Hogan Lovells

Antitrust, Competition and Economic Regulation Quarterly Newsletter

Autumn 2017

Contents

What blockchain can learn from the net neutrality debate:

Antitrust and regulatory aspects of “paid prioritisation” for a nascent technology*

First come, first served. That’s not the principle behind the clearance of Bitcoin transactions. Equally for other blockchain technology networks, the relevant factor to get a transaction on the next available block is not time, but often: money. “Paid prioritisation” is a reality. Miners will first pick and clear those transactions which will most highly reward them.

Is this a problem? Not necessarily. As long as users have plenty of alternatives in the fields of cryptocurrency or smart contracts they can just use different networks. However, in the medium or long run this issue could trigger the attention of regulators and antitrust authorities. Blockchains in highly regulated industries such as financial services or stock exchanges and those with consumer-facing applications are most likely to be under the microscope.

Is this concern premature? No. Who would have envisaged ten years ago that antitrust authorities would choose internet search engines, e-commerce platforms and algorithms as their favourite subjects for investigations and conference talks? And compare blockchain with other internet industries that are actually subject to regulation: this article argues that blockchain activists and users can learn from the heated debate around the net neutrality of internet networks. In that case, regulators eventually prohibited higher fees for bandwidth-consuming content such as streaming services. So it is important that a blockchain network gets its governance issues right from the very beginning to avoid cumbersome regulation and antitrust procedures.

Paid prioritisation in Blockchain networks

Paid prioritisation is a reality, in particular for Bitcoin. This phenomenon has already led to comparably high transaction fees for Bitcoin for small payments. While fees of around 300 satoshi/byte are almost guaranteed to get you on the next block, participants paying only at the lower end of the band will experience significant delay. In other blockchain networks alternative factors such as corporate affiliations or membership in a consortium could trigger similar disparity in clearing transactions.

A paid prioritisation blockchain environment can create a dual speed blockchain: one for those who can or want to pay more and one for those who can’t or simply don’t want to do so and whose transactions accordingly lag behind. Depending on the governance of the blockchain network those with less buyer power will stand on unequal footing. This could in the long run particularly affect start-ups, SMEs or consumers.

Paid prioritisation and net neutrality

But this is not necessarily a problem from the antitrust perspective in itself. Paying more in exchange for a faster service is not a new concept. It is an integral part of our society in various business segments; a bank transaction is executed faster at an additional cost and next day delivery is available at a higher price.

There need to be additional factors affecting how different prices in a network trigger the attention of antitrust authorities or regulators. Paid prioritisation has been at the heart of the net neutrality debate regarding internet access both in the EU and the US. A first possible explanation could be the fear of some regulators and internet activists that the increasing commercialisation of the internet jeopardises the underlying idea of a de-centralised and open network which is accessible for everyone. More specifically, there is only one internet, and it has become a global enabler of freedom of speech and expression. We are far from having only one blockchain – so does the comparison with net neutrality really matter?

Probably yes. Regulators were not only interested in net neutrality because of the constitutional background and the intense lobbying of certain internet user groups. There were also commercial and competition law related aspects: internet bandwidth can reach a certain capacity and if fast lanes were to be created to prioritise certain content, slow lanes would equally have to be created. More bandwidth and thus faster content delivery comes at a higher price. In this way fast lanes would effectively be reserved for the prevailing service providers who can afford to pay more for faster content delivery. Simultaneously the delivery of rival content would shift to the slow lane.

**Myrto Tagara, a trainee in the Hogan Lovells Brussels office, contributed to this article*

In the EU, since 2016 a specific Regulation[1] on open internet access enshrines the principle of net neutrality into EU law. In the US the Federal Communications Commission in 2015 explicitly prohibited paid prioritisation and blocking or throttling end-users' access.[2] Interestingly, the new FCC chairman, Ajit Pai, announced his plans to repeal net neutrality regulations in the US earlier in 2017. As laid out in a testimony by the FTC,[3] this could potentially increase the role of the FTC as antitrust enforcer stepping into the role previously played by the FCC (albeit that the current enforcement powers of the FTC regarding communication carriers are more limited).

From the first amendment to fairness of platforms

What can blockchain learn from the net neutrality debate? There are strong voices in particular from consumer organisations lobbying for net neutrality on the internet. Net neutrality has been described as a code word for the First Amendment, enshrining the principle of freedom of expression on the internet. The blockchain environment as an emerging de-centralised technology could well trigger attention from these groups even if the links to free speech are less obvious and there are more available alternatives. This is due to the fact that there is a general trend sometimes described as "hipster antitrust enforcement" which looks at the power of digital platforms in a gloomy way.

In the EU, these ideas are sometimes discussed under the term "Fairness". In an impact assessment of October 2017 on "Fairness in platform-to-business relations", the European Commission expressly raised concerns regarding situations in which there is discriminatory access to data on a platform: "[s]ome platforms may favour own products or services, or discriminate between different third-party suppliers and sellers, e.g. on their search facilities or by capitalising on superior data access. The general inability for business users to verify the existence or absence of such discriminatory practices also leads to uncertainty that can in itself be harmful."[4] Will we see a grass-root campaign for blockchain neutrality? And how would politicians and regulators react to such claims? While it is too early to predict the outcome of such a hypothetical debate regarding this nascent technology, it is conceivable that blockchain networks which are used in heavily regulated areas such as the banking sector or stock exchanges, could be the first to come under scrutiny. Relevant factors for policy or antitrust action will be (1) whether paid prioritisation within a blockchain evolves into a problem for consumers or small businesses, (2) whether there are alternative blockchains to which those users can divert, and (3) whether those on the blockchain network who cause the clearance of transactions to be bottlenecked are easily identifiable. It will be more difficult, for instance, to take antitrust action against the masses of Bitcoin miners than against a more limited number of mining pools.

Regulate Blockchain?

Regulators might consider specific rules on blockchain and regulate the way they should operate in an effort to combat paid prioritisation. But regulation is not the only supervisory mechanism available. Again, blockchain activists should carefully analyse how strongly the FTC argues against net neutrality regulation and in favour of antitrust supervision.

Acting FTC Chairman Maureen Ohlhausen in July 2017 commented: "[i]n dynamic, innovative industries like internet services, an ex post case-by-case enforcement-based approach has advantages over ex ante prescriptive regulation. It mitigates the regulator's knowledge problem and allows legal principles to evolve incrementally. A case-by-case approach also focuses on actual or likely, specifically-pled harms rather than having to predict future hypothetical harms."[5]

1 European Parliament and Council Regulation 2015/2120 of 25 November 2015 Laying Down Measures Concerning Open Internet Access, OJ L 310, 26.11.2015, p. 1–18.

2 Rule of the Federal Communications Commission, 'Protecting and Promoting the Open Internet', 13 April 2015, 80 FR 19737, available at https://www.federalregister.gov/documents/2015/04/13/2015-07841/protecting-and-promoting-the-open-internet [Accessed 6 November 2017].

3 Federal Trade Commission, Press Release: 'FTC Testifies Before House Judiciary Subcommittee on Net Neutrality', November 1 2017, available at https://www.ftc.gov/news-events/press-releases/2017/11/ftc-testifies-house-judiciary-subcommittee-net-neutrality [Accessed 6 November 2017].

4 European Commission, 'Fairness in Platform-to-Business Relations', 25 October 2017, Inception Impact Assessment, Ares (2017) 52222469, available at https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5222469_en [Accessed 6 November 2017].

5 Comment of Maureen K. Ohlhausen, Acting Chairman of the Federal Trade Commission before the Federal Communications Commission in the matter of Restoring Internet Freedom, 17 July 2017, WC Docket No. 17-108, p. 12, available at https://www.ftc.gov/system/files/documents/public_statements/1231563/mko_rif_comment_7-17-2017_final.pdf [Accessed 6 November 2017].

The same comment could be made for blockchain. Competition law aims to preserve the competitive process while not dictating market outcomes. The premature stage of blockchain deployment in various business segments indicates that consumer demand cannot be forecasted by regulators and embodied in ex-ante regulation rules. Thus, competition law will be viewed as the most suitable tool to deal with such issues in the future, striking the fine balance between protection of competitive process and satisfaction of consumer demand.

And indeed, the determination of whether paid prioritisation in a blockchain network harms consumers or competition requires a careful economic analysis. The precondition would be a dominant position or market power and a lack of competitive alternative which would set a high threshold for antitrust enforcement.

Thus, the lesson learned for blockchain from the net neutrality debate is: early engagement in political and regulatory discussions will help to educate decision-makers in order to fend off overly burdensome regulation. Existing antitrust powers may help shape the argument that ex post enforcement is more suitable for this dynamic technology.

Don't hide behind the Blockchain

Paid prioritisation is not the only blockchain sphere where competition law might intervene. Recent speeches by EU antitrust officials and most importantly by Commissioner Vestager herself indicate the increasing focus of the Commission on antitrust issues caused by algorithms and other big data-applications. If a blockchain network were used to camouflage anti-competitive practices, antitrust regulators would use their existing investigation powers.

Information exchange through blockchain is probably blockchain's most attractive aspect for competition law enforcers. As a matter of fact, competitors who are part of the same blockchain network can exchange commercially sensitive information given that each of them keeps an identical record of all transactions cleared within the distributed ledger. Other relevant antitrust aspects include the extent of access to closed blockchain networks if membership to such networks is a requirement for activity on the market.

The more blockchain technology evolves and penetrates into almost all industries, the more it will attract the authorities' attention. Paid prioritisation will most likely feature as one of the issues which regulators will carefully analyse. Blockchain activists should watch closely as the debate on net neutrality develops. These lessons learned will be important to help continue the dynamic growth of this exciting technology.

Falk Schoening
Partner, Brussels
T +32 2 505 09 06
falk.schoening@hoganlovells.com

In this interview, partner Winston Maxwell and counsel Gianni De Stefano discuss how European data protection, smart transport systems, and competition law intersect and the impact they will have on the connected car

What are some of the European policy issues affecting the connected car?

Maxwell: What's interesting are all the security, environment, and other policy rules beyond privacy that affect data sharing. The European Commission is trying to develop what they call Intelligent Transport Systems ("ITS"). In that context, the Commission wants cars and road systems to be able to communicate effectively to reduce traffic and therefore reduce CO_2 emissions. The idea is to have smart transport systems so that you can avoid traffic jams and fluidify traffic and thereby reduce greenhouse gas ("GHG") emissions. The Commission wants auto manufacturers to build intelligent cars that share data.

The European Commission's European Strategy on Cooperative Intelligent Transport Systems ("C-ITS") emphasises the role that data can play in enhancing road safety, road conditions, the environment, accident notifications, and so forth. Connected car makers need to have systems in place to actually share data in real time with other actors in the ecosystem.

How do European data protection, smart transport systems, and competition law intersect?

Maxwell: You basically have three different policy environments that all come into play here. You have protection of personal data, you have intelligent transport systems, and then you have competition law. These three environments intersect and affect how you think about developing data governance policies for connected cars.

For example, in Europe, car manufacturers need to share data with independent repair shops under European Regulation 715/2007. If you buy a certain vehicle, the manufacturer can't lock out independent garages and force people to only go to an approved garage. An independent garage has to be able to access the data in the on-board diagnostics module so that car manufacturers don't monopolise the repair market.

That's also going to be very important in the connected car area because there will be service providers that want to access the data in the car to provide value-added services to the user. Some players in this space want to provide the digital interface in the connected car – so it is just an extension of your smart phone. The question is, will car manufacturers embrace the entry of independent service providers or will they try to keep control over the user interface? There may be valid cyber-security concerns relating to opening up the user interface to independent service providers. Competition law may also come into play.

De Stefano: Antitrust-savvy advice in a connected car business and/or partnership is crucial to avoid any liability down the road. What a car manufacturer views as a valid safety-related limitation to data access may be perceived by service providers as impeding their business chances. This could end up in complaints or litigation.

How will Competition law come into play when setting standards for the connected car?

De Stefano: The automotive industry is currently developing a set of standards that apply to the connected car — as envisaged by the EU Intelligent Transport Systems legislation. From a competition law perspective the questions relate to the potential restriction of access of independent operators to this new business model, and/or the monitoring of their activities by OEMs, which are competing with them. European competition law requires a constant balance of the legitimate concerns of OEMs (or other stakeholders that possess the data) to protect their intellectual property and the need to permit new market entry.

The other issue relates to sharing of information among existing stakeholders. To create standards these firms will need to work together. In some instances they will be actual or potential competitors. There is a concrete risk of "spill-over" discussions among stakeholders. There is a fine line between legitimate discussions about standards and talking about commercially sensitive information, which is forbidden.

When it comes to competition law compliance, Hogan Lovells offers to all stakeholders involved (i.e., OEMs; suppliers of car components, smart components, chips, or software; and insurance companies) business-friendly compliance programs to make sure competition and other rules are not breached while they work together within their partnerships or trade associations for the purpose of standards setting or data pooling.

What are the antitrust and competition risks associated with the connected car's data?

De Stefano: The future of the automotive industry is digital; vehicles will soon become like our smartphones. One of the main applications of the upcoming 5G infrastructure and services will be connected cars. One of the EU's priorities is to boost innovation and support the growth of Europe's data economy. However, from a competition law perspective, certain data is considered an asset that can potentially confer market power, especially in connected industries. There haven't been any cases yet, but the competition authorities in Europe are really focusing on this issue, with Germany and France at the forefront.

First, European competition rules may warrant independent operators' access to certain technical information in the connected automotive industry. The notion of independent operators is broad: independent repair shops, spare parts manufacturers and distributors, publishers of technical information, automobile clubs, roadside assistance operators, operators offering inspection and testing services, and operators offering training for repair technicians. And the notion of technical information is flexible and will no doubt give rise to debate.

Second, other practices may be subject to scrutiny (for example, discounts in return for the customer agreeing that the data belongs to the OEM or another stakeholder). There are many factors that can be taken into account. For example, will the data that each OEM obtains as a result of developing connected car standards represent one single market? Would the OEM be considered the owner of the data? Or will the car user? And what does "ownership" mean? It's something you have to focus on because competition law is about defining relevant markets and creating a level playing field. Companies considered as being dominant on a given market have a special responsibility to compete on the merits and not exclude other stakeholders.

Will the increased levels of consolidation and/or partnerships related to the connected car trigger more antitrust review in Europe?

De Stefano: In Europe, the current consolidation and/or partnerships between or among OEMs, component suppliers, hardware or software suppliers, technology companies, and/or insurance companies may need to be notified to the various merger control authorities worldwide — even when the target has limited revenues. Competition authorities have recently begun to take into account privacy and data protection concerns to some extent. When we work with clients on global merger control filings, we are also able to help them address the privacy and data protection aspects of their deal. That's thanks to our cross-practice approach to the connected car and the needs of the players participating in the race.

Winston Maxwell
Partner, Paris
T +33 1 53 67 48 47
winston.maxwell@hoganlovells.com

Gianni De Stefano
Counsel, Brussels
T +32 2 505 0967
gianni.destefano@hoganlovells.com

China releases new rules to address perceived anti-competitive practices in the pharmaceutical industry

On 16 November 2017, the National Development and Reform Commission ("NDRC") released Guidelines on Pricing Conduct by Business Operators for Drugs in Shortage and Active Pharmaceutical Ingredients ("Guidelines").

NDRC published the draft version of the Guidelines earlier this year on 14 August 2017. Almost at the same time, on 15 August 2017, NDRC made public the full text of its decisions against two local companies for excessive pricing and refusal to supply active pharmaceutical ingredients, confirming its determination to use antitrust as a key enforcement tool in the pharmaceutical industry.

Background

The Guidelines are a set of rules implementing the Anti-Monopoly Law ("AML") and the Price Law in the pharmaceuticals field. This normative effort comes against the background of the landmark drug pricing reform, on which China embarked since June 2015, which is explicitly mentioned in the Guidelines. Already during the launch of the reform, NDRC publicly announced it would resort to antitrust rules to ensure that drug pricing does not get out of hand.

During the months that followed, both NDRC and another antitrust authority in China – the State Administration for Industry and Commerce ("SAIC") – brought a number of cases against pharmaceutical companies. In its six-month nationwide campaign launched in June 2016, NDRC already listed active pharmaceutical ingredients as one of the key enforcement targets. Perhaps the release of the Guidelines is a recognition by NDRC that, in its view, more needs to be done to keep drug prices in check after the pricing liberalisation.

Overview of the Guidelines

The Guidelines contain 13 provisions which – with broad strokes – can be categorised into four types: general provisions; rules on restrictive agreements; abuse of dominance provisions; and unilateral pricing conduct rules.

In terms of substantive prohibitions, the Guidelines contain a provision each on horizontal agreements (basically, cartel conduct) and vertical agreements (resale price maintenance).

Perhaps more importantly, the Guidelines contain some more or less detailed guidance on abuse of dominance prohibitions: excessive (that is, unfairly high or low) pricing; exclusive dealing; imposition of unreasonable charges; and discriminatory treatment.

The above-mentioned types of provisions implement the AML. An additional provision with several sub-provisions is aimed at implementing the Price Law and its subordinate rules. These provisions appear to sanction unilateral pricing conduct by pharma companies, with or without a dominant position: fabrication of information to drive up prices; hoarding; collusion and price manipulation; and fraudulent conduct vis-à-vis consumers, etc.

The impact of the Guidelines is potentially far-reaching – both in and outside the pharmaceutical sector.

Impact in the pharmaceutical sector

The Guidelines define their scope of application broadly. "Drugs in shortage and active pharmaceutical ingredients" are defined collectively, ambiguously, as "drugs which cannot be supplied normally in a specific territory…[a]nd chemical or natural ingredients used to manufacture drug preparations". Yet the Guidelines do not explain what "normal supply" (or the absence thereof) would be. Hence, the imprecise definition may lead to much uncertainty among pharma companies, as the threat of NDRC finding unusual supply patterns may always loom in the background. Also, the Guidelines' definition of "active pharmaceutical ingredients" appears to go beyond the narrow notion of active pharmaceutical ingredients (as for example used by the World Health Organisation), which seemingly covers any kind of input materials used in a drug, even if not essential to its function. As a result, many chemicals manufacturers supplying to pharma companies may be impacted.

In short, the scope of the Guidelines is potentially very broad.

In contrast, the scope of the substantive legal obligations is not significantly enlarged in the Guidelines. To a large extent, the Guidelines closely follow the rules in the AML, the Price Law and their implementing provisions.

Impact beyond pharmaceuticals

The Guidelines also have an impact beyond the pharmaceutical sector. In particular, they may show NDRC's latest thinking on how the various AML provisions should be interpreted.

Back in 2010, NDRC enacted the Anti-Price Monopoly Regulation, which fleshed out the AML provisions within its field of competence. Now, the Guidelines contain deviations from that regulation – and many of these deviations do not seem to be sector-specific.

By way of example, the Guidelines largely follow the text of the Anti-Price Monopoly Regulation to provide benchmarks for excessive pricing, namely comparison with competitors' prices; the level of the price increase (with costs remaining stable); and a price/cost increase comparison. The NDRC decisions against two local pharma companies released in August 2017, for example, identify the excessiveness of prices by reference to the level of price increases with costs remaining stable – that is, the second above-mentioned benchmark. Now the Guidelines put forward an additional, new benchmark: comparison with the price in a different region or at a different point in time. This approach is not entirely novel, as different markets were used as benchmarks in past NDRC cases, but still marks a departure from the text of the Anti-Price Monopoly Regulation.

Another example, on the upside, is that the Guidelines provide for additional possibilities to justify a refusal to deal when the dominant company is not able to satisfy market demand or needs the input materials for its own production.

Since few, if any, of the deviations relate to factual aspects which are unique to the pharmaceutical sector, the real question is then why there is a need for pharmaceutical sector-specific antitrust rules in the form of the Guidelines – rather than for NDRC to amend the Anti-Price Monopoly Regulation, for example.

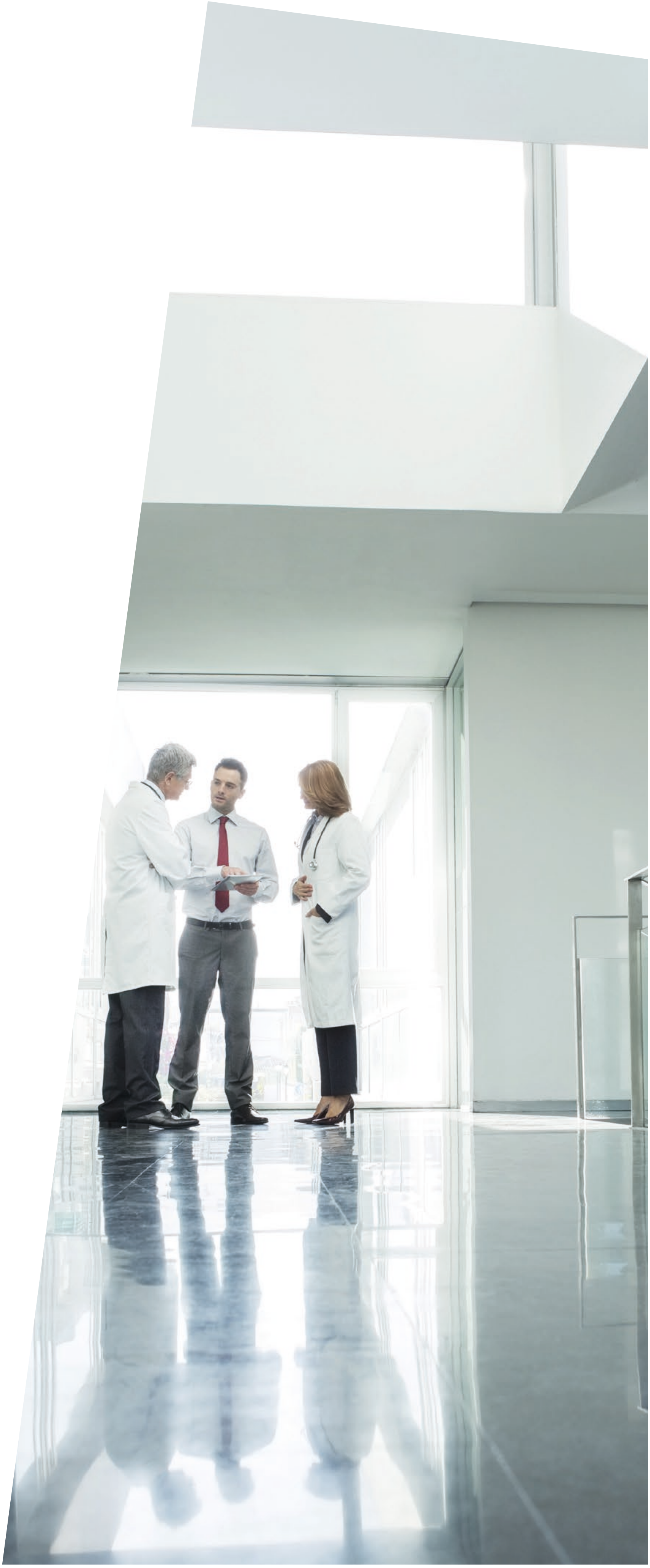
Perhaps the answer to this question can, again, be traced back to the drug pricing reform: NDRC may have got the impression that there have been too many actual or perceived abuses of the increased pricing freedom that liberalisation has brought about, and that there is a need to show tough regulatory action to tackle those abuses. The issuance of the two decisions against local active ingredients players would seem to confirm this point.

Adrian Emch
Partner, Beijing
T +86 10 6582 9510
adrian.emch@hoganlovells.com

Leigh Oliver
Partner, Washington D.C.
T +1 202 637 3648
leigh.oliver@hoganlovells.com

May Lyn Yuen
Senior Associate, Brussels
T +32 2 505 0977
maylyn.yuen@hoganlovells.com

Jiaming Zhang
Associate, Beijing
T +86 10 6582 9520
jiaming.zhang@hoganlovells.com



The Netherlands post-damages Directive: will the popularity as a preferred forum for actions for damages for competition law infringements increase?

This material was first published by Thomson Reuters (Professional) UK Limited in Ivan Pico & Sanne Bouwers, The Netherlands Post-Damages Directive: Will the Popularity as a Preferred Forum for Actions for Damages for Competition Law Infringements Increase?, [2017] 10 (2) G.C.L.R 72, and is reproduced by agreement with the Publishers.

On 10 February 2017, the Dutch Government implemented the EU Damages Directive (the "Directive")[1] into national law with the entry into force of the Implementation Act regarding the Private Enforcement of Competition Law Directive (the "Act").[2] The Act amends several provisions of the Dutch Civil Code and of the Dutch Code of Civil Procedure and – in line with the Directive – essentially aims to ensure that anyone who has suffered harm caused by an infringement of competition law can effectively exercise their right to full compensation. As an increasing number of damages actions are being brought for infringements of competition law before courts in the Netherlands, the future will tell whether this implementation will further increase the attractiveness of the Netherlands as a preferred forum for antitrust actions for damages or whether other jurisdictions will also (or further) attract popularity.[3]

What's new?

Introduction of the term undertaking in civil law

The Directive uses the term "undertaking" to describe the entity that has infringed competition law. Under competition law, the concept of an undertaking is an economic one, as it may encompass separate legal entities within a corporate group. In essence, separate legal entities may be viewed as a single undertaking, thus holding the group of legal entities liable for the anti-competitive conduct carried out by one of them. For instance, the European Commission (the "Commission") can hold a parent company liable for the conduct of its subsidiary, even if that parent company has not itself participated in the infringement. This is the case when the parent company has the ability to exercise decisive influence over the conduct of its subsidiary and if it actually exercised decisive influence during the period of infringement. Where the subsidiary is wholly-owned, or almost wholly-owned by its parent, there is a rebuttable presumption that the parent company does in fact exercise decisive influence. In such cases, the Commission will be able to hold the parent company jointly and severally liable for the payment of the fine imposed on its subsidiary, unless the parent company rebuts that presumption by proving that its subsidiary acted independently on the market.[4] This presumption has proven extremely difficult to rebut in practice and is therefore an important tool for the Commission to hold the economic undertaking (including the parent company and the subsidiary) liable from a competition law perspective. However, the Directive deals with liability from a civil law perspective.

The question has now arisen as to whether the Directive aims to introduce the broader economic concept of an undertaking under European competition law into Dutch civil law. The answer to that question is not entirely clear, but should most likely be answered negatively. On the one hand, the use of the term undertaking seems to imply that the Commission wants civil liability to be in line with competition liability on this point. On the other hand, this would result in a big change on how the various Member States deal with civil parent company liability, as multiple EU jurisdictions, including the Netherlands, require

1 Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on Certain Rules Governing Actions for Damages Under National Law for Infringements of the Competition Law Provisions of the Member States and of the European Union [2014] OJ L 349, p.1.

2 Wet van 25 januari 2017, houdende wijziging van Boek 6 van het Burgerlijk Wetboek en het Wetboek van Burgerlijke Rechtsvordering, in verband met de omzetting van Richtlijn 2014/104/EU van het Europees Parlement en de Raad van 26 november 2014 betreffende bepaalde regels voor schadevorderingen volgens nationaal recht wegens inbreuken op de bepalingen van het mededingingsrecht van de lidstaten en van de Europese Unie (Implementatiewet richtlijnprivaatrechtelijke handhaving mededingingsrecht), Goverment Gazette, 9.2.2017, Nr.28, available at https://zoek.officielebekendmakingen.nlidossier/34490/stb-2017-28?resultIndex=0&sorttype= I [Accessed 25 May 2017]. On 7 June 2016, the legi34490) was submitted to the second chamber of Parliament, see https://zoek.officielebekendmakingen.nl/kst-34490-1.html [Accessed 25 May 2017].

3 In addition to the Netherlands, popular jurisdictions for antitrust damages claims are the UK and Germany.

4 Akzo Nobel NV v Commission of the European Communities (C-97/08 P) EU:C:2009:536; [2009] 5 C.M.L.R. 23 at [61].

a separate unlawful act of the parent company (for example through means of active involvement in the infringement). If the Directive would indeed require a change in the rules on civil parent company liability, it would have made sense for such a far reaching consequence to have been explicitly dealt with in the (recitals of the) Directive. This is not the case. Furthermore, the Court of Justice of the European Union (CJEU) held rather recently that a:

"decision [of the Commission] does not determine the requirements for holding the defendants liable in tort, jointly and severally as the case may be, since this is to be determined by the national law of each Member State".[5]

Moreover, the Directive itself also seems to leave room for national preferences on this point.[6]

In the Act the notion of "infringer" is also a key element. It is the infringer that acted unlawfully and it is the infringer that can invoke the passing-on defence. The Dutch legislator has not indicated whether, with the introduction of the term infringer and the corresponding definition of undertaking, it aimed to change the current status of the rules on parent company liability. Under Dutch civil law, a parent company can be held liable for the actions of its subsidiary on the basis of attribution, but only in exceptional circumstances. However, the Explanatory Memorandum to the Act is not entirely clear on this issue, especially because the legislator indicated that the authentic interpretation of the term undertaking is reserved to the CJEU.[7]

Presumption of damage

In line with the Directive, the Act introduces a rebuttable presumption that cartel infringements cause harm. The presumption of harm is new under Dutch law. The presumption can be rebutted by evidence to the contrary, to be provided by the infringer. It is important to note that the rebuttable presumption does not change the fact that a claimant still needs to quantify the damages he is claiming. In addition, it should be mentioned that no similar presumption exists for other types of infringements of competition law that are not cartels. The definition of what infringement constitutes a cartel and what infringement does not is thus crucial for any damages claimant wishing to rely on the presumption of damage.[8]

Disclosure of documents: the black and grey lists

In relation to the disclosure of documents, the Act introduces the so-called black list and grey list. The disclosure of documents falling under the black list cannot be ordered by the national court under any circumstances. These documents do not constitute proof in actions for damages and are deemed inadmissible. The black list includes:

- leniency statements; and
- settlement submissions.

The national court may, however, order the disclosure of documents falling under the grey list, though only after the competition authority, by adopting a decision or otherwise, has closed its proceedings. If those documents are used prior to that date they will be declared inadmissible. The grey list includes:

- information that was prepared by a natural or legal person specifically for the proceedings of a competition authority, such as a reply to the Statement of Objections or a reply to a Request for Information;

---

5 Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV (C-352/13) EU:C:2015:335; [2015] Q.B. 906; [2015] 5 C.M.L.R. 4 at [21].

6 Recital 11 of the Directive states that "[w]here Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions in so far as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive".

7 Explanatory Memorandum, TK 11, 2015-2016, 34490, nr.3, p.12.

8 The Directive incorporated for the first time, in Article 2(14), a definition of the term "cartel", which the Act identically takes over. A cartel means "an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors".

– information that the competition authority has drawn up and sent to the parties in the course of its proceedings, such as a Statement of Objections; and
– settlement submissions that have been withdrawn.

The new rules on disclosure constitute a significant improvement with regard to the previous situation where the disclosure of leniency statements was subject to a weighing exercise by national courts on a case-by-case basis taking into account all the relevant factors.[9] The introduction of the absolute ban on the disclosure of leniency statements reflects the need to safeguard the effectiveness of leniency programmes. The effectiveness of such programmes would indeed be undermined if potential leniency applicants would be faced with the possibility of disclosure in actions for damages.

The right to full compensation and the passing-on defence

Since *Courage and Crehan*, it has been settled case law that individuals should be entitled to claim damages for loss caused by infringements of competition law.[10] Actions for damages brought before national courts of EU Member States are therefore meant to strengthen the public enforcement of the competition rules as undertaken by the Commission and the national competition authorities. This was confirmed by the Directive, which states that any natural or legal person who has suffered harm caused by an infringement of competition law can claim full compensation for that harm. Full compensation shall put that person in the position in which it would have been had the infringement of competition law not been committed, and shall therefore cover the right to compensation for actual loss and for loss of profit, plus the payment of interest. Importantly, the Directive also states that full compensation shall not lead to overcompensation.

A tool to avoid overcompensation is the passing-on defence, which is explicitly allowed by the Directive and adopted by the Act. The passing-on defence means that defendants can invoke the fact that the injured party passed on (part of) the overcharge resulting from the defendant's infringement of competition law to another customer further downstream. If the injured party paid a higher price resulting from a competition law infringement, the defendant can argue that the injured party suffered no or reduced harm because it passed on the whole or part of the higher price to its downstream customer(s). The burden of proving that the overcharge was passed on is on the defendant.

Prior to the implementation of the Directive, the Dutch Supreme Court already confirmed that the passing-on defence is a valid defence under Dutch law.[11] The Dutch Supreme Court also gave an opinion on how the passing-on defence should be qualified under Dutch law and thereby settled the discussion in legal literature about this topic. Most legal writers took the position that the passing-on defence affects the extent of the damages awarded (in short: the overcharge minus the part of the overcharge that was passed on). On the other hand, some other authors argued that the passing-on defence should be qualified as a means for the infringer to invoke the concept of deduction of collateral benefits (voordeelstoerekening).[12]

Perhaps surprisingly, the Dutch Supreme Court held that both approaches can be applied when it comes to the passing-on defence. According to the Supreme Court, both approaches will lead to the same result: the advantages and disadvantages connected to the infringement should be assessed in such a way that they can reasonably be attributed to the defendant. A court assessing the passing-on defence can therefore choose which approach it will take, thereby taking into account the procedural debate.

9 Pfleiderer AG v Bundeskartellamt (C-360/09) EU:C:2011:389; [2011] 5 C.M.L.R. 7; [2011] All E.R. (EC) 979 at [31]; Bundeswettbewerbsbehorde v Donau Chemie AG F°-536/11) EU:C:2013:366; [2013] 5 C.M.L.R. 19 at [34].

10 Courage Ltd v Crehan (C-453/99) EU:C:2001:465; [2001] 3 W.L.R. 1646; [2001] 5 C.M.L.R. 28 at [26]–[27]; Manfredi v Lloyd Adriatico Assicurazioni SpA (Joined Cases C-295/04 to C-298/04) EU:C:2006:461; [2007] R.T.R. 7; [2006] 5 C.M.L.R. 17 at [60].

11 TenneT v ABB NL:PHR:2016:70.

12 The concept of deduction of collateral benefits can be described as follows: where one and the same event has resulted in both loss for the person who suffered it (i.e. paying the overcharge) and benefited from it (i.e. passing-on the overcharge), the benefit must, to the extent that this is reasonable, be taken into account in assessing the reparation of the damage to be made.

Despite being a valid defence, the passing-on defence remains controversial because it requires a complex and extensive economic analysis. To provide guidance on the subject the Commission has published a Communication on quantifying harm in actions for damages,[13] which is accompanied by a more comprehensive and detailed Practical Guide.[14] More recently, on 25 October 2016, the Commission also published a "Study on the Passing-on of Overcharges",[15] which includes a 39-step manual for national judges on how to calculate damages. The importance that Dutch courts will attach to these documents remains to be seen.

Limitation periods

The Act provides a limitation period of five years. This period starts running on the day following the day on which the competition law infringement ceased and the claimant became aware or could reasonably be expected to be aware of the infringement, the fact that it caused harm and the identity of the infringer. In any event, an action for damages is time barred upon the expiry of 20 years following the day after the end of the infringement.

Furthermore, the Act states that the limitation period will be extended if a competition authority takes action for the purpose of the investigation or its proceedings in respect of the infringement to which the action for damages relates. The duration of the extension is one year after the infringement decision has become final or after the proceedings are otherwise terminated. A final infringement decision is a decision that cannot or can no longer be appealed. Thus, if an infringement decision is being appealed the limitation period will be suspended for the duration of the appeal. The Act also provides for an extension of the limitation period in case of out-of-court settlement discussions. The limitation period regime has retroactive effect and applies to cases initiated after 26 December 2014. As a result of the limitation periods and their possible extensions, infringers may not know the full extent of the damage claims they face until several years after the infringement decision.

In the consultation round on the draft Act, there was a lot of criticism on the limitation topic because the initial limitation scheme in the draft went one step further than was required by the Directive. Interestingly, the limitation period was the only topic on which practitioners mostly representing claimants and those mostly representing defendants seemed to agree. It is in the interest of both claimants and defendants (as well as in the public interest) that limitation periods are clear and not too long. After all, extending limitation periods will generally limit any willingness for defendants to come to a settlement because those defendants can be confronted with new claims during such extensions.

Limitation of liability for small and medium enterprises and immunity recipients

The Act provides that undertakings that have infringed competition law through joint behaviour are jointly and severally liable for the harm caused. Each of those undertakings is bound to compensate the harm in full and the injured party has the right to require full compensation from any of them.

However, the Act provides an exception for small and medium enterprises ("SMEs") and immunity recipients. SMEs can only be held liable to their direct and indirect purchasers if their market share in the relevant market was below five per cent at any time during the infringement period and if the application of the normal rules would irretrievably jeopardise their economic viability and cause their assets to lose all their value. Immunity recipients on the other hand can only be held liable to their direct and indirect purchasers, unless full compensation cannot be obtained from the other infringers. Furthermore, the Act also provides a windfall for immunity recipients with respect to contribution claims from other infringers. The Act introduces the rule that the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm and shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

13 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union [2013] OJ C 167, p.19.

14 Practical Guide—Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union SWD(2013) 205.

15 Available at http://ec.europa.eu/competition/publications/reports/KDO216916E1VN.pdf [Accessed 25 May 2017].

Proportionate share reduction in consensual settlements

The Act introduces the rule whereby an injured party, following a consensual settlement, will see its claim reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the injured party. Any remaining claim of the settling injured party can only be exercised against non-settling co-infringers. The claimant will then have to reduce its claims against the remaining co-infringers with the proportionate share of the settling co-infringer. This principle was already recognised by the District Court of The Hague with relation to damage claims deriving from the Candle Waxes cartel.[16]

Practical significance

Over the last years the Netherlands has seen a significant increase in actions for damages deriving from competition law infringements.[17] This is mainly related to the advantages of the Dutch judicial system. For instance, Dutch courts have a reputation of being professional and efficient, judgments are rendered expeditiously and the costs of litigation are modest.[18] Furthermore, actions for damages in the Netherlands can be brought by claim vehicles that can bring actions under their own name and there are no limitations on funding by third parties. The Act is thus expected to make the Netherlands an even more appealing forum for actions for damages. Considering the current Brexit-related uncertainties, it remains to be seen whether follow-on damages claims will shift to Continental Europe, in particular the Netherlands.

Ivan Pico
Associate, Brussels
T +32 2 505 0969
ivan.pico@hoganlovells.com

Sanne Bouwers
Associate, Amsterdam
T +31 20 55 33 624
sanne.bouwers@hoganlovells.com

16 CDC v Shell NL:RBDHA:2016:11305.

17 Notable cartel damage actions that have been brought in the Netherlands include Airfreight (AT.39258), Bitumen Netherlands (AT.38456), Candle Waxes (COMP/39181), Elevators and Escalators (COMP/E-1/38823), Gas Insulated Switchgear (Case COMP/F/38899), Prestressing Steel (COMP/39344) and TV and Computer Monitor Tubes (AT.39437).

18 Dutch law does not have the "loser pays it all" principle.

Friends forever? Joint and several liability for cartel damages

"Good friends can never be separated; good friends are never alone; for there's one thing in life they know how to do, be there for one another...". This timeless classic was sung by Franz Beckenbauer on the occasion of the 1966 FIFA World Cup in England. And he is right: friends show consideration for each other and they are sincere to one another. Whilst delightful virtues in the context of interpersonal relationships, these traits of friendship may become troublesome vices in the context of intercorporate relationships. If companies are too friendly with one another, they may breach antitrust law. Yet, what about friendship, when the cartel is over and third parties are eager to claim their cartel damages?

Good friends can never be separated...

In 2014, the German Antitrust Authority (the Bundeskartellamt) imposed a fine of almost €200 million on a single member of the 'sugar cartel'. Therefore, the price for a good friendship should be well known – one would expect. But the fine is only half of the story. In addition, there exists civil liability vis-à-vis the parties damaged by the friendship. Cartel members are not only obliged to compensate for the damage they have caused to their direct and indirect buyers throughout their, maybe decade-long, cartel (such as the damage caused by higher prices), they are also jointly and severally liable for these damages vis-à-vis their fellow cartel members. It is quite understandable that this may put a strain on the friendship.

...can they?

Until now, joint and several liability between cartel members had been governed by general provisions of German law; this had caused many uncertainties. From now on, however, joint and several liability will be governed by the new special provision in paragraph 33d GWB. With this new provision, for example, the discussion of whether compensation between cartel members should be excluded for reasons of deterrence (inspired by American antitrust law), is now cleared. Additionally, uncertainties regarding how compensation should be conducted are resolved to some extent, because the EU Directive on Cartel Damage Claims and the reasoning of the new GWB set out certain points of reference. According to these criteria, the degree of causation, in particular, will continue to be taken into account. But also other criteria, such as turnover, market share and the actual role of the company in the cartel, will be assessed. These standards aim at ensuring a fair balance between the joint and several debtors.

The free rider

What is fair, and what is not, lies in the eye of the beholder. Cartel members, for example, may not find it fair that an infringer who has been granted full immunity from a fine due to a leniency program, is now also privileged as regards his external civil liability vis-à-vis the cartel victims and his internal liability vis-à-vis the other cartel members, through paragraph 33e GWB. With the new paragraph 33e(1) GWB, his liability towards third parties is now, in principle, limited to a liability towards his direct and indirect buyers. An exemption will apply only if the other cartel members are unable to compensate for the remaining damage that they have caused. With the new paragraph 33e(3) GWB, the immunity recipient is also privileged as regards compensation between the cartel members. In this internal relationship, he is also only liable for the amount of damage he caused to his direct and indirect buyers.

He who settles, wins?

More inconspicuous than the limited liability of the immunity recipient, but no less serious, are the new provisions regarding settlements between cartel members and damaged parties (which have nonetheless lately enjoyed growing popularity). For the sake of promoting a willingness to settle (be it within or outside the court) the new paragraph 33f GWB ensures substantial advantages for a settling cartel member: first, he is relieved from his liability not only vis-à-vis the damaged party, but also vis-à-vis the other cartel members; the relief applies not only to the actual amount of the settlement but to the amount of the actual share of liability. Second, the settling cartel member is entitled to agree with the settling damaged party that he cannot be held liable for the remaining damage of the settling damaged party in case the other cartel members are not able to fulfill their obligations towards the damaged party. Thus, the new provision ensures considerable motivation to settle with the damaged party.

Sebastian Faust
Senior Associate, Düsseldorf
T +49 211 13 68 0
sebastian.faust@hoganlovells.com

Elena Wiese
Associate, Düsseldorf
T 49 211 13 68 316
elena.wiese@hoganlovells.com

Federal judge declares the rule of reason will apply in criminal antitrust case and dismisses the case as barred under the statute of limitations

On 28 August 2017, a Utah federal judge held in *United States v. Kemp & Associates, et al.* that he will apply the rule of reason standard in a criminal prosecution against an heir-locator company for allegedly colluding with its horizontal competitors to allocate customers. This ruling was a sharp departure from well-established precedent. It is unclear how this ruling would have played out in practice. On the same day the Court issued its order holding that the rule of reason applied, the Court also dismissed the Indictment, holding that the case was time-barred under the statute of limitations.

In *United States v. Kemp*, the Department of Justice (DOJ) filed a felony indictment in the U.S. District Court for the District of Utah against Salt Lake City-based heir-locator Kemp & Associates, Inc. (Kemp) and its co-owner and vice president, Daniel J. Mannix. The Indictment alleged that Defendants conspired with other heir-locator services to "suppress and eliminate competition by agreeing to allocate customers" from 1999 through 2014. Heir-locator companies like Kemp identify people who might be entitled to an inheritance from the estate of a relative who died without a will. For a contingency fee, these companies compile evidence to prove potential heirs' claims to the inheritance in probate court. If the claim is successful, the heir-locator company receives its fee; however, because potential heirs can be identified from public court records, numerous competitors often contact them and compete by offering better contingency fee rates. According to the Indictment, Kemp and Mannix allegedly colluded with competitors to prevent heirs from shopping around for better rates by allocating customers and sharing contingency fees.

Violations of the Sherman Act can be adjudicated either under the rule of reason standard or the *per se* standard. The Department of Justice brings cases criminally only if the charged conduct falls squarely within the type of conduct that courts have held warrant adjudication under the *per se* standard. Courts typically analyse customer allocation agreements under the *per se* standard.

Defendants in *Kemp* filed a motion to adjudicate under the rule of reason. Defendants argued that the Court should look beyond the Indictment to analyse how the charged agreement was structured and whether the uniqueness of the industry justified treatment under the rule of reason. Defendants argued that the charged agreement was not a "garden-variety horizontal agreement" because prior courts have not analysed a customer-allocation agreement that was similarly structured. Defendants also argued that the uniqueness of the industry justified treatment under the rule of reason. DOJ's motions urged the court to look at the conduct charged in the Indictment and analyse the restraint of trade as defined by the Indictment to determine what standard should apply. DOJ argued that customer allocation agreements as charged in the Indictment have "long been held to be *per se* illegal because they are manifestly anticompetitive."

In a surprising move, the Court granted Defendants' motion and departed from the vast majority of modern courts, which have held that a criminal case charging a customer allocation agreement should be tried under the *per se* standard. In reaching its conclusion, the Court looked beyond the Indictment and considered the industry and the effects of the alleged agreement. The Court found that the charged agreement differed from other customer allocation agreements because it "affected a small number of estates", "occurred in a relatively obscure industry", and had an "unusual manner of operation." For these reasons the Court held that it "cannot predict with any confidence" that the customer allocation agreement would "[operate] as a classic customer allocation," and therefore the agreement contained "efficiency-enhancing potential" and should be adjudicated under the rule of reason.

Despite the Court's holding, it is unclear how the charged customer allocation agreement functionally differed from the myriad of other customer allocation agreements to which courts have applied the *per se* standard. The Indictment charged a straightforward agreement "to allocate customers of Heir Location Services." Precedent generally dictates in criminal cases that if the alleged restraint falls under the exact type of conduct where courts have previously applied the *per se* standard, then it is not necessary to look beyond the charging documents to determine what standard applies. However, the Court in *Kemp* flipped this analysis and looked not at the alleged agreement in the Indictment, but at how the agreement was implemented in the industry to determine what standard applied.

As DOJ stated in its motions "[b]y exercising its prosecutorial discretion . . . to focus on the most serious and plain antitrust offenses, 'as opposed to the rule of reason or monopolisation analyses,' the government provides 'clear, predictable boundaries for business' between what conduct is potentially subject to the severe sanctions that accompany criminal conviction and what conduct is subject only to civil equitable relief." By adjudicating a straightforward customer allocation agreement under the rule of reason, the Court blurred this distinction, potentially making it more difficult for companies to predict how future courts will analyse alleged restraints of trade.

The effect of the Court's holding on the trial is unknown, however, because on the same day it granted Defendants' rule of reason motion, the Court also granted Defendants' motion to dismiss. On March 31, Defendants filed a motion asking the court to dismiss the Indictment as time-barred under the statute of limitations and to apply the rule of reason. In dismissing the Indictment, the Judge rejected DOJ's argument that, for statute of limitations purposes, the conspiracy continued until the parties to the alleged agreement recovered monies for heirs and made payment to the firms themselves for clients allocated under the agreement. Rather, the Judge held that for statute of limitations purposes, the conspiracy ended when the actual customer allocation ended. The Court held "the purpose of the alleged conspiracy had been abandoned in July 2008 when the [agreement was] terminated and all that remained were administrative issues related to resolving the estates and payments resulting therefrom" and "[b]ecause of the length of time it may take to complete full administration of an estate, the theory that this extends the conspiracy into the statute of limitations period would create a significant arbitrariness regarding the length of the limitations period."

DOJ's argument – that the conspiracy continued until payments subject to the illicit agreement ceased – is also known as the "payments theory." This is at least the second time in recent years that courts have rejected the Antitrust Division's application of the payments theory. In *United States v. Grimm*, defendants were convicted of conspiring to rig the bidding process for guaranteed investment contracts (GIC). DOJ argued that the charged conduct occurred within the statute of limitations because interest payments made under the rigged GIC continued into the statute of limitations period. The Second Circuit rejected DOJ's theory and overturned the convictions, holding that the interest payments were a result of the conspiracy and not an act in furtherance of it. While neither case overrules the viability of payments theory, combined these cases illustrate the vulnerability of relying on only a payments theory to extend the statute of limitations.

The *United States v. Kemp* case offers the following takeaways:

– Courts may be willing to apply the rule of reason approach for particularly unique industries, even if the alleged agreement is a type of restraint to which courts have traditionally applied the *per se* standard. As a result, companies should consider filing a motion to adjudicate under the rule of reason when indicted. While rarely granted, these motions can result in either a dismissal of the indictment or a strategic advantage at trial.

– The government's reliance on a payments theory to bring an antitrust conspiracy within the statute of limitations may be insufficient. Recent courts have rejected the government's payment theory and have either dismissed the indictment or overturned the conviction.

Kathryn Hellings
Partner, Washington D.C.
T +1 202 637 5483
kathryn.hellings@hoganlovells.com

The new Italian law on markets and competition for M&A deals, insurance, pharmaceuticals, transportation, communication, energy, touristic services, cultural goods and legal professions

The new Italian Act on markets and competition of 2 August 2017 represents a systematic intervention by the Italian legislator aimed at more opened up markets and increased consumer protection in a number of economic sectors.

New thresholds for merger control filings before the Italian Competition Authority

The new Italian Act on markets and competition revises the turnover thresholds triggering merger control filings before the Italian Competition Authority. Under the new regime, concentrations will be reportable if the combined Italian turnover of the parties involved exceeds €492 million and the individual Italian turnover of each of at least two of the parties involved exceeds €30 million (said thresholds are to be adjusted each year). The reform will likely increase the number of concentrations reportable under Italian merger control rules, especially in cases of joint ventures.

The new Act is relevant to the following individual economic sectors:

– Insurance
– Pharma
– Transportation
– Hotels
– Postal Services
– Communications
– Energy
– Cultural Goods
– Legal Profession

Insurance

The new Act addresses the terms and conditions of motor vehicle insurance policies. In particular, the Act provides for the obligation on insurance companies to grant discounts on insurance premiums whenever the insured person accepts: (i) to submit the vehicle to an inspection (with the related costs borne by the insurance company); (ii) to install on the vehicle portable electronic mechanisms which register the activities of the vehicle, i.e. “black boxes” which will have full evidential value in the context of civil proceedings relating to car accidents; and (iii) to install electronic mechanisms which impede the starting of the vehicle’s engine whenever the driver’s Blood Alcohol Content (BAC) exceeds the limit imposed by law. Discounts on insurance premiums are also prescribed for residents in risky areas who have not been found liable for car accidents in the four years prior to the conclusion of the insurance contract.

The new Act also addresses the terms and conditions of insurance policies relating to the provision of financial services. In this respect, the new Act prescribes that insurance intermediaries, banks, credit institutions and financial intermediaries accept the insurance policies presented by the client without imposing any change to the conditions of financial services related to real estate mortgages and consumer credit. The new Act further extends the consumer’s right of withdrawal, it increases the level of information that needs to be provided by intermediaries and it intervenes in the definition of the concept of “serious breach of the obligations imposed” on consumers, which is relevant for the early termination of the financing agreement.

Finally, the new Act sets forth the prohibition of automatic renewal of non-life insurance contracts.

Pharma

The new Act opens the door to the ownership of pharmacies by limited liability companies and repeals the current limit of four licences per company. However, in order to avoid conflict of interests, the new Act provides that pharmacies' shareholders cannot exercise any other activity in the sector of production and scientific information of pharmaceutical products or any other medical professions. Furthermore, pharmacies' shareholders shall not own more than 20% of pharmacies active in a single Italian region or autonomous province. Finally, the new Act liberalises the opening hours of pharmacies provided that they comply with the minimum level of service standards set forth by the relevant Italian national health system rules.

Transportation

The new Act sets out new rules for road transportation service providers such as the introduction of new informative obligations, new rules for ticket redemption, and the implementation of updated online platforms for purchasing tickets in order to reach a broader consumer protection.

The new Act lays down the principles and criteria for a governmental intervention which would aim to harmonise existing provisions governing limousine services ("NCC" in Italian), with new forms of mobility, involving the use of web applications and technology platforms for the interconnection of passenger and driver that are already used by companies such as Uber and My Taxi. This intervention has been advocated by the Italian Competition Authority, which has underlined the need for a reform aligning the regulation of services provided by taxi licensors and those provided by NCC, thus facilitating the development of more innovative and effective services for consumers.

The governmental intervention shall also provide for a sanctioning system for administrative violations, identifying effective, dissuasive and proportionate sanctions to avoid abuses.

Hotels

The new Act prohibits the "parity rate" practice and it declares void any agreement which prohibits hotels from offering, both online and offline, their facilities at better prices and conditions than those published on online travel agencies and booking portals. This intervention follows the European Commission's report of 2016, resulting from the monitoring undertaken in conjunction with various national competition authorities including the Italian Competition Authority, on the online hotel

booking sector, and specifically on "parity rate clauses". The report urged national competition authorities in the European Competition Network to keep the online hotel-booking sector under review and to reassess the current competitive situation.

Postal services

As of 10 September 2017, the Italian Post Office (Poste Italiane S.p.A.) will forego its role as a universal postal service provider. Instead, private companies will be authorised to provide services for the process serving and communication of judicial acts, and for the notification and communication of violations of the highway code (Italian "codice della strada").

Communications

The new Act prescribes stricter rules for telephone, television and electronic communications agreements. In particular, the new Act imposes informative duties, simpler rules to end subscriptions and a maximum of 24 months for the duration of any contract – concluded with telephone operators and TV companies – including promotional offers for the provision of services and goods. The new Act also introduces new digital payment systems through the use of mobile credit. By contrast, the stricter rules on telemarketing proposed in the first draft of the new Act have not been included in the final Act.

Energy

The new Act abolishes the "higher protection regime" and imposes on the Authority for Electricity, Gas and Water the creation of an open database to compare the offers on the retail market for electricity and gas with particular reference to domestic utilities. Moreover, the new Act requires the Authority for Electricity, Gas and Water to guarantee the implementation of any relevant measures aimed at facilitating the payment of invoices to gas and water distributors (such as the acceptance of payment by instalments, the limitation of interest rates, and so on).

Furthermore, the new Act intervenes in the area of fuel distribution, providing for the verification of the territorial compatibility of the fuel plants with regard to the security of road traffic; as well as a specific procedure for the disposal of fuel plants occurring within a period of three years from the entry into force of the new Act.

Cultural goods

The new Act liberalises the reproduction of archives and bibliographies through the use of digital systems and simplifies the procedure of international movement of cultural goods.

Legal profession

The new Act opens the door to the provision of legal services in the form of Italian partnerships, limited liability companies, and cooperatives subject to (i) the enrolment of any such legal entity in a separate section of the public register of the territorial circumscription in which the entity has its registered office and (ii) the condition that at least 2/3 of the entity's shareholders shall be qualified lawyers that are members of the national bar association or registered members of other professions (for example, accountants). A personal liability regime continues to apply to individual lawyers exercising their profession through a company vehicle. Finally, the new Act provides for an increase of public notaries exercising the legal profession on Italian territory from 1 in every 7,000 inhabitants to 1 in every 5,000 inhabitants.

Sabrina Borocci
Partner, Milan
T +39 02 720 2521
sabrina.borocci@hoganlovells.com

Gianni De Stefano
Counsel, Brussels
T +32 2 505 0967
gianni.destefano@hoganlovells.com

Luigi Nascimbene
Senior Associate, Milan
T +39 02 720 2521
luigi.nascimbene@hoganlovells.com

Eugenia Gambarara
Associate, Milan
T +39 02 720 2521
eugenia.gambarara@hoganlovells.com

Dawn raids in Poland – tighter rules on the gathering of electronic evidence

On 7 March 2017, the Polish Court of Competition and Consumer Protection (the "CCCP"), issued an important judgment regarding the powers of the Polish Competition Authority (the "PCA"), to search IT systems and hardware (e-mails and hard disks) during dawn raids (the Order of the CCCP of 7 March 2017, XVII Amz 15/17). This judgment significantly changes the landscape for antitrust inspections in Poland by limiting the excessive use of the PCA's investigative powers. It also confirms the need for the protection of legal professional privilege ("LPP") within antitrust inspections, and creates the grounds for further debate on its possible scope.

According to the provisions of the Polish Act on Competition and Consumer Protection (the "ACCP"), the PCA enjoys similar powers to conduct inspections and obtain evidence of antitrust violations as those stipulated under EU law. However, as recent PCA practice has shown, the ACCP's provisions on antitrust inspections were broadly interpreted as far as the collection of electronic evidence was concerned. These provisions were regarded as empowering the PCA, not only to review IT systems and hardware at the premises of the inspected undertaking, but also to indiscriminately copy entire data carriers and/or e-mails found at the place of inspection with a view to subsequently reviewing them at the premises of the PCA. In many cases the PCA obliged the undertakings undergoing the inspection not only to provide the specific data covered by the scope of the inspection, but also to disclose any e-mails and/or hardware containing information which could potentially exceed it. The PCA regarded a failure to do so as a refusal to submit to the inspection, or as an act of obstruction, and this often resulted in severe financial penalties. For instance, in the *Polkomtel* case in 2011, the undertaking's refusal to disclose a hard disk containing the entire e-mail correspondence of a number of its employees so that it could subsequently be analysed at the PCA's premises was considered to obstruct the inspection. This, as well as other acts of obstruction, resulted in a financial penalty of €33 million imposed on Polkomtel.

The above practice was criticized by various scholars and legal practitioners. It was regarded as an abuse by the PCA of their inspection powers, resulting in the

limitation of the right of defence, as well as the right to the privacy of the undertakings subject to the antitrust inspection. Even though the courts often decrease the amount of the fines imposed in these cases, they have never contested the PCA's approach with regard to searching electronic evidence.

The PCA's practice was also different from the European Commission's approach to the collection of electronic evidence. When it comes to dawn raids conducted by the European Commission, if the European Commission has not finished selecting the documents which are relevant to the inspection a copy of the outstanding data-set may be sealed and collected in order to continue the inspection at a later time. However, in circumstances where the Commission wants to continue the inspection at its own premises, it invites the undertaking to be present when the sealed envelope is opened and during the continued inspection process. Alternatively, the Commission is obliged to return the sealed envelope to the undertaking without opening it or to ask the undertaking to keep the sealed envelope in a safe place to allow the Commission to continue its inspection during a further announced visit to the premises of the undertaking.

The recent ground-breaking judgment issued by the CCCP overrules the PCA's previous practice applied, in the *Polkomtel* case, among others. Even though the CCCP did not contest the PCA's general right to request access to electronic evidence, the method of its execution has been limited by the CCCP.

During the inspection assessed by the CCCP in its judgment, the PCA's employees made copies of three hard disks belonging to the company's CEO, as well as the entire e-mail correspondence of the company's CFO. Before being copied, the data (hard disks and e-mails) was neither analysed, nor selected by the inspectors. The copies were sealed and taken to the premises of the PCA with a view to their further analysis. The company lodged a complaint to the CCCP claiming that by copying such a large quantity of information, without its previous selection at the company's premises, the PCA: (1) exceeded the scope of the inspection; (2) obtained access to information covered by LPP; (3) violated the company's right to a defence and privacy; and (4) violated the prohibition to conduct a search outside the premises of an undertaking without its previous consent. As a result of the company's complaint, the data concerned was sealed and withheld from the search until a judgment was issued by the CCCP.

Although for procedural reasons the CCCP eventually rejected the complaint, in the grounds of its judgement it analysed, in detail, the PCA's practice concerning the complete and indiscriminate copying of hard disks for the purpose of conducting a further review of the copied data at its own premises.

Firstly, the CCCP underlined that the PCA's right of inspection was an important limitation to the individual's right to privacy and, as such, should be interpreted narrowly. Otherwise, as the CCCP claimed, the existing guarantees of the right to privacy would have had only an "illusory character." Based on this approach, the CCCP maintained that the provisions of the ACCP, granting the PCA the right to request information during an inspection, had to be understood as obliging the PCA to strictly select and request only that information which fell within the scope of the inspection. Similarly, while making copies of the information/documents, the PCA had to limit itself only to that information which was relevant for the purpose and scope of the inspection. In the opinion of the CCCP, there should have been no difference in the PCA's approach depending on the information carrier, i.e. electronic, or paper, since, in both scenarios, the PCA was able to select only that content which might have been relevant for the case.

Secondly, as the CCCP pointed out, in order to ensure the appropriate protection of an undertaking's right of defence, and its right to privacy, the selection of information had to be conducted at the undertaking's premises and in the presence of its representative. Otherwise, the inspection itself, understood as the selection of evidence, making copies of documents and preparing notes, would have had to be conducted outside the premises of the undertaking which would have been contrary to the provisions of the ACCP. In the opinion of the CCCP, the analysis of hard disks and e-mails constituted an inspection in itself (given that the PCA was dealing with evidence) and could not have been regarded as a mere technical activity; therefore, performing it in the absence of the inspected undertaking would have undermined its right of defence.

The above approach of the CCCP to the question of the scope of an inspection and the position of the inspected undertaking seems to draw a clear line between those inspections allowed under the ACCP, and prohibited "fishing expeditions". By obliging the PCA to select evidence at the premises of the undertaking, and copy only that information which was relevant to the case, the CCCP has limited the possible abuse of the PCA's right to inspection. Moreover, the CCCP emphasized the need for the protection of undertakings which were the subject of the inspection, and confirmed that a right of defence should not be a dead letter, but had to be manifested at each stage of any antitrust proceedings.

Apart from setting the limits for the PCA's collection and analysis of electronic evidence, the CCCP also referred to the issue of LPP. The CCCP confirmed that LPP must be protected during antitrust inspections and would be put at risk if certain data were to be collected indiscriminately (such as hard disks and e-mail correspondence) at the premises of the inspected undertaking. Moreover, the CCCP held that the legal basis for the protection of LPP should be the one set out within the Code of Criminal Procedure. Even though the CCCP did not elaborate on the scope of LPP (in particular, whether it should be limited to correspondence with an external lawyer, or whether it should also cover communication with the company's internal lawyer), it provided the grounds for further debate on this issue in Poland. This is because, as various Polish scholars underline, the current construction of LPP in Polish antitrust law, i.e. the absence of any specific provisions on LPP in the ACCP, and the subsequent need to apply provisions of the Code of Criminal Procedure, could lead to a situation in which the scope of the LPP under Polish law would be broader than under EU law. This is because the Code of Criminal Procedure does not make a distinction between external and internal legal advice for the purpose of LPP, and could therefore at least in theory cover both scenarios.

The CCCP's judgment is a turning point in inspections conducted by the PCA. It clearly states that the PCA's current practice, according to which electronic data was copied without prior selection and taken from the premises of the inspected undertaking for further analysis at the PCA's premises, is no longer permissible. Moreover, the appropriate protection of LPP also requires the selection of electronic data at the undertaking's premises before the data carriers, which could potentially contain information covered by LPP, are copied and taken by the PCA. Finally, according to the CCCP's ruling, it cannot be excluded that the scope of information covered by LPP might be broader under Polish law than under EU law. Even though the CCCP does address this issue, its reference to the provisions of the Code of Criminal Procedure in order to assess LPP has laid the groundwork for a broader interpretation of the LPP's scope in Poland.

Piotr Skurzyński
Counsel, Warsaw
T +48 22 529 29 00
piotr.skurzynski@hoganlovells.com

Maciej Gac
Lawyer, Warsaw
T +48 22 529 29 00
maciej.gac@hoganlovells.com

Hogan Lovells and MLex host Director-General of DG Competition Johannes Laitenberger on EU competition law in innovation and digital markets:

Fairness and the consumer welfare perspective*

On 10 October 2017 Director-General of DG Competition, Johannes Laitenberger, spoke at Hogan Lovells' Brussels office at an event held jointly with MLex. The Director-General expressed his thoughts on the role of European competition law in innovation and digital markets, focusing on the adequacy of competition law in the face of modern challenges, such as the evolution of modern technologies, and given its fundamental aims, such as the protection of fairness, consumer confidence, and choice. Competition law must continue to meet the demands of all industries, from the oldest, such as the railway sector, to the newest, such as digital platforms.

'Baltic Rail' and remedies

Director-General Laitenberger chose to open his discussion with a competition decision concerning the railway sector, one of the oldest sectors in the book. In so doing, he made space for reflection on how the 'old' may have a place beside the 'new' and affect its evolution in radically changing times.

In the *Baltic Rail* abuse of dominance decision of 2 October 2017, the European Commission (the "Commission") fined Lithuanian Railways approximately 28 million euros. In that case, there were two railway routes for oil to be transported to Latvia: one, the longer route, passed extensively through Lithuania, whilst the second, shorter route, passed very briefly through Lithuania. Lithuanian Railways dismantled the shorter route so that a key customer would have to pass more extensively through Lithuania. No objective justification was given. The Commission concluded that Lithuanian Railways' actions were motivated by a desire to protect itself from competition.

As for a remedy? The Commission ordered Lithuanian Railways to end the infringement but did not, in the words of the Director-General "spell out a specific remedy". This is because firms have a duty to self-assess their conformity with competition rules, with the help of the Commission's decisions and legal instruments, and with the help of their advisors who can interpret and apply relevant case-law. In the Director-General's opinion, legal certainty is not lacking, and the Commission will not shy away from proposing specific remedies where it is clear that they are appropriate. However, where there are many possible remedies, the Commission cannot impose a particular remedy (see, for example, *Automec II* (T-24/90)).

This provides some flexibility for undertakings, who may settle on a commercially viable, competition-compliant result by proposing the remedies they consider adequate in the circumstances. Indeed, according to the Director-General, "where there may be several ways, then it is preferable to let the company assess options and propose one of them – and we are ready to listen to them".

Fairness

But what is listening if one is not heard? As part of encouraging undertakings to propose their own remedies, the Commission will give them a fair hearing. Fairness is rooted in procedural fairness, said the Director-General. And each of the various limbs of procedural fairness has its own vital role in the smooth functioning of competition law (take, for example, rights of defence, impartiality in decision-making and objective communications with the public): "procedural fairness ensures a rigorous process".

**Anna Stellardi, a trainee in the Hogan Lovells Brussels office, contributed to this article.*

The notion of fairness has been intertwined with competition law since its inception. Whilst competition law has a different role from other spheres of regulation between companies, such as unfair trading, where fairness is in the name, competition law nevertheless places a high premium on fairness. Fairness is mentioned in Article 102 of the Treaty on the Functioning of the European Union (the 'TFEU'), and the preamble of the TFEU calls for concerted action in order to guarantee fair competition, not to mention State aid cases, in which the assessment of 'unfair advantage' is of prime importance.

State aid rules ensure that companies compete on the merits within the Single Market. And not only this, they prevent Member States from disrupting competition on the merits by unjustifiably favouring one company over another. At the crux of State aid, and of competition law more broadly, is economic reality – the real conditions that companies and industries operate within – and the regulation of those conditions to permit fair access to and the fair functioning of markets.

"No selective advantage without objective justification: this is a specific translation of the broader fairness rationale", said the Director-General. And the same goes for the fair treatment of consumers: no overcharging through collusion or abuse of dominance. Competition on the merits is what nourishes healthy markets and what legitimately wins market power. This is essential for consumer confidence; if the game is "rigged" consumers may feel excluded or left behind and the innovative spirit of entrepreneurs may be compromised.

As for mergers, fairness plays a key role. The Director-General stressed: "[t]he Commission has always endeavoured to give all parties involved in merger cases ample opportunity for open and frank discussions and to make their points of view known throughout the procedure". In spite of the Commission's efforts to ensure transparency in merger procedures, concerns were raised in *UPS/TNT* (T-194/13), which alleged procedural inconsistencies in the Commission's assessment. In response to this, the Director-General urged stakeholders to take stock of the seriousness with which the Commission has received such allegations, and has appealed the General Court's judgment to the Court of Justice for clarification.

Yet procedural fairness is not purely the responsibility of the authority, said the Director-General. Companies must also do their bit to respect the rules and permit them to take their course.

Digital markets and innovation markets

Fairness is a hot topic today in the digital and innovation markets. Yet the parameters of merger assessment seem to be shifting somewhat in the face of many digital markets, where price and quantity may no longer play a decisive role.

More emphasis is in fact on quality, choice and innovation, according to the Director-General. Not all mergers hinder innovation; the *TomTom/TeleAtlas* merger created some innovation efficiencies that could benefit consumers. And yet this cannot always be the case.

The recent *Dow/Dupont* merger decision addressed concerns about innovation in the agro-chemical industry and shed light on the importance that the Commission attributes to innovation more generally. The Commission's assessment, which was made public shortly after the Director-General gave his speech, took account of various elements in this sector including the existence of very few research and development ('R&D') players at industry level, the potential suppression of R&D following the merger, and overlaps within the R&D activities of the merging entities, among other factors. In the Director General's words: "[i]nevitably, cases that hinge on quality, choice and innovation are bound to be somewhat different from cases focused on price and quantity, although the classic labels still apply: collusion, exclusion, significant impediment to effective competition."

Whilst the Director-General expressed the hope that innovation in the digital sector is being put into action by new start-ups, he also expressed the concern that start-ups currently seem more interested in being acquired than in challenging the elite players, largely due to the difficult conditions for growth, which require talent, capital, innovation and links to research institutions. The environment for innovation is hard enough without competition being restricted, and so the authorities' role is all the more important in digital markets, he said.

EU competition law is fit for purpose

Speaking of innovation, it is not just technology that must continue to innovate, but competition law itself. Technology business methods, marketing channels, they are all evolving and so must their regulators, according to the Director-General.

Whilst the issues of ten years ago were network effects, the lock-in effect, the gatekeeper effect, switching costs and multi-sided markets, the Commission is now confronted with open-source software, online ecosystems, scale effects, feedback loops, data and algorithms. And yet the rules remain adequate, for now. EU competition law is adaptable precisely because it is drafted in terms that allow new phenomena to be addressed.

The Director-General alluded to the *Microsoft/LinkedIn* merger, in which the Commission feared that Microsoft would use its strong market position to strengthen LinkedIn's market position, to the disadvantage of competitors. And so a solution was found, which included practical remedies, such as ensuring that manufacturers and distributors of personal computers would not be forced to install LinkedIn on Windows, and allowing competing professional social network service providers to maintain their levels of interoperability with Microsoft products following the merger.

The decision demonstrates the Commission's approach: data can be treated as an output (for example, the sale of financial data); it can be treated as an input (for example, when it is accumulated, potentially in order to prevent competitors from accessing sufficient data, to the detriment of consumers); it can even be treated in the context of data protection (in instances where data protection is an element of the quality of the products). So, whereas competition law is presented with new phenomena, the old competition law reasoning is flexible enough to still do an effective job.

Recent commentary has questioned whether competition law is in fact equipped to deal with digital markets, in which consumers often do not pay with money but with data. In his speech, the Director-General argued that the current system can rise to the challenge. He said, "the Commission has tackled these kind of markets in many cases", including the *Oracle/Sun, Facebook/Whatsapp, Microsoft/Skype* and

Microsoft/LinkedIn decisions, among many others. In his view, since there is no competition on price, there is instead competition on quality. Rather than computing market shares based on shares of sales, the focus should be on shares of volume, and products should be compared on the basis of functionality rather than comparative price movements. Quoting former Commissioner for Competition Mario Monti, he concluded that it is better to be unimpressed by new phenomena, as they will most likely require competition regulation, and as the existing tools of competition regulation will most likely prove to be adequate upon appropriate reflection.

Close

The Director-General concluded his speech by urging not caution, but rather a reliance on the proper use of competition law tools to strike the appropriate balance between over and under enforcement. The focus is not on short term competitive outcomes, but on the "competitive process". Accordingly, "a merely static, short-term, price-centric perspective will fail to deliver the benefits of competition. The consumer welfare standard to which we are bound also includes a dynamic perspective, looking also at longer-term effects, potential effects, and counterfactual effects."

Finally, competition law has undergone phases, much like the internet (the web 1.0, the web 2.0, and so on). EU competition law 1.0, prior to 2003, was about formal rules devised to level the Single Market by overcoming the fragmentation of national markets. EU competition law 2.0 developed into a more dynamic network involving the national competition authorities and the national courts. And EU competition law 3.0? The Director General concluded: "whether EU competition law 3.0 will be based on artificial intelligence, like the web 3.0, I cannot yet say. But I can tell you that EU competition law will account for new phenomena and new technologies while maintaining the level of enforcement that is needed for the Single Market to serve society as a whole."

A promising assessment of the role of EU competition law in the future.

Matthew Levitt
Partner, Brussels
T +32 2 505 09 03
matthew.levitt@hoganlovells.com

Jaime Rodriguez-Toquero
Associate, Brussels
T +32 2 505 0961
jaime.rodriguez-toquero@hoganlovells.com

Alicante
Amsterdam
Baltimore
Beijing
Boston
Brussels
Budapest
Caracas
Colorado Springs
Denver
Dubai
Dusseldorf
Frankfurt
Hamburg
Hanoi
Ho Chi Minh City
Hong Kong
Houston
Jakarta
Johannesburg
London
Los Angeles
Louisville
Luxembourg
Madrid
Mexico City
Miami
Milan
Minneapolis
Monterrey
Moscow
Munich
New York
Northern Virginia
Paris
Perth
Philadelphia
Rio de Janeiro
Rome
San Francisco
São Paulo
Shanghai
Shanghai FTZ
Silicon Valley
Singapore
Sydney
Tokyo
Ulaanbaatar
Warsaw
Washington, D.C.
Zagreb

Our offices
Associated offices

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses.

The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members.

For more information about Hogan Lovells, the partners and their qualifications, see www. hoganlovells.com.

Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.