the US effects of the defendants’ anti-competitive conduct “[gave] rise to the claim.”<sup>5</sup> Mere correlation between US and foreign prices is not enough.<sup>6</sup>

To meet this burden, the plaintiffs proffered a theory of ‘global pricing,’ alleging that the domestic effect of defendants’ conduct gave rise to their claims because the defendants made US and foreign sales pursuant to

1. *In re Capacitors Antitrust Litigation*, 2016-1 Trade Cases P 79,777 (N.D. Cal. September 30, 2016).
2. *Ibid.*
3. 654 F.3d 462, 465 (3d Cir. 2011).
4. *In re Capacitors*, 2016-1 Trade Cases P 79,777, at 5.
5. *Ibid.*
6. *Ibid.*
7. *Ibid.*, at 6 (citing *In re Dynamic Random Access Memory (DRAM) Antitrust Litigation*, 546 F.3d 981 (9th Cir. 2008); *Empagram S.A. v. F. Hoffman-La Roche, Ltd.*, 417 F.3d 1267 (D.C. Cir. 2005)).
8. *Ibid.*
9. 778 F.3d 738 (9th Cir. 2015).
10. 2016-1 Trade Cases P 79,777, at 6-7.
11. *Ibid.*, at 7.
12. 2016-1 Trade Cases P 79,777, at 7 (citing cases).
13. *Ibid.*, at 8 (citing *Global Reinsurance Corp. U.S. Branch v. Equitas Ltd.*, 18 N.Y.3d 722 (N.Y. 2012) (internal quotation marks omitted)).

a global pricing system that resulted in inflated prices globally. The court, however, found that this theory was analytically indistinguishable from similar theories that the Ninth Circuit and other courts have rejected because it shows at most that the US effects (*i.e.*, higher prices in the US) facilitated the conspiracy, but not that the US effects proximately caused the foreign injury.<sup>7</sup> Thus, the court barred plaintiffs from proceeding on this ‘global pricing’ theory, while indicating (without offering much hope) that it would consider any new facts during Phase II that might enable the plaintiffs to “*get through the eye of the needle*” to show proximate cause.<sup>8</sup>

#### 4. Products Incorporated Into Products Destined for Sale in the US

The court began its analysis of the fourth category — capacitors that were manufactured abroad and incorporated abroad into finished products destined for sale in the United States — with a discussion of *United States v. Hsiung*.<sup>9</sup> In *Hsiung*, the Ninth Circuit rejected an FTAIA defense to the Sherman Act conviction of a Taiwanese executive for his participation in the alleged global TFT-LCD cartel. The district court read *Hsiung* to suggest, “*without definitively stating, that transactions like this [i.e., foreign sales of components that went into US-bound finished products] may come within the Sherman Act either as import trade or under the domestic effects exception.*” That said, the court distinguished *Hsiung* because, *inter alia*, the price-fixed TFT-LCD panels in *Hsiung* were indisputably substantial components of the imported finished products and it was well understood that the effect of the conspiracy would be to increase US prices, while capacitors, in contrast, are a trivial portion of the cost of finished products.<sup>10</sup> Nevertheless, the court found that disputed factual issues precluded resolution of this issue in Phase I. Although the court did not say so, presumably one of those factual issues will be the extent to which the alleged overcharge in the ‘tiny’ cost of capacitors in relation to the price of finished goods had a ‘direct, substantial and reasonably foreseeable effect’ on import commerce.

The court declined to rule on whether the *Illinois Brick* doctrine barred direct purchaser claims from plaintiffs who bought, not from the defendants or co-conspirators, but from foreign affiliates of the defendants, finding that “*the intersection between Illinois Brick and the FTAIA is a complex topic*” requiring greater factual development.<sup>11</sup>

#### 5. The Application of the FTAIA to State Law Claims

Although the issue is not settled in the Ninth Circuit, a number of federal and state cases have held that the FTAIA serves as an outer limit on the extraterritorial application of state law antitrust and consumer protection claims.<sup>12</sup> Judge Donato accepted this view, but noted that this did not answer the related question of whether state laws extended as far as the Sherman Act under the FTAIA. The New York Court of Appeals, the district court pointed out, had questioned this assumption in connection with its state antitrust statute, suggesting there would need to be “*a very close nexus between the conspiracy and the injury*” in the state in order to reach a “*a purely extraterritorial conspiracy.*”<sup>13</sup> Because this would need to be addressed on a state-by-state basis, the court called for additional briefing on the state law claims.

Although litigation of any global cartel case that proceeds past the motion to dismiss is likely to be painfully expensive and burdensome, the *Capacitors* case provides a reasonable case management model for a relatively efficient, early resolution of the FTAIA issues. Courts and litigants facing these issues should seriously consider whether it can be adapted to their global cartel matters.

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# Antitrust Litigation

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## Current state of play in benchmarking cases and investigations

Since 1914, Section 4 of the Clayton Act has provided a private right of action to “*any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.*”<sup>1</sup> Over the last century, thousands of court cases have given meaning to this broad language, setting forth standards that define who may sue for what conduct. For the most part, the law has developed in cases alleging antitrust violations in markets for physical goods or services. *Continued overleaf*

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## Current state of play in benchmarking cases and investigations

Since the 2008 financial crisis, however, there has been an onslaught of lawsuits alleging misconduct in financial markets. These cases include, for example, lawsuits alleging collusion in connection with the setting of benchmark rates — such as the London Interbank Offered Rate (LIBOR), ISDAfix, and the silver fix — as well as cases involving allegations of collusion in the trading of financial products — such as US government treasuries and supranational, sub-sovereign, and agency bonds (SSA bonds).

The recent wave of financial services cases is presenting courts with new challenges as they apply established rules to transactions and markets that often defy traditional characterizations. Unlike the purchase and sale of physical goods, transactions in the financial markets often involve rapid price movement, multiple interrelated markets, blurred or non-existent lines between customers and competitors, active inter-bank markets requiring regular discussion and price negotiation among banks, and intangible and fungible ‘products’ that cannot be traced from seller to purchaser to indirect purchaser. These differences are even more acute in cases alleging manipulation of benchmarks, which are not products at all and may not set the prices paid by consumers. These cases have created a renewed focus on three threshold requirements for a plaintiff to state a claim: (i) the plaintiff must plead harm to competition; (ii) the plaintiff must be an ‘efficient enforcer’ of the antitrust laws; and (iii) the plaintiff must have participated in the market that was allegedly restrained. Over the last few years, there have been a host of federal trial court and appellate court decisions that have begun to clarify how these antitrust requirements should be applied in the context of alleged collusion in financial markets. We highlight a few of the key issues from those decisions below.

First, in one of the earliest challenges to the application of the antitrust laws to financial benchmarks, the defendants in the US dollar LIBOR case moved to dismiss the

complaint on the ground that the plaintiffs failed to allege harm to competition because LIBOR rate setting was not intended to be a competitive process. This argument was based on the long-standing requirement “*that a plaintiff can recover only if the loss stems from a competition-reducing aspect or effect of the defendant’s behavior.*”<sup>2</sup> The district court agreed with the defendants’ argument and ruled that, even if LIBOR had been manipulated, “*plaintiffs have not alleged that defendants’ alleged fixing of LIBOR caused any harm to competition between sellers of [LIBOR-based financial] instruments or between buyers of those instruments.*”<sup>3</sup> On appeal, the US Court of Appeals for the Second Circuit reversed, holding that because “*LIBOR forms a component of the return from various LIBOR-denominated financial instruments, (...) the fixing of a component of price violates the antitrust laws.*”<sup>4</sup> The Court also held that, when a plaintiff alleges adequately a horizontal price-fixing conspiracy, as it did here, the plaintiff does not need to separately allege harm to competition. Instead, a consumer who pays a higher price on account of horizontal price-fixing suffers an antitrust injury, and no further showing of actual adverse effect in the marketplace is necessary. The defendants have filed a petition for *writ of certiorari*, asking the United States Supreme Court to hear their appeal of this decision.

A second threshold issue in antitrust litigation involving benchmark rates and financial products is whether the plaintiff is a participant in the market that was restrained. This requirement derives from the rule articulated in *Brunswick*<sup>5</sup> that “[p]laintiffs must prove antitrust injury” and the statement in *Associated General Contractors* that the antitrust laws exist to protect “*the economic freedom of participants in the relevant market.*”<sup>6</sup> The Second Circuit recently analyzed this requirement in the *Aluminum Warehousing* antitrust litigation, where the plaintiffs alleged that collusion in the aluminum warehousing market affected the price that plaintiffs paid for aluminum in the consumer and commercial aluminum market. The Second Circuit ruled that these allegations were insufficient to plead antitrust injury because these plaintiffs failed to plead

1. 15 U.S.C. § 15.
2. *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990).
3. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 688 (S.D.N.Y. 2013).
4. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 771 (2d Cir. 2016).
5. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (“Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”).
6. *Associated General Contractors of Cal., Inc. v. California State Council of Carpenters*, 459 U.S. 519, 538; see, e.g., *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1057 (9th Cir. 1999) (“Antitrust injury requires the plaintiff to have suffered its injury in the market where competition is being restrained.”) (citing *Associated General Contractors*).
7. *In re Aluminum Warehousing Antitrust Litig.*, 833 F.3d 151, 161-62 (2d Cir. 2016).
8. *Associated General Contractors*, 459 U.S. at 538-46.
9. *Gelboim v. Bank of Am. Corp.*, 823 F.3d 759, 778 (2d Cir. 2016).
10. *Ibid.*, at 779.

that they were “*participant[s] in the very market that [was] directly restrained.*”<sup>7</sup> Plaintiffs argued that, even if they could not meet the market participant requirement, they could still establish antitrust standing based on the exception for “*parties whose injuries are ‘inextricably intertwined’ with the injuries of the market participants.*” The Second Circuit, however, rejected this argument and explained that, in order to fall within this narrow exception, the plaintiff must plead (and later prove) that he was used by the defendants as a ‘fulcrum’ or ‘conduit’ to injure participants in the relevant market. Plaintiffs could not meet this standard because “*all of the alleged anti-competitive acts (...) were within the defendants’ power to do.*” The defendants did not need to use the plaintiffs as a ‘fulcrum’ or ‘conduit’ to effectuate their scheme. As a result, the plaintiffs could not establish standing through the narrow ‘inextricably intertwined’ exception. Following *Aluminum Warehousing*, defendants in antitrust cases involving benchmarks and financial products are increasingly attempting to have the cases dismissed based on the argument that the plaintiff is not a participant in the relevant market.

A third threshold issue in antitrust litigation involving benchmarks and financial products is whether the plaintiff bringing the case is an ‘efficient enforcer’ of the antitrust laws. This requirement originates from the 1983 Supreme Court decision in *Associated General Contractors*, which

as the ‘efficient enforcer’ inquiry: “(1) whether the violation was a direct or remote cause of the injury; (2) whether there is an identifiable class of other persons whose self-interest would normally lead them to sue for the violation; (3) whether the injury was speculative; and (4) whether there is a risk that other plaintiffs would be entitled to recover duplicative damages or that damages would be difficult to apportion among possible victims of the antitrust injury.”<sup>9</sup> The Second Circuit recently provided a detailed discussion of these factors in the LIBOR case and ordered the district court to analyze each factor on remand. In that decision, the Second Circuit noted that the LIBOR case has features “*that make it like no other*” and expressed concern that requiring the banks “*to pay treble damages to every plaintiff who ended up on the wrong side of an independent LIBOR-denominated derivative*” may result in “*damages disproportionate to [the] wrongdoing.*”<sup>10</sup> Following the LIBOR decision, defendants have raised the ‘efficient enforcer’ argument in numerous motions to dismiss in cases concerning financial products such as LIBOR, foreign exchange, and interest rate swaps.

Many of the antitrust cases involving benchmark rates and financial products are still at an early stage and the case law in this area is still developing, but the doctrines discussed in this article are likely to be heavily litigated as defendants attempt to obtain dismissal of or, at the very least, narrow the scope of antitrust claims against them.

## The defendants did not need to use the plaintiffs as a ‘fulcrum’ or ‘conduit’ to effectuate their scheme.

held that to have antitrust standing a plaintiff must, in addition to having suffered antitrust injury, satisfy a loose set of factors to establish that the harms she has suffered are closely and clearly tied to the anti-competitive behavior at issue.<sup>8</sup> The lower courts have subsequently refined these factors into a four-part test, now commonly known

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# Antitrust Litigation

## *In re vitamin C antitrust litigation*

In the fall of 2016, a US federal appeals court addressed the question of how to respond when a foreign government appears in a pending lawsuit to say that it ‘compelled’ the defendants to violate US antitrust laws. Simply put, the instruction from the US Court of Appeals for the Second Circuit is to defer to the foreign government and dismiss the action. *Continued overleaf*

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The case, *In re Vitamin C Antitrust Litigation*, marks the first time that Chinese companies were sued for violating US antitrust laws, and, perhaps even more significant, the first time that the Chinese government has ever intervened in a US lawsuit to tell its side of the story. The decision handed down by the Second Circuit on September 30, 2016 represents a major victory for proponents of international comity, and most of all, the Chinese defendants.

### The District Court Ruling

Plaintiffs were purchasers of vitamin C in the United States who alleged that the defendants, Chinese vitamin manufacturers, formed an agreement to sell vitamin C in the US at artificially high prices in violation of US antitrust law. The defendants did not contest that they agreed on prices; instead, they filed a motion to dismiss on the basis that applicable Chinese regulations *required* them to do so.

In a historic move, the Ministry of Commerce of the People's Republic of China filed an *amicus curiae* brief with the district court in support of dismissal, explaining that the defendants, as members of a chamber of commerce in China, were required to implement Ministry regulations regarding the vitamin C trade, which compelled manufacturers to set prices “*at or above the minimum acceptable price set by coordination through the Chamber.*”

Despite the Ministry's intervention, the US District Court for the Eastern District of New York denied the motion to dismiss and instead ordered the parties to engage in discovery on the issue of whether the defendants were indeed compelled by Chinese law to fix prices. Following discovery, the defendants again asked the court to rule in their favor and throw out the case on summary judgment. Once again, the court denied the defendants' motion, this time expressly “*declining to defer to the Ministry's interpretation of Chinese law*” in light of certain provisions in the Chinese regulations that appeared to undermine the Ministry's interpretation. In other words, the district court refused to credit the Chinese government's explanation of its own law.

### *In re vitamin C antitrust litigation*

The case ultimately went to trial. In March 2013, a federal jury found the Chinese manufacturers (other than those that had already settled with the plaintiffs) liable for violating Section 1 of the Sherman Act and awarded the plaintiffs nearly US\$150 million in damages. The Chinese manufacturers appealed.

### Second Circuit's Decision

On appeal, the Second Circuit considered whether the district court abused its discretion by failing to abstain from asserting jurisdiction on international comity grounds. Finding in the affirmative, the Second Circuit vacated the district court's order denying the defendants' motion to dismiss and returned the case to the lower court with instructions to dismiss with prejudice.

#### “True conflict” analysis

The Second Circuit's analysis hinged on the first factor of a multi-factor balancing test — *i.e.*, whether a “true conflict” exists between US law and Chinese law. The first step in this analysis is to determine the appropriate level of deference to afford the Chinese government's submission. In a key pronouncement, the Second Circuit explained that “[i]f deference by any measure is to mean anything, it must mean that a US court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, even if that representation is inconsistent with how those laws might be interpreted under the principles of our legal system.”

Because the Chinese government submitted a “*sworn evidentiary proffer regarding the construction and effect of its laws and regulations,*” and such interpretation demonstrated “*a true conflict between China's regulatory scheme and US antitrust laws,*” US courts were duty-bound to defer to the Chinese and abstain. The Second Circuit also held, in contrast to the district court, that a true conflict does not require evidence of government compulsion to follow the law in question, proof that the laws in question were actually enforced, nor proof that the defendants sought approval from the government for their actions. Instead, “[i]t is enough that Chinese law actually mandated such action, regardless of whether Defendants benefited from, complied with, or orchestrated the mandate.” After finding a true conflict,

the court went on to consider the remaining factors of the balancing test and concluded that China's interests *"outweigh whatever antitrust enforcement interests the United States may have in this case as a matter of law."*

The defendants did not contest that they agreed on prices; instead, they filed a motion to dismiss on the basis that applicable Chinese regulations required them to do so.

#### **What it Means**

The Second Circuit's ruling is a decisive win for international comity and the principles of deference and abstention. More than that, however, it could be regarded as a sign of 'safe passage' for foreign manufacturers to collude with their peers to fix prices of products sold into the US as long as they — or more accurately, their government — can point to regulations requiring such conduct. For most jurisdictions with market-driven economies, the risk of abuse is probably low. But for jurisdictions with planned economies and protectionist policies, the ruling is an open invitation for those governments to come to the rescue when their companies are sued in US courts.

## Antitrust Litigation

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### 2016 representative matters



### **Cargolux Airlines**

Representing Cargolux Airlines in both the successful application for annulment of the European Commission's decision in the Air Cargo Investigation before the General Court and the damages litigation in the United Kingdom before the High Court.

The Air Cargo Investigation received *Global Competition Review's* 2016 "Matter of the Year" award and at *The American Lawyer* Global Legal Awards 2016 it was the "Global Dispute of the Year: International Litigation."

### **JTEKT**

Representing JTEKT in the Auto Parts multidistrict follow-on antitrust class action.

### **Major financial institution**

Representing a major financial institution in antitrust class actions relating to foreign exchange (FX) trading.

### **Major financial institution**

Representing a major financial institution in antitrust class actions related to supranational, sub-sovereign and agency (SSA) bonds.

### **Major financial institution**

Representing a major financial institution in antitrust class actions relating to interest rate swaps.

### **Major financial institution**

Representing a major financial institution in a shareholder derivative suit concerning alleged conduct in the FX market.

### **Major financial institution**

Representing a major financial institution in antitrust class actions related to the silver market.

### **Major financial institution**

Representing a major financial institution in litigation regarding the challenge to network and card-issuers' conduct with respect to setting and applying interchange fees and various payment-card network rules.

### **Major financial institution**

Represented a major financial institution in litigation alleging that the introduction of "EMV" chip technology in payment cards disadvantages merchants.

### **Major financial institution**

Representing a major financial institution in antitrust class actions relating to alleged manipulation of yen LIBOR and euroyen TIBOR rates.

### **Major financial institution**

Representing a major financial institution in the Australian dollar benchmark antitrust class action.

### **Major financial institution**

Representing a major financial institution in an investigation by the Department of Justice's Antitrust Division into certain equities trading matters.

### **Major financial institutions**

Representing numerous major financial institutions in investigations related to LIBOR.

### **Major solar panel manufacturer**

Representing a solar company in a predatory pricing matter where the Sixth Circuit affirmed a district court's dismissal with prejudice of an action claiming more than US\$1 billion in damages arising out of alleged collusion between Chinese solar panel manufacturers.

### **Major distributed solar energy company**

Representing a leading distributed solar energy company in litigation regarding the monopolization of the market for the retail sale of electricity in the Phoenix, Arizona metropolitan area.

### **Two major financial institutions**

Representing two major financial institutions in antitrust class actions relating to US Treasury securities.

### **Two major financial institutions**

Representing two major financial institutions in antitrust class actions relating to ISDAfix.

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# State Aid

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## State aid and tax rulings

In 2016, the European Commission (EC) continued its assault on tax rulings for multinationals. The EC handed down the largest State aid penalty concerning a single company to date, by requiring Ireland to recover illegal State aid from Apple amounting to €13 billion (plus interest) in unpaid taxes over the period 2003-2014. The decision follows earlier decisions for recovery against the Netherlands and Luxembourg in cases involving Starbucks and Fiat, respectively. The EC has also ruled that Belgium must recover €700 million from 35 multinational companies that benefited from an ‘excess-profit’ scheme. In addition, the EC is still actively investigating hundreds of other tax rulings, including in respect of Amazon and McDonald’s. *Continued overleaf*

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 State aid and tax rulings

These tax cases will be of huge interest to all multinationals operating in the European Union (EU) due to concerns they have undermined the legal certainty traditionally provided by tax rulings. Multinational companies should consider carefully the State aid risks when seeking tax rulings from Member States, in particular because, from January 1, 2017, certain tax rulings will be disclosed to the EC under the Council Directive on Administrative Cooperation in the field of taxation.<sup>1</sup>

Given the severe financial consequences to companies of having a tax ruling deemed illegal State aid, the EC's decisions in these cases are concerning because they rely on novel and previously unarticulated legal arguments that depart from established and internationally recognized principles. In particular, the EC's notion of what constitutes a 'selective advantage' has attracted much attention.

A common factor of the EC's decisions is an assertion that the tax rulings do not comply with the arm's length principle, which the EC states is "a general principle of equal treatment in taxation falling within the application of Article 107(1) of the Treaty, which binds the Member States and from whose scope the national tax rules are not excluded."<sup>2</sup> In this regard, the EC explicitly states that "the arm's length principle that the Commission applies in a State aid assessment is not that derived from Article 9 of the OECD Model Tax Convention."<sup>3</sup> This is despite the EC itself acknowledging that the Organisation for Economic Co-operation and Development (OECD) Guidelines represent "the internationally agreed standard"<sup>4</sup> by which arm's length terms are benchmarked.

This is an unwelcome development; it creates uncertainty for businesses that may have undertaken thorough and comprehensive assessments of transfer pricing arrangements under the OECD Guidelines relating to arm's length transactions, only to find the EC could still deem they fall foul of a separate, previously unarticulated, EU law concept. The practical effect is that it gives the EC further discretion to import its own view as to what are acceptable norms surrounding inter-group transactions.

Applying such a novel analysis arguably undermines the principle of legal certainty and the legitimate expectations of those concerned. Indeed, this point is being appealed in the General Court, with the Netherlands claiming "there is no arm's length principle in EU law and that that principle is not part of a State aid assessment"<sup>5</sup> and Fiat lamenting the EC's "failure to explain how it derives the arm's length principle from Union law, or even what the principle is."<sup>6</sup>

The EC will also have to defend against claims that it has not carried out an appropriate assessment whether an advantage is 'selective.' While the concepts of selectivity and an economic advantage are closely related, they are usually subject to separate assessments in State aid cases. The selectivity of a measure is normally assessed using a three-step analysis: first, identify the appropriate reference system; second, ascertain whether the measure departs from that system insofar as it differentiates between economic operators who are in a comparable factual and legal situation; and third, consider if the deviation is justified by the logic of the system.

In its tax cases, the EC has defined the reference system broadly to encompass the national taxation system of the Member State as it applies to all companies such that multinational companies are in the same factual and legal situation as independent companies. It has then identified measures as capable of being selective where they allow disparate treatment between multinational companies and independent companies. This is in itself a significant leap from the EC's previous rulings, which identified selectivity where there was a difference in treatment between multinational companies.

The EC then suggests that an individual tax ruling that deviates from its novel interpretations of the arm's length principle to the benefit of a multinational company can be considered selective, thereby conflating the issues of selectivity and advantage: "where a tax measure results in an unjustified reduction of the tax liability of a beneficiary who would otherwise be subject to a higher level of tax under the reference system, that reduction constitutes both the

1. Council Directive 2011/16/EU concerning administrative cooperation in the field of taxation and repealing Directive 77/799/EEC.
2. Case SA.38374 — The Netherlands — Starbucks, para. 264; and Case SA.38375 — Luxembourg — Fiat Finance and Trade Ltd, para. 228.
3. *Ibid.*
4. Case SA.38374 — The Netherlands — Starbucks (Initiation of formal proceedings), para. 12; and Case SA.38375 — Luxembourg — Fiat Finance and Trade Ltd (Initiation of formal proceedings), para. 14.
5. Case T-760/15, *Netherlands v. Commission*.
6. Case T-759/15, *Fiat Chrysler Finance Europe v. Commission*.
7. Case SA.38375 — Luxembourg — Fiat Finance and Trade Ltd, para. 217; Case SA.38374 — The Netherlands — Starbucks, para. 253.

*advantage granted by the tax measure and the derogation from the system of reference.”<sup>7</sup>*

Again, this has proved fertile ground for appeal — in the Starbucks case, the Netherlands argues “*the Commission did not adequately — and separately — demonstrate that the selectivity criterion was fulfilled*”; while in the Fiat case, Luxembourg argues “*the Commission has not adduced proof that the contested anticipatory decision was selective.*”

The EC has defined the reference system broadly to encompass the national taxation system of the Member State as it applies to all companies such that multinational companies are in the same factual and legal situation as independent companies.

Given the significant departures from established legal principle made by the EC in reaching these decisions, many of the appeals will also contest orders for recovery of the disputed amounts on the grounds that such recovery would be contrary to the legitimate expectations of the companies concerned and effectively amount to retroactive enforcement of novel principles.

Clearly the decisions raise fundamental questions concerning the principles of legitimate expectations and legal certainty. The boundaries of the interaction between State aid and tax rulings, particularly how the EC applies the concept of a ‘selective advantage,’ will be determined by the European Courts. While these appeals may eventually bring clarity, the process will take many years. In the meantime, the EC’s decisions stand, the companies involved in the cases will have to repay the aid in question, and uncertainty as to the law and the comfort that can be provided by tax rulings remains.

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# State Aid

## Red loans, red alert: Calming the southern NPLs' crisis

Over the past decade, non-performing loans (NPLs) have steadily grown to become today's biggest challenge for the banking sector in the European Union (EU). For countries relying mainly on bank financing, NPLs increase funding costs and tie up bank capital, thereby hindering economic growth. Southern Europe, predominantly Greece, Cyprus and Italy, reported in 2015 alarming ratios reaching even 40% of their respective entire bank lending. Despite the stabilization trend of 2016, the NPLs' resolution is exceedingly slow. *Continued overleaf*

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## Red loans, red alert: Calming the southern NPLs' crisis

Both macroeconomic and bank-specific factors have contributed to today's high NPLs ratios. Those include: the long recession coupled with the austerity measures imposed across Europe, the high unemployment rates, the low credit standards which resulted in poor loan quality, as well as the banks' own inability to manage effectively their portfolios. For Italy, the complex debt write-off legislation, the disproportionate court fees for insolvency procedures and the backlog of judicial cases emerged as aggravating factors. None of the above was helped by the lack of a sophisticated and sufficiently developed European secondary market for NPLs. Regrettably for the Southern countries, most of their NPLs were granted to small and medium-sized enterprises and households. That means that even if their gross domestic product were to improve, the probability of recovery would still be close to nil. The negative sentiment around Italy's third-largest bank, Monte dei Paschi di Siena, was just the tip of the iceberg; albeit, it demonstrated the need for a quick fix.

Addressing NPLs means in essence that the 'system' absorbs losses, be it the banks' shareholders, the depositors or the respective government, or a combination thereof. To tackle the underlying causes of NPLs requires structural changes at both the macroeconomic and the microeconomic level, which may prove even impossible. The South embarked on strengthening insolvency frameworks, enhancing supervision and amending tax rules.

Below we provide an overview of the key measures taken in Italy and Greece, the champions of NPLs in Europe. Those need to be considered against the background of the more stringent application of State aid rules mandated under the revised regulatory framework for the financial markets, including the novel Bank Recovery and Resolution Directive (BRRD), which requires enhanced burden sharing, turning the disposal of impaired assets to a much harder or even unattractive exercise and restraining at unprecedented levels the ability of banking institutions to use state funds to raise capital. Devising State aid compatible structures is, therefore,

more challenging than ever; any transfer of assets or risks should be done at market terms to not raise the European Commission's (EC) eyebrows.

Traditionally, 'good' and 'bad' portions of the balance sheet would be separated and toxic assets would be transferred away from the healthy(ier) business to either individual or system-wide bad (and therefore unlicensed) banks. In Italy, however, the creation of a single nationwide bank that would allow for loading off the risk from banks to the government was rejected by the EC as being exactly the type of unwanted result from a State aid perspective.

Instead, earlier this year Italy adopted a hybrid solution teaming up the government with the banks and the private sector: In agreement with the EC, a state guarantee scheme was put in place to help Italian banks sell their large portfolios of NPLs to private investors, in essence, to asset management companies, by covering losses related to specific portfolios of assets. The guarantee would be priced at market terms based on the price of credit default swaps on Italian issuers with similar risk profiles to the loans in question, and would only cover the senior, namely the safest, tranches of the NPLs. The next step, namely the sale of NPLs in a secondary market, is a different and perhaps more difficult question, due to a number of factors, including the lack of liquidity in the market and the various regulatory barriers to the purchasing of NPLs. The South is rapidly introducing legislation to protect borrowers and facilitate the sales of NPLs. However, the sales' volume is still considered suboptimum.

Contrary to Italy which focused on a government-driven solution in collaboration with private actors, Greece focused predominantly on the revision of its legislation. In April 2016, Athens introduced comprehensive legislation and revised the existing law to allow for alternative ways of bankruptcy, thereby empowering asset managing companies to initiate legal action and any other judicial action necessary to collect debts which they manage. A month later, the US-based private equity group, KKR, signed an agreement with two of Greece's leading



banks, Alpha Bank and Eurobank, to help manage underperforming assets, via its pioneering platform known as Pillarstone. Interestingly, in the absence of specific legal provisions on the pricing of loan portfolios to be transferred to and managed by the NPL-acquiring companies, the price will be negotiated freely between the parties on an ad hoc basis. This raises the question of how likely is it for buyers and sellers to come to an agreement if the delta in price between the book value at which NPLs are recorded and their expected market price is vast. In 2014, Piraeus, Greece's largest financial institution, had announced the securitization of a €1.2 billion portfolio of assets by putting together a structure with KKR; however, the deal did not go through. The same platform was also launched in Italy, rolling out a similar system for three Italian banks, Banca Carige, Intesa Sanpaolo SpA and UniCredit SpA.

The sale of NPLs in a secondary market is a different and perhaps more difficult question, due to a number of factors, including the lack of liquidity in the market and the various regulatory barriers to the purchasing of NPLs.

## State Aid

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2016 representative matters

### **Asian energy company**

Representing an Asian energy company in the EU State aid aspects of its contemplated participation in the recapitalization of a state-owned energy producer.

### **Committee of Subordinated Creditors of Banco Espirito Santo**

Representing a Committee of Subordinated Creditors of Banco Espirito Santo in legal proceedings before the Court of Justice challenging the European Commission's decision to approve Portugal's bailout of the bank.

### **Eurobank and Alpha Bank**

Representing Eurobank and Alpha Bank on the creation of a program for the outsourcing of the management to a KKR subsidiary of non-performing loans (NPLs) that the banks have granted to a selected number of large Greek companies.

### **Government of Cyprus**

Advising on all aspects of the current privatization of Cyprus Telecommunications Authority (CYTA).

### **Jaguar Land Rover**

Advised Jaguar Land Rover on the EC approval for the UK's £35 million industrial grants (State aid) for Jaguar Land Rover's £500 million new 325,000 sq ft development facility near Coventry.

Advising Jaguar Land Rover on the regional aid (State aid) aspects of the development of a major new manufacturing plant in the city of Nitra in western Slovakia with an initial capacity of 150,000 cars per year.

### **Numerous investment banks, hedge funds and distressed debt investors**

Advised numerous clients in connection with State aid approvals for Eurozone bank restructuring.

## Pro Bono

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A selection of our pro bono work



MTV Gender Violence Project

#### A4ID Sustainable Development Goals Project

Shirin Lim is part of the team assisting in research and analysis of the links between the law (globally) and three Sustainable Development Goals (SDGs)

- Goal 1: end poverty in all its forms, everywhere;
- Goal 8: promote sustainable economic growth, employment and decent work for all; and
- Goal 11: make cities and human settlements inclusive, safe, resilient and sustainable.

The research/analysis will eventually form part of a comprehensive document that will be a legal guide to the SDGs, disseminated throughout the global legal, government and stakeholder community for free in hardcopy and online, as well as developing an online knowledge sharing platform that allows open discussion and critique of the developing guide as a living document, facilitating continuous discussion of implementation possibilities.

#### Co-Counsel With LatinoJustice on a Significant New Civil Rights Policing Matter

Heather Kafele, Kelly Karapetyan, Arjun Chandran and James Alicea have been part of the team working on a large litigation matter focusing on alleged police discrimination against Latinos.

After conducting research and drafting submissions, the team filed a complaint against the Suffolk County Police which is now being litigated in the Eastern District of New York, United States District Court.

#### Lawyers Without Borders

Lawyers Without Borders (LWOB) is a 501c3 charitable organization that harnesses the *pro bono* work of lawyers from around the world into volunteer service in global rule of law, capacity building and access to justice initiatives. Antitrust Associates around the world have worked on a variety of LWOB Projects throughout the year, a few of which are named below.

#### Anti-poaching

Beau Buffier and Heather Kafele (Chair of the Shearman & Sterling Pro Bono Committee) travelled to Africa as part of a Lawyers Without Borders delegation to provide training to local game management officials on how to preserve an animal trafficking crime scene. Other members of the Antitrust Practice, including Tim Haney and Arjun Chandran, worked on a research project looking at legal remedies to avoid destabilization of the lion population.

#### MTV Gender Violence Project

Marixenia Davilla has coordinated relevant work streams and legal work concerning the creation of the fourth edition of the Shuga comic strip focusing on Nigeria, and in particular Lagos. The Shearman team has reviewed and provided comments on the draft comic strip plot, and has prepared information panels providing advice to sexual assault victims, good practices, and an overview of the legal framework dealing with the various forms of sexual assault. The comic strip was published in May 2016.

#### Viacom Youth Unemployment Project

We are also working on a collaborative *pro bono* project between LWOB and lawyers from Viacom focused on youth unemployment. Gabriella Griggs has been helping the team to try and identify the causes of youth unemployment in Brazil to enable Viacom's charitable foundations to develop a creative campaign or initiative to be launched in Brazil which will be targeted at those causes. The initial tasks involve carrying out research on the worldwide phenomenon of youth unemployment as it relates to the rule of law and conducting an in-depth legal analysis on international, regional and national conventions and legislation and Brazilian case law which may impact youth unemployment in Brazil.

#### Representation of Low Income Individuals in Matters Globally

Shirin Lim and Gabriella Griggs have contributed to advising low income individuals at London-based legal clinics. One of these clinics focuses on issues of domestic violence and family law and has been nominated for two awards in the Corporate Social Responsibility (CSR) space in the UK in 2016.

Jessica Delbaum continued her efforts on behalf of low income individuals, working on matters relating to access to public benefits, drafting end of life documents for low income elderly individuals and assisting women seeking uncontested divorces. Kelly Karapetyan also assisted low income individuals in employment discrimination matters as well as child immigrants arriving in the US from Central America. Alisa Mastro joined a Shearman team representing an incarcerated individual in his claim of innocence. Further, she worked on a claim of asylum on behalf of a woman from Central America. Aleksandra Petkovic is assisting low income artists, and election protection. She also worked on a clemency petition for an incarcerated individual.

#### **Research Project for Human Rights Watch**

Human Rights Watch defends the rights of people worldwide. They investigate abuses, expose the facts widely, and pressure those with power to respect rights and secure justice. It is an independent, international organization working as part of a vibrant movement to uphold human dignity and advance the cause of human rights for all.

The UN Committee on the Elimination of Racial Discrimination issued a report on the UK in which it expressed concern about hate crime, and incitement to racial hatred, and the role of politicians and the media in such incitement. A team in London researched and summarized the existing UK laws on incitement to racial hatred, any commentary by UN review bodies on them and if the laws apply to politicians and the media.

#### **Work in the Refugee Space**

Lawyers, particularly across our European offices, have been active in the space of refugee and asylum law to help with the growing number of people seeking asylum.

Assistance has been given in a number of ways including taking on direct cases of individuals in association with the International Refugee Assistance Project. Shirin Lim is working with other Associates in the London Office to represent an Afghan national who served as a translator

for the US government in Afghanistan. As a result of his service to the US, he and his family have received threats to their safety and have had to flee their village. The team helped close down some gaps and supplement his Chief of Mission approval, the first step required in the application for a Special Immigrant Visa to enter and reside in the United States. The application is currently pending approval.

Collette Rawnsley and George Milton have also been leading separate research teams looking into relevant areas of law, such as (i) the rights to family unity and family reunification for refugees; (ii) Syrian country of origin research; and (iii) research on asset seizure and taxation of refugee property in the context of refugee admission, re/settlement, and the provision of social services or benefits under international, regional, and comparative law for the HIAS refugee rights organization and the UN High Commissioner for Refugees.

#### **Competition Focused *Pro Bono***

*Eliminating Child Labour in Tobacco Growing Foundation*  
The Eliminating Child Labour in Tobacco Growing Foundation (ECLT Foundation) is a non-profit foundation and a global leader in preventing child labor in tobacco agriculture, and protecting and improving the lives of children in tobacco-growing areas. It funds programs in tobacco-growing communities worldwide to help them end child labor by addressing the root causes. These programs raise awareness so communities can come together to protect children, improve standards for children's safety and health, build schools, provide vocational training, create infrastructure and deliver technology. ECLT Foundation also leads global advocacy efforts that aim to influence and help improve policies and undertakes research on preventing and eliminating child labor.

Christopher Bright and Tim Haney have been assisting the ECLT Foundation by attending board meetings to advise members on US and EU competition/antitrust law to ensure they are fully compliant.

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### Savas Manoussakis shares his experiences doing *pro bono*



Lawyers at Shearman & Sterling have the opportunity to engage in a wide variety of *pro bono* work. This includes taking part in in-person free legal advice clinics for individuals who could not otherwise afford legal services, providing legal advice to charities, non-governmental organizations (NGOs) and social enterprises, undertaking *pro bono* training and working on regional and international research projects.

The projects I personally seek out often involve international human rights law, public international law and similar legal areas. The projects also usually relate to important ongoing global issues.

The World Bank was a recent Shearman & Sterling *pro bono* client. I supervised a team of lawyers in completing legal surveys on the rights of various minorities in different jurisdictions. As part of this review we analyzed the legal protections (or lack thereof) of lesbian, gay, bisexual, and transgender (LGBT), religious, and ethnic minorities in several jurisdictions. It was particularly interesting to contrast the lofty goals and declarations of certain national constitutions with the sometimes restrictive and ambiguous provisions of the respective jurisdictions' criminal and other codes. The World Bank is using the data from the surveys to assist the international human rights community and civil society organizations in conducting research, analysis and advocacy on issues relating to discrimination.

The Public International Law and Policy Group (PILPG), a non-profit organization providing legal services, is another ongoing *pro bono* client of Shearman & Sterling. I drafted an extensive note for PILPG on a Libyan law intended to exclude from public positions all individuals associated with the Gaddafi regime. The note reviewed the legislation's clarity as well as its compliance with international laws and standards and addressed the law's implications on institutional reform in Libya. PILPG used the note to advise its partners in civil society and government.

Another recent research project for PILPG dealt with the rise of ISIS and Syria's international legal obligations. The note assisted PILPG in advising the Syrian Coalition on the legal implications of the rise of terrorist groups in Syria, and particularly ISIS. The note analyzed Syria's international legal obligations related to the prevention of terrorism under international and regional treaties and customary international law. It also identified instances in which the Syrian government violated these international legal obligations by allowing ISIS to grow and operate in Syria.

The *pro bono* opportunities at Shearman & Sterling are varied and impactful, and are often high-profile. They are a great learning opportunity and allow lawyers such as myself to make a meaningful and positive contribution.

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## Thought Leadership

## ACADEMIC ROLES

### Brussels School of Competition

Miguel Rato | EU Competition Law and Intellectual Property

### Georgetown University Law Center

Wayne Dale Collins | Adjunct Professor of Law | Antitrust

### Leiden University

Geert Goeteyn | Visiting Professor | EU Competition Law and its Application in the Aviation Industry

### New York University

Wayne Dale Collins | Adjunct Professor of Law | Case Development and Litigation Strategy

### Oxford University

Matthew Readings | Visiting Professor | Competition Law (Undergraduate level)

### College of Europe

Elvira Aliende Rodriguez | Summer School Competition Law

### IEB – Instituto de Estudios Bursatiles

Mark English | Competition Law and Regulation

## AWARDS AND RECOGNITIONS

### Air Cargo Investigation, Representing Cargolux Airlines

- Global Competition Review's (GCR) 2016 'Matter of the Year', and
- The American Lawyer's 2016 'Global Dispute of the Year: International Litigation'

### GCR 2016 Women in Antitrust

Collette Rawnsley, Counsel, was named in *Global Competition Review's* (GCR) 2016 'Women in Antitrust' list

### Merger Matrix

- Shortlisted for the 2016 British Legal Awards in 'Best use of technology'
- Commended by Financial Times in its 'Most innovative North American law firms 2016' ranking

## BLOGS

### Antitrustunpacked.com

A blog providing concise but operationally meaningful content to in-house counsel and senior management on important antitrust and competition law topics

### Carteldigest.com

A repository of key data on global cartels with significant enforcement activity in the past 30 years

## PUBLICATIONS

### Antitrust Adviser

Chapter on Mergers and Acquisitions | Jessica Delbaum, Beau Buffier, Matthew Jennejohn | 2016

### Wolters Kluwer

EU State Aid Control: Law and Economics | Chapter on '*Aid in the Banking Sector*' | Stephen Mavroghenis (co-authored) | December 2016

### Getting The Deal Through

Air Transport 2017 | Chapter on European Union | Geert Goeteyn | October 2016

### International Financial Law Review (IFLR)

'*Brexit's implication for merger control*' | Geert Goeteyn | October 2016

### Global Competition Review

KnowHow IP & Antitrust | Chapter on United States | Jessica Delbaum, Timothy Haney | October 2016

### Getting The Deal Through

Private Antitrust Litigation 2017 European Union | '*The EU Damages Directive's framework on passing on of overcharges – does it work?*' | Geert Goeteyn | September 2016

### Women in Business Law Group

Best Practices Series | 'The network effect' | Jessica Delbaum | September 2016

### Global Competition Review

KnowHow IP & Antitrust | Chapter on European Union | Miguel Rato | September 2016

### Global Competition Review

The Antitrust Review of the Americas | Chapter on US Cartels | Beau Buffier, Jessica Delbaum, Heather Kafele, Aleksandra Petkovic | September 2016

### Global Competition Review

The EMEA Antitrust Review 2017 | Chapter on EU Cartels and leniency | Stephen Mavroghenis, Elvira Aliende Rodriguez, Laura Abram | August 2016

### Competition Law Insight

*'Big data: The challenges and questions for competition law'* | Geert Goeteyn | July 2016

### Strategic View Competition Litigation

*'The EU Damages Directive & access to evidence for antitrust damages actions'* | Geert Goeteyn, Collette Rawnsley | April 2016

### The In-House Lawyer

*'Antitrust treatment of online advertising markets'* | James Webber, Jeremy Kutner | March 2016

### JECLAP

*'An assessment of injunctions, patents and standards following the Court of Justice's Huawei/ZTE ruling'* | Miguel Rato, Mark English | February 2016

### Concurrences

*'The EU General Court annuls the Commission's decision fining a number of cargo airlines for a price fixing cartel (Airfreight Cartel)'* | Geert Goeteyn, Stephen Mavroghenis, Collette Rawnsley | January 2016

### Competition Law Insight

*'UK competition enforcement: It is high time for a rethink on priorities,*

*especially when it comes to market investigations'* | Chris Bright | January 2016

## SPEAKING ENGAGEMENTS

### IBC Legal

Advanced EU Competition Law Conference, November 21–24, 2016

- 'Cartel Settlements' and 'Q&A Clinic' | Stephen Mavroghenis
- 'Competition law in the digital environment' | James Webber

### Chillin' Competition

2nd Chillin' Competition Conference: Neutrality Everywhere? Panel on *'Neutrality and licensing'* | Mark English | November 21, 2016

### Competition Law Bar Association of India

Competition Law Conference, Panel on *'Merger control: The regulator and the regulated'* | Geert Goeteyn | November 12, 2016

### International Financial Law Review (IFLR)

The Competition Law Forum, Panel on *'Industry's response to the Brexit result'* and Chair of conference | James Webber | November 9, 2016

### European Air Law Association (EALA)

ELEA 28th Annual Conference, Panel on *'Recent competition law developments in the aviation sector: What lessons can we learn?'* | Geert Goeteyn | November 4, 2016

### IBC Legal

Big Data and Competition Law Conference, *'A view from the US'* | Jessica Delbaum | October 25, 2016

### New York State Bar

NYSBA International Section Seasonal Meeting, Panel on *'Enforcement of antitrust laws: Global challenges'* | Jessica Delbaum | October 19–21, 2016

### Instituto Brasileiro de Estudos de Concorrência, Consumo e Comércio Internacional (IBRAC)

22° Seminário Internacional de Defesa da Concorrência, Roundtable with foreign speakers | Miguel Rato | October 20–21, 2016

### IBC Legal

Competition Law and Regulation in the Telecoms, Media and Technology Sector Conference | October 18–19, 2016

- Panel on *'Regulation of platforms and the digital single market'* | Stephen Mavroghenis
- *'Geoblocking and access to content'* | Geert Goeteyn

### International Financial Law Review (IFLR)

European M&A Forum, *'European merger control 2016/2017'* | Elvira Aliende Rodriguez | September 29, 2016

### Kluwer Law

2nd Annual Global Competition Law Forum | July 21, 2016

- *'Cartels – International problems and issues'* and panel on *'Regional enforcement updates – Ask the experts – China, India, HK and EU – Q&A'* | Stephen Mavroghenis
- *'IP and EU competition law'* | Miguel Rato

### College of Europe

Training course on *'FRAND royalties, The Huawei judgment and its aftermath – An Economic perspective'* | Miguel Rato | July 13, 2016

### Global Competition Review

GCR Live 8th Annual Brussels Conference: The Bigger Picture *'Process, privilege and procedure: A guide to navigating new approaches to the EU process issues'* | Stephen Mavroghenis | July 11–12, 2016

### **Kluwer Law**

2nd Annual Global Competition Law Forum, ‘*Cartels – Advice in investigations – Japan, US and Asia focus*’ | Stephen Mavroghenis | June 30, 2016

### **Concurrences and Shearman & Sterling**

Workshop on ‘*The EU Commission’s Dominance Guidance: Towards a review or abandonment?*’ | June 22, 2016

### **American Conference Institute**

9th Advanced China Summit on Anti-Corruption, Panel on ‘*International investigations Think Tank: Senior In-House Counsel discuss how to effectively structure the investigation*’ | Brian Burke | June 15–16, 2016

### **American Bar Association (ABA)**

ABA Antitrust Section Teleconference, Panel on ‘*Joint Conduct 101: Joint Ventures*’ | Jessica Delbaum | June 10, 2016

### **International Association of Young Lawyers (AIJA)**

Shower of regulation on the financial and insurance sectors: Where does the journey end? ‘*When regulators and governmental agencies come knocking at the institutions’ door: How to be prepared and how to better react when an investigation is instituted. Case study – LIBOR case*’ | Elvira Aliende Rodriguez | June 10, 2016

### **Global Competition Review**

GCR Live 4th Annual IP & Antitrust, Chair of conference | Miguel Rato | June 2, 2016

### **IBC Legal**

Vertical Restraints Conference ‘*The E-commerce Inquiry: Where are we now?*’ | Chris Bright | June 2016

### **IBC Legal**

Competition Law Challenges in the Financial Sector Conference, ‘*Why the sector is under scrutiny and how the regulatory framework is adapting*’ | Chris Bright | May 24, 2016

### **IBC Legal**

Advanced EU Competition Law Conference | May 9–12, 2016

- Panel on ‘US antitrust laws: Practical considerations’ | Jessica Delbaum
- ‘Competition law challenges in the digital environment’ | Geert Goeteyn

### **Kluwer Law**

5th Annual Global Competition Law Summit, Chair of conference | Stephen Mavroghenis | April 21, 2016

### **Concurrences and Shearman & Sterling**

Workshop on ‘e-Commerce inquiry: Removing the last public and private barriers’ | Geert Goeteyn | April 20, 2016

### **IBC Legal**

Merger Control Conference, ‘*Minority shareholders: Updated on proposals for reform*’ | Stephen Mavroghenis | April 13, 2016

### **Commercial Dispute Resolution (CDR)**

Spring Competition Litigation Forum | March 3, 2016

- Panel on ‘The EU Damages Directive and relationship with national legislation’ | Geert Goeteyn
- Panel on ‘Beyond the follow-on claim’ | Collette Rawnsley

### **Global Competition Review**

5th Annual Asia-Pacific Law Leaders Forum, Panel on ‘*IP & Antitrust*’ | Miguel Rato | March 3, 2016

### **Liège Competition and Innovation Institute (LCII)**

Conference: Regulating patent “hold-up”?, Legal panel on ‘*Trends in antitrust and IP law*’ | Miguel Rato | February 29, 2016

### **Queen Mary University London**

Lecture on ‘*Competition enforcement: From investigation to sanctions*’ | Athina Kontosakou | February 2, 2016

### **IBC Legal**

Advanced EU Competition Law conference (postponed from November 2015), Panel on ‘*Mergers: Practical challenges*’ | Stephen Mavroghenis | February 9–10, 2016

### **American Bar Association (ABA)**

International Cartel Workshop, Panel on ‘*Counsel for plaintiffs and defendants discuss settlement in the US*’ | Heather Kafele | February 5, 2016

### **International Financial Law Review (IFLR)**

European In-House Counsel Summit, Panel on ‘*Competition law*’ | Matthew Readings, James Webber | January 28, 2016

### **IBC Legal**

Competition Law Challenges in the Transport Sector | January 27–28, 2016

- Chair of conference | Geert Goeteyn
- ‘Aviation alliances, cooperation and joint ventures’ | Mark English

## Our Clients

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**We would like to thank our clients  
for their continued trust**

Abu Dhabi National Oil Company (ADNOC)  
Acacia Mining  
Ad hoc Committee of HSH Nordbank  
Ad hoc Committee of LT2 Creditors of Banco Espirito Santo  
Aditya Birla  
Advanced Disposal Waste Holdings  
Airline Personnel Directors Council  
Ajinomoto  
Albemarle  
Alliance Medical  
Alpha Bank  
Altice  
Alusuisse of America  
American Axle & Manufacturing  
American Sugar Refining  
Amyris  
Anglo American  
Anhui Guozhen Environment Protection Technology  
ArcelorMittal  
Bank of America Merrill Lynch  
Barclays  
BASF  
B/E Aerospace  
Bechtel  
BMI Healthcare  
BMO  
BNP Paribas  
Boston Scientific  
Bridgepoint  
British Airways  
Bunge  
Byco Busient  
Canada Pension Plan Investment Board  
Canadian Apartment Properties Real Estate Investment Trust  
Capital Z Partners  
Cargolux Airlines International  
Caris Life Sciences  
Carlson Capital  
Citic  
Citigroup  
Coopervision  
Corning  
Credit Suisse  
Deutsche Bank  
dmg::information  
Dover Corporation  
Dun & Bradstreet  
Dycom Industries  
Eddingpharm International Holdings  
EFG-Hermes  
Electra Private Equity  
Elkem  
Engie  
Eurobank Ergasias  
Everstone Capital Asia  
ExxonMobil  
Fairfax Financial Holdings Limited  
Famous Brands  
Farallon Capital Management  
Fenway Sports Group  
Finnair  
First Eagle Investment Management  
Francisco Partners  
Fujitsu  
Galaxy Bidco and Electra Private Equity Partners  
General Electric  
Glatfelter  
GSK  
Golar LNG  
Goldman Sachs

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## Our Clients (continued)

Halcyon Partnerships  
Hangzhou Hikvision Digital  
Hanjin Shipping  
Harmonic  
Heartware International  
Highways Term Maintenance Association  
Horizon Therapeutics  
Hoya  
Iberia, Líneas Aéreas de España  
Intercontinental Exchange (ICE)  
Icopal  
IFM Investors  
Integral  
International Air Transport Association (IATA)  
International Chemical Investors Group  
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N&W Global Vending  
Nokia  
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Olayan  
OMV  
Orbimed Advisors  
Ormat Technologies  
Pall  
Pepsi Cola & National Brand Beverages  
Piraeus Bank  
Pometon  
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Qualcomm  
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Relevant Sports  
Renewable Energy Trust Capital  
Republic of Cyprus  
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Sanofi  
Scandinavian Airlines  
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Sears Hometown and Outlet Stores  
Shanda Interactive Entertainment  
Shanghai Linxin Investment Management  
Shanghai Pudong Science and Technology Investment  
Shell International  
Shenzhen Comix Group  
Societe Generale  
SolarCity Corporation  
Sompo Japan Nipponkoa  
Sony  
Southeastern Asset Management  
S&P Global (formerly McGraw-Hill Financial)  
State Grid International Development  
STMicroelectronics  
Sun Pharmaceutical Industries  
Symphony Technology Group  
Syniverse Holdings  
Tata Steel Europe  
Temasek Holdings  
Terumo BCT  
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The Baupost Group  
The Carlyle Group  
The Dow Chemical Company  
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WebMD Health  
West Pharmaceutical Services  
Wintershall Holding  
Wolong Electric Group  
World Coal Association  
World Sugar Research Organisation  
Zillow

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## About Shearman & Sterling

Shearman & Sterling LLP distinguishes itself by harnessing the intellectual strength and deep experience of its lawyers across its extensive global footprint. As one of the first law firms to establish a presence in key international markets, we have led the way in serving clients wherever they do business. This innovative spirit and the experience we have developed throughout our history make us the “go-to” law firm for seamless service. From major financial centers to emerging markets, we have the reach, depth and global perspective necessary to advise our clients on their most complex worldwide business needs.

The firm is organized as a single, integrated partnership that collaborates to deliver its best to clients. With approximately 850 lawyers in many of the commercial centers around the world, we operate seamlessly across practice groups and offices and provide consistently superior results. Our lawyers come from some 80 countries, speak more than 60 languages and practice US, English, EU, French, German, Italian, Hong Kong, OHADA and Saudi law. We also practice Dubai International Financial Centre law and Abu Dhabi Global Market law. In addition, nearly one-half of our lawyers practice outside the United States. From complex cross-border transactions to exclusively local deals, clients rely on our vast international network to help accomplish their business goals.

We represent many of the world's leading corporations, financial institutions, emerging growth companies, governments and state-owned enterprises. Those clients, in turn, continue to choose us for the market-defining expertise of our accomplished cross-border legal teams. We have a dedicated focus on building partnerships with our clients for their success, and they appreciate our direct partner involvement on day-to-day matter management. With a deep understanding of our clients' needs, we develop creative ways to address their problems and are ideally situated to counsel them in this challenging 21st century global economy.

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**“We like their overall consistent high-quality work and excellent value for money.”**

— client comment in *Chambers Europe*, 2016

**“Shearman & Sterling are very responsive, proactive, thoughtful, very knowledgeable of the wider environment and our arrangements and structure.”**

— client comment in *Chambers UK*, 2016

**“They’re excellent. Their understanding of the law is top-notch and they have real practical experience.”**

— client comment in *Chambers USA*, 2016

**“They are very pragmatic and business-oriented.”**

— client comment in *Chambers USA*, 2016

**‘Stephen Mavroghenis heads Shearman & Sterling LLP’s team, which has a first-rate reputation in complex behavioural and transactional matters, with a focus on abuses of dominance, phase II merger cases, and cartel investigations.’**

— *Legal 500 EMEA*, 2016

**‘The “outstanding” team at Shearman & Sterling LLP handles a range of work, including merger control, CMA investigations and EC cartel investigations (...)**

— *Legal 500 UK*, 2016

**‘Shearman & Sterling LLP provides “a high level of service” across a broad range of industries, but it is particularly strong in financial services related cases’**

— *Legal 500 US – Antitrust Litigation*, 2016

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